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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'S NOTE

Every avalanche begins with a single snowflake, and recent decisions, rule changes, and political upheavals in the Philippine legal system have been very large snowflakes indeed. Whether intended or not, each change has caused far-reaching ramifications in such diverse areas of practice as competition law, constitutional litigation, and treaty compliance and enforcement. And it is often left to the practitioners and judges on the ground level to operationalize these changes and implement doctrinal evolutions into our cohesive system of law.

In light of these watershed moments, Volume 47, Issue 4 of the IBP Journal thoroughly examines the effects of these changes in various areas of practice and provides innovative procedural and substantive tools to both judges and practitioners, so that they may better equip themselves to navigate a legal landscape which has changed significantly in a short period of time.

In *The Concept (Scope and Limitations) of the Doctrine on Institutional Independence of the Judiciary*, Judge Teresa A. Lacandula-Rodriguez explores the various facets of judicial independence and takes a hard look at the concept's academic and practical limitations, particularly in comparison to the two other branches of government, considering the doctrine's end goal of ensuring public trust and confidence in the judiciary as an institution.

In *Frowning Upon Defaults: The Need to Reinstate the Then Section 4, Rule 16 of the Rules of Court*, Judge Ruel H. Espaldon discusses the gap in procedure caused by the deletion of Section 4, Rule 16 of the Rules of Court governing motions to dismiss notwithstanding the preservation of four limited grounds to file such a motion and posits that courts

may nonetheless read the deleted provision back to life to provide a lifeline for the unsuccessful proponents of a motion to dismiss to interpose their defense on the merits.

In *The Status of International Law in the Philippines: A Restatement*, Banuar Reuben A. Falcon provides a cohesive analysis on international law in relation to the Philippine legal system, clarifies the methods by which international law can be invoked in Philippine courts, and proposes a hierarchy of statutes in cases of conflict among sources of international law *inter se* or with domestic legislation.

In *Sowing the Seeds for Strategic Competition Litigation: The Philippine Competition Commission's* Amicus Curiae *Brief in* PCAB v. MWCI, El Cid Butuyan, Graciela Base, and Jose Maria Marella shed light on the Philippine Competition Commission's innovative use of a hybrid legal and economic analysis in its *amicus curiae* brief in *PCAB v. MWCI* and explain how the brief grounded its constitutional and jurisdictional points in economic realities, setting the stage for the presentation of economic and other technical evidence in competition cases.

The journey to a more competent and solution-driven Philippines begins with a single step and it is with great hope that these articles are eventually looked back as significant precursors to a Philippine legal system that had adapted when it needed to and had changed lives when it was given the opportunity to.

THE CONCEPT (SCOPE AND LIMITATIONS) OF THE DOCTRINE ON INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY

Judge Teresita A. Lacandula-Rodriguez

I. INTRODUCTION TO THE CONCEPT OF JUDICIAL INDEPENDENCE

Judicial independence is important not just to the judiciary as a branch of government; it also has ramifications to the peace and order of the whole country. Rule of law, human rights, and fair trial are just a few of the democratic values that hinge on judicial independence. The judiciary faces influence, pressure, and intimidation from various fronts: its stakeholders, the political branches of the government, private sectors with vested interests, and even criminal elements. Judges may be learned and competent, but if they are not independent, the administration of justice becomes arbitrary and unstable. The aim of justice is to uphold the rights of the people. This becomes necessary because the authorities which govern them have power over their way of being, and the tendency to abuse this power. It is not just the state that can act arbitrarily, but powerful private interests as well. And without an independent judiciary, such abuses become unchecked, causing suffering to the victims and unrest to the whole community.

Independence has been mandated as a principle in the New Code of Judicial Conduct for the Philippine Judiciary (Code).[1] In discussing the scope of judicial independence, this

[1] Supreme Court, New Code of Judicial Conduct for the Philippine Judiciary [NEW CODE OF JUDICIAL CONDUCT], A.M. No. 03-05-01-SC (2004).

paper shall discuss the relevant canons in the Code and international standards in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles).[2]

A. Rule of Law and the Separation of Powers

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.[3]

Rule of law is indispensable to foster peace and prosperity. In this sense, it is used as an indicator of a good society where human flourishing is possible. It has been said that this broad concept "has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it."[4]

In the Philippines, the rule of law is put in place by democratic institutions led by the three branches of government: executive, legislative and judiciary. Separation of powers of these branches of government ensure that each has its own role in governance and independence in implementing such role so that each does not encroach on the other. This means that when the judiciary acts within its competence to hear and decide cases involving the

[2] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2, annex. Endorsed by United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, par. 14.

[3] NEW CODE OF JUDICIAL CONDUCT, Canon 1.

[4] Julio Rios-Figueroa & Jeffrey K. Staton, Unpacking the Rule of Law: A Review of Judicial Independence Measures, (A Paper for the 4th Annual Conference on Empirical Legal Studies, November 20-21, 2009) at 6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434234 (last accessed July 29, 2019).

application of the law, the other branches are bound to respect its actions and judgments.

Judicial independence is necessary to the rule of law. The community can only be governed by the rule of law if there is an independent judiciary which will apply the law impartially and equally among its constituents and will not be dictated upon by the other branches of government seeking to protect their respective interests.

While the judiciary needs the rule of law in order to function well, its task is likewise to defend the rule of law by guarding its independence. As the Supreme Court stated:

> Judges have an affirmative duty to defend and uphold the integrity and independence of the judiciary…. The judiciary itself must continue to be a voice that explains and preserves its own independence. The respect accorded to judges is an adjunct of the social-contract necessity for impartial judges in the creation of a civil society.[5]

The rule of law is a multi-dimensional concept that has many components, an essential one of which is judicial independence. Everyone should be bound by the law, including the judges who interpret it for the people. When the judiciary interprets the law, the people should be bound to abide by it.

The political departments and the laws enacted represent the majority will of the people. However, political power is dynamic and those in power may not always support all the laws in place at any given time. The judiciary

[5] In the Matter of the Allegations Contained in the Columns of Mr. Amado P. Macasaet Published in Malaya Dated September 18, 19, 20 and 21, 2007, A.M. No. 07-09-13-SC, August 8, 2008, 561 SCRA 395.

interprets the Constitution and law based on its standards and the rule of law requires that it be insulated from the political control of the majority at the time of adjudication. The result is that the judiciary can uphold legitimate minority interests even if the decision is unpopular. To be under the rule of law entails that even the majority cannot overrule the rights of the few as they are all equal under the law.

B. Fair Trial and Decisional Independence

Judges shall exercise the judicial function independently on the basis of their assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason.[6]

In performing judicial duties, judges shall be independent from judicial colleagues in respect of decisions which the judge is obliged to make independently.[7]

Judges shall not allow family, social, or other relationships to influence judicial conduct or judgment. The prestige of judicial office shall not be used or lent to advance the private interests of others, nor convey or permit others to convey the impression that they are in a special position to influence the judge.[8]

[6] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Sec. 1.
[7] *Id.*, sec. 2.
[8] *Id.*, sec. 4.

Judges shall be independent in relation to society in general and in relation to the particular parties to a dispute which he or she has to adjudicate.[9]

Litigants should be assured that trial will be fair. In criminal cases, the accused has a constitutional right to have a speedy, impartial, and public trial.[10] This is in line with an accused's right to due process wherein the "cold neutrality of an impartial judge" is indispensable.[11] Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR)[12] provides for the right of persons to "be equal before the courts and tribunals" and "be entitled to a fair and public hearing by a competent, independent and impartial tribunal."

An impartial judge presides over a trial that is fair, where the outcome has not been prejudged and judgment after trial is based purely on the facts as proved by evidence and objective application of the law. Such a judge does not discriminate but treats the litigants and their counsels equally.

An independent judge is the author of his/her own opinion.[13] Such a judge is not pressured to decide a certain way by anyone. Furthermore, an independent judge has no interest in the outcome of the case. In discussing objectivity, the Supreme Court declared:

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[9] *Id.*, sec. 6.
[10] CONSTITUTION, Art. III, Sec.14 (2).
[11] Lai v. People, G.R. No. 175999, July 1, 2015.
[12] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 14 November 2019]. Adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 2200A (XXI), December 16, 1966, entered into force on January 3, 1976.
[13] Rios-Figueroa & Staton, *supra* note 4, at 11.

> What is required on the part of judges is objectivity. An independent judiciary does not mean that judges can resolve specific disputes entirely as they please. There are both implicit and explicit limits on the way judges perform their role. Implicit limits include accepted legal values and the explicit limits are substantive and procedural rules of law.[14]
>
> This was called "decisional independence" or adjudicative independence of the individual judge, as opposed to "institutional independence" of the whole judiciary as an institution.[15]

As stated in the Code, an independent judiciary is "free of any extraneous influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason."[16] The quarters mentioned do not refer only to the parties and political branches of the government, but also partisan forces, the magistrate's family, friends, vested interests like business and lobbyists, or the general public. Judges are also expected to extend courtesy to fellow judges[17] and superiors but should not influenced by them to bend the rules.[18]

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[14] Office of the Court Administrator v. Floro, Jr., A.M. No. RTJ-99-1460, March 31, 2006.

[15] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, A.M. No. 11-7-10-SC, July 31, 2012.

[16] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Sec. 1.

[17] NEW CODE OF JUDICIAL CONDUCT, Canon 5, Sec. 3 states:

Sec. 3. Judges shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

[18] Re: Letter of Presiding Justice Conrado M. Vasquez, JR. on CA-G.R. SP NO. 103692 [Antonio Rosete, et al. v. Securities and Exchange Commission, et al.], A.M. No. 08-8-11-CA, September 9, 2008.

1. Sub Judice Rule

Judges shall not knowingly, while a proceeding is before or could come before them, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall judges make any comment in public or otherwise that might affect the fair trial of any person or issue.[19]

An independent judiciary safeguards the rights of the litigants, including the rights of the accused and presumption of innocence in his/her favor. The *sub judice* rule cautions against "comments and disclosures pertaining to pending judicial proceedings."[20] The constraint is applicable to the litigants and their witnesses, to judges and lawyers and even to the general public, which include the media.[21]

The purpose is to avoid prejudgment, undue influence on the court, or obstruction of the administration of justice.[22] Such comments may also shape public opinion, thus prejudicing the right of the parties, particularly of the accused, to a fair trial. Courts should decide based on evidence and law. As such, comments and disclosures could evoke in the judge certain sentiments that can color his/her judgment.

The Rules of Court does not speak of the *sub judice* rule, but a violation thereof may be covered by the provision on indirect contempt under Section 3(d) of Rule 71, which punishes "improper conduct tending, directly or indirectly,

[19] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Sec. 4.
[20] Re: Show Cause Order in the Decision Dated May 11, 2018 in G.R. No. 237428 (Republic of the Philippines, Represented by Solicitor General Jose C. Calida v. Maria Lourdes P.A. Sereno), A.M. No. 18-06-01-SC, July 17, 2018.
[21] Romero v. Guerzon, G.R. No. 211816, March 18, 2015.
[22] Marantan v. Diokno, G.R. No. 205956, February 12, 2014.

to impede, obstruct, or degrade the administration of justice" as contemptuous.

Contempt power is inherent in the court.[23] It should, however, be used sparingly, and only where there is a clear and present danger that the administration of justice would be harmed.[24] The purpose is to maintain the respect accorded to the courts so that the people will continue to trust the institution. But when a member of the bar is charged with violating the *sub judice* rule, it may be a ground for an administrative case.

2. Contempt Power Against Unfair Criticism

The contempt power of the court has been used against the media when published articles contained unjustified criticism and baselessly attacked the integrity of magistrates.[25] In view of the power of the press to form public opinion, such criticism has the effect of encouraging the people to mistrust the judiciary and its work. This damages judicial independence as the decision-making could be swayed by the wants of the public.

II. INSTITUTIONAL INDEPENDENCE

Judges shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to be free therefrom to a reasonable observer.[26]

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[23] Cabansag v, Fernandez, G.R. No. L-8974, October 18, 1957.
[24] People v. Godoy, G.R. Nos. 115908-09, March 29, 1995.
[25] See In the Matter of the Allegations Contained in the Columns of Mr. Amado P. Macasaet Published in Malaya Dated September 18, 19, 20 and 21, 2007, *supra* note 5.
[26] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Sec. 5.

The institutional independence of the judiciary focuses on it "as a branch of government and protects judges as a class",[27] separating it from the executive and legislative branches of government.[28] Specifically, when the other branches of government are parties in the case before the court, the court must be independent even if they rely on these branches in many aspects. Nevertheless, even when the political branches are not directly interested in the controversy, they may stand to lose or gain something from the ruling of the court. Because of the previous experience of the Filipino people, the 1987 Constitution put safeguards in place to protect the independence of the judiciary as a separate branch of government against encroachment by the political branches.

A. Constitutional Safeguards

The Supreme Court is given special protection by the Constitution with respect to its jurisdiction. Its jurisdiction is laid out under Art. VIII, Sec. 5. Although Congress can legislate on the jurisdiction of lower courts under Sec. 2, it may not do the same to the Supreme Court if it would diminish its jurisdiction. This gives stability to the authority and powers of the Court such that it need not be bothered by changes in policy direction.

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[27] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, *supra* note 15.

[28] Arroyo v. Department of Justice, G.R. No. 199082, September 18, 2012, citing Joseph M. Hood, Judicial Independence, 23 J. Nat'l Ass'n Admin. L. Judges 137, 138 (2003), in turn citing American Judicature Society, What is Judicial Independence? (Nov. 27, 2002), at http://www.ajs.org/cji/cji_whatisji.asp (last visited Apr. 14, 2003).

The other constitutional safeguards for the independence of the judiciary are hereunder discussed:

1. Fiscal Autonomy

Under Art. VIII, Sec. 3 "[the] Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released."

According to *Bengzon v. Drilon*,[29] the judiciary has "full flexibility to allocate and utilize their resources with the wisdom and dispatch that their needs require," *i.e.*, as long as the matter is related to judicial needs. This means that it can use and dispose of its funds and properties without outside interference. This covers the distribution of additional allowances and incentives,[30] grant of retirement benefits to its pensioners,[31] power to "levy, assess and collect fees, including legal fees",[32] and prohibition against downgrading the positions and salary grades of judicial staff.[33]

[29] Bengzon v. Drilon, G.R. No. 103524, 15 April 1992, 208 SCRA 133.
[30] Maritime Industry Authority v. Commission on Audit, G.R. No. 185812, January 13, 2015.
[31] Re: Request of Retired Supreme Court and Court of Appeals Justices for Increase/Adjustment of Their December 1998 Pensions, A.M. No. 99-7-01-SC, August 18, 2015.
[32] Bengzon v. Drilon, *supra* note 29; Re: In The Matter of Clarification of Exemption from Payment of All Court and Sheriff's Fees of Cooperatives Duly Registered in Accordance with Republic Act No. 9520 Otherwise Known as the Philippine Cooperative Code of 2008, Perpetual Help Community Cooperative (PHCCI), A.M. No. 12-2-03-0, March 13, 2012.
[33] Re: Clarifying and Strengthening the Organizational Structure and Administrative Set-Up of the Philippine Judicial Academy, A.M. No. 01-1-04-SC-PHILJA, January 31, 2006.

2. Rule-making Power

To strengthen its independence, the Constitution, under Art. VIII, Sec. 5 (5), grants to the Supreme Court the expanded power to promulgate rules regarding pleading, practice, and procedure in courts, and rules concerning admission to the Bar. The intention is for the Court to have this power exclusively and not to share it with the other branches.[34]

Applying this provision, the Supreme Court ruled that Congress cannot amend the Rules of Court, including the rule on plea bargaining.[35] The legislature cannot make exemptions from court or legal fees by repealing, modifying or supplanting the same.[36] It had also been held that because of the judiciary's power to make rules on execution of judgment, the Court can temporarily restrain the execution of a death convict.[37] To deny or intrude into this power to make rules for subjects under its exclusive domain is to diminish the independence of the judiciary.

3. Administrative Supervision

Art. VIII, Sec. 6 of the Constitution exclusively grants the Supreme Court "administrative supervision over all courts and the personnel thereof." This means that if a judge or court employee violates any law or rule on administrative

[34] Echegaray v. Secretary of Justice, G.R. No. 132601, January 19, 1999.
[35] Estipona, Jr. v. Lobrigo, G.R. No. 226679, August 15, 2017.
[36] Re: In the Matter of Clarification of Exemption from Payment of All Court and Sheriff's Fees of Cooperatives Duly Registered in Accordance with Republic Act No. 9520 Otherwise Known as the Philippine Cooperative Code of 2008, Perpetual Help Community Cooperative (PHCCI), A.M. No. 12-2-03-0, March 13, 2012; In Re: Exemption of the National Power Corporation from Payment of Filing/ Docket Fees, A.M. No. 05-10-20-SC, March 10, 2010; Re: Petition for Recognition of the Exemption of the Government Service Insurance System from Payment of Legal Fees, A.M. No. 08-2-01-0, February 11, 2010.
[37] Echegaray v. Secretary of Justice, *supra* note 34.

matters and in relation to their official functions,[38] it is only the Court, through the Office of the Court Administrator, that can act against them[39] and when the Ombudsman does so, the same is an infringement upon this judicial prerogative.[40] In addition, as long as the judge acts in good faith, he/she cannot be held civilly, criminally, or administratively liable for his/her judicial acts, even if erroneous, where a judicial remedy against the questioned action is available.[41]

Such administrative supervision also extends to the power to manage its internal affairs, like the handling of retirement applications, privileges and benefits.[42] Because of such administrative supervision, under Art. VIII, Sec. 5 (3), the Supreme Court has the power to "[a]ssign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned." The UN Basic Principles, par. 14 also expressly provides that "[t]he assignment of cases to judges within the court to which they belong [should be] an internal matter of judicial administration" to ward off external manipulation. All of these were reserved to the judiciary to guarantee its control over its own matters and shield judicial personnel from arbitrariness of the other branches.

[38] Garcia v. Miro, G.R. No. 167409, March 20, 2009.
[39] Office of the Court Administrator v. Ampong, A.M. No. P-13-3132, June 4, 2014.
[40] Maceda v. Vasquez, G.R. No. 102781, April 22, 1993.
[41] Tamondong v. Pasal, A.M. No. RTJ-16-2467, October 18, 2017.
[42] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, *supra* note 15.

4. Non-diminution of Salaries

The salaries of justices and judges can be subject to income tax imposed generally on income earners.[43] Under Art. VIII, Sec. 10, salaries of members of the judiciary shall be fixed by law. However, "[during] their continuance in office, their salary shall not be decreased" by the other branches of government. Of course, the Supreme Court does not object to any increase.[44]

> With these guarantees, justices and judges can administer justice undeterred by any fear of reprisals brought on by their judicial action. They can act inspired solely by their knowledge of the law and by the dictates of their conscience, free from the corrupting influence of base or unworthy motives.[45]

5. Security of Tenure

In order to assure that the Supreme Court can decide without fear of retaliation from the political departments affecting their job security, Art. VIII, Sec. 2 provides that the security of tenure of Justices cannot, by law, be impaired by passing a law reorganizing the Judiciary when it undermines the same. Under Sec. 11, all members of the judiciary "shall hold office during good behavior until they reach the age of seventy years or become incapacitated to discharge the duties of their office."

Tenure refers to the stability and duration that the holder of the position is in office until mandatory retirement.

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[43] Nitafan v. Commissioner of Internal Revenue, G.R. No. 78780, July 23, 1987.
[44] *Id.*
[45] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, *supra* note 15.

The judge or justice enjoys security against arbitrary removal from office. It is the judiciary's task to ensure "good behavior" of its members. Disciplinary action resulting in penalties, including suspension and removal from office, shall be for cause consisting of clear grounds and after undergoing administrative due process. A limited tenure of judges would put them at the mercy of the appointing authority, whom they would have to please in order to retain their livelihood, hence tainting their independence.

Just recently, there have already been two instances when the incumbent administration's political branches sought the removal of a Chief Justice appointed by the previous administration, namely President Gloria Macapagal-Arroyo's appointee, Chief Justice Renato C. Corona, and President Benigno C. Aquino III's appointee, Maria Lourdes P.A. Sereno. These consecutive events do not inspire confidence in the stability and independence of the judiciary as an institution. This showed that tenure of the justices is not enough to protect the institution from backlash resulting from a change in administration.

6. Qualifications, Selection and Appointment

Under the Constitution, the executive branch through the president has the power to appoint justices and judges. To shield the appointment process from partisan politics and other centers of power, the Judicial and Bar Council (JBC) was created as an independent constitutional body which has the "principal function of recommending appointees to the Judiciary."[46] The JBC is comprised of representatives of different sectors of the community, specifically, "[the] *ex-officio* members of the [JBC] consist of representatives from the three main branches of government while the regular

[46] CONSTITUTION, Art. VIII, Sec. 8 (5).

members are composed of various stakeholders in the judiciary":[47]

> A [JBC] is hereby created under the supervision of the Supreme Court composed of the Chief Justice as ex officio Chairman, the Secretary of Justice, and a representative of the Congress as ex officio Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector.[48]

The aim is to "de-politicize" the judiciary by doing away with the confirmation of appointments by the legislature.[49] The Constitution has provided for the basic qualifications under Art. VIII, Sec. 7[50] but the JBC sets the criteria for screening of the qualified applicants through its own rules and procedures. At least three qualified nominees are selected and

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[47] Chavez v. Judicial and Bar Council, G.R. No. 202242, July 17, 2012.
[48] CONSTITUTION, Art. VIII, Sec. 8. (1).
[49] De Castro v. Judicial and Bar Council, 629 Phil. 629, 697 (2010). CONSTITUTION, Art VIII, Sec. 9 states:

> Sec. 9. The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation.

[50] Sec. 7.

> (1) No person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the Philippines. A Member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines.
> (2) The Congress shall prescribe the qualifications of judges of lower courts, but no person may be appointed judge thereof unless he is a citizen of the Philippines and a member of the Philippine Bar.
> (3) A Member of the Judiciary must be a person of proven competence, integrity, probity, and independence.

shortlisted from which the President can appoint within a specified period.[51]

7. Prohibition Against Designation to Quasi-judicial or Administrative Agencies

During their tenure, justices and judges should not hold any other office that is not incidental to their judicial duties.[52] Accordingly, they "shall not be designated to any agency performing quasi-judicial or administrative functions."[53] These agencies are not under the judiciary, consequently, work therein would tend to subordinate the judge to a political authority and influence him/her in his/her judicial functions leading to an encroachment on the judiciary's independence.

B. Personal Safeguards

Judges shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.[54]

In order to maintain the institutional independence of the judiciary, individual judges must have support mechanisms so they can adjudicate well. These personal safeguards of judges give them the necessary resources so that they can perform their public duty. Protection assured

[51] CONSTITUTION, Art. VIII, Sec. 9.
[52] In Re: Designation of Judge Rodolfo U. Manzano as Member of the Ilocos Norte Provincial Committee on Justice, A.M. No. 88-7-1861-RTC, October 5, 1988.
[53] CONSTITUTION, Art. VIII, Sec. 12.
[54] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Sec. 7.

to judges also makes them less vulnerable to undue influence and intimidation.

1. Freedom of Expression

Judges, like any other citizen, are entitled to freedom of expression, belief, association and assembly, but in exercising such rights, they shall always conduct themselves in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.[55]

Judges shall avoid impropriety and the appearance of impropriety in all of their activities.[56]

As a subject of constant public scrutiny, judges must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, judges shall conduct themselves in a way that is consistent with the dignity of the judicial office.[57]

Judges shall refrain from influencing in any manner the outcome of litigation or dispute pending before another court or administrative agency.[58]

Judges shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession, and litigants in the impartiality of the judge and of the judiciary.[59]

Under the Constitution, "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and

[55] NEW CODE OF JUDICIAL CONDUCT, Canon 4, Sec. 6.
[56] *Id.*, Sec. 1.
[57] *Id.*, Sec. 2.
[58] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Sec. 3.
[59] NEW CODE OF JUDICIAL CONDUCT, Canon 3, Sec. 2.

petition government for redress of grievances."[60] Upon appointment and oath, the judges are not stripped of their constitutional rights, including the freedom of expression. They are free to express themselves as they conduct they judicial functions. They are free to form their own opinions even on public issues.[61] However, all government workers, by reason of their employment, have accepted certain limitations on this freedom because they are performing public services.[62] These limitations also serve to maintain the judiciary's institutional independence.

In exercising their freedoms, the judge is expected to uphold the dignity and independence of their office and institution, whether in the courtroom, other official activities and even in their personal lives. For example, they are allowed to join a social networking sites, but should avoid impropriety and the appearance of impropriety:

> To restate the rule: in communicating and socializing through social networks, judges must bear in mind that what they communicate – regardless of whether it is a personal matter or part of his or her judicial duties – creates and contributes to the people's opinion not just of the judge but of the entire Judiciary of which he or she is a part. This is especially true when the posts the judge makes are viewable not only by his or

[60] CONSTITUTION, Art. III, Sec. 4.
[61] In the old Code of Judicial Conduct which can supplement the New Code of Judicial Conduct, it is provided:

Rule 5.10. A judge is entitled to entertain personal views on political questions. But to avoid suspicion of political partisanship, a judge shall not make political speeches, contribute to party funds, publicly endorse candidates for political office or participate in other partisan political activities.

[62] Quinto v. Commission on Elections, G.R. No. 189698, February 22, 2010.

her family and close friends, but by acquaintances and the general public.[63]

In order to do this, judges should exercise self-restraint,[64] not just to avoid impropriety, but also to prevent conflict of interest. They cannot engage in political debates that may affect their neutrality. All these guidelines, including the *sub judice* rule, are restrictions on the freedom of expression of judges[65] such that improper speech can subject them to contempt proceedings or administrative charges.[66] To illustrate, a judge may be disciplined for using discourteous and intemperate language while discussing another judge in the classroom.[67]

2. Freedom of Association

Judges may form or join associations of judges or participate in other organizations representing the interests of judges.[68]

Judges, even as government workers, have the right to form associations.[69] The UN Basic Principles states that "[j]udges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence".[70] The independence of the judiciary and the restraint required of judges do not mean that they

[63] Lorenzana v. Austria, A.M. No. RTJ-09-2200, April 2, 2014.
[64] Tormis v. Paredes, A.M. No. RTJ-13-2366, February 4, 2015.
[65] Davao City Water District v. Aranjuez, G.R. No. 194192, June 16, 2015 (J. Leonen, concurring opinion).
[66] Re: Show Cause Order in the Decision Dated May 11, 2018 in G.R. No. 237428 (Republic of the Philippines, Represented by Solicitor General Jose C. Calida v. Maria Lourdes P.A. Sereno), *supra* note 20.
[67] Tormis v. Paredes, *supra* note 64.
[68] NEW CODE OF JUDICIAL CONDUCT, Canon 4, Sec. 12.
[69] CONSTITUTION, Art. IX-B, Sec. 2(5) states: The right to self-organization shall not be denied to government employees.
[70] UN Basic Principles, par. 9.

have to live in isolation from the rest of the world or become aloof from the concerns of his/her community.

Indeed, judge's associations can assist in promoting judicial independence by making their voice heard in the local and international levels. However, in their personal capacity, judges cannot join associations which would compromise their impartiality or create conflict of interest. For instance, government officials and employees are expressly prohibited from participating in partisan political activities[71] and a violation of the same is considered a serious charge.[72] If there is conflict of interest because of past membership in associations, they have to inhibit themselves from hearing the case.

As long as the objective of the international association or of the cooperation among judiciaries in different countries is to advocate for support on matters involving judicial work, *e.g.* sharing of information or pushing for judicial reform, the same is also a tool to further judicial independence.

3. Training and Promotion

Judges shall take reasonable steps to maintain and enhance their knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.[73]

[71] CONSTITUTION, Art. IX. B, Sec. 2. (4) states: No officer or employee in the civil service shall engage, directly or indirectly, in any electioneering or partisan political campaign.
[72] RULES OF COURT, Rule 140, Sec. 8 (10), as amended by A.M. No. 01-8-10-SC, Re: Proposed Amendment to Rule 140 of the Rules of Court Re: Discipline of Justices and Judges (Sep. 11, 2001).
[73] NEW CODE OF JUDICIAL CONDUCT, Canon 6, Sec. 3.

Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.[74]

The Philippine Judicial Academy (PHILJA) was established by Republic Act No. 8557[75] to train judges, among others:

> Sec. 3. The PHILJA shall serve as a training school for justices, judges, court personnel, lawyers and aspirants to judicial posts. For this purpose, it shall provide and implement a curriculum for judicial education, and shall conduct seminars, workshops and other training programs designed to upgrade their legal knowledge, moral fitness, probity, efficiency, and capability. It shall perform such other functions and duties as may be necessary in carrying out its mandate.

The PHILJA believes that "[t]he people are best served when the Judiciary is independent and its members are women and men of proven competence, integrity, probity, and independence".[76] Accordingly, its programs are geared

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[74] UN Basic Principles, par. 13.

[75] An Act Establishing the Philippine Judicial Academy, Defining its Powers and Functions, Appropriating Funds Therefor, and for other Purposes [Republic Act No. 8557] (1998). See also Supreme Court, Re: Establishment of the Philippine Judicial Academy (PHILJA), Administrative Order No. 35-96, Sec. 8 (Mar. 12, 1996) which states:

> Sec. 8. Graduates. — The graduates of the Academy shall be issued certificates of attendance with coded serial numbers.
>
> The Judicial and Bar Council is expected to give preference to graduates of the Academy in its nominations for appointment to and promotion in the Judiciary, all other requisite standards being equal.

[76] Philippine Judicial Academy, Philosophy and Objectives, available at http://philja.judiciary.gov.ph/history.html (last accessed Oct. 2, 2019).

towards training judges to be independent, which in turn will strengthen institutional independence.

According to the International Organization for Judicial Training, "[j]udicial training is fundamental to judicial independence," hence, the "judiciary and judicial training institutions should be responsible for the design, content, and delivery of judicial training."[77] For this purpose, "[t]raining should be judge-led and delivered primarily by members of the judiciary who have been trained for this purpose," though "[t]raining delivery may involve non-judicial experts where appropriate."[78] This is to avoid external influence on the training of judges who have to be impartial. Judges and other stakeholders can evaluate the effectiveness of the training and its responsiveness to their needs. Under this set-up, judicial training remains autonomous and insulated from sectors which may be interested in manipulating the decision-makers' mindset and behavior.

Continuing legal education or training may also be a factor in promotion of judges. The JBC is directed under Republic Act No. 8557 to take into consideration the compliance of judges with the programs of the PHILJA.[79] It has been held that the rule of the JBC, that only incumbent judges who have served for five years can be eligible for

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[77] International Organization for Judicial Training, Declaration of Judicial Training Principles, Principles 1 & 2, available at http://www.iojt.org/~/media/Microsites/Files/IOJT/Microsite/2017-Principles.ashx (last accessed Oct. 3, 2019).
[78] *Id.*, Principle 9.
[79] Republic Act No. 8557, Sec. 10 states:

> Sec. 10. As soon as PHILJA shall have been fully organized with the composition of its Corps of Professorial Lecturers and other personnel, only participants who have completed the programs prescribed by the Academy and have satisfactorily complied with all the requirements incident thereto may be appointed or promoted to any position or vacancy in the Judiciary.

promotion, is a way to screen applicants for their proven competence, integrity, probity and independence as required by the Constitution and was within the exercise of its discretion.[80] To avoid harming judicial independence, the challenge in is in designing a merit based system of promotion that rewards high quality of work of incumbent judges vis-à-vis legitimate appointments of other qualified practitioners who may be better known by the political representatives in charge of the selection and appointment process.

4. Conditions of Service

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.[81]

Just like any worker, magistrates are entitled to humane conditions of work.[82] While judges cannot join unions which can bargain for better working conditions, any demand must be handled by the judiciary as an institution in line with its constitutionally guaranteed fiscal autonomy.[83] Judges should be provided with suitable conditions in order to function well and maintain the dignity of their office so as to foster the esteem of the public.

The laws on retirement pensions also enhances independence since the judge is assured that he/she and his/her family are protected even after retirement, disability or death.[84] The Supreme Court stated that "[the] provisions

[80] Villanueva v. Judicial and Bar Council, G.R. No. 211833, April 7, 2015.
[81] UN Basic Principles, par. 11.
[82] CONSTITUTION, Art. XIII, Sec. 3.
[83] Association of Court of Appeals Employees (ACAE) v. Ferrer-Calleja, G.R. No. 94716, November 15, 1991, 203 SCRA 597.
[84] Republic Act No. 9946 [An Act Granting Additional Retirement, Survivorship, and Other Benefits to Members of the Judiciary, Amending

regarding retirement pensions of Justices arise from the package of protections given by the Constitution to guarantee and preserve the independence of the Judiciary."[85] "These benefits… allow peace of mind since members of the judiciary have financial security in knowing that they could provide for their spouses and children even beyond their death."[86]

5. Accountability and Protection from Harassment

The judiciary should be able to discipline its own ranks, using its own standards and procedures, and punish when there is failure to meet such standards. This is to oblige magistrates to be at all times accountable to the people. But concomitant thereto is the defense of its own from outside attack and harassment through unjustified charges, whether administrative, civil or criminal, so as to preserve its integrity and independence. Otherwise, the judge may be subjected to humiliation, which in turn would lower public confidence in the judiciary.[87]

> [The Court must] ***step forward and take the lead to defend [a trial judge] against unsubstantiated tirades which put to shame and disgrace not only the magistrate on trial but the entire judicial system as well.*** As champion – at other times tormentor – of trial and appellate judges, this Court must be unrelenting in weeding the judiciary of unscrupulous judges, ***but it must also be quick in dismissing administrative***

for the Purpose Republic Act No. 910, as Amended, Providing Funds Therefor and for Other Purposes (2009)], Secs. 3 & 3A.

[85] Bengzon v. Drilon, *supra* note 29, at 153.

[86] Re: Application for Survivorship Pension Benefits Under Republic Act No. 9946 of Mrs. Pacita A. Gruba, Surviving Spouse of the Late Manuel K. Gruba, Former CTA Associate Judge, A.M. No. 14155-Ret., November 19, 2013.

[87] Fortun v. Labang, G.R. No. L-38383. May 27, 1981, 104 SCRA 607.

> ***complaints which serve no other purpose than to harass them.*** In dismissing judges from the service, the Court must be circumspect and deliberate, lest it penalizes them for exercising their independent judgments handed down in good faith.[88] (Emphasis in the original)

C. Respect for Judicial Decisions

Art. VIII, Sec. 1 states that "[j]udicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." As the weakest branch of government,[89] the effectiveness of the exercise of judicial power also impacts the independence of the judiciary.

The judiciary may be working independently such that external factors have no bearing on the conduct of trial and rendition of judgments. The court, under its Rules of Court, can execute its final judgments and parties have to contend with the authority of the court to bind them to the obligations imposed. Nonetheless, the judiciary cannot be considered as effectively autonomous if its final judgments are not respected and implemented by the law enforcers. Under the separation of powers, the judiciary decides but its decisions are enforced by the executive branch. To illustrate, it is the executive branch that enforces warrants of arrest to

[88] Tan Tiac Chiong v. Cosico, A.M. No. CA-02-33, July 31, 2002, citing State Prosecutors v. Muro, A.M. No. RTJ-92-876, September 19, 1994, 236 SCRA 505, 544 (J. Bellosillo, dissenting opinion).
[89] In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement vs. Abolition of Judiciary Development Fund (JDF) and Reduction of Fiscal Autonomy, UDK-15143, January 21, 2015.

bring the accused under the court's jurisdiction or to jail for the service of sentence after conviction in criminal cases. Without the action of the police and penal institutions, orders, resolutions and decisions of the courts will remain as written words on paper. Indeed, faced with inaction, the court has contempt powers to compel obedience. For instance, the Supreme Court ordered former Secretary of Justice Leila M. De Lima to answer contempt charges for her failure to comply with the temporary restraining order of the Court.[90]

Still, it is apparent that the powers of the courts are clipped and judicial credibility is tainted if its announcements are not followed. It is a serious blow to judicial independence if court orders are routinely ignored and rendered meaningless through executive inaction. Such lack of cooperation by the executing arm of government is a form of pressure on the Court and making it appear useless before the public.

III. LIMITATIONS OF INSTITUTIONAL INDEPENDENCE

The democratic set up of the separation of the powers of government ensures institutional independence of the judiciary, but it does not mean complete detachment from the two other branches. The democratic system also has a scheme of checks and balances in order to make all the branches accountable to each other under the Constitution. The objective is to prevent a branch from having too much power leading to abuse. Therefore, the judiciary has the independence to act within the powers granted to it by the Constitution, but the Constitution itself provides for limits

[90] Gloria Macapagal-Arroyo v. de Lima, G.R. No. 199034, November 15, 2011.

to its powers. The application of the constitutional and personal safeguards would likewise not have the effect of absolute judicial insulation from the political branches, as will be discussed.

A. Lack of Resources

It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.[91]

Although the judiciary has fiscal autonomy in spending the budget allocated to it by legislature and approved then disbursed by the executive, it cannot be denied that compared to the political branches of government, it has a very small portion of the national budget. Under Art. VIII, Sec. 3, the only requirement is that "[a]ppropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released." To have real judicial independence, courts have to be given sufficient amount of funding and infrastructure in order to perform its functions under the Constitution competently.

The budget should be enough in order to afford the technology, human resources, equipment, facilities and proper judicial training for efficient court management and to handle the volume of cases that go through the courts. However, even after defending the budget based on the needs of the courts during the budgetary process, the allocation to the judiciary had remained very low throughout the years:

[91] UN Basic Principles, par. 7.

> Despite being the third co-equal branch of the government, the judiciary enjoys less than 1% of the total budget for the national government. Specifically, it was a mere 0.82% in 2014,51 0.85% in 2013, 0.83% in 2012, and 0.83% in 2011.
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> xxx
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> As a result, our fiscal autonomy and judicial independence are often undermined by low levels of budgetary outlay, the lack of provision for maintenance and operating expenses, and the reliance on local government units and the Department of Justice.[92]

The budgetary process also makes it possible to impose pressure on the judiciary while proposing its budget and allows grandstanding of congressional representatives during the budget hearings. After the budget is determined and passed, the executive, through the Department of Budget and Management controls the schedule and disbursement of the appropriations. Although the Supreme Court had ruled that such disbursements shall be fully released on time within the fiscal year,[93] this does not assure that funds will be available when the needs are already present.

[92] In the Matter of: Save the Supreme Court Judicial Independence and Fiscal Autonomy Movement vs. Abolition of Judiciary Development Fund (JDF) and Reduction of Fiscal Autonomy, *supra* note 89.
[93] Civil Service Commission v. Department of Budget and Management (Resolution), G.R. No. 158791, February 10, 2006.

B. Composition of JBC

Under Art. VIII, Sec. 8 (2), the JBC is envisioned to be multisectoral as it is composed of representatives from all the branches of government and other groups in the community which have an interest in judicial appointments. However, all the regular members, who are from the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and from the private sector, are appointed by the president with the consent of the legislature through the Commission on Appointments. The Secretary of Justice, who is a cabinet member and alter ego of the president, is an ex-officio member. The other ex-officio member is from the Senate or House of Representatives,[94] who may be from the same political party as the president. Accordingly, the shortlist from which the president would appoint is prepared by this group of presidential appointees.

The JBC screening process can lessen political influence on the selection of magistrates, but does not remove the same. It can disqualify applicants, but the contender favored by the president can easily qualify, be shortlisted and ultimately appointed.

C. Composition of the Supreme Court

The Supreme Court is a collegial body that rules on legal matters of transcendental importance to the nation. In fact, under Art. 8 of the New Civil Code,[95] the Court's "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system." This being so, it is understandable that the president has interest in

[94] Chavez v. Judicial and Bar Council, *supra* note 47.
[95] An Act to Ordain and Institute the Civil Code of the Philippines, Republic Act No. 386 (1950).

controlling its composition. The president also gives special attention to picking the Chief Justice who, as leader of the third branch of government, heads important committees and exerts considerable influence within the institution. Even if the appointee does not actually decide because of debt of gratitude, his/her legal ideology, in most likelihood, approximates that of the appointing authority who chose him/her. Indeed, it is not unnatural that among qualified applicants, the appointing authority would pick based on who would not hamper or oppose his/her political agenda. Therefore, it is inevitable that the composition of the Court has a political component.

However, as with all other presidential appointments in the judiciary, such appointment does not automatically mean that the appointee will decide in favor of the executive in cases brought before the court.[96] In addition, the term of the president is for six years, without any reelection, whereas the tenure of justices is until they reach the age of 70 years old. In this sense, there need not be any inevitable loyalty to the appointing authority even after the term of the latter.

D. Impeachment

The aim of judicial independence is to free the magistrate from political forces that would unduly influence or hinder his/her judicial work. However, the Constitution itself stated that Supreme Court justices may be removed from office through the political process of impeachment. To make members of the Court accountable as public officers,

[96] Sedfrey M. Candelaria & Maria Eloisa Imelda S. Singson, Political and Social Legitimacy of Judicial Decisions, Ateneo Law Journal Special Issue 48, 69 (April 2018), available at http://ateneolawjournal.com/Media/uploads/7a81e301934bc1f67910525b7439ea64.pdf (last accessed Oct. 8, 2019).

they may be impeached and convicted of "culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust."[97] Impeachment is a legislative process initiated in the House of Representatives then tried and decided by the Senate.[98] It is a political mechanism imposed on the judiciary and can weaken its institutional independence, *e.g.* when used because the political branches disagreed with the judicial actions of the Court, which they view as erroneous.

There have been three instances when the Chief Justice of the Court was subjected to impeachment. In order to prevent abuse of this political process, the Court exercised its power of judicial review through its expanded certiorari jurisdiction under the Constitution and held that the second impeachment complaint filed against then Chief Justice Hilario G. Davide, Jr. was unconstitutional for being filed within the one-year bar.[99] It guarded its institutional independence when it exercised judicial power in impeachment matters which traditionally had been considered to be outside its jurisdiction.[100]

When court officials were subpoenaed to testify and produce documents in relation to cases in the Supreme Court for the impeachment trial against former Chief Justice Corona, the Court invoked its institutional independence.[101] It declined to produce documents which were confidential

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[97] CONSTITUTION, Art. XI, Sec. 2.
[98] *Id.*, Sec. 3.
[99] Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc., 415 SCRA 44 (2003).
[100] *Id.* at 160, citations omitted.
[101] See In Re: Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses under the Subpoenas of February 10, 2012 and the Various Letters for the Impeachment Prosecution Panel dated January 19 and 25, 2012 (Resolution), February 14, 2012.

and privileged[102] as part of the adjudicative or official functions of the Court. It also limited the testimony of court officials to matters which were not confidential and privileged.[103] The Court held that only the Supreme Court as representative of the judiciary can waive these privileges.[104]

In the midst of the impeachment proceedings against former Chief Justice Sereno, the Solicitor General filed a *quo warranto* petition against her in the Supreme Court. The Court granted the petition, ruling that she was disqualified to hold the office of Chief Justice. It held that an impeachable officer need not be removed from office only through impeachment. Impeachment "does not preclude a *quo warranto* action questioning an impeachable officer's qualifications to assume office."[105] The dissent of Justice Marvic M.V.F. Leonen[106] stated that allowing impeachable officers to be removed through *quo warranto* proceedings through an "aggressive Solicitor General" impairs the institutional independence of the judiciary.

However, in an academic discussion, it was opined that in ruling this way, the Court was actually strengthening its institutional independence by "insulating the Chief Justice from the political process of impeachment"[107] and deciding to disqualify, and effectively remove, its own member and leader through a judicial process.

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[102] *Id.* at 12-18.
[103] *Id.* at 18.
[104] *Id.* at 20.
[105] Republic v. Sereno (Resolution), G.R. No. 237428, June 19, 2018.
[106] Republic v. Sereno, G.R. No. 237428, May 11, 2018.
[107] Sedfrey M. Candelaria & Patrick Edward L. Balisong, Justice on Trial: Consolidation of Powers, Judicial Independence, and Public Accountability in the Philippine Judiciary, 63 ATENEO L. J. 21, 65, available at http://ateneolawjournal.com/Media/uploads/625555ebae011d850a4ae6e40fd80713.pdf (last accessed Oct. 9, 2019).

IV. GOAL OF INSTITUTIONAL INDEPENDENCE: PUBLIC CONFIDENCE

Judges shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.[108]

The institutional independence of the judiciary is not an end in itself but serves the end goal of ensuring public confidence in the authority, work and outcomes of the courts. The courts' most important role in society is to protect human rights and fundamental freedoms while upholding justice, rule of law and constitutional values. The judiciary cannot do its job well if the people do not choose to bring their disputes to court, do not respect its processes or do not believe that judgments were arrived at on reasonable bases. Only when the public recognizes the integrity and competence of magistrates and all court personnel will they "accept the legitimacy of judicial authority."[109] Furthermore, institutional independence that was once enjoyed may thereafter be attacked and damaged. Consequently, constant vigilance is necessary to preserve, defend and restore and the same.

The judiciary must both in fact and in perception be seen and believed by the public to be independent.[110] To this end, communicating and explaining to the people the arguments and reasoning in the decisions and other actions

[108] NEW CODE OF JUDICIAL CONDUCT, Canon 1, Section 8.
[109] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, *supra* note 15.
[110] Re: Letter of Presiding Justice Conrado M. Vasquez, Jr. on CA-G.R. SP No. 103692 [Antonio Rosete, et al. v. Securities and Exchange Commission, et al.], *supra* note 18.

in an official manner is necessary. This will inform them and prevent erosion of confidence due to misunderstandings.

Though magistrates are appointed and not elected by the people, they still need to engage the populace towards a clearer understanding of court operations, processes and judgments, especially in impactful or potentially divisive cases. Nonetheless, as previously discussed, pure judicial independence can mean that an appointed judge has authority to decide even against the will of the majority. The remedy of the people is to give mandate to its elected representatives to change the law or even the Constitution.

The majority may disagree with the judgment, but they must acknowledge the competence of the judiciary to rule on the controversy and nevertheless respect the same. This way, the institution continues to be intact and strong, with the enduring capability to accomplish its role in society. This must be so since "[b]oth judicial independence and the public's trust and confidence in the judiciary as an institution are vital components in maintaining a healthy democracy.[111]

[111] In the Matter of the Allegations Contained in the Columns of Mr. Amado P. Macasaet Published in Malaya Dated September 18, 19, 20 and 21, 2007, *supra* note 5.

FROWNING UPON DEFAULTS: THE NEED TO REINSTATE THE THEN SECTION 4, RULE 16 OF THE RULES OF COURT

Judge Ruel H. Espaldon[*]

Abstract

The recent amendments to the 1997 Rules of Civil Procedure have resulted in the removal of Rule 16 which governed motions for the dismissal of cases. While a motion to dismiss can still be filed under the 2019 Amendments, albeit on limited grounds, the same does not toll the running of the period to answer anymore in view of the deletion of Section 4 of Rule 16. Notwithstanding such omission, it is submitted that courts can still read the deleted provision back to life and provide a lifeline for the unsuccessful proponents of a motion to dismiss to interpose their defense on the merits.

Cognizant that adjective law must float and roll with the changing tides, the Supreme Court has embarked on a long-overdue voyage to streamline the proceedings before the courts by fine-tuning certain provisions of the Rules of Court. Amendments were proposed in order to keep our legal system attuned to recent innovations in adjective and

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substantive laws, jurisprudence and digital technology, both locally and internationally. These proposals were finally made official through and in the form of A.M. No. 19-10-20-SC 2019 which took effect on May 1, 202

Among the sweeping and significant changes that were intended to rationalize the proceedings in the first and second level courts is the removal of Rule 16 pertaining to Motions to Dismiss. The said rule previously governed the procedure by which a party may truncate the life of a civil action by invoking one of the recognized grounds by which the court may immediately do away with the case.

It has been a long-standing impression that motions under the former Rule 16 only contributed to the further delay of actions in court. Indeed, quite a number of lawyers have resorted to this remedy in order to afford them time to come up with an answer or a defense to the complaint. Thus, some have welcomed the removal of Rule 16 without realizing that a good number of the grounds for dismissal were merely transposed to or tucked in the other rules that were either partly amended or wholly retained.

Even prior to A.M. No. 19-10-20-SC, litigants had already been reminded to exercise restraint from filing a motion to dismiss at the first instance as an initial response to a complaint against them. Instead, A.M. No. 03-1-09-SC[1] encouraged defendants to allege the grounds therefor as defenses in the answer, in conformity with the IBP-OCA Memorandum on Policy Guidelines dated March 12, 2002. Indeed, Rule 16 has often been the refuge of the uninitiated. Even those that are mindful of the aforementioned admonition cannot help but file a motion to dismiss as a knee-jerk reaction without carefully determining if they

[1] Guidelines to be Observed by Trial Court Judges and Clerks of Court in the Conduct of Pre-Trial and Use of Deposition-Discovery Measures.

would be better off pleading such grounds as ordinary or affirmative defenses instead.

This disdain for motions to dismiss has been made evident in the 2019 Amendments by relegating it under Section 12 of Rule 15 pertaining to prohibited motions. This does not mean, though, that a motion to dismiss is entirely proscribed. Undeniably, it is still an effective tool or remedy which could extricate a defendant from being dragged into a case that has no merit from the outset. As explained in *Romualdez vs. Sandiganbayan*,[2] "such motions are employed to raise preliminary objections so as to avoid the necessity of proceeding to trial." Its objective is, therefore, laudable and is not dissimilar to the purpose of the 2019 Amendments: to provide litigants a more expeditious manner through which they can proceed with their cases.

As had been mentioned earlier, a motion to dismiss will still be allowed and recognized, albeit as an exception, if the grounds therefor are any of the following: 1) that the court has no jurisdiction over the subject matter of the claim; 2) that there is another action pending between the same parties for the same cause; and 3) that the cause of action is barred by a prior judgment or by the statute of limitations.[3]

If a motion to dismiss is still recognized on limited grounds, then the consequent effects thereof in a civil action should also be acknowledged and applied. Prior to the amendments, the filing of a motion to dismiss tolls the running of the period to file an answer. Thus, under Section 4 of Rule 16, if the motion to dismiss is denied, the movant shall file his answer within the balance of the period prescribed by Rule 11 to which he was entitled at the time of

[2] G.R. No. 152259, July 29, 2004.
[3] RULES OF COURT, Rule 15, Section 12(a).

serving his motion, but not less than five (5) days in any event, computed from his receipt of the notice of the denial.

Although their applicability is now in question, there are a plethora of cases[4] to the effect that the filing of a motion to dismiss stays the period within which the movant should plead or file an answer, and allows him to do so within the balance of the time that he had prior to the serving of his motion. In short, and to borrow the words of the venerable Justice J.B.L. Reyes in *Epang v. De Layco*,[5] "he (is) entitled to have that motion resolved before being required to answer." This long-standing hornbook doctrine or rule of practice has its roots, as had been pointed out earlier, in a specific provision of the Rules of Court which expressly provides for the same.

The interruption of the period to answer during the filing and pendency of a motion to dismiss can be traced as far back as 1901 when Act. 190, or the Code of Civil Procedure, took effect. While the said Code did not have a specific chapter or rule pertaining to a motion to dismiss, it did provide for a Demurrer to the Complaint under Sec. 91[6]

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[4] Epang vs. Ortin de Layco, L-7574, May 17, 1955; Sps. Barraza vs. Hon. Campos, Jr., G.R. No. L-50437 February 28, 1983; Alonzo vs. Rosario, G.R. No. L-12309, April 30, 1959; Narciso vs. Garcia, G.R. No. 196877 November 21, 2012.

[5] G.R. No. L-7574, May 17, 1955.

[6] Section 91. Demurrer to the Complaint. —
The demurrer is an allegation that, admitting the facts of the preceding pleading to be true, as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. It imports that the objecting party will not proceed, but will wait the judgment of the court, whether he is bound so to do. The defendant may demur to the complaint, or to the statement of any distinct cause of action therein set forth, within the time fixed by general rules of court for such pleadings when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or
2. That the plaintiff has no legal capacity to sue; or

thereof, which is essentially akin to the motion defined and described in the then-existing Rule 16. Under Sec. 101 of Act. 190:

> If the demurrer is overruled, the court shall proceed, if no answer is filed, to render such judgment as the law and the facts duly pleaded warrant. But after the overruling of a demurrer to a complaint, the defendant may answer within a time to be fixed by general rules of court.

In his treatise on the Code of Civil Procedure,[7] Claro M. Recto explained that the period within which the defendant can file his answer is five (5) days, referring to Rule 9 of the Courts of First Instance which provides that when a demurrer to a complaint is overruled, the defendant shall answer within five days after service upon him of written notice of the order, which notice the plaintiff shall give.[8]

This opportunity given to the defendant has been reproduced in the subsequent iteration of the rules. Sec. 4, Rule 8 of the 1940 Rules of Court provides that "a motion under this rule interrupts the time to plead." The 1964 revision of the Rules of Court was not as terse, stating in Sec. 4, Rule 16 thereof:

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3. That there is another action pending between the same parties for the same cause; or
4. That there is a defect or misjoinder of parties, plaintiff or defendant; or
5. That the complaint does not state facts sufficient to constitute a cause of action; or
6. That the complaint is ambiguous, unintelligible, or uncertain.

The demurrer must distinctly specify the grounds upon which any of the objections to the complaint, or to any of the causes of action therein stated, are taken.

[7] Recto, Claro M., The Code of Civil Procedure of the Philippine Islands Vol. I, 1925 Ed., p. 144.

[8] *Id.*, citing Mercado vs. Vicencio, 36 Phil. 414.

> [I]f the motion to dismiss is denied or if determination thereof is deferred, the movant shall file his answer within the period prescribed by Rule 11, computed from the time he received notice of the denial or deferment, unless the court provides a different period.

The 1997 revision of the Rules of Court essentially echoed the previous version of Sec. 4, Rule 16, with the difference being that the defendant was then allowed a grace period of five (5) days should the balance of the period within which he or she should file the answer is less than the lifeline just mentioned. The provision concerned states:

> Section 4. Time to plead. — If the motion is denied, the movant shall file his answer within the balance of the period prescribed by Rule 11 to which he was entitled at the time of serving his motion, but not less than five (5) days in any event, computed from his receipt of the notice of the denial. If the pleading is ordered to be amended, he shall file his answer within the period prescribed by Rule 11 counted from service of the amended pleading, unless the court provides a longer period.

Surprisingly, the aforementioned provision that provided relief and allowance for defendants under such situation has been deleted in the 2019 revisions to the 1997 Rules of Civil Procedure. While a motion to dismiss can still be resorted to and filed by a defendant under Rule 15, the same is generally proscribed, and the grounds excepted

therefor are limited.[9] However, it would seem that the deletion of Sec. 4, Rule 16 signifies that the running of the 30-day period within which to file an answer is not tolled anymore by the filing and pendency of a motion to dismiss.

A possible explanation as to why there is no express provision anymore for the interruption of the period to file an answer pending resolution of the defendant's motion to dismiss under the amended rules is that the permissible grounds under Sec. 12(a) of Rule 15 can be taken up and considered at any time, and even *motu proprio*, if they already become apparent from the pleadings or during the course of the proceedings. This is clear under Sec. 1, Rule 9 of the Rules of Court:

> Section 1. Defenses and objections not pleaded. — Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim.

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[9] Section 12. Prohibited motions. — The following motions shall not be allowed:
(a) Motion to dismiss except on the following grounds:
1) That the court has no jurisdiction over the subject matter of the claim;
2) That there is another action pending between the same parties for the same cause; and
3) That the cause of action is barred by a prior judgment or by the statute of limitations;

x x x

It may be gleaned from the said provision that except for the defenses of: (a) lack of jurisdiction over the subject matter of the case; (b) *litis pendentia*; (c) *res judicata*; and (d) prescription, other defenses must be invoked when an answer or a motion to dismiss is filed in order to prevent a waiver thereof. Otherwise stated, if a defendant fails to raise a defense not specifically excepted in Section 1, Rule 9 of the Rules of Court either in a motion to dismiss or in the answer, such defense shall be deemed waived, and consequently, the defendant is already estopped from relying upon the same in further proceedings.[10]

So, does this mean that courts are already compelled to ignore a century's worth of jurisprudence providing for the interruption of the period to file an answer pending resolution of the motion to dismiss?

Not necessarily. It is humbly submitted that notwithstanding the deletion of Rule 16, as well as of the fact that the limited grounds that can be invoked for a motion to dismiss under Sec. 12(a) of Rule 15 essentially mirror the four instances by which a case can be dismissed at any time under Sec. 1, Rule 9, the rules still treat them differently. It has been explained that Section 5(2) of Rule 15 pertains to and treats of the grounds for a motion to dismiss the complaint, whereas Sec. 1 of Rule 9 specifically deals with the dismissal of the claim by the court *motu proprio*.[11]

Notably, the 2019 Amendments still allow the filing of a motion to dismiss. Necessarily, the consequent effects thereof are also presumed to still apply, which includes the interruption of the period within which to file an answer

[10] Noche, Maria Concepcion S., Civil Procedure Explained Vol. I, 2021 Ed., pp. 390-391, citing Edron Construction Corp. vs. Provincial Government of Surigao Del Sur, G.R. No. 220211, June 29, 2017.
[11] Moya II, Salvador N., Notes and Cases in Remedial Law, Vol. I, Part I, 2020 Ed., p. 595.

when a motion to dismiss has been filed and is pending resolution. The amended rules could not have intended a situation where courts are asked to proceed with the trial of the case, and at the same time continue to hear and resolve the motion to dismiss. That would simply be too taxing and superfluous not just for the parties to the case, but for the courts as well. The simultaneous consideration of the same will take too much of the triers' time, and rather needlessly if the motion to dismiss turns out to be meritorious.

It would be more in keeping with the aims of the rules, and of justice if the defendant is given the opportunity to show that there is no need for the proceedings to move further without forfeiting their right to participate in the case should the court resolve to deny the motion to dismiss.

Another reason which makes the courts reluctant to declare a defendant in default under such situation is the prevailing policy that orders of default must be shunned or avoided as much as possible since it prevents a just determination of the controversy between the parties. In *Heirs of Yabao v. Van Der Kolk*,[12] it was underscored anew that:

> It is the policy of the law that every litigant should be afforded the opportunity to have his case be tried on the merits as much as possible. Hence, judgments by default are frowned upon. It must be emphasized that a case is best decided when all contending parties are able to ventilate their respective claims, present their arguments and adduce evidence in support of their positions. By giving the parties the chance to be heard fully, the demands of due process are subserved. Moreover, it is only amidst such an atmosphere that accurate

[12] G.R. No. 207266, June 25, 2014.

> factual findings and correct legal conclusions can be reached by the courts.

Notwithstanding the aforementioned reasons, the fact still remains that Section 4 of the former Rule 16 has been deleted and has not been reproduced in the current version of the rules. If we are to apply the rules on statutory construction, then the only interpretation of such omission is that the revision indeed revoked such benefit from the proponent of a motion to dismiss. It is a rule of legal hermeneutics, as explained in *People v. Fronda*,[13] that:

> An act which purports to set out in full all that it intends to contain operates as a repeal of anything omitted which was contained in the old act and not included in the amendatory act.

It is humbly opined, however, that the void created by this omission left may still be filled by the courts. The silence of the rules in this particular situation does not mean that judges are effectively muted thereby, especially if an insistence on the supposed apparent import of the deletion would cause injustice or would not result in the orderly and speedy disposition of cases as envisioned by the amendments. As exhorted in *Amatan v. Aujerio*,[14] in instances where a literal application of a provision of law would lead to injustice or to a result so directly in opposition with the dictates of logic and everyday common sense as to be unconscionable, Article 10 of the Civil Code exhorts judges to take principles of right and justice at heart.

The confusion at hand is not surprising given the infancy of the amendments and the novelty of the issue. Thus, courts should not be faulted if they continue to apply

[13] G.R. No. L-26551, February 27, 1976.
[14] A.M. No. RTJ-93-956, September 27, 1995.

the old rule. In choosing to lean towards what has been established and practiced thereunder, courts are not writing back what has already been deleted; rather, they are only affirming and applying a well-established effect or consequence of a motion to dismiss, rooted on fairness and practical justice.

Reasons clearly abound to accord this benefit back to a defendant who plans to truncate the civil action against them through a motion to dismiss before entertaining the complaint on the merits through the appropriate responsive pleading. The author is not alone in espousing this view or position on the matter. A respected commentator in Remedial Law has opined in his treatise on the subject that if the motion to dismiss based on any of the grounds enumerated under the second sentence of Section 1, Rule 9, has been denied, the defendant's next remedy is to file an answer within the remaining period (if the motion to dismiss was filed first).[15]

It can thus be argued with substance that there is a need to reinstate Section 4 of Rule 16. The said rule has already chartered the course of a defendant's voyage for over a century. It has already been validated by time and reason. Until such provision finds its way back in the Rules of Court, judges should be allowed to read out the former rule back to life in their issuances and provide a lifeline for the unsuccessful proponents of a motion to dismiss to interpose their defense on the merits.

[15] Bathan, Eleuterio L., The Amendments to the 1997 Rules of Civil Procedure, Explained with Notes and Cases, 2020 Ed., p. 14.

THE STATUS OF INTERNATIONAL LAW IN THE PHILIPPINES: A RESTATEMENT

Banuar Reuben A. Falcon[*]

I. INTRODUCTION

The Philippine government recently received the List of Issues in relation to the country's fifth periodic report submitted in accordance with Article 40 of the International Covenant on Civil and Political Rights.[1] Among the many queries is a request for the Philippine government to "clarify the precise status of the Covenant within the national legal order".[2] However, this is not the first such request from the Human Rights Committee, which has, in the past, posed questions on a treaty's hierarchy in the Philippine legal system and its application in case of conflict with domestic legislation.[3]

The forthcoming periodic review (scheduled for the end of 2020), as well as the lapse of a decade since a comprehensive paper on the subject matter appeared in this journal,[4] presents a timely opportunity to provide a restatement on the status of international law in Philippine law. For ease of reference, each source of international law as

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[1] 999 U.N.T.S. 171. Adopted 16 December 1966 and entered into force 23 March 1976. The Philippines became a State party on 23 October 1986. The body monitoring compliance with this treaty is the Human Rights Committee.

[2] U.N. Doc. CCPR/C/PHL/Q/5 (30 June 2020), para. 2.

[3] U.N. Doc. CCPR/C/SR.2138 (23 October 2003), para. 30.

[4] *See* Merlin M. Magallona, *A Survey of Problems in the Law of Treaties and Philippine Practice*, 34 J. INTEG'D B. PHIL. 1 (2009) [hereinafter, "Magallona"].

provided in Article 38(1) of the Statute of the International Court of Justice (ICJ) is discussed individually, focusing on the manner of domestication and the extent to which each source may be invoked before domestic courts. Lastly, a hierarchy is proposed in case of conflict among the sources *inter se* or with domestic legislation.

A. Treaties

Definition

Under the Vienna Convention on the Law of Treaties[5] (VCLT):

> "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[6]

This has been the go-to definition in several decisions of our Supreme Court,[7] although it has also acknowledged the definition of the Executive branch, which provides:

> Treaties [are] international agreements entered into by the Philippines which require legislative concurrence after executive ratification. This

[5] 1155 U.N.T.S. 331. Concluded on 23 May 1969. The Philippines became a State Party on 15 November 1972.
[6] VCLT, art. 2(1)(b).
[7] *See, e.g.,* China National Machinery & Equipment Corp. v. Santamaria G.R. No. 185572, Feb. 7, 2012, 665 SCRA 189, 214; Bayan Muna v. Romulo, G.R. No. 159618, Feb. 1, 2011, 641 SCRA 244 [hereinafter, "Bayan Muna"], 258; Bayan (Bagong Alyansang Makabayan) v. Zamora, G.R. No. 138570, Oct. 10, 2000, 342 SCRA 449 [hereinafter, "Bayan v. Zamora"], 488-489.

> term may include compacts like conventions, declarations, covenants and acts.[8]

Enforceability of treaties to which the Philippines is a State Party

The Treaty Clause of the Constitution states:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.[9]

Although the clause only speaks of "concurrence", early jurisprudence has mis-characterized the function of the Senate as "treaty-ratifying".[10] However, Oppenheim explains that ratification, or "the final confirmation given by the parties to an international treaty concluded by their representatives",[11] "is effected by those organs which exercise the treaty-making power of the States[,] regularly the

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[8] Exec. Order No. 459 (Nov. 25, 1997), § 2(b). *Cited in* Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, July 19, 2016, 797 SCRA 134 [hereinafter, "IPAP"], 159; *and* Bayan Muna, *supra* note 7, at 258 n.32.

[9] CONST. art. VII, § 21.

10 *See* Tolentino v. Secretary of Finance, G.R. No. 115455, Aug. 25, 1994, 235 SCRA 630, 661-662. At issue was the constitutionality of a law widening the tax base of the value-added tax. In passing, the Supreme Court mentioned that the exercise of the legislature's "treaty-ratifying power" is a check on the executive power. *See also* Wright v. Court of Appeals, G.R. No. 113213, Aug. 15, 1994, 235 SCRA 346, 356, where the Supreme Court held that the extradition treaty with Australia had been "concurred and ratified by the Senate". *See*, *finally*, Gov't of the United States of America v. Purganan, G.R. No. 148571, Sept. 24, 2002, 389 SCRA 623 [hereinafter, "Purganan"], 655: "our executive branch voluntarily entered in the Extradition Treaty [with the U.S.], and our legislative branch ratified it."

[11] LASSA F. OPPENHEIM, INTERNATIONAL LAW: A TREATISE. VOL. I – PEACE (London, 2nd ed. 1912) [hereinafter, "OPPENHEIM"], at 553, § 510.

heads of the States".[12] The Supreme Court has since clarified the matter in dismissing a petition for mandamus seeking to compel transmission by the Executive branch to the Senate of the signed copy of the Rome Statute of the International Criminal Court:[13]

> It should be emphasized that under our Constitution, **the power to ratify is vested in the President**, subject to the concurrence of the Senate. **The role of the Senate**, however, **is limited only to giving or withholding its consent**, or concurrence, to the ratification. (*Bayan v. Zamora*, 342 SCRA449 [2000]) Hence, it is within the authority of the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, refuse to ratify it. (ISAGANI A. CRUZ, INTERNATIONAL LAW 174 [1998 ed.]).[14] (Emphasis supplied)

In any case, *Pharmaceutical and Health Care Association of the Philippines v. Duque III*[15] has explained how the Treaty Clause embodies the "transformation" method by which one of the sources of international law – international conventions or treaties – becomes part of domestic law:

> Under the 1987 Constitution, international law can become part of the sphere of domestic law either by transformation or incorporation. **The transformation method requires that an international law be transformed into a**

[12] *id.* at 558, § 516.
[13] Pimentel, Jr. v. Office of the Executive Secretary, G.R. No. 158088, Jul. 6, 2005, 462 SCRA 622.
[14] *id.* at 637-638. Emphasis supplied and internal citations edited and inserted in the text.
[15] G.R. No. 173034, Oct. 9, 2007, 535 SCRA 265 [hereinafter, "Pharmaceutical & Health Care Assoc"].

> **domestic law through a constitutional mechanism such as local legislation**. The incorporation method applies when, by mere constitutional declaration, international law is deemed to have the force of domestic law (JOAQUIN G. BERNAS, CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT (NOTES AND CASES) Part I [2005]).
>
> **Treaties become part of the law of the land through transformation pursuant to Article VII, Section 21 of the Constitution** which provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate." Thus, treaties or conventional international law must go through a process prescribed by the Constitution for it to be transformed into municipal law that can be applied to domestic conflicts (JOAQUIN G. BERNAS, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 57 [2002 ed.]).[16] (Emphasis supplied)

Besides Senate concurrence and Presidential ratification, the treaty must be published domestically[17] and, as Dean Magallona reminds, it must have entered into force in accordance with its own provisions.[18] And if the treaty or its provisions are not self-executing, then local legislation

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[16] *id.* at 289. Emphasis supplied and citations edited.
[17] Mirpuri v. Court of Appeals, G.R. No. 114508, Nov. 19, 1999, 318 SCRA 516 [hereinafter, "Mirpuri"], 543. *Reiterated in* Sehwani, Inc. v. In-N-Out Burger, Inc., G.R. No. 171053, Oct. 15, 2007, 536 SCRA 225 [hereinafter, "Sehwani, Inc."], 237. *See*, *generally*, Civil Code, art. 2 *and* Tañada v. Tuvera, G.R. No. L-63915, Dec. 29, 1986, 146 SCRA 446, 452.
[18] Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, 85 PHIL. L.J. 1, 36 (2010). Emphasis supplied.

must be passed before such treaty or its provisions may be enforced before Philippine courts.

Self-executing treaties

In the 1918 case of *Singh v. Insular Collector of Customs* involving a petition by Indian nationals to enter the Philippines, one of the issues raised was the applicability of a treaty between Great Britain and the United States relating to the right of British subjects to enter U.S. territory.[19] The Supreme Court held:

> **By the Constitution a Treaty is placed on the same footing**, and made of like obligation, **with an Act of legislation**. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if the that can be done without violating the language of either, but **if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing**.[20] (Emphasis supplied)

The ruling in *Singh* did not explain what was meant by "self-executing". But in upholding a provision of the 1968 Philippine-U.S. Base Labor Agreement,[21] the Supreme Court, in *Guerrero's Transport Services, Inc. v. Blaylock*

[19] At the time, Indian nationals were British subjects, while the Philippines was U.S. territory.
[20] Singh v. Insular Collector of Customs, 38 Phil. 862, 872-873 (1918). Emphasis supplied.
[21] 658 U.N.T.S. 347. Signed in Manila on 27 May 1968.

Transportation Services Employees Association-KILUSAN,[22] clarified that:

> [A] treaty has two (2) aspects — as an international agreement between states, and as municipal law for the people of each state to observe. **As part of the municipal law, the aforesaid provision of the treaty enters into and forms part of the contract between petitioner and the U.S. Naval Base authorities**. In view of said stipulation, the new contractor is, therefore, bound to give "priority" to the employment of the qualified employees of the previous contractor. It is obviously in recognition of such obligation that petitioner entered into the afore-mentioned Compromise Agreement.[23] (Emphasis supplied)

The implication was that the executive agreement was self-executing as the contractor in said case was bound by its provisions when hiring qualified employees to work on base. In another case involving a bilateral treaty with the United States, the 1998 Visiting Forces Agreement was also declared to be self-executing in *Nicolas v. Romulo*.[24] And bilateral tax treaties with Germany[25] and Canada[26] were treated as self-executing instruments, taking precedence as *lex specialis*

[22] G.R. No. L-41518, June 30, 1976, 71 SCRA 621.
[23] *id.* at 629. Emphasis supplied.
[24] *See* Nicolas v. Romulo, G.R. No. 175888, Feb. 11, 2009, 578 SCRA 438, 466. The conclusion was supposedly anchored on the definition of "self-executing" in the opinion of the U.S. Supreme Court on Medellín v. Texas, but there was no extensive discussion on the latter.
[25] Deutsche Bank AG Manila Branch v. Commissioner of Internal Revenue, G.R. No. 188550, Aug. 19, 2013, 704 SCRA 216, 227-228.
[26] Air Canada v. Commissioner of Internal Revenue, G.R. No. 169507, Jan. 11, 2016, 778 SCRA 131 [hereinafter, "Air Canada"], 156-160 and 175.

over the general provisions of the National Internal Revenue Code.

As regards multilateral treaties, jurisprudence has been more specific. In ruling on Article 6*bis*[27] of the Paris Convention for the Protection of Industrial Property,[28] the Supreme Court explained that:

> **[A] self-executing provision does not require legislative enactment to give it effect** in the member country. It may be applied directly by the tribunals and officials of each member country by the mere publication or proclamation of the Convention, after its ratification according to the public law of each state and the order for its execution.[29] (Emphasis supplied)

Our Supreme Court has yet to rule on how to distinguish a treaty or treaty provision that is self-executing from one that is not. However, *Nicolas v. Romulo*[30] points to the 2008 opinion of the U.S. Supreme Court in *Medellín v. Texas*[31] which, in turn, relies on the 1829 opinion of *Foster v.*

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[27] *Introduced by* the Revision Conference of The Hague on 6 November 1925 *and modified by* the Revision Conferences of London on 2 June 1934 and of Lisbon on 31 October 1958. *See* G.H.C. BODENHAUSEN, A GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 89 (Geneva 1968).

[28] Concurred in by the Senate on 10 May 1965 and instrument of ratification signed by the President on 11 October 1965. *See* Smith Kline & French Laboratories, Ltd. v. CA, G.R. No. 121867, July 24, 1997, 276 SCRA 224, 237 n.9.

[29] Mirpuri, *supra* note 17, at 543, *citing* STEPHEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS. NATIONAL AND INTERNATIONAL PROTECTION, VOL. I 233 (1975). *Reiterated in* Sehwani, Inc., *supra* note 17, at 237.

[30] *See supra* note 24.

[31] Medellín v. Texas, 552 U.S. 491; 128 S. Ct. 1346 (2008). The main issue revolved around the enforceability of a judgment of the ICJ, which is discussed elsewhere in this work. *See infra* notes 98-100 and accompanying text.

Neilson.[32] In *Foster*, at issue was the effect to be given to the Treaty of San Ildefonso on certain land grants over areas located inside territory ceded to the U.S. Their Supreme Court explained:

> Our constitution declares **a treaty** to be the law of the land. It is, consequently, **to be regarded** in courts of justice **as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision**. But **when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act**, the treaty addresses itself to the political, not the judicial department; and **the legislature must execute the contract before it can become a rule for the Court**.[33] (Emphasis supplied)

Thus, according to *Foster*, a treaty is self-executing when, based on a reading of its text, "it operates of itself without the aid of any legislative provision". On the other hand, if the words of a treaty "import a contract, when either of the parties engages to perform a particular act", then it is not self-executing because "the legislature must execute the contract", namely, pass implementing legislation. Given our legal tradition,[34] the reasoning in *Foster* can be adopted by Philippine courts, especially given the Supreme Court's implicit support of *Medellín*, which cites *Foster*.

[32] Foster v. Neilson, 2 Pet. 253 (1829).
[33] *id.* at 314. Emphasis supplied.
[34] *See*, *e.g.*, In re: Shoop, 41 Phil. 213, 250 (1920), where Malcolm, *J.* pointed out that 3,810 U.S. citations were used over a span of 20 volumes of Philippine Supreme Court decisions.

Distinguished from "executive agreements"

Jurisprudence on the distinction between treaties and executive agreements can be traced to two cases.[35] In *USAFFE Veterans Association, Inc. v. Treasurer of the Philippines*,[36] the Supreme Court passed upon the validity of the 1950 Romulo-Snyder Agreement, according to which the Philippine Government undertook to return to the U.S. Government unspent money advanced by the latter to our National Defense Forces. In upholding the validity of the executive agreement despite the lack of Senate concurrence, the Supreme Court, quoting extensively from the brief of the Solicitor General, held:

> [I]t must be noted that treaty is not the only form that an international agreement may assume. For the grant of the treaty-making power to the Executive and the Senate does not exhaust the power of the government over international relations. Consequently, **executive agreements may be entered with other states and are effective even without the concurrence of the Senate** […]. It is observed in this connection that **from the point of view of the international law, there is no difference between treaties and executive agreements in their binding effect upon states** concerned as long as the negotiating functionaries have remained within their powers […]
>
> x x x

[35] *See* J. Eduardo Malaya III & Maria Antonina Mendoza-Oblena, *Philippine Treaty Law and Practice,* 85 PHIL. L.J. 505, 512-516 (2011), for a brief discussion on the difference between treaties and executive agreements.
[36] 105 Phil. 1030 (1959) [hereinafter, "USAFFE"].

> There are now various forms of such pacts or agreements entered into by and between sovereign states which do not necessarily come under the strict sense of a treaty and which do not require ratification or consent of the legislative body of the State, but nevertheless, are considered valid international agreements.
>
> x x x
>
> "Nature of Executive Agreements"
>
> Executive Agreements fall into two classes: (1) agreements made purely as executive acts affecting external relations and independent of or without legislative authorization, which may be termed as presidential agreements and (2) agreements entered into in pursuance of acts of Congress, which have been designated as Congressional-Executive Agreements […].[37] (Emphasis supplied)

In the subsequent case of *Commissioner of Customs v. Eastern Sea Trading*,[38] the Court of Appeals had struck down an executive agreement regulating the importation of goods from Japan for lack of Senate concurrence. In upholding the validity of the executive agreement, the Supreme Court explained that:

> Treaties are formal documents which require ratification with the approval of two thirds of the Senate. **Executive agreements become**

[37] *id.* at 1037-1038. Emphasis supplied and citations of U.S. authorities omitted.
[38] G.R. No. L-14279, Oct. 31, 1961, 3 SCRA 351 [hereinafter, "Eastern Sea Trading"].

> **binding through executive action without the need of a vote by the Senate or by Congress**.
>
> x x x
>
> [T]he right of the Executive to enter into binding agreements *without* the necessity of subsequent Congressional approval has been *confirmed by long usage*.
>
> x x x
>
> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying out well-established national policies and traditions and those involving arrangements of a more or less *temporary* nature usually take the form of executive agreements.[39] (Emphasis supplied)

The *USAFFE* and *Eastern Sea Trading* rulings have since been quoted or cited to uphold the validity and binding effect on Philippine authorities of:

- the 1951 Host Agreement with the World Health Organization, granting the latter a tax exemption;[40]
- a loan agreement taken in conjunction with the 1999 Exchange of Notes with Japan;[41]

[39] *id.* at 356. Emphasis supplied and citations of U.S. authorities omitted.
[40] Commissioner of Internal Revenue v. John Gotamco & Sons, Inc., G.R. No. L-31092, Feb. 27, 1987, 148 SCRA 36, 39 n.1, *citing* USAFFE.
[41] Abaya v. Ebdane, Jr., G.R. No. 167919, Feb. 14, 2007, 515 SCRA 720 [hereinafter, "Abaya"], 772, *citing* Eastern Sea Trading.

- loan agreements entered into with the World Bank and Asian Development Bank;[42]
- the 2003 Non-surrender Agreement with the United States;[43]
- a loan agreement between the Landbank of the Philippines and the International Bank for Reconstruction and Development;[44]
- the 1989 Madrid Protocol acceded to by the President in relation to the Intellectual Property Code of the Philippines;[45]
- a loan agreement with the Overseas Economic Cooperation Fund, undertaken pursuant to the 1987 Exchange of Notes with Japan;[46]
- the 2014 Enhanced Defense Cooperation Agreement with the United States;[47] and
- a loan agreement with the Overseas Economic Cooperation Fund, undertaken pursuant to the 1993 Exchange of Notes with Japan.[48]

Likewise, *USAFFE* and *Eastern Sea Trading* were relied on to re-affirm the authority of the President to enter into valid

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[42] DBM Procurement Service v. Kolonwel Trading, G.R. Nos. 175608, 175616 & 175659, June 8, 2007, 524 SCRA 591, 608-609, *citing* Abaya.
43 Bayan Muna, *supra* note 7, at 258 nn.31 & 35 and at 262-263, *citing* Eastern Sea Trading *and* USAFFE.
[44] Landbank of the Philippines v. Atlanta Industries, Inc., G.R. No. 193796, July 2, 2014, 729 SCRA 12 [hereinafter, "Landbank"], 30, *citing* Bayan Muna.
[45] IPAP, *supra* note 8, at 159-162, *quoting* Eastern Sea Trading.
[46] Mitsubishi Corporation–Manila Branch v. Commissioner of Internal Revenue, G.R. No. 175772, June 5, 2017, 825 SCRA 332, 344-345, *citing* Abaya.
[47] Saguisag v. Ochoa, Jr., G.R. Nos. 212426 & 212444, Jan. 12, 2016, 779 SCRA 241 [hereinafter, "Saguisag v. Ochoa, Jr."], 360-361, *quoting* Eastern Sea Trading.
[48] Manila International Airport Authority v. Commission on Audit, G.R. No. 218388, Oct. 15, 2019, *quoting* Landbank at pp. 9-10 of the advance decision.

executive agreements absent Senate concurrence.[49] Moreover, the Supreme Court has been cautious to not foreclose on the possibility that other types of international agreements may be entered into by the executive branch of government and need not be submitted to the Senate for concurrence, stating that the enumeration in *Eastern Sea Trading* "cannot circumscribe the option of each state on the matter of which international agreement format would be convenient to serve its best interest".[50]

B. Customary international law

Definition

Oppenheim describes custom as "the older and the original source of International Law in particular as well as of law in general."[51] And in order to identify customary norms, Clapham instructs that:

> [W]e must look at **what states actually do** in their relations with one another, and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course.[52] (Emphasis supplied)

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[49] Neri v. Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Sept. 4, 2008, 564 SCRA 152, 198 n.26, *citing* USAFFE. *Reiterated in* Bayan Muna v. Romulo, *supra* note 7, at 297.
[50] Bayan Muna, *supra* note 7, at 262. *Reiterated in* Saguisag v. Ochoa, Jr., *supra* note 47, at 361-362.
[51] OPPENHEIM, *supra* note 11, at 22, § 17.
[52] ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS 57 (Oxford, 7th. ed. 2012) (hereinafter, "CLAPHAM"). Emphasis supplied. This is the latest edition of the work by the late J.L. Brierly, "The Law of Nations: An Introduction to the International Law of Peace", first published by the Oxford University Press in 1928, and the 1963 edition of which has been cited several times by our Supreme Court (s*ee infra* note 125).

As explained by the International Court of Justice:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character, of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[53]

The foregoing has been summarized by Fr. Bernas, and used by our Supreme Court, in the wise:

> Custom or customary international law means "a general and consistent *practice of states followed by them from a sense of legal obligation* [*opinio juris*]." (Restatement) **This statement contains the two basic elements of custom: the *material factor*, that is, how states behave, and the**

[53] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, at p. 44, para. 77.

> **psychological or *subjective factor*, that is, why they behave the way they do**.[54] (Emphasis supplied)

According to Clapham, *jus cogens* (peremptory norms) are a form of customary international law that requires less evidence of acceptance.[55] However, our Supreme Court has noted the absence of any criteria on how to identify norms that had attained *jus cogens* status.[56] Indeed, although the ICJ has declared the prohibition against genocide[57] and torture[58] to be *jus cogens*, as regards the latter, it merely added:

> That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons

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[54] Pharmaceutical & Health Care Assoc., *supra* note 15, at 291-292, *quoting* JOAQUIN G. BERNAS, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 57 (2002 ed.). Emphasis and italics in the original.

[55] CLAPHAM, *supra* note 52, at 62.

56 *See* Vinuya v. Executive Secretary, G.R. No. 162230, Apr. 28, 2010, 619 SCRA 533 [hereinafter, "Vinuya"], at 577-579.

[57] *See* Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006, at p. 32, para. 64; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, at pp. 110-111, para. 161; *and* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment of 3 February 2015, ICJ Reports 2015, at p. 47, para. 87.

[58] Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment of 20 July 2012, ICJ Reports 2012, at p. 457, para. 99.

> from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.[59]

Rather than explain how the prohibition against torture had attained *jus cogens* status, the ICJ seemed content to demonstrate how said prohibition had attained *customary* status. (Years earlier, our Supreme Court conducted a similar analysis when it was confronted with an *amparo* petition involving an enforced disappearance,[60] before there was any domestic law on the matter.[61])

Enforceability of norms of customary international law

The Incorporation Clause of the Constitution provides that:

> **The Philippines** renounces war as an instrument of national policy, **adopts the generally accepted principles of international law as part of the law of the land** and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[62] (Emphasis supplied)

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[59] *id.*

[60] *See* Razon, Jr. v. Tagitis, G.R. No. 182498, Dec. 3, 2009, 606 SCRA 598 [hereinafter, "Razon, Jr."], 674-679.

[61] The Anti-Enforced or Involuntary Disappearance Act (Rep. Act No. 19353) was signed on 21 December 2012.

[62] CONST., art. II, § 2. Emphasis supplied. *See* Mark Richard D. Evidente, *The Interaction of Domestic and International Law: The Doctrine of Incorporation in Philippine Practice*, 78 PHIL. L.J. 395 (2004) for an overview of the application of the incorporation doctrine.

The term "generally accepted principles of international law" has been held to encompass norms of general or customary international law that are binding on all states.[63] They form part of the laws of the land even if they do not derive from treaty obligations,[64] and "are considered to be automatically part of our own laws",[65] with no further legislative action needed to make such adopted principles applicable in the domestic sphere.[66] This is because "**our Constitution** has been deliberately general and extensive in its scope and **is not confined to the recognition** of rule and principle **of international law as contained in treaties** to which our government may have been or shall be a signatory."[67]

Aside from the right of innocent passage[68] and the principle of *pacta sunt servanda* (independent of the VCLT provision),[69] the most prominent embodiment of customary norms cited by the Supreme Court has been the Universal

[63] Razon, Jr., *supra* note 60, at 673.
[64] Mijares v. Ranada, G.R. No. 139325, April 12, 2005, 455 SCRA 397 [hereinafter, "Mijares"], 421, *citing* Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 124 (Malcolm D. Evans, ed., 2003).
[65] Tañada v. Angara, G.R. No. 118295, May 2, 1997, 272 SCRA 18 [hereinafter, "Tañada"], 66.
[66] Secretary of Justice v. Lantion, G.R. No. 139465, Jan. 18, 2000, 322 SCRA 160 [hereinafter, "Lantion"], 196, *citing* JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 12 (1992 ed.).
[67] Kuroda v. Jalandoni, 83 Phil. 171, 178 (1949). Emphasis supplied.
[68] Magallona v. Ermita, G.R. No. 187167, Aug. 16, 2011, 655 SCRA 476, 501-503, *citing*, *inter alia*, U.N. Convention on the law of the Sea, arts. 17 and 53.
[69] *See*, *e.g.*, Lantion, *supra* note 66, at 196; Tañada, *supra* note 65, at 66 (*reiterated in* Air Canada, *supra* note 26, at 157 n.77); Puma Sportschuhfabriken Rudolf Dassler, K.G. v. Intermediate Appellate Court, G.R. No. L-75067, Feb. 26, 1988, 158 SCRA 233, 239-240; *and* La Chemise Lacoste, S.A. v. Fernandez, G.R. Nos. L-63796-97 & L-65659, May 21, 1984, 129 SCRA 373, 390.

Declaration of Human Rights,[70] whether relied on in its general character[71] or its specific provisions relative to:

- the right to equality;[72]
- the right to privacy[73] and against arbitrary interference with such right, in relation to unreasonable searches and seizures;[74]
- the right to freedom of expression;[75]
- the right liberty and security;[76]
- the right to take part in government;[77]
- the right to a nationality;[78] and
- the right to education.[79]

[70] *See* Republic v. Sandiganbayan, G.R. No. 104768, Jul. 21, 2003, 407 SCRA 10, 58. *Reiterated in* Poe-Llamanzares v. Commission on Elections, G.R. Nos. 221697 & 221698-700, Mar. 8, 2016, 786 SCRA 1, 144-145.
[71] Gov't of Hong Kong Special Administrative Region v. Olalia, Jr., G.R. No. 153675, Apr. 19, 2007, 521 SCRA 470, 484. *Reiterated in* Enrile v. Sandiganbayan, G.R. No. 213847, Aug. 18, 2015, 767 SCRA 282, 305-306.
[72] Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, Dec. 15, 2004, 446 SCRA 299 [hereinafter, "Central Bank Employees Assoc."], 376, *citing* UDHR, art. 1.
[73] Sabio v. Gordon, G.R. No. 174177, Oct. 17, 2006, 504 SCRA 705, 736 n.48, *citing* UDHR, art. 12.
[74] Ogayon y Diaz v. People, G.R. No. 188794, Sept. 2, 2015, 768 SCRA 670, 681, *mis-citing* UDHR, art. 17(1) [should be UDHR, art. 12].
[75] Chavez v. Gonzales, G.R. No. 168338, Feb. 15, 2008, 545 SCRA 441, 481-482, *citing* UDHR, art. 19.
[76] Secretary of National Defense v. Manalo, G.R. No. 180906, Oct. 7, 2008, 568 SCRA 1 [hereinafter, "Manalo"], 52-53, *citing* UDHR, art. 3. *Reiterated in* Barbieto v. Court of Appeals, G.R. No. 184645, Oct. 30, 2009, 604 SCRA 825, 845.
[77] Ang Ladlad LGBT Party v. Commission on Elections, G.R. No. 190582, Apr. 8, 2010, 618 SCRA 32 [hereinafter, "Ang Ladlad"], 76, *citing* UDHR, art. 21(1).
[78] Poe-Llamanzares v. Commission on Elections, G.R. Nos. 221697 & 221698-700, Mar. 8, 2016, 786 SCRA 1, 145, *citing* UDHR, art. 15.
[79] Pimentel v. Legal Education Board, G.R. Nos. 230642 & 242954, Sep. 10, 2019, page 68 of the advance decision (declaring the PhilSAT unconstitutional as it restricts the right to a legal education, among other reasons).

Likewise, the Vienna Convention on the Law of Treaties reflects customary international on the matter,[80] and its provisions have been cited in relation to:

- the obligation not to defeat the object and purpose of a treaty prior to its entry into force;[81]
- *pacta sunt servanda*;[82]
- internal law and the observance of treaties;[83]
- the general rule on the interpretation of treaties;[84]
- supplementary means of interpretation;[85] and
- *jus cogens*.[86]

General principles of law recognized by civilized nations

According to Dean Magallona, each source of international law "is assigned its own entry point by which it becomes 'part of the law of the land'; **the Incorporation Clause for customary norms** and the Treaty Clause for the conventional or treaty rules."[87] In actual practice, the

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[80] *See*, *e.g.*, Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 433 (2d Cir. 2001): "[W]e rely upon the Vienna Convention here as an 'authoritative guide to the customary international law of treaties.'" Note, however, that the Philippines is a State Party to the VCLT (*see supra* note 5), while the U.S. is not.

[81] Bayan Muna, *supra* note 7, at 270 n.58, *citing* VCLT, art. 18.

[82] Bayan v. Zamora, *supra* note 7, at 493; Lim v. Executive Secretary, G.R. No. 151445, Apr. 11, 2002, 380 SCRA 739 [hereinafter, "Lim"], 758 n.14; Abaya, *supra* note 42, at 773 n.73 *in rel.* 749 n.33; Bayan Muna, *supra* note 7, at 261 n.42, *all citing* VCLT, art. 26.

[83] Lim, *supra* note 82, at 758 n.15, *citing* VCLT, art. 27.

[84] Commissioner of Internal Revenue v. S.C. Johnson and Son, Inc., G.R. No. 127105, Jun. 25, 1999, 309 SCRA 87, 90 n.22; Secretary of Justice v. Lantion, G.R. No. 139465, Oct. 17, 2000, 343 SCRA 377, 383 n.5; Lim, *supra* note 82, at 753, *all citing* VCLT, art. 31.

[85] Lim, *supra* note 82, at 754, *citing* VCLT, art. 32.

[86] Vinuya, *supra* note 56, 577 n.70, *citing* VCLT, art. 53.

[87] *See* Magallona, *supra*, note 4, at 4 (emphasis supplied). *See also* Air Canada, *supra* note 26 , at 174, pointing out that there are "two ways through which international obligations become binding. Article II,

Incorporation Clause has also been used to incorporate general principles of law such as the bar against suing a State without its consent[88] and the principle of equity.[89] Other candidates for this category cited by Clapham include prescription and *res judicata*,[90] while international tribunals mention estoppel[91] and the principle that reparation must be made in case of breach of an obligation,[92] to list a few.

However, it must be pointed out that, in the past, application of the Incorporation Clause has been somewhat

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Section 2 of the Constitution deals with international obligations that are incorporated, while Article VII, Section 21 deals with international obligations that become binding through ratification."

[88] U.S. v. Guinto, G.R. Nos. 76607, 79470, 80018 & 80258, Feb. 26, 1990, 182 SCRA 644, 653. *Reiterated in* Arigo v. Swift, G.R. No. 206510, Sep. 16, 2014, 735 SCRA 102, 130-131, involving a petition for the issuance of a writ of *kalikasan* against U.S. Navy officers of the USS Guardian, which the Supreme Court denied.

[89] International School Alliance of Educators v. Quisumbing, G.R. No. 128845, June 1, 2000, 333 SCRA 13 [hereinafter, "International School"], 20-21:

> "International law, which springs from general principles of law, likewise proscribes discrimination. General principles of law include principles of equity (MIRIAM DEFENSOR-SANTIAGO, INTERNATIONAL LAW 75 (1999), citing Diversion of Water from the Meuse, P.C.I.J. Series A./B. No. 70, Judgment of 28 June 1937, Individual Opinion of Mr. Hudson, at p. 76), i.e., the general principles of fairness and justice, based on the test of what is reasonable (*id.*, citing *Rann of Kutch Arbitration (India and Pakistan)*, Award of 19 February 1968, *reprinted in* 7 INT'L L. MATERIALS 633, 643 (1968)). The Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation—all embody the general principle against discrimination, the very antithesis of fairness and justice. **The Philippines, through its Constitution, has incorporated this principle as part of its national laws**." (Internal citations edited, others omitted, and emphasis supplied).

[90] CLAPHAM, *supra* note 52, at 64.

[91] *See* Case concerning the Temple of Preah Vihear (*Cambodia v. Thailand*), Merits, Judgment of 15 June 1962, ICJ Reports 1962, at p. 26.

[92] *See* Case concerning the factory at Chorzów, P.C.I.J. Series A. No. 17, Judgment of 13 September 1928, at p. 29.

indiscriminate: it was invoked in relation to the 1961 Vienna Convention on Diplomatic Relations[93] and the 1968 Vienna Convention on Road Signs and Signals,[94] both of which had been duly signed and ratified by the Philippine government. And in relation to the extradition treaty with the United States, the Supreme Court concluded that:

> [T]he observance of our country's legal duties under a treaty is also compelled by [the Incorporation Clause]. Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere (JOVITO R. SALONGA & PABLO L. YAP, PUBLIC INTERNATIONAL LAW 12 [1992 ed.]).[95]

This practice has led Dean Magallona to caution that the foregoing pronouncements of the Supreme Court "may be interpreted to mean that the Incorporation Clause is a method by which both customary norms and conventional rules of international law are internalized into Philippine law and become part of it".[96]

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[93] Reyes v. Bagatsing, G.R. No. L-65366, Nov. 9, 1983, 25 SCRA 553 [hereinafter, "Reyes"], 566: "To the extent that the Vienna Convention is a restatement of the generally accepted principles of international law, it should be a part of the law of the land." (Internal citation omitted).

[94] Agustin v. Edu, 177 Phil. 160, 178-179 (1979): "'The Philippines *xxx* adopts the generally accepted principles of international law as part of the law of the land *xxx*.' The 1968 Vienna Convention on Road Signs and Signals **is impressed with such a character**." (Internal citation omitted and emphasis supplied).

[95] *Supra* note 66.

[96] *See* Magallona, *supra* note 4, at 3.

C. Judicial decisions and teachings of the most highly qualified publicists

Judicial decisions

Our Supreme Court has yet to rule on a case seeking the domestic enforcement of a decision of an international court or tribunal. However, in a case of *private* international law involving the ruling of a U.S. federal district court, it has held that "there is no obligatory rule derived from treaties or conventions that requires the Philippines to recognize foreign judgments, or allow a procedure for the enforcement thereof."[97]

In the United States, the Supreme Court in *Medellín v. Texas* explained that the decision of the International Court of Justice in *Avena and Other Mexican Nationals*,[98] which found that the U.S. was in breach of Article 36 of the 1963 Vienna Convention on Consular Relations,[99] did not become binding domestic law because the language of the U.N. Charter and ICJ Statute indicates that ICJ decisions were not intended to be self-executing.[100] As expressed earlier, the analysis in *Medellín* can be applied by Philippine courts if faced with a question on the enforceability of a decision rendered by an international tribunal or body involving State obligations.[101]

Otherwise, our jurisprudence firmly establishes that "foreign decisions and authorities are not *per se* controlling in this jurisdiction. At best, they are persuasive and have

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[97] Mijares, *supra* note 64, at 421.
[98] Avena and Other Mexican Nationals (*Mexico v. U.S.A.*), Judgment of 31 March 2004, ICJ Reports 2004, p. 12.
[99] *See id.* at pp. 41-42, para. 57. Under Article 36, U.S. authorities are supposed to inform persons arrested of their right to contact the local consular office of the sending State, which in this case was Mexico.
[100] Medellín v. Texas, *supra* note 31, at 1361-1362 and 1364-1365.
[101] *See supra* note 34.

been used to support many of our decisions."[102] Decisions of international courts or tribunals, "while not formally binding on Philippine courts, may nevertheless have persuasive influence on the Court's analysis."[103]

It is in this context that the Supreme Court has cited decisions of the Inter-American Commission on Human Rights on the permissible use of consistent statements by a credible witness to establish a human rights violation,[104] and of the Inter-American Court of Human Rights on the duty of governments to investigate allegations of human rights violations,[105] as well as judgments of the European Court of Human Rights relative to:

- indirect discrimination;[106]
- "suspect" grounds for discrimination, such as gender[107] and nationality;[108]
- free speech;[109]

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[102] Central Bank Employees Assoc., *supra* note 72, at 387, *citing* Republic v. Meralco, G.R. No. 141314, Apr. 9, 2003, 401 SCRA 130, 134. While the latter case only referred to American decisions, the former broadened the applicability of the doctrine to "foreign decisions".

[103] Ang Ladlad, *supra* note 77, at 69.

[104] Manalo, *supra* note 76, at 48, *citing* Ortiz v. Guatemala, Case 10.526, Report No. 31/96 (Oct. 16, 1996)

[105] Manalo, *supra* note 76, at 57-58, *quoting* Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988.

[106] Central Bank Employees Assoc., *supra* note 72, at 381 n.91, *citing* Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 Judgment of 23 July 1968 *and* Thlimmenos v. Greece, Application no. 34369/97, Judgment of 6 April 2000.

[107] Central Bank Employees Assoc., *supra* note 72, at 375, *citing* Abdulaziz v. U.K., Application nos. 9214/80; 9473/81; 9474/81, Judgment of 28 May 1985.

[108] Central Bank Employees Assoc., *supra* note 72, at 375, *citing* Gaygusuz v. Austria, Application no. 17371/90, Judgment of 16 September 1996.

[109] Guingguing v. Court of Appeals, G.R. No. 128959, Sep. 30, 2005, 471 SCRA 196, 215-216, *citing* Lingens v. Austria, Application no. 9815/82, Judgment of 8 July 1986.

- the right to security of a person as a right against torture;[110]
- the positive duty of the State to protect a person's right to security;[111]
- the permissible use secondary evidence to establish State complicity in a human rights violation;[112]
- give an overview of rulings in favor of gay rights on the basis of the general right to privacy and freedom from discrimination;[113]
- the rights to freedom of expression and of association, in relation to the establishment of political parties;[114]
- the right of political parties to publicly debate controversial political issues;[115]
- sovereign immunity;[116] and

[110] Manalo, *supra* note 76, at 56, *citing* Popov v. Russia, Application no. 26853/04, Judgment of 13 July 2006.
[111] *See* Manalo, *supra* note 76, at 60-61, *and* Razon, Jr., *supra* note 60, at 676, *both citing* Kurt v. Turkey, Application no. 15/1997/799/1002, Judgment of 25 May 1998.
[112] Razon, Jr., *supra* note 60, at 708-709, *citing* Timurtaş v. Turkey, Application no. 23531/94, Judgment of 13 June 2000.
[113] Ang Ladlad, *supra* note 77, at 67-49 nn.42, *citing* Dudgeon v. U.K., Application no. 7525/76, Judgment of 24 February 1983; Norris v. Ireland, Application no. 10581/83, Judgment of 26 October 1988; Modinos v. Cyprus, Application no. 15070/89, Judgment of 22 April 1993; L. and V. v. Austria, Application nos. 39392/98 & 39829/98, Judgment of 9 January 2003; *and* S.L. v. Austria, Application no. 45330/99, Judgment of 9 January 2003.
[114] Ang Ladlad, *supra* note 77, at 70 n.44, *citing* United Macedonian Org. Ilinden and Others v. Bulgaria, Application no. 5941/00, Judgment of 20 January 2006; *and* Baczkowski and Others v. Poland, Application no. 1543/06, Judgment of 3 May 2007.
[115] Ang Ladlad, *supra* note 77, at 70 n.45, *citing* Freedom & Democracy Party (ÖZDEP) v. Turkey, Application no. 23885/94, Judgment of 8 December 1999.
[116] Vinuya, *supra* note 56, at 580 n.77, *citing* Al-Adsani v. U.K, Application no. 35763/97, Judgment of 21 November 2001.

- the permissible interference with the right to privacy on grounds of national security.[117]

Likewise, the Supreme Court has ruled that views adopted by U.N. treaty bodies are "not *per se* decisions which may be enforced outright, [being] mere recommendations to guide the State it is issued against."[118] Nevertheless, the Supreme Court has cited heavily the views adopted by the Human Rights Committee on:

- the coverage of the right to be free from discrimination;[119] and
- the right to security as a right independent of the right to liberty; [120] or
- to give an overview of rulings in favor of gay rights on the basis of the general right to privacy and freedom from discrimination;[121]

Finally, a decision has declared that the Incorporation Clause is applicable to international jurisprudence.[122] In line with *Gibbs v. Rodriguez, Sr.*,[123] "international jurisprudence"

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[117] Gamboa v. Chan, G.R. No. 193636, Jul. 24, 2012, 401-403, *quoting* Leander v. Sweden, Application no. 9248/81, Judgment of 26 March 1987.
[118] Wilson v. Ermita, G.R. No. 189220, Dec. 7, 2016, 813 SCRA 103 [hereinafter, "Wilson"], 121.
[119] Central Bank Employees Assoc., *supra* note 72, at 380, *citing* S.W.M. Broeks v. the Netherlands, Comm. no. 172/1984 *and* F.H. Zwaan-de Vries v. the Netherlands, Comm. no. 182/1984.
[120] Manalo, *supra* note 76, at 58-60, *citing* Delgado Paez v. Colombia Comm. no. 195/1985; Bwalya v. Zambia Comm. no. 314/1988; Bahamonde v. Equatorial Guinea, Comm. no. 468/1991; Tshishimbi v. Zaire, Comm. no. 542/1993; Dias v. Angola Comm. no. 711/1996; *and* Chongwe v. Zambia, Comm. no. 821/1998.
[121] Ang Ladlad, *supra* note 77, at 67-49 nn.42, *citing* Toonen v. Australia, Comm. no. 488/1992.
[122] Bayan Muna, *supra* note 7, at 257, *citing* ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 55 (1995 ed.). However, the page cited does not support this conclusion.
[123] 84 Phil. 231 [hereinafter, "Gibbs"], 243 (1949): "A decision of the Supreme Court of the small Republic of the Philippines is as much a

need not be confined to judgments or decisions of international courts or tribunals, so our courts can seek guidance from judgments or decisions of other national courts interpreting international law.

Text writers

In 1784, the U.S. Supreme Court had occasion to rule on an indictment that featured "an infraction of the Law of Nations." It explained that the "Law of Nations" was part of the law of the United States "and is to be collected from the *practice* of different Nations, and the *authority* of *writers*."[124] This was further expounded in 1899:

> **International law is part of our law, and must be ascertained and administered by the courts** of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, **where there is no treaty**, and no controlling executive or legislative act or judicial decision, **resort must be had** to the customs and usages of civilized nations; and, as evidence of these, **to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat**. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to

source of *International Law* as a decision of the Supreme Court of the great Republic of the United States of America." Italics in the original.

[124] Respublica v. De Longchamps, 1 Dall. 111, 116 (1784). Italics in the original.

> be, but for trustworthy evidence of what the law really is.[125] (Emphasis supplied)

Domestically, the Supreme Court has cited the works of international law scholars such as Bassiouni,[126] Brierly,[127] Brownlie,[128] Henkin *et al.*,[129] Oppenheim,[130] and Shaw.[131] Moreover, it has referred to the opinions of U.N. treaty bodies[132] interpreting provisions of human rights treaties to which the Philippines is a State Party, particularly those of:

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[125] La Paquete Habana, 175 U.S. 677, 700 (1899). Emphasis supplied.

[126] *See* Purganan, *supra* note 10, nn. 28, 30, 35 and 53, *citing* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION (1987 ed.). *See also* Bayan Muna, *supra* note 7, nn. 99 & 106-107, *citing* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63 (1996).

[127] *See* International Catholic Migration Commission v. Calleja, G.R. Nos. 85750 & 89331, Sep. 28, 1990, 190 SCRA 130, 141-142 nn.7 & 10, *and* Minucher v. Court of Appeals, G.R. No. 142396, Feb. 11, 2003, 397 SCRA 244, 259 n.16, *both citing* J.L BRIERLY, THE LAW OF NATIONS (1963 ed.).

[128] *See* Reyes, *supra* note 93, n.32, *citing* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2nd ed.).

[129] *See* JUSMAG Philippines v. NLRC, G.R. No. 108813, Dec. 15, 1994, 239 SCRA 224, 230 n.16 and 232 n.22; *and* Pharmaceutical & Health Care Assoc., *supra* note 15, at 291 n.21, *both citing* LOUIS HENKIN, RICHARD PUGH, OSCAR SCHACHTER & H. SMITH, INTERNATIONAL LAW, CASES AND MATERIALS (2nd ed.).

[130] *See* Co Kim Cham v. Valdez Tan Keh, 75 Phil. 371, 375 (1945); Peralta v. Director of Prisons, 75 Phil. 285, 295 & 298 (1945); Laurel v. Misa, 77 Phil. 856, 860 (1947); Estorma v. Ravelo, 78 Phil. 145, 157 (1947); Tubb v. Griess, 78 Phil. 249, 253 (1947); Haw Pia v. China Banking Corp., 80 Phil. 604, 615-617 & 630 (1948); Gibbs, *supra* note 124, at 242-243, 249, & 254; Brownwell v. Sun Life Assurance Co., 95 Phil. 228, 235 (1954); *and* Tan Se Chiong v. Director of Posts, 97 Phil. 971 (1955), *all citing* LASSA S. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed.).

[131] Bayan Muna, *supra* note 7, at 285 n.82, *citing* MALCOLM SHAW, INTERNATIONAL LAW (2008 ed.).

[132] According to the official website of the Office of the U.N. High Commissioner for Human Rights, U.N. treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. *Available at* https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx (accessed on 04 June 2020).

- the Human Rights Committee, on the right to life;[133] non-discrimination;[134] participation in public affairs and the right to vote;[135] the nature of the legal obligations imposed on States Parties by the International Covenant on Civil and Political Rights (ICCPR);[136] and on obligations of States Parties under the first Optional Protocol of the ICCPR;[137]
- the Committee on Economic, Social and Cultural Rights, on the rights to the highest attainable standard of health; to water; and to work;[138]
- the Committee on the Rights of the Child, on adolescent health;[139] and
- the Committee on the Elimination of Discrimination Against Women, on violence against women.[140]

As regards "soft law",[141] the Supreme Court has, where applicable, categorized it as part of "generally accepted

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[133] Echegaray v. Secretary of Justice, G.R. No. 132601, Oct. 12, 1998, 297 SCRA 754, 781, *citing* Human Rights Committee, General Comment (GC) no. 6 (1982). *See also* People v. Mercado, G.R. No. 116239, Nov. 29, 2000, 346 SCRA 256, 274.

[134] Central Bank Employees Assoc., *supra* note 72, at 381 n.90, *citing* Human Rights Committee, GC no. 18 (1989).

[135] Ang Ladlad, *supra* note 77, at 76-77, *citing* Human Rights Committee, GC no. 25 (1996).

[136] Razon, Jr., *supra* note 60, at 677 n.131 & 680-682, *citing* Human Rights Committee, GC no. 31 (2004).

[137] Wilson, *supra* note 118, at 121, *citing* Human Rights Committee, GC no. 33 (2009).

[138] Ang Ladlad, *supra* note 77, at 75 n.49, *citing* Committee on Economic, Social and Cultural Rights, GC no. 14 (2000), no. 15 (2003) and no. 18 (2006), *respectively*.

[139] Ang Ladlad, *supra* note 77, at 75 n.49, *citing* Committee on the Rights of the Child, GC no. 4 (2003).

[140] Manalo, *supra* note 76, at 56-57 n.132, *citing* Committee on the Elimination of Discrimination Against Women, General Recommendation no. 19 (1992).

[141] Pharmaceutical & Health Care Assoc., *supra* note 15, at 297-298: "'Soft law' does not fall into any of the categories of international law set forth in Article 38, Chapter III of the 1946 Statute of the International Court of Justice. It is, however, an expression of non-binding norms, principles, and practices that influence state behavior (David P. Fidler,

principles of international law" and applied the Incorporation Clause. An example is the Universal Declaration on Human Rights. Before it was considered part of customary international law,[142] a former member of the Supreme Court described the UDHR as "merely proclaiming standards towards which nations should strive."[143] Thus, in *Ichong v. Hernandez*, the Supreme Court observed that the UDHR "contains nothing more than a mere recommendation or a common standard of achievement for all peoples and all nations."[144]

Nevertheless, on the strength of the Incorporation Clause, its provisions were applied six years prior to *Ichong* to justify the release on bail of persons whose detention could no longer be legally justified.[145] Thereafter, UDHR provisions were cited to strengthen arguments on:

- the right to education;[146]

"*Developments Involving SARS, International Law, and Infectious Disease Control at the Fifty-Sixth Meeting of the World Health Assembly*", June 13, 2003, American Society of International Law, *available at* https://www.asil.org/insights/volume/8/issue/14/developments-involving-sars-international-law-and-infectious-disease). Certain declarations and resolutions of the UN General Assembly fall under this category. The most notable is the UN Declaration of Human Rights *xxx*.". (Internal citation edited; others omitted).

[142] *See supra* note 70 and accompanying text.

[143] Alejo Labrador, *The Declaration of Human Rights*, 28 PHIL. L.J. 830 (1953).

[144] Ichong v. Hernandez, 101 Phil. 1156 (1957) [hereinafter, "Ichong"], 1190.

[145] Mejoff v. Director of Prisons, 90 Phil. 70 (1951); Borovsky v. Commissioner of Immigration, 90 Phil. 107 (1951); Chirskoff v. Commissioner of Immigration, 90 Phil. 256 (1951); Andreu v. Commissioner of Immigration, 90 Phil. 347 (1951).

[146] Villar v. Technological Institute of the Philippines, G.R. No. L-69198, Apr. 17, 1985, 135 SCRA 706, 710, *citing* UDHR, art. 26. *Reiterated in* Arreza v. Gregorio Araneta University Foundation, G.R. No. L-62297, Jun. 19, 1985, 137 SCRA 94, 98; *and* Guzman v. National University, G.R. No. L-68288, Jul. 11, 1986, 142 SCRA 699, 705 (a decision ordering a

- freedom of movement[147] and the right to an effective remedy in case of violation of such freedom;[148] and
- freedom from discrimination.[149]

The foregoing shows that works of commentators (U.N. treaty bodies inclusive) can be cited in their own right, without resorting to the Incorporation Clause. However, the same cannot be said of soft law instruments, as their relevance will always be subordinate to the text of ratified treaties or established customary norms, and may only be cited to support a constitutionally provided right.[150]

D. Hierarchy

It has been suggested that *jus cogens* norms enjoy precedence over both the Constitution and domestic legislation. As stated by the Supreme Court:

> The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any way it wants, so long as the change is not inconsistent

university to allow students who participated in a demonstration to re-enroll).

[147] Kant Kwong v. Presidential Commission on Good Government, G.R. No. L-79484, Dec. 7, 1987, 156 SCRA 222, 232 n.6, *citing* UDHR, art. 13.

[148] *id.* at 232 n.7, *citing* UDHR, art. 8.

[149] International School, *supra* note 89, at 20 n.12, *citing* UDHR, art. 2(1).

[150] *See* Laguna Lake Development Authority v. Court of Appeals, G.R. No. 110120, Mar. 16, 1994, 231 SCRA 292, 307-308. Although only by way of *obiter*, the fact that the Philippines is a party to the 1978 Alma Conference Declaration, which recognizes health as a fundamental human right, was cited to support a ruling upholding compliance with a cease and desist order. *See also* Lagman v. Medialdea, G.R. Nos. 243522/677//745/797, Feb. 19, 2019, at p. 31 of the advanced decision, citing several soft law instruments held to be applicable to law enforcement during the imposition of Martial Law in Mindanao.

> with what, in international law, is known as Jus Cogens.[151]

Other than *jus cogens* norms, the Constitution is supreme over treaties and international agreements, since the Supreme Court can pass upon the "constitutionality or validity of any treaty, international or executive agreement."[152] "In states where the constitution is the highest law of the land, such as the Republic of the Philippines, **both statutes and treaties may be invalidated if they are in conflict with the constitution**."[153]

As for treaties, one case seems to suggest a hierarchy *inter se*, with multilateral international human rights conventions being favored over bilateral extradition treaties.[154]

Vis-à-vis local legislation, *Singh* applied the statutory construction principle of *lex posteriori derogat priori*. This was reiterated in *Ichong*[155] which, however, added that a treaty, besides being subject to qualification by a subsequent law, "may never curtail or restrict the scope of the police

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[151] Province of North Cotabato v. Gov't of the Republic of the Philippines Peace Panel on Ancestral Domain, G.R. No. 183591, Oct. 14, 2008, 568 SCRA 402, 518, *citing* Planas v. Commission on Elections, G.R. No. L-35941, Jan. 22, 1973 49 SCRA 105, 126.
[152] CONST., art. VIII, § 5(2)(a).
[153] Lantion, *supra* note 66, at 197. Emphasis supplied and internal citations omitted.
[154] *See* Gov't of Hong Kong Special Administrative Region v. Olalia, Jr., G.R. No. 153675, Apr. 19, 2007, 521 SCRA 470, 483. "[I]t does not necessarily mean that in keeping with its treaty obligations, the Philippines should diminish a potential extraditee's rights to life, liberty, and due process. More so, where these rights are guaranteed, not only by our Constitution, but also by international conventions, to which the Philippines is a party."
[155] *Supra* note 144. This case dealt with, among others, the effect of the 1954 Retail Trade Law (repealed by the Trade Liberalization Act of 2000) on the 1947 Treaty of Amity with China.

power of the State."[156] And in *Gonzales v. Hechanova*,[157] the Supreme Court interpreted its power to pass upon on the constitutionality and validity of treaties and international agreements to mean that "**our Constitution authorizes the nullification of a treaty**, not only when it conflicts with the fundamental law, but, also, **when it runs counter to an act of Congress**."[158]

Since the nullification of a treaty could be based on it running afoul *any* law, not just a subsequent law, it has been suggested that *Gonzales* implies the supremacy of local legislation over treaties.[159] However, the statement highlighted above in *Gonzales* cites no legal precedent and is, therefore, erroneous. Any review of the validity of a treaty should be confined to questions of whether a treaty is at odds with a particular provision of the Constitution, or whether the constitutional mechanism was followed, *i.e.* whether two-thirds of the Senate did, in fact, concur and whether the President (or their alter ego) properly conveyed the instrument of ratification.

To enlarge the meaning of the judicial review clause to include nullification of a treaty due to its incompatibility with *any* piece of legislation irrespective of chronology is not sanctioned by the wording of the Constitution, and runs contrary to the presumption that a treaty was "carefully

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[156] *id.* at 1191, *citing* Plaston [*sic*] v. Pennsylvania, 58 L. Ed. 539 (the first party should read "Patsone").
[157] G.R. No. L-21897, Oct. 22, 1963, 9 SCRA 230. This case involved the legality of the importation of rice pursuant to executive agreements entered into with Vietnam and Burma.
[158] *id.* at 243. Emphasis supplied.
[159] *See* Magallona, *supra* note 4, at 8-11, for an analysis of the *Gonzales* ruling.

studied and determined to be constitutional before it was adopted and given the force of law in the country."[160]

Neither can *Gonzales* take refuge in the earlier pronouncement of *Ichong*, inasmuch as the U.S. opinion cited, *Patsone v. Commonwealth*[161] is not on point. In *Patsone*, an Italian citizen was caught hunting wild game and convicted under a Pennsylvania law making it "unlawful for any unnaturalized foreign born resident to kill any wild bird or animal except in defence of person or property".[162] Patsone appealed his conviction on the ground, *inter alia*, that it violated his right to carry on his trade, as provided in a treaty between the U.S. and Italy. Upholding the conviction, the U.S. Supreme Court, speaking through Holmes, *J.*, reiterated an earlier ruling that a State can preserve wild game for its citizens,[163] and held that the language of the U.S.-Italy treaty did not prohibit States from regulating such preservation.[164] Nowhere in the opinion was it stated that State police power trumped a treaty. Rather, the silence of the treaty could not be interpreted as a restriction of the right of the State to regulate a matter that, by previous ruling, the State was held to have an interest in regulating.

In any event, *Abbas v. Commission on Elections*[165] reverted back to *lex posteriori derogat priori*, stating that a treaty is "in the same class" as, and not superior to, an enactment of the legislature.[166] "Thus, if at all, [the act of Congress] would be amendatory of the Tripoli Agreement,

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[160] Santos III v. Northwest Orient Airlines, G.R. No. 101538, Jun. 23, 1992, 210 SCRA 256, 261.
[161] Patsone v. Commonwealth of Pennsylvania, 232 U.S. 138 (1914).
[162] *id.* at 143.
[163] *id.* at 145-146, *citing* Geer v. Connecticut, 161 U.S. 519, 529 (1896).
[164] *id.* at 146, *citing* Compagnie Française de Navigation à Vapeur v. Louisiana State Board of Health, 186 U.S. 380, 394 and 395 (1902).
[165] G.R. No. 89651, Nov. 10, 1989, 179 SCRA 287.
[166] *id.* at 294. Emphasis supplied.

being a subsequent law."[167] Likewise, *Bayan Muna* held that "a ratified treaty … takes precedence over any prior statutory enactment".[168]

The ruling in *Philip Morris, Inc. v. Court of Appeals*[169] must also be considered. In that case, the Supreme Court held:

> Following universal acquiescence and comity, **our municipal law on trademarks regarding the requirement of actual use in the Philippines must subordinate an international agreement inasmuch as the apparent clash is being decided by a municipal tribunal** (Mortisen vs. Peters, Great Britain, High Court of Judiciary of Scotland, 1906, 8 Sessions, 93; Paras, International Law and World Organization, 1971 ed., p. 20). Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, **rules of international law are given a standing equal**, not superior, **to national legislative enactments**.[170]

Reiterated over the years,[171] the foregoing pronouncement suggests that treaties *and* norms of

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[167] *id.*
[168] Bayan Muna, *supra* note 7, at 259-260. Internal citations omitted.
[169] G.R. No. 91332, Jul. 16, 1993, 224 SCRA 576.
[170] *id.* at 593, *citing* JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 16 (1974 ed.).
[171] *See* Emerald Garment Manufacturing Corp. v. Court of Appeals, G.R. No. 100098, Dec. 29, 1995, 251 SCRA 600, 621; Lim, *supra* note 83, at 758-759; Mighty Corp. v. E. & J. Gallo Winery, G.R. No. 154342, Jul. 14, 2004, 434 SCRA 473, 497; Shangri-La International Hotel Management,

customary international law are given equal standing to domestic laws. Thus, when there appears to be a conflict between a rule of international law and the provisions of a domestic law:

> **Efforts should first be exerted to harmonize them**, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the observance of the Incorporation Clause in the above-cited constitutional provision (*Cruz*, Philippine Political Law, 1996 ed., p. 55). In a situation, however, **where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts** (Ichong vs. Hernandez, 101 Phil. 1155 [1957]; Gonzales vs. Hechanova, 9 SCRA 230 [1963]; In re: Garcia, 2 SCRA 984 [1961]) for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances (Salonga & Yap, *op. cit.*, p. 13).[172] (Emphasis supplied)

The only exceptions to *lex posteriori* in jurisprudence refer to bilateral tax treaties, which have been held to be *lex specialis* taking precedence over the provisions of the local tax code.[173]

Ltd. v. Developers Group of Companies, Inc., G.R. No. 159938, Mar. 31, 2006, 486 SCRA 405, 428-429; *and* Philip Morris, Inc. v. Fortune Tobacco Corp., G.R. No. 158589, June 27, 2006, 493 SCRA 333, 353.

[172] Lantion, *supra* note 66, at 197. Emphasis supplied.

[173] *See supra* notes 25-26 and accompanying text.

Finally, while a subsequent law may qualify or amend a treaty previously ratified, an executive agreement cannot,[174] and, thus, would be "lowest" in ranking.

II. CONCLUSION

For domestic practitioners, resort to the Treaty and Incorporation Clauses may be muted in cases involving certain provisions of the Magna Carta of Women,[175] the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity,[176] and the Special Protection of Children in Situations of Armed Conflict Act,[177] which have paved the way for the domestic application, and even enforcement, of the various sources of international law mentioned therein.

However, for our government lawyers who keep reverting back to one method of domestication,[178] it is hoped

[174] Bayan Muna, *supra* note 7, at 263.

[175] Rep. Act No. 9710 (Aug. 14, 2009), sec. 8, which provides, rather broadly, that rights recognized under international instruments to which the Philippines is a State Party are rights of women to be enjoyed without discrimination.

[176] *See* Rep. Act No. 9851 (Dec. 11, 2009), sec. 15(e)-(f) and (i), according to which courts are instructed to be guided by customary international law, judicial decisions of international courts and tribunals, and the teachings of highly qualified text writers.

[177] Rep. Act No. 11188 (Jan. 10, 2019), sec. 4, providing that its provisions do not preclude the application of international human rights and humanitarian laws that are more conducive to the realization of the rights of children.

[178] *See* U.N. Doc. CCPR/C/PHL/CO/4 (13 November 2012), para. 5 *and* U.N. Doc. E/C.12/PHL/Q/5-6/Add.1 (29 August 2016), para. 1, applying the Incorporation Clause to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, respectively. *See also* U.N. Doc. CRPD/C/PHL/CO/1 (16 October 2018), para. 4, which encapsulates the understanding of the Committee on the Rights of Persons with Disabilities that the Philippine Constitution is monist, on the basis of statements made by the Philippine delegation (U.N. Doc. CRPD/C/SR.420 (15 October 2018), para. 13).

that this disquisition on the Treaty and Incorporation Clauses, our Supreme Court's practice relative to such provisions, and the hierarchy proposed herein, will be of some guidance for future submissions to the United Nations treaty bodies.

SOWING THE SEEDS FOR STRATEGIC COMPETITION LITIGATION: THE PHILIPPINE COMPETITION COMMISSION'S *AMICUS CURIAE* BRIEF IN *PCAB V. MWCI*

El Cid Butuyan[*], *Graciela Base*[**] *and Jose Maria Marella*[***]

For an infant agency, the Philippine Competition Commission (PCC) did not have the luxury to take baby steps. With the Philippine Competition Act[1] (PCA), the country's first comprehensive competition framework enacted only after a 24-year long legislative gestation, several key sectors had since become economically concentrated. Business and the government had progressed without a strong culture of fair competition. Further, despite early recognition of the problem of government-induced competitive distortions,[2] addressing this problem remained complex. Though vested with quasi-judicial powers, the PCC is co-equal to other administrative agencies and subordinate to the legislature—both agencies and legislature being potential sources of government-induced distortions. Inasmuch as the PCC wanted to be effective, it could not risk provoking

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Disclaimer: The views and opinions expressed in this article are those of the authors alone, were formulated prior to their present affiliations, and do not reflect the views or positions of their past and present affiliations. Mr. Butuyan's substantive views and inputs were provided in 2020.
[1] Republic Act No. 10667.
[2] Erlinda Medalla, *Understanding the New Philippine Competition Act*, Philippine Institute for Development Studies, Discussion Paper Series No. 2017-14; National Economic Development Authority, *Leveling the Playing Field Through a National Competition Policy*, Philippine Development Plan 2017-2022.

jurisdictional backlashes and had difficulty touting an unfamiliar mandate, especially against well-entrenched economic and political interests. At best, the PCC was empowered to advocate pro-competitive policies and advise other bodies of the competitive implications of government action.[3] Operationally, the PCC strove to attract talent and dedication towards a novel multi-disciplinary field, as well as marshal resources and support for a fledgling agency.

It was in this context that in 2016—barely a year since it began operating—the PCC learned of the pendency of the case of *Philippine Contractors Accreditation Board (PCAB) v. Manila Water Company, Inc. (MWCI)*[4] before the Supreme Court. It was brought to the PCC's attention that the PCAB's regulation may be contrary to free trade and fair competition. While this case was initially litigated as an administrative rule-making issue, the PCC eyed a strong competition angle, and sought to intervene as *amicus curiae* to shed light on the effects of the PCAB regulation from the perspective of competition law and policy. The PCC saw the case as a potential "quick win", so to speak, which would allow it to advocate a pro-competitive government policy and enrich jurisprudence through strategic litigation. It was identified as a rather unique and catalytic opportunity to quickly embed modern competition principles in case law, which consequently could be leveraged to strengthen the PCC's enforcement muscle in future proceedings.[5] Four years later, the high court issued its decision in the case, which paved the way for leveling the playing field in the country's

[3] PCA, Section 12(r)(1) & (2).
[4] G.R. No. 217590, March 10, 2020.
[5] The authors of this article led the initial strategy discussions and drafting of the *Amicus Curiae* Brief, in collaboration with other officials and employees within the PCC and outside experts.

construction industry and generated a valuable precedent for future competition litigation.

In this article, we look back on this consequential Supreme Court case and the inspiration and strategy behind the PCC's pioneering *Amicus Curiae* Brief—blending legal and economic analysis and applying an empirical and data-driven approach. The full text of the Brief is reproduced at the end of this article.

Fertile Grounds: Philippine Contractors Accreditation Board vs. Manila Water Company, Inc.

The case arose in 2012 when PCAB denied MWCI's request for accreditation of its foreign contractors to undertake the construction of necessary facilities for its waterworks and sewerage system, citing the Implementing Rules and Regulations (IRR) of R.A. No. 4566, otherwise known as the Contractors' License Law. Under the IRR, foreign entities are only eligible for a special license that allows them to engage in a single specific project, while Filipino firms can be granted a regular license that gives them continuing authority to engage in multiple contracting activities throughout a one-year period. This prompted MWCI to file a petition for declaratory relief before the trial court, claiming that this licensing scheme is unconstitutional because it creates limits on foreign investments, a power exclusively vested on Congress by the Constitution, and that it adds restrictions that are not present in the delegating statute. PCAB invoked its authority to promulgate the classification of contractors and contended that the IRR does not restrict the construction industry to Filipinos, but merely regulates the issuance of licenses to foreign contractors. In addition, PCAB asserted that the regulation was consistent

with the constitutional provision limiting the practice of all professions in the Philippines to Filipino citizens. The lower court ruled in favor of MWCI and declared the assailed provision of the IRR void on the ground that it creates an entirely new restriction not found in the law.

PCAB sought the reversal of the lower court's decision before the Supreme Court. The PCC moved to intervene as *amicus curiae* and argued that the nationality-based restriction is a barrier to the entry of foreign contractors in the construction industry in violation of the constitutional policy against unfair competition. Adopting an economic effects-based analysis in the assessment of the IRR in question, the PCC's intervention brought to the fore the real impact of the licensing scheme in terms of costs and benefits to the contractors and the regulation's far-reaching consequences for the Philippine economy. The Court, speaking through Justice Alexander Gesmundo, affirmed with modification the lower court's decision and ruled that PCAB exceeded the confines of the delegating statute when it created the nationality-based restriction. The Court further held that contracting is not a profession the practice of which the Constitution had reserved exclusively for Filipinos. It agreed with the PCC that the nationality-based restriction is a deterrent to the entry of foreign players in the construction industry and recognized the use of economic evidence to prove that the ostensible objective of a regulation may be negated by its actual effects. Urged by the PCC, the Court effectively applied a "less restrictive test", finding that PCAB's purported concerns could be addressed through some form of regulation other than restricting the contractor's license. Justice Marvic Leonen registered the lone dissent, mainly on the ground that the IRR does not create an absolute restriction against foreign contractors but merely regulates the grant of licenses, which is within the powers of PCAB.

Folding the Economics into the Legalese

The decision of the PCC to weigh in on the issue in *PCAB* was rather straightforward, owing to its express mandate under the PCA to advocate pro-competitive government policies. The PCC considered that this mandate, which is distinct and separate from its power under the PCA to investigate and penalize anticompetitive agreement and abusive conduct, provided ample basis for its intervention in the case. The PCC's intervention to promote its fresh mandate and, for the first time, champion a pro-competitive regulation through a novel route—that is, via litigation to provide jurisprudential grounding to what was still a nascent area of law—proved to be highly consequential and impactful.

Substantively, the PCC intended to advance and mainstream a hybrid legal and economic analysis in litigations where competition issues are involved—after all, competition analysis incorporates both fields. The PCC took inspiration from the unorthodox yet acclaimed "Brandeis Brief" pioneered by United States (US) Supreme Court Justice Louis Brandeis who, while a practicing attorney, was tapped to defend a regulation on working hours subject of *Muller v. Oregon*.[6] Instead of pleading pure legalese, the Brandeis Brief provided statistical analyses of socio-economic data for a nuanced and empirical appreciation of the controversy.[7] Acknowledging the Brief's copious collection of data, the US Supreme Court sustained the labor regulation. This fusion of legal and socio-economic analyses has since spilled over onto landmark litigations affecting critical sectors, such as affirmative action for minorities in school admissions,[8] racial

[6] 208 U.S. 412 (1908).
[7] Marion Doro, *The Brandeis Brief*, 11 Vanderbilt Law Review 783, 790 (1958).
[8] See *Fisher v. University of Texas*, 570 U.S. 297 (2013).

segregation,[9] and abortion rights.[10] The brief has been emulated in antitrust cases, with the US Federal Trade Commission occasionally intervening as *amicus curiae* to shed light on issues such as those relating to the relevant market for therapy drugs,[11] and the state action defense relative to an ordinance that enabled price-fixing.[12]

Mindful of its role as "friend of the court" rather than as party to the case, the PCC was careful not to simply reiterate in its *Amicus* Brief the legal arguments already raised by MWCI. Instead, the PCC focused on assembling a robust array of economic evidence—it gathered empirical data on the current state of the construction industry in the Philippines, compared the estimated construction costs among ASEAN countries, translated the average cost of the application process for a license into quantifiable figures, and collated ease of firm entry data and cross-country statistics on foreign direct investment inflows. The objective was to show that the nationality-based restriction was a barrier to the entry of foreign firms in the construction industry. The PCC also prepared a counterfactual scenario to demonstrate that lifting the said restriction could lead to potential gains in terms of additional output in the construction sector and help address the infrastructure backlog in the country.

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[9] See *Brown v. Board of Education*, 347 U.S. 483 (1954).
[10] See *Roe v. Wade*, 410 U.S. 113 (1973).
[11] Federal Trade Commission, *FTC Files Amicus Brief in Appeals Court Case Involving for-Hire Drivers in Seattle*, November 6, 2017, available at https://www.ftc.gov/news-events/news/press-releases/2017/11/ftc-files-amicus-brief-appeals-court-case-involving-hire-drivers-seattle.
[12] Federal Trade Commission, *FTC Amicus Brief Explains that relevant Antitrust Markets Should be Defined in Light of the Anticompetitive Effects Alleged*, October 28, 2019, available at https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-amicus-brief-explains-relevant-antitrust-markets-should-be-defined-light-anticompetitive-effects.

But the more challenging aspect of preparing the *Amicus* Brief was finding a way to anchor all this technical information on a legal argument so that the Brief does not end up being dismissed by the Court for raising a purely policy issue that is better left to Congress. This presented a challenge given the scarcity of Philippine jurisprudence interpreting competition principles. Since there was no basis for invoking the application of the PCA (as no anticompetitive agreement or abusive conduct was involved), the PCC decided to frame the issue as a constitutional violation, urging the Court to determine whether the assailed regulation should be struck down for being in contravention of the Constitutional State Policy against unfair competition embodied in Article XII, Section 19.[13] The PCC found the perfect precedent in the 1997 case of *Tatad v. Secretary of Energy*[14] where the Court interpreted said constitutional provision and used it to nullify R.A. No. 8180, also known as the Downstream Oil Industry Deregulation Act of 1996. The law was intended to pave the way for a deregulated environment, but the Court found that its provisions on tariff differential, inventory reserve, and predatory pricing gave more power to an already powerful oil oligopoly and blocked the entry of effective competitors. The PCC considered this case to be on all fours with the regulation assailed in *PCAB.*

Doctrinal Grounding in Economic Realities

Based on the Court's previous interpretation of Article XII, Section 19 in *Tatad*, the PCC argued in its *Amicus* Brief

[13] 1987 Constitution, Article XII, Section 19. The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.
[14] *Tatad v. Secretary of the Department of Energy*, G.R. Nos. 124360 and 127867, November 5, 1997; December 3, 1997.

that this provision has both a nullifying and compulsory function, which means that any act in violation of this constitutional policy must be declared void, and every law or government regulation must take this policy into account. The Court, however, did not explicitly invoke Article XII, Section 19 in its decision in *PCAB*, which is understandable given that the case can already be decided through statutory interpretation. This approach is consistent with the rule that the Court will not pass upon a constitutional question if there is some other ground upon which the case may be disposed of.[15] In this case, the Court found that the delegating statute did not authorize PCAB to impose a nationality-based restriction and, therefore, PCAB exceeded the confines of the law when it created such a restriction.

Nonetheless, the *Amicus* Brief was critical in helping the Court perform a thorough analysis and careful assessment of the parties' arguments and apply the appropriate standard of judicial review. For instance, the emphasis on PCAB's administrative rulemaking power to classify contractors could have been persuasive, when taken in light of the supposed reasonableness of treating foreign contractors differently from Filipino contractors. In fact, the dissent repeatedly stressed that the classification does not restrict foreign contractors from doing business in the Philippines but only regulates the grant of licenses, particularly in terms of the documentary requirements, expiration date, and the number of projects that can be undertaken under a license. Thus, in the absence of contrary evidence, the additional requirements imposed on foreign contractors might appear to be an innocuous regulatory measure, which, as PCAB and the dissent posited, was well within the power of PCAB to impose. The Court could have simply relied on the doctrine that administrative agencies are

[15] *Garcia v. Executive Secretary*, G.R. No. 157584, April 2, 2009.

presumed experts within their fields such that their findings are afforded great weight by the courts.[16]

But the PCC's *Amicus* Brief outlined the real impact of the licensing scheme and its far-reaching consequences. It called the Court's attention to the fact that the classification that PCAB created carries with it a substantial distinction in terms of costs and benefits to the contractors. The Court considered the PCC's data showing the apparent disparity in the number of licenses granted to Filipinos and foreigners and how a considerable number of the licenses issued during a certain period did not translate into the entry of new participants in the construction industry. In view of this evidence, the Court found that the assertion that the IRR "merely regulates" the license of foreign contractors and does not restrict the construction industry to Filipinos was "contrary to the obvious consequence of the assailed regulation". Having established that the classification led to an uneven playing field between foreign and local contractors, the PCC submitted that the burden was on PCAB to show that the nationality-based restriction sought to fulfill an important and substantial State interest, which could not be achieved through other less restrictive means. The Court agreed, finding that PCAB's purported concerns could be addressed through some form of regulation other than restricting the contractor's license, which hinders the advancement of the construction industry. In effect, the Court applied a "less restrictive test", as proposed by PCC, and did not simply rely on the presumed administrative expertise of PCAB considering the regulation's demonstrably anticompetitive effect. In holding that the construction industry should not be restricted absent any showing that opening it to foreigners would be unfair to Filipino citizens, the Court implicitly adopted an economic effects-based

[16] *Abpi v. Commission on Audit*, G.R. No. 252367, July 14, 2020.

analysis in the assessment of the IRR in question and recognized the use of economic evidence to prove that the ostensible objective of a law or regulation may be negated by its actual effects.

Further, the *Amicus* Brief helped the Court hurdle a major jurisdictional issue, that is, whether a law or a government regulation creates a barrier to entry was a *legal* issue within the Court's competence to decide. The Court could have been swayed to find that this is a policy issue that should be addressed to Congress, as the dissent had suggested. But the PCC reminded the Court of its pronouncement in *Tatad* that "the Constitution is a covenant that grants and guarantees both the political and economic rights of the people" such that the Court is mandated "to be the guardian not only of the people's political rights but their economic rights as well". The Court agreed with the PCC and, in affirmation of its mandate to be the "guardian of the people's economic rights", it opined that eliminating the nationality-based restriction will encourage healthy competition among local and foreign contractors, provide the market with alternative options, and open opportunities for development and innovation to our local contractors to increase their competitiveness in the world market.

Finally, and more importantly for future competition litigation, the *Amicus* Brief helped buttress the notion that the presence of structural barriers in an industry does not preclude the Court from independently inquiring into whether a law or a government regulation *also* imposes a barrier to entry. The dissent explained that structural barriers, such as the amount of investment and sunk costs, are common in the construction industry and that foreign contractors are "expected to be burdened" with additional requirements and more stringent conditions given their substantial difference from local contractors. This, the

dissent maintained, does not constitute an unfair entity behavior that competition law guards against. However, the PCC recalled that in *Tatad*, the presence of structural barriers in the downstream oil industry did not prevent the Court from determining that the provisions of the assailed law will further block the entry of new players and enhance the market positions of the then existing oil oligopoly. Thus, in the same way, natural barriers in the construction industry should not be further aided by an anticompetitive government regulation that discriminates in favor of certain market participants without valid economic basis or policy rationale. The Court agreed with the PCC, noting that the "additional burden and expenses" of securing a special license, given its limited scope, "scare away" foreign investors. The Court concluded that "[e]vidently, the assailed regulation is a deterrent to the entry of foreign players in the construction industry".

In sum, the Court in *PCAB* was, to a great extent, receptive to the economic evidence presented by the PCC and largely relied upon it in its analysis of the issues. The decision has thus set the stage for the presentation of economic and other technical evidence in competition cases. It is a valuable precedent that the PCC can leverage as it pushes for pro-competitive government policies by way of litigation.

Legacies in Analysis, Strategy & Advocacy

The mere filing of the PCC'S Amicus Brief quickly prompted legislative hearings on improvements to

contractors' licensing regulations.[17] When the *PCAB* decision came out, it was celebrated for lifting the unequal treatment of foreign contractors, thereby promising more competitive prices and quality services, along with the facilitation of technology transfers.[18] It was expected that this would translate to foreign direct investments inflows and the development and fast-tracking of infrastructure projects in the Philippines.[19] Still, significant business resistance remains. After the decision was issued, PCAB was joined by several domestic contractors and construction associations, as intervenors, in seeking the decision's reversal, arguing that the anticipated influx of more technologically and financially capable foreign firms would displace smaller local contractors. But the Court affirmed its decision, denying intervention on the ground that the intervenors raised policy matters and finding that PCAB's amendments were still afflicted with the same vice that rendered the original regulation invalid.[20]

The PCC's successful intervention in the *PCAB* case proves that litigation is a viable legal avenue for competition advocacy. Through such initiatives, the PCC could help enrich

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[17] During the 17th Congress, Rep. Arthur Yap filed House Resolution No. 898 entitled, "*A Resolution Strongly Urging the Appropriate Committees to Conduct and Inquiry, in Aid of Legislation, on the Desired Economic Policy Direction of the Philippines with Regard to Foreign Participation in the Ownership and Operation of Corporations and Firms engaged in the Business of Construction of Buildings and Other infrastructure in the Philippines*", which was deliberated by the House Economic Affairs Committee on August 29, 2017.

[18] Arsenio Balisacan, *SC decision on construction regulation: A win for competition advocacy*, Business Mirror, September 16, 2020, available at https://businessmirror.com.ph/2020/09/16/sc-decision-on-construction-regulation-a-win-for-competition-advocacy/.

[19] Felix Sy, *Supreme Court Strikes Down the Nationality Requirement on Contractors' License,* ZICO Law, November 11, 2020, available at https://www.zicolaw.com/resources/alerts/supreme-court-strikes-down-the-nationality-requirement-on-contractors-license/.

[20] *Philippine Contractors Accreditation Board v. Manila Water Co., Inc.,* G.R. No. 217590 (Notice), October 5, 2021.

the arsenal of public interest litigation on competition and shape doctrine on the judicial review of competitively distortive State actions. After the *PCAB* decision was released, the Competition Law and Policy Program at the UP College of Law organized a forum discussing the *Amicus* Brief as a model case study in strategic competition litigation. Commenting on the Brief, Professor and former PCC Executive Director Gwen Grecia-De Vera observed how "competition policy involves economic analysis embedded within a legal framework and the necessity of being able to convey the economic analysis in a way that would be understandable from the legal perspective."[21]

Nonetheless, litigation is not without its limitations: Government action may be challenged only in relatively narrow circumstances; admission as *amicus curiae* is subject to the court's discretion such that there is no guarantee that this route will prosper every time, and litigation could be protracted (it took eight years for the *PCAB* case to be finally decided).

Harmonizing government action with pro-competitive principles would entail additional pre-emptive measures to address government-induced distortions and keep government action attuned to free and fair competition. The PCC-led competition law trainings and capacity-building for judges and legislative and local government staff, and inter-agency collaborations and policy coordination on competition-related matters are steps in the right direction.

The full text of the *Amicus* Brief follows:

[21] University of the Philippines College of Law Facebook Page, November 8, 2020, available at https://fb.watch/eXXTkwBeLs/, from 54:40 to 54:58.

REPUBLIC OF THE PHILIPPINES
SUPREME COURT
MANILA
THIRD DIVISION

PHILIPPINE CONTRACTORS ACCREDITATION BOARD,
Petitioner,

- versus -

G.R. No. 217590
(Civil Case No. R-QZN-13-01205 CV)
For: Declaratory Relief

MANILA WATER COMPANY, INC.,
Respondent.
x----------x

AMICUS BRIEF

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I.

STATEMENT OF THE CASE

This involves a *Petition for Review on Certiorari* filed under Rule 45 of the Rules of Court, seeking to reverse and set aside the (i) *Resolution* dated 24 February 2014 (the "first questioned *Order*"); and (ii) *Order* dated 10 February 2015 (the "second questioned *Order*") issued by the Regional Trial Court of Quezon City, Branch 83 (the "trial court") in connection with the case entitled ***"Manila Water Company, Inc. v. Philippine Contractors Accreditation Board*,"** docketed as Civil Case No. R-QZN-01205 CV.

In the first questioned *Order*, the trial court granted respondent Manila Water Company, Inc.'s (MWCI) *Petition for Declaratory Relief* dated 20 June 2013, which sought for, among others, a declarative judgment stating that Section 3.1, Rule 3 of the Revised Rules and Regulations Governing Licensing and Accreditation of Constructors in the Philippines (the "assailed regulation") is void for imposing unconstitutional nationality-based restrictions on the availment of contractors' licenses required for legally undertaking construction activities in the Philippines. Said *Order* was subsequently affirmed by the trial court in its second questioned *Order* denying the *Motion for Reconsideration* dated 22 April 2014 filed by petitioner Philippine Contractors Accreditation Board ("PCAB").

II.

QUESTIONS PRESENTED

i. Whether the Honorable Court may strike down laws, rules and regulations that are anti-competition.

ii. Whether the assailed regulation should be struck down for violating the constitutional State policy against unfair competition.

III.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Philippine Competition Commission (PCC) is an independent quasi-judicial body created under R.A. No. 10667, or the Philippine Competition Act (PCA). The PCC is the agency charged with the implementation of the national competition policy and enforcement of the provisions of the PCA.[1] It was organized in February 2016 and has since been actively pursuing pro-competition policies.[2]

The intervention of the PCC in the present case is in line with its mandate to issue advisory opinions and guidelines on competition matters for the effective enforcement of the PCA[3] and to advocate pro-competition policies of the government by reviewing economic and administrative regulations that may adversely affect relevant market competition.[4] Its intervention as *amicus curiae* is allowed under Rule 138, Section 36[5] in relation to Rule 19, Section 1[6] of the Rules of Court.

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[1] PCA, Section 5.

[2] *See* PCC primer, attached hereto as Annex "A." *See also* www.phcc.gov.ph.

[3] PCA, Section 12(k).

[4] PCA, Section 12(r).

[5] Rules of Court, Rule 138, Section 36. Experienced and impartial attorneys may be invited by the Court to appear as *amici curiae* to help in the disposition of the issues submitted to it.

[6] Rules, of Court, Rule 19, Section 1. *Who may intervene*. — A person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof may, with leave of court, be allowed to intervene in the action. The court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding.

IV.

OUTLINE OF THE AMICUS BRIEF

Considering that the resolution of the pending *Petition* is expected to make a significant impact in the dynamics and level of competition in the construction industry, the PCC seeks to submit this *amicus* brief in order to present an argument against the validity of the assailed regulation from the perspective of competition law. It is the view of the PCC that the assailed regulation violates the constitutional policy against unfair competition by creating a barrier to the entry of new players, particularly foreign firms, in the construction industry. The Honorable Court possesses the power, already demonstrated in one notable decision, to nullify laws and regulations that violate the constitutional policy against unfair competition.

The succeeding sections are organized to present a coherent picture of the assailed regulation and the backdrop upon which the issues surrounding it are being considered by the PCC. Section V presents a background of the Philippine construction industry. It describes the outcomes observed in the industry and the challenges that must be considered. Section VI provides detailed information regarding the assailed regulation. Section VII summarizes the arguments presented in this *amicus* brief. Section VIII builds on the previous section and provides an expanded discussion of the arguments. Sub-section A presents the facts, data, and the analysis performed to reach an objective and robust conclusion that the assailed regulation is a barrier to entry. Sub-section B discusses the constitutional and jurisprudential bases for nullifying the assailed regulation. Sections IX and X end with the conclusion and the relief prayed for.

V.

THE PHILIPPINE CONSTRUCTION INDUSTRY: OVERVIEW

High quality service sectors are fundamental elements in promoting people's well-being and nurturing human capital. In this regard, service sectors should not be treated simply as absorbers of redundant labor but as a central player in economic development through innovation.[7] Competition in input markets such as construction services, regardless of whether the competitive pressure is coming from foreign or domestic players, is a key driver of efficiency and productivity growth in related downstream markets.

The construction industry in particular plays an important role in economic development, providing services not only for households but also in building infrastructure vital for the functioning of almost every other industry and the rest of the economy. There is plenty of room for improvement in the Philippines to close the infrastructure gap. According to The Global Competitiveness Report 2016-2017, the Philippines ranks 95th out of 138 countries in terms of infrastructure. In fact, the quality of overall infrastructure ranks a dismal 112th out of 138.

The need for improved infrastructure is evident as (i) greater connectivity of national transport infrastructure enhances logistical efficiency and supports the growth of investment, trade and commerce; (ii) investment in power infrastructure increases energy security, provides electricity to industrial estates in rural areas and is essential for achieving universal access for all; (iii) the provision of information and communication technology infrastructure

[7] Ishido, H., & Fukunaga, Y. (2012). Liberalization of Trade in Services: Toward a Harmonized ASEAN++ FTA. Economic Research Institute for ASEAN and East Asia Policy Brief.

supports downstream businesses such as e-commerce and provides connectivity with the world; and (iv) infrastructure development plays an important role in reducing the transaction costs of doing business.[8]

The significance of the construction industry for a well-functioning economy thus cannot be overemphasized. Its linkages with other industries means that the construction sector generates significant economic activity both as provider of necessary inputs and a demander of products and services from other sectors. Since construction services are intermediate inputs into production in several key sectors, technological improvements in the construction industry would lead to the improvement in overall productivity.[9]

The construction industry provides an appreciable share of gross domestic product and gross capital formation, which pertains to the rate of acquisition of new fixed assets. It accounts for a considerable percentage of total national employment, promotes local manufacture and supply of materials and equipment, and encourages the development of engineering, architectural, and technical capabilities. Construction services remain a highly labor-intensive sector for both skilled and unskilled laborers, given how the potential for automation and mechanization remains limited.[10]

Between 2010 and 2015, gross value of construction grew by 40 per cent, public construction grew by 8 percent

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[8] United Nations Conference on Trade and Development, ASEAN Investment Report 2015, Infrastructure Investment and Connectivity.
[9] Konan, D. E., & Maskus, K. E. (2004). Quantifying the Impact of Services Liberalization in a Developing Country. Policy Research Working Papers. World Bank.
[10] Geloso Grosso, M., et al. (2014), "Services Trade Restrictiveness Index (STRI): Legal and Accounting Services", *OECD Trade Policy Papers*, No. 171, OECD Publishing, Paris.

while private construction grew even more substantially by 58 percent. In 2015, the construction sector employed over 2,712,000 Filipinos or 7.0 per cent of total employment.

Table 1: Key Indicators for Philippine Construction Services (in Php billions)

Indicator	2010	2011	2012	2013	2014	2015
Public	6.491	4.585	5.100	6.201	5.842	7.045
Private	15.588	16.578	18.173	19.604	23.434	24.701
Gross Value	22.079	21.163	23.273	25.806	29.277	31.746
Gross Value Added[11]	14.661	13.727	15.296	16.998	18.996	20.681
Employment (in thousands)	2,017	2,091	2,232	2,373	2,578	2,712

Source: Philippine Statistical Authority, World Bank Development Indicators

These figures notwithstanding, there still remains a backlog in the country's infrastructure needs. Among other numerous infrastructure concerns, (i) power supply will remain a serious problem if generating capacity is not increased; (ii) transport facilities are insufficient to meet the demands of a growing population and higher tourist influx; (iii) Metro Manila's traffic situation translates to over Php2 billion worth of foregone productivity and quality of life per day; and (iv) housing needs to be addressed for low- and middle-income earners to discourage informal settling which clutters the urban areas and leads to disasters complicated by typhoons.

[11] Gross Value Added of construction services in the Philippines is the value of the construction sector's output less the cost of intermediate inputs used.

In the water and sanitation sector, the country still falls short of its goal to achieve universal access to potable water and quality sanitation facilities. A World Health Organization Joint Monitoring Program reported that, as of 2010, urban areas have achieved 93 per cent access while rural areas have reached 92 per cent. National sanitation coverage, on the other hand, reached 79 per cent in urban areas and 69 per cent in rural areas. The deficiency is much more pronounced for rural areas as their water and sanitation facilities are being serviced by small cooperatives, barangay water and sanitation associations, and rural waterworks and sanitation associations while urban areas are being serviced by Maynilad, Manila Water Company Inc., and Water Districts.

As the population grows and communities start to get congested, government—especially local government in the case of rural areas—will be overwhelmed by the increasing needs for such utilities. There will be an increasing reliance for private entities to bring in investments to lay down new pipelines, pumps, construct reservoirs and replace outdated facilities. These facilities are often high-cost and require up-to-date technologies which the private sector is in the best position to supply.[12]

While the overall outlook for the Philippine construction industry is very positive, more investments and greater productivity are still required and **restrictive policies that hinder growth need to be reviewed and revised** to take advantage of opportunities that come with a stronger economy.

Foremost among these restrictive policies is the assailed regulation subject of the present Petition. As will be demonstrated in the succeeding sections, the nationality

[12] Asian Development Bank, Water Supply and Sanitation Sector Assessment, Strategy and Roadmap (2013).

distinction created by the current contractors' licensing scheme is a restriction which hinders competition in the construction industry. This barrier excludes foreign contractors who are in a position to construct vital projects and share their technical know-how with local firms.

The Philippines is already suffering from escalated construction costs which, according to the PCC's research, is brought about by restricted competition and the ineffective weeding out of inefficient firms. The table below is just a reflection of one time-honored tenet of economics—when supply is restricted, prices increase.

As shown in the table below, the Philippines registered the highest cost of construction in select projects when compared to other ASEAN countries.

Table 1: Estimated construction costs in ASEAN as of 2016 (in USD per sqm)

Area	Standard High Rise Apartments	Prestige high rise offices	Average standard high rise offices	Prestige shopping centres	Average standard shopping centres	Industrial Units	Business Hotels
Manila	900	1320	870	1115	815	470	1330
Bangkok	773.5	990	727.5	882	750.5	565	1593.5
Jakarta	707	1025.5	757.5	649	594	315.5	1681.5
Vietnam	665	942.5	750	-	740	330	1787.5
Kuala Lumpur	465	1190	757.5	885	690	422.5	2192.5

Source: Langdon & Seah Construction Cost Handbook (2016)

The removal of the assailed regulation will bring about several benefits such as (i) an increase in foreign direct investments (FDI) through equity contributions to construction projects; (ii) the formation of partnerships or consortia agreements to strengthen local contractors' participation in larger projects which may not otherwise be accessible due to limited capacities; (iii) the sharing of experience in the design, construction, and management of large infrastructure projects; and (iv) the introduction of technology, contractual, concessionary and management arrangements that can be shared with local contractors to help improve local industry productivity; (v) the entry of new players will force the incumbents to innovate and be more efficient thus benefiting consumers in terms of high quality products at lower costs; among others.

The introduction of foreign factors in the construction industry is likely to generate growth due to the considerable scope for learning-by-doing, knowledge generation, expansion of product variety, and an upgrade on product quality.[13]

[13] Mattoo, A., Rathindran, R., & Subramanian, A. (2006). Measuring Services Trade Liberalization and Its Impact on Economic Growth: An Illustration. Journal of Economic Integration.

VI.

THE ASSAILED REGULATION

P.D. No. 1746 created the Philippine Contractors Accreditation Board (PCAB) as an implementing arm of the Construction Industry Authority of the Philippines (CIAP) with the power to issue, suspend and revoke licenses of construction contractors under R.A. No. 4566[14] or the "Contractors' License Law."

Section 9 of R.A. No. 4566 defines a "contractor" as "any person who undertakes or offers to undertake or purports to have the capacity to undertake or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor."

Under Section 16 of R.A. No. 4566, contractors may be classified under the following branches:

(a) General engineering contracting;

(b) General building contracting; and

(c) Specialty contracting.

Section 17 of R.A. No. 4566 provides that the Board may adopt reasonably necessary rules and regulations to effect the classification of contractors in a manner consistent with established usage and procedure as found in the

[14] An Act Creating the Philippine Licensing Board for Contractors, Prescribing Its Powers, Duties and Functions, Providing Funds Therefor, And for Other Purposes.

construction business and limit the field and scope of the operations of a licensed contractor to those in which he is classified to engage. A licensee may be classified in more than one classification if the licensee meets the qualifications prescribed by the Board for such additional classification or classifications.

Under Section 20 of R.A. No. 4566, the only qualifications for the grant of a contractor's license are:

(i) at least two years of experience in the construction industry;

(ii) knowledge of the building, safety, health and lien laws of the Republic of the Philippines; and

(iii) knowledge of the rudimentary administrative principles of the contracting business necessary for the safety of the contracting business of the public.

Thus, under R.A. No. 4566, the Board's power to grant contractor's licenses is limited by the classification under Section 16 and the qualifications prescribed by Section 20. Notably, the required qualifications only pertain to the competence of the licensee to engage in construction projects.

The PCAB, however, introduced in its implementing rules and regulations a nationality requirement that became the basis of the classification of contractors applying for license.[15] Section 3.1, Rule 3 of the Revised Rules and

[15] As correctly pointed out by Respondent MWCI in its Comment/Opposition, nowhere in R.A. No. 4566 did the legislature authorize PCAB to impose nationality qualifications in order for an entity to obtain a license in the construction business. In fact, the imposition of a nationality requirement is a power which can only be wielded by the Legislature and not by a mere administrative agency pursuant to Article XII, Section 10 of the Constitution. PCAB therefore exceeded its authority

Regulations Governing Licensing and Accreditation of Constructors in the Philippines (the "assailed regulation") provides:

> Sec. 3.1. License Types
>
> Two types of Licenses are hereby instituted and designated as follows:
>
> a) The Regular License
>
> "Regular License" means a License of the type issued to a domestic construction firm which shall authorize the Licensee to engage in construction contracting within the field and scope of his License classification(s) for as long as the License validity is maintained through annual renewal; unless renewal is denied or the License is suspended, cancelled or revoked for cause(s).
>
> The Regular License shall be reserved for and issued only to constructor-firms of Filipino sole proprietorship or partnership/corporation with at least seventy percent (70%) Filipino equity participation and duly organized and existing under and by virtue of the laws of the Philippines.
>
> *Adjusted to 60% under Art. 48 of Chapter III, Book II of the Omnibus Investment Code of 1987.
>
> b) The Special License

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as it has gone beyond the powers granted to it by the Legislature under R.A. No. 4566.

> "Special License" means a License of the type issued to a joint venture, a consortium, a foreign contractor or a project owner which shall authorize the Licensee to engage only in the construction of a single specific undertaking/project. In case the Licensee is a foreign firm, the license authorization shall be further subject to condition(s) as may have been imposed by the proper Philippine government authority in the grant of the privilege for him to so engage in construction contracting in the Philippines. Annual renewal shall be required for as long as the undertaking/project is in progress, but shall be restricted to only as many times as necessary for completion of the same.
>
> xxx

The assailed regulation distinguished between (i) a domestic firm or corporation with at least 60 percent Filipino equity, on the one hand; and (ii) a joint venture, consortium, or foreign contractor, on the other.

Under the PCAB's regulatory scheme, the following licenses may be issued: (i) Regular License to Filipino sole proprietorship or partnership/corporation; (ii) Special License to foreign contractors or project owners; (iii) Special License to joint ventures; and (iv) Special License to consortiums.

Table 2: Comparative matrix of the different PCAB licenses

	Regular	Special (Foreign)	Special (JV)	Special (Consortium)
To whom issued	1. Filipino sole proprietor 2. Partnership or corporation with at least 60% Filipino equity participation	1. Foreign firm	1. Filipino partners, or 2. Filipino and foreign partners (Individual firms must themselves be Regular or Special Foreign License holders)	1. Filipino partners, or 2. Filipino and foreign partners (Individual firms must themselves be Regular or Special Foreign License holders)
Validity	1 year			
Documentary Requirements	20-page form with roughly 48 accompanying documents	15-page form with roughly 32 accompanying documents	4-page form with roughly 15 accompanying documents	6-page form with roughly 18 accompanying documents
Renewal (Sec. 10.4, IRR)	Annual Required during life of any pending project (Renewal carries	Annual Required during life of any pending project (Renewal is limited only for purposes of completing the specific undertaking)		

	with it authority to engage in other projects)

Source: CIAP and PCAB websites, IRR

Through the current regime, foreign contractors are able to obtain special licenses for themselves, or with joint ventures or consortiums. Under the last two avenues, foreign contractors are expected to partner with domestic contractors and the constituent firms must both be individually licensed.[16]

Regular licenses are preferred over special licenses because regular licenses permit the holders to engage continuously in construction activities for one year, while special licenses only allow the grantee to engage in one project or undertaking under such license.[17]

It is evident then that the nationality-based distinctions are not mere labels and in fact carry with them substantial distinctions in terms of costs and benefits. The distinction thus forms the linchpin around which the succeeding discussions will revolve, specifically on how said distinctions create an uneven playing field between foreign and local contractors.

[16] IRR, Section 10.3.
[17] IRR, Section 3.2(b), 6.1.

VII.

SUMMARY OF ARGUMENT

A. THE NATIONALITY-BASED RESTRICTION IMPOSED BY THE ASSAILED REGULATION IS A "BARRIER TO ENTRY."

1. GENERAL PRINCIPLES

2. THE NATIONALITY REQUIREMENT ERECTS A SUBSTANTIAL BARRIER TO THE ENTRY OF FOREIGN CONTRACTORS IN THE CONSTRUCTION INDUSTRY.

3. INDICATORS OF THE RESTRICTIVENESS OF THE NATIONALITY REQUIREMENT ON FOREIGN FIRMS

   3.1. EASE OF FIRM ENTRY DATA

   3.2. CROSS-COUNTRY STATISTICS ON FDI INFLOWS

4. POTENTIAL GAINS FROM LIFTING THE RESTRICTIONS

B. BARRIERS TO ENTRY VIOLATE THE CONSTITUTIONAL STATE POLICY AGAINST UNFAIR COMPETITION.

1. THE STRICTER AND BROADER LANGUAGE OF ARTICLE XII, SECTION 19 OF THE CONSTITUTION PROVIDES THE LEGAL IMPETUS FOR NULLIFYING GOVERNMENTAL ACTS THAT RESTRAIN COMPETITION.

2. BARRIERS TO ENTRY VIOLATE THE CONSTITUTIONAL STATE POLICY AGAINST UNFAIR COMPETITION.

   2.1. CASE IN POINT: *TATAD V. SECRETARY OF THE DEPARTMENT OF ENERGY*

3. GOVERNMENT RULES AND REGULATIONS MUST COMPLY WITH THE ANTI-TRUST PRINCIPLE IN ARTICLE XII, SECTION 19 OF THE CONSTITUTION.

VIII.

DISCUSSION

A. THE NATIONALITY-BASED RESTRICTION IMPOSED BY THE ASSAILED REGULATION IS A "BARRIER TO ENTRY."

1. GENERAL PRINCIPLES

A "barrier to entry" is a cost that must be borne by firms seeking to enter an industry but is not borne by firms already in the industry.[18]

Low barriers are expected to ease the entry of new players into an industry and force incumbents to produce and price their products or services competitively. Ultimately, consumers are benefitted by a wider array of products or services at lower prices.[19] Conversely, substantial barriers to entry discourage potential entrants from entering the market and allow incumbent firms to maintain their established positions. There is less incentive for incumbents to behave more competitively, hence, consumers lose out on the opportunity for more products or services at competitive prices.[20]

In and of themselves, barriers to entry are not harmful to an industry. In fact, entry barriers are embodied in acceptable forms such as patents[21] or entrenched buyer

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[18] Stigler, George J. The organization of industry. Chicago, IL: University of Chicago Press, 1968, at p.67.
[19] Morgan, Thomas D., Cases and Materials on Modern Antitrust Law and its Origins, American Casebook Series, West Publishing Co. (1994), at p.17.
[20] See Morgan, Thomas D., Cases and Materials on Modern Antitrust Law and its Origins, American Casebook Series, West Publishing Co. (1994), at p.17.
[21] Barriers to Entry, Organisation for Economic Co-operation and Development, Policy Roundtables (2005), at p.283.

preferences.[22] But on the other end of the spectrum are the more detestable and harmful forms of entry barriers such as exclusive dealing,[23] rent-seeking[24] or tying-in of products.[25] These mechanisms constitute unnatural barriers which unnecessarily exclude actual and potential competition and restrict a free market.[26]

Entry barriers also assume the form, and are given the legal imprimatur, of government regulation, sometimes referred to as "public restraints". When government regulates, it may either intentionally or unintentionally generate restraints that reduce competition.[27] The pernicious effects of governmental barriers to entry are exhibited when firms achieve and/or maintain a dominant position in the market through such barriers instead of through "growth or development as a consequence of a superior product, business acumen, or historic accident."[28]

In the context of international trade and competitiveness, where foreign entry is often the primary source of potential competition, governmental barriers provide fewer incentives to incumbent firms to undertake risks that may produce innovation and economic growth. The limited threat of entry reduces market dynamism.[29]

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[22] *Moecker v. Honeywell Int'l Inc.*, 144 F. Supp. 2d 1291, 1308 (M.D. Fla. 2001)
[23] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).
[24] Sokol, D. Daniel, Limiting Anticompetitive Government Interventions that Benefit Special Interests, 17 George Mason Law Review 119 (2009), at 127.
[25] *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).
[26] *United States v. United Shoe Machinery,* 110 F. Supp. 295 (D. Mass. 1953), at 346.
[27] Sokol, D. Daniel, Limiting Anticompetitive Government Interventions that Benefit Special Interests, 17 George Mason Law Review 119 (2009), at 119.
[28] *United States v. Grinnell Corp.*, 384 U. S. 563, 571 (1966).
[29] Sokol, D. Daniel, Limiting Anticompetitive Government Interventions that Benefit Special Interests, 17 George Mason Law Review 119 (2009), at

2. THE NATIONALITY REQUIREMENT ERECTS A SUBSTANTIAL BARRIER TO THE ENTRY OF FOREIGN CONTRACTORS IN THE CONSTRUCTION INDUSTRY.

Under the current regime, a foreign firm may only be granted a special license, which allows it to engage in one project under such license. On the contrary, domestic firms are eligible for regular licenses which grant them the continuing authority to engage in contracting activities, subject to specified terms and conditions, within a period of one year.

The application process for a special license takes an average of thirty (30) days. Applying the minimum wage for a person processing the application in behalf of a company, a conservative estimate for the average cost of a special license application for each project is roughly Php14,730.[30] This estimate does not include the registration fees which range from Php650 to Php22,250 per application depending on the category. For 2015, there were a total of 132,006 construction projects with a total value of Php331.6 billion which means each registered contractor undertook an average of twelve (12) projects for the year. A foreign contractor would therefore have to spend twelve times more compared to a domestic contractor on a typical year to undertake the same level of activity. If the per-project special license application process were to be applied to all projects, it would cost contractors roughly Php1.94 billion while awarding a multi-project regular license to all qualified contractors would only cost them a total of Php155 million -

124, citing MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 8-9 (2003) & Org. for Econ. Cooperation & Dev. [OECD], Regulating Market Activities in Public Sector, 7 OECD J. COMPETITION L. & POL'Y 21, 33 (2005).

[30] Thirty days multiplied by Php491 which is the minimum wage in NCR as of 29 November 2016.

a difference of Php1.79 billion in total cost for the application process alone sans the registration fees.

Thus, if foreign firms wish to secure the same benefits as domestic firms, that is, to undertake multiple projects in a single year, they would have to repeat the entire cycle of fulfilling the requirements, and incur the concomitant costs, for every project. In other words, for the same amount of resources spent by a foreign firm and a domestic firm, the foreign firm would be able to secure less benefits.

In *Tatad v. Secretary of the Department of Energy*,[31] the Honorable Court held that "[t]he first need is to attract new players and they cannot be attracted by burdening them with heavy disincentives." Corollarily, in this case, the nationality requirement which imposes "heavy disincentives" constitutes a substantial barrier to the entry of new players, particularly foreign firms, in the construction industry.

It is of no moment that regular licenses may also be issued to partnerships and corporate entities with up to 40 percent foreign equity. These options do not address the core problem because foreign firms may be discouraged from participating through these vehicles. As the minority participant in the entity, a foreign firm is exposed to the risk of pursuing major management decisions over which it does not have full control. This concern was best expressed by the Vice-President of the European Chamber of Commerce of the Philippines (ECCP) when he said that, "…you cannot expect these companies to bring the technology, bring the money, carry the risks and then control only 40 percent of the venture."[32] The result is that, unless they are able to find a

[31] G.R. Nos. 124360 and 127867, 5 November 1997.
[32] Mercurio, R. (18 August 2016) Foreign contractors decry tight regulations in Philippines, The Philippine Star online, available at http://www.philstar.com/business/2016/08/18/1614493/foreign-

reliable local partner, foreign firms with much-needed technology are deterred from investing in the Philippines as they do not have the comfort of having full control and management over their investments.

3. INDICATORS OF THE RESTRICTIVENESS OF THE NATIONALITY REQUIREMENT ON FOREIGN FIRMS

A survey of data, as presented below, may indicate the restrictiveness of the nationality requirement on foreign firms.[33]

3.1. EASE OF FIRM ENTRY DATA

Table 3: Summary Statistics of PCAB Licenses issued

	Total Licenses Issued	Renewal (in %)	New Regular License (in %)	License Amendments (in %)	New Special License (in %)
2013	9,118	70	12	8	10
2014	9,126	68.4	13.4	7.8	10.4
2015	10,526	66.6	11.7	6.5	15.2

Source: CIAP Accomplishment Reports

The annual number of licenses being issued by the PCAB serves as a proxy for ease of firm entry because

contractors-decry-tight-regulations-philippines, last accessed 9 November 2016.

[33] There are two caveats. Ease of entry is brought about by a confluence of factors and may not be solely ascribed to the PCAB's regulation policy. Also, there is no hard and fast rule to determine at what point the rate of new licenses issued (meaning the number of firms that have penetrated) becomes "competitive". Nevertheless, it is still incumbent upon regulators to adopt measures that will increase firm participation in the construction industry.

licensing is a precondition to engage in construction activity. Ease of entry into an industry is a positive sign of competitiveness.

As can be seen from the table above, statistics from 2013 to 2015 indicate that a large majority of the total licenses issued during the three-year period did not translate to the entry of new participants in the construction industry. Roughly 70 percent to 75 percent of issued licenses consist of mere Renewals and Amendments to already existing licenses. On the other hand, New Regular Licenses actually issued ranges from just 11 percent to 12 percent of the total issued licenses. The snapshot provided by the three-year period paints the picture of a domestic construction industry that has remained structurally unchanged with three-fourths of the industry still being controlled by incumbents as of 2015.

Foreign participation in the construction industry looks even more lackluster, as reflected by the rate of PCAB's issuance of Special Licenses, ranging from 10 percent to 15 percent for the years in question. In this regard, it bears emphasizing that while foreign firms can only be granted Special Licenses, such licenses can also be issued to domestic firms via the consortium or joint venture vehicles. Hence, the estimated 10 percent to 15 percent industry participation of foreign contractors may not reflect the actual foreign participation which may be significantly lower.

In fact, data from the PCAB reveals that out of the 1,600 Special Licenses issued in 2015, only 20 were issued to foreign firms while 4 were issued to joint venture/consortiums with foreign participation—a mere 0.23 percent of the total licenses issued for that year. These contractors undertake major infrastructure projects which could facilitate the development of Filipino skills and bring

in much needed investment and advanced technology. However, their potential to share these benefits to the entire industry is blunted by their very limited participation.

More importantly, insofar as the rate of entry of new participants indicates the level of competition within a given industry, the consistently minuscule rate of entry of both foreign firms and new players in the construction industry is quite indicative of how competition in this industry remained relatively stagnant and inert throughout the years.

3.2. CROSS-COUNTRY STATISTICS ON FDI INFLOWS

Studies have indicated that restrictiveness of trade policy discourage FDI inflows.[34] For instance, constraints on the ability of foreign nationals to manage an enterprise make them more hesitant to invest.[35]

As indicated in figure 1 below, the Philippines attracts the least amount of Construction FDI at barely one per cent of GDP. While the amount of construction FDI being received by the Philippines cannot be attributed to any single factor, the same is reflected by the differences in the entry barriers imposed by the ASEAN countries.

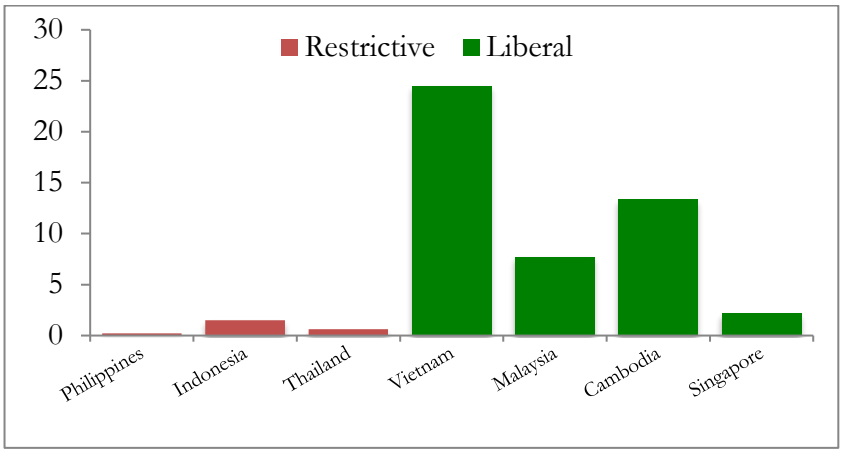
Indonesia imposes a foreign equity limitation of up to 67 per cent for companies with projects over 1Billion Rupiah and using advance technology or engaged in high-risk projects. Thailand allows up to 49 per cent foreign equity except for certain restricted industries (i.e. public utilities, transportation). Notably, in comparison with these two

[34] Demirhan, E. & Masca, M., Determinants of Foreign Direct Investment Flows to Developing Countries: A Cross-Sectional Analysis, Prague Economic Papers (2008), at 4.
[35] Golub, S., Openness to Foreign Direct Investment in Services: An International Comparative Analysis, The World Economy (2009), at 1250-1252.

countries, only the Philippines has a regulatory scheme which distinguishes between Regular and Special Licenses to which are attached different sets of requirements and benefits.

In countries where entry barriers are relaxed, the FDI as % of GDP ranges from between two per cent to 24 per cent. These countries impose minimal restrictions and even allow up to 100 per cent foreign equity in construction projects. Singapore issues licenses which remain valid for three (3) years while Vietnam allows for the validity of a license until the completion of the project for which it was issued.

Figure 1: Restrictiveness and Construction FDI as % of GDP (2014)



Source: World Bank data

These comparative data lead one to infer a negative relationship between FDI level and restrictiveness of policy in the construction industry among the ASEAN countries. In other words, more restrictive policies translate to lower levels of FDI inflows.

FDI has become an important source of private external finance for developing countries. It is different from other major types of external private capital flows in that it is motivated largely by the investors' long-term prospects for making profits in production activities that they directly control.

While FDI represents investment in production facilities, its significance for developing countries is much greater. Not only can FDI add to investible resources and capital formation, but more importantly, it is also a means of transferring production technology, skills, innovative capacity, and organizational and managerial practices between locations, as well as of accessing international marketing networks.[36]

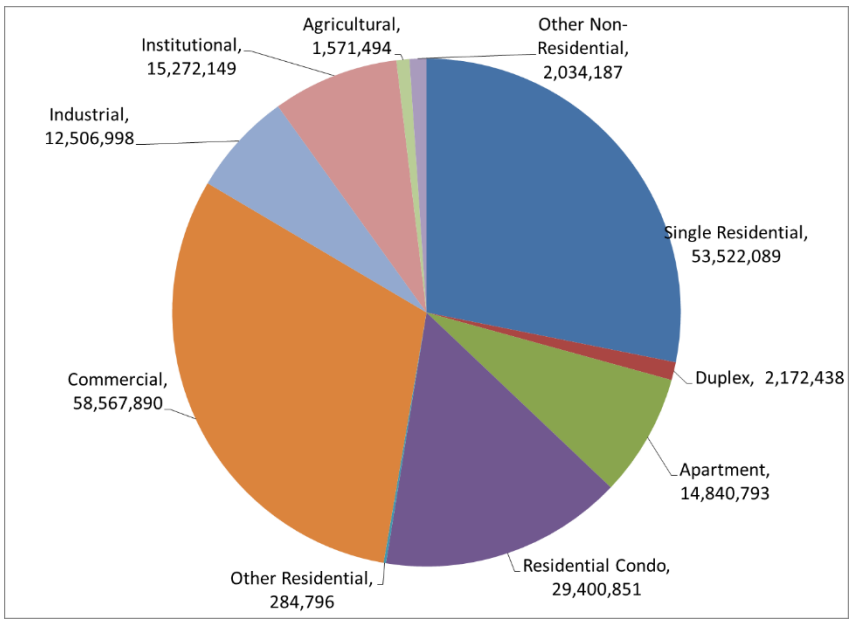
4. POTENTIAL GAINS FROM LIFTING THE RESTRICTIONS

As the data below would show, the lifting of the nationality-based entry barriers in the assailed regulation may lead to potential gains.

Considering the size of the various sectors in the construction industry, the segments that will likely be attractive to foreign investors are the residential condominiums, commercial, industrial and institutional segments. These segments constitute 54 per cent of the private construction segment. The largest of these segments is the commercial sector that constitutes around 27 per cent of the total private construction industry, followed by residential condominiums at 14 per cent.

[36] Mallampally, P. & Sauvant, K., Foreign Direct Investment in Developing Countries, Finance and Development Quarterly Magazine of the IMF, Vol. 36, No. 1 (1999).

Figure 2: Segments of the Private Construction as of 2011



Source: CIAP website

Using data from the Philippine Statistical Authority (PSA), it is predicted that the lifting of restrictions against foreign contractors will yield an additional Php210 billion worth of construction services in these segments.[37] Considering that the gross value of private construction in 2015 is at PhP1 trillion, lifting the restrictions would potentially translate to 17.5 per cent worth of additional output.

[37] The results are produced using a model that predicts the amount of additional FDI that will come into the Philippines once the restrictions are lifted. The predicted figure is then contrasted against the *status quo* FDI levels.

While the foregoing analysis of the projected gains is only limited to private construction, it must be emphasized that even public construction stands to sustain considerable gains. Between 2010 and 2015, public sector spending in power, energy, electrification, water and the like consisted only of 22 per cent of total investments in construction during said period.[38]

Noting the infrastructure backlog in the Philippines, foreign contractors have in fact expressed their willingness to help address this concern. Should the restrictions be lifted, they expect to undertake large projects, which would typically be valued at around Php1 billion[39] and more importantly, such projects would involve the application of the newest and most advanced technologies.[40]

The advantages of lifting the nationality-based restriction in the assailed regulation therefore cannot be overemphasized. As aptly observed by the ECCP:

> It is in the best interest of project/infrastructure developers that they are able to choose from the most qualified contractors, whether foreign or local, to undertake their projects. This ensures obtaining the best and most suitable bid for each project…This should be seen as an opportunity

[38] National Statistical Coordination Board.
[39] Mercurio, R. (18 August 2016), Foreign contractors decry tight regulations in Philippines, The Philippine Star online, available at http://www.philstar.com/business/2016/08/18/1614493/foreign-contractors-decry-tight-regulations-philippines, last accessed 9 November 2016.
[40] Mercurio, R. (24 February 2016), ECCP exec laments restrictions on international contractors, The Philippine Star online, available at http://www.philstar.com/business/2016/02/24/1556057/eccp-exec-laments-restrictions-international-contractors, last accessed 9 November 2016.

for technology transfer and a long-term partnership for sustainable economic growth.[41]

B. Barriers to entry violate the Constitutional State policy against unfair competition.

1. The stricter and broader language of Article XII, Section 19 of the Constitution provides the legal impetus for nullifying governmental acts that restrain competition.

In the Philippine jurisdiction, the importance of market competition is well-recognized. Prior to the 1987 Constitution, competition policy has largely focused on regulating or prohibiting private acts that are anti-competitive. This trend can be observed as far back as in the 1935 Constitution, which did not contain an explicit pro-competition provision, and in the 1973 Constitution,[42] where regulation was limited to private monopolies.

Early jurisprudence on competition mostly involves the validity of contracts which tend to restrain business or trade. For instance, in the 1939 case of *Red Line Transportation v. Bacharach Motor Company*,[43] the Honorable Court nullified the agreement between two common carriers whereby each carrier undertook not to operate in the other carrier's territory. According to the Court:

It should be observed that public service

[41] Annex "B", ECCP Letter dated 24 February 2016.
[42] Article XIV, Section 2 of the 1973 Constitution provides: "The State shall regulate or prohibit private monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."
[43] G.R. No. L-45173, 27 April 1939. See also *Pampanga Bus Company Inc. v. Enriquez*, G.R. No. L-46040, 29 November 1938.

> companies are more strictly limited than others in entering into contracts in restraint of the free flow of trade, commerce and communication because of their duty to give equal service to the public. They can make no contracts inimical to that duty. As a general proposition, all contracts and agreements, of every kind and character, made and entered into by those engaged in an employment or business impressed with a public character, which tend to prevent competition between those engaged in like employment, are opposed to the public policy and are therefore unlawful. All agreements and contracts tending to create monopolies and prevent proper competition are by the common law illegal and void.

In the 1979 case of *Gokongwei v. Securities and Exchange Commission*,[44] the Honorable Court sustained the validity of a provision in a corporation by-law which renders a stockholder ineligible to be director if he is also a director in a rival corporation. Invoking the prohibition against combinations in restraint of trade and unfair competition under the 1973 Constitution and Article 186 of the Revised Penal Code, the Court said:

> Basically, these anti-trust laws or laws against monopolies or combinations in restraint of trade are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unfettered competition as the rule of trade. "It rests on the premise that the unrestrained interaction of

[44] G.R. No. L-45911, 11 April 1979.

> competitive forces will yield the best allocation of our economic resources, the lowest prices and the highest quality ...” They operate to forestall concentration of economic power. The law against monopolies and combinations in restraint of trade is aimed at contracts and combinations that, by reason of the inherent nature of the contemplated acts, prejudice the public interest by unduly restraining competition or unduly obstructing the course of trade.

Under the 1987 Constitution, competition policy has taken a more comprehensive approach. Article XII, Section 19 of the 1987 Constitution mandates:

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

This provision is a re-statement of Article XIV, Section 2 of the 1973 Constitution, with one significant amendment—the deletion of the word “private” before “monopolies.” Unlike the 1973 Constitution which mandates the State to regulate “private monopolies,” the 1987 Constitution requires the State to regulate both private and public monopolies.[45] The proscription against combinations in restraint of trade and unfair competition is also directed both against the State as well as the private sector.[46]

As explained by the Honorable Court in *Tatad v.*

[45] *Agan v. PIATCO*, G.R. Nos. 155001, 155547 and 155661, 5 May 2003.
[46] *See* Record of the Constitutional Commission, Volume III, p. 258 cited in *Tatad v. Secretary of the Department of Energy*, G.R. Nos. 124360 and 127867, 5 November 1997.

Secretary of the Department of Energy,[47] competition is the underlying principle of Article XII, Section 19:

> Again, we underline in scarlet that the fundamental principle espoused by section 19, Article XII of the Constitution is competition for it alone can release the creative forces of the market. But the competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. **Monopolistic or oligopolistic markets deserve our careful scrutiny and laws which barricade the entry points of new players in the market should be viewed with suspicion**.[48]

The stricter and broader language of Article XII, Section 19 provides the legal impetus for nullifying governmental acts that restrain competition. Such acts can range from laws passed by Congress, to rules and regulations issued by administrative agencies, and even contracts entered into by the Government with a private party.

Thus in *Tatad*, the Honorable Court struck down the provisions of R.A. No. 8180 (Downstream Oil Industry Deregulation Act of 1996) on tariff differential, inventory and predatory pricing because they imposed substantial barriers to the entry of new players in the downstream oil industry, thus inhibiting fair competition, encouraging monopolistic

[47] G.R. Nos. 124360 and 127867, 5 November 1997.
[48] Emphasis added.

power and interfering with the free interaction of market forces.

In *Agan v. Philippine International Air Terminals Co., Inc. (PIATCO)*,[49] the Honorable Court held that the exclusive right given to PIATCO to operate a commercial international passenger terminal is subject to reasonable regulation and supervision by the Government. This is in accord with the constitutional mandate that a monopoly which is not prohibited must be regulated. The Court said that the declared policy of the Build-Operate-Transfer Law[50] to encourage private sector participation by providing a climate of minimum government regulations does not mean that the Government must completely surrender its sovereign power to protect public interest in the operation of a public utility as a monopoly.

In *Pabillo v. COMELEC*,[51] the Honorable Court nullified COMELEC Resolution No. 9922 as it violates the Government Procurement Reform Act. The Court underscored the importance of competition in public bidding as a method of government procurement:

> Case law states that competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking, but also that it be legitimate, fair and honest and not designed to injure or defraud the government. The essence of competition in public bidding is that the bidders are placed on equal footing which means that all qualified bidders have an equal chance of winning the auction through

[49] G.R. Nos. 155001, 155547 and 155661, 5 May 2003.
[50] R.A. No. 6957, as amended by R.A. No. 7718.
[51] G.R. No. 216098, 21 April 2015.

> their bids. Another self-evident purpose of competitive bidding is to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts.

Indeed, the more comprehensive competition policy embodied in the present Constitution empowers the Honorable Court to nullify both public and private acts that restrain competition.

2. BARRIERS TO ENTRY VIOLATE THE CONSTITUTIONAL STATE POLICY AGAINST UNFAIR COMPETITION.

2.1. CASE IN POINT - *Tatad v. Secretary of the Department of Energy*

That the Court may strike down a governmental act which erects a barrier to entry is not without precedent. A case in point is *Tatad v. Secretary of the Department of Energy*.[52]

At the time *Tatad* was decided, the country's downstream oil industry was operated and controlled by an oligopoly composed of Petron, Shell and Caltex. R.A. No. 8180 (Downstream Oil Industry Deregulation Act of 1996) was enacted to pave the way for a deregulated environment where "any person or entity may import or purchase any quantity of crude oil and petroleum products from a foreign or domestic source, lease or own and operate refineries and other downstream oil facilities and market such crude oil or use the same for his own requirement," subject only to monitoring by the Department of Energy.

The law, however, was met with opposition. Petitions

[52] G.R. Nos. 124360 and 127867, 5 November 1997.

were filed assailing the provisions of R.A. No. 8180 on tariff differential, inventory reserve, and predatory pricing on the ground, among others, that they imposed substantial barriers to the entry of new players in the downstream oil industry in violation of the State's policy against unfair competition under Article XII, Section 19 of the 1987 Constitution.

On tariff differential

Section 5(b) of R.A. No. 8180 provides:

> Any law to the contrary notwithstanding and starting with the effectivity of this Act, tariff duty shall be imposed and collected on imported crude oil at the rate of three percent (3%) and imported refined petroleum products at the rate of seven percent (7%) except fuel oil and LPG, the rate for which shall be the same as that for imported crude oil. Provided, that beginning on January 1, 2004 the tariff rate on imported crude oil and refined petroleum products shall be the same. Provided, further, that this provision may be amended only by an Act of Congress.

Petitioner, then Senator Francisco Tatad, claimed that the imposition of different tariff rates on imported crude oil and imported refined petroleum products unduly favors the three existing oil refineries and discriminates against prospective investors in the downstream oil industry who do not have their own refineries and will have to source refined petroleum products from abroad.

The Honorable Court agreed with the petitioner.

According to the Court, since the dominant players (Petron, Shell and Caltex) have their own refineries, the tariff differential of 4% therefore works to their immense benefit by imposing a substantial barrier to the entry of new players. On the one hand, new players who intend to equalize the market power of Petron, Shell and Caltex by building refineries of their own will have to spend billions of pesos. On the other hand, those who will not build refineries but import refined petroleum products will suffer the huge disadvantage of increasing their product cost by 4%. Under these circumstances, the new players will be competing on an uneven field.

On inventory reserve

Section 6 of R.A. No. 8180 provides:

> To ensure the security and continuity of petroleum crude and products supply, the DOE shall require the refiners and importers to maintain a minimum inventory equivalent to ten percent (10%) of their respective annual sales volume or forty (40) days of supply, whichever is lower.

The Honorable Court found that the provision on inventory reserve widens the balance of advantage of Petron, Shell and Caltex against prospective new players. While Petron, Shell and Caltex can easily comply with the inventory requirement of R.A. No. 8180 in view of their existing storage facilities, prospective competitors will find compliance with this requirement difficult as it will entail a prohibitive cost. The construction cost of storage facilities and the cost of inventory will discourage prospective players. The reserve requirement thus further blocks the entry points of new

players, dampen competition and enhance the control of the market by the three existing oil companies.

On predatory pricing

> Section 9(b) of R.A. No. 8180 provides:
>
> To ensure fair competition and prevent cartels and monopolies in the downstream oil industry, the following acts shall be prohibited: xxx
>
> > (b) Predatory pricing which means selling or offering to sell any product at a price unreasonably below the industry average cost so as to attract customers to the detriment of competitors.

The Honorable Court said that that the ban on predatory pricing cannot be analyzed in isolation as its validity is interlocked with the barriers imposed by R.A. No. 8180 on the entry of new players. Since predatory pricing will be profitable only if the market contains significant barriers to entry, the Court deemed it necessary to determine whether predatory pricing on the part of the dominant oil companies is encouraged by the provisions in the law blocking the entry of new players.

Since the 4% tariff differential and the inventory requirement are significant barriers which discourage new players to enter the market, the Court found that the temptation for a dominant player to engage in predatory pricing and succeed is a "chilling reality." The lack of real competition will allow the existing oil oligopolists to dictate prices and entice them to engage in predatory pricing to eliminate rivals. The Court held that the fact that R.A. No.

8180 prohibits predatory pricing will not dissolve this clear danger as its definition of predatory pricing is too loose to be a real deterrent. As further explained by the Court in its resolution on the Motion for Reconsideration:

> In light of its loose characterization in R.A. 8180 and the law's anti-competitive provisions, we held that the provision on predatory pricing is constitutionally infirm for it can be wielded more successfully by the oil oligopolist. Its cumulative effect is to add to the arsenal of power of the dominant oil companies. For as structured, it has no more than the strength of a spider web—it can catch the weak but cannot catch the strong; it can stop the small oil players but cannot stop the big oil players from engaging in predatory pricing.[53]

In sum, the Honorable Court found the assailed provisions to have imposed substantial barriers to the entry of prospective players, thus creating the clear danger that the deregulated market in the downstream oil industry will not operate under an atmosphere of free and fair competition. According to the Court:

> **Unfortunately, contrary to their intent, these provisions on tariff differential, inventory and predatory pricing inhibit fair competition, encourage monopolistic power and interfere with the free interaction of market forces.** R.A. No. 8180 needs provisions to vouchsafe free and fair competition. The need for these vouchsafing provisions cannot be overstated. Before deregulation, PETRON, SHELL and CALTEX had

[53] *Tatad v. Secretary of the Department of Energy*, G.R. No. 124360 and G.R. No. 127867, 3 December 1997.

> no real competitors but did not have a free run of the market because government controls both the pricing and non-pricing aspects of the oil industry. After deregulation, PETRON, SHELL and CALTEX remain unthreatened by real competition yet are no longer subject to control by government with respect to their pricing and non-pricing decisions. The aftermath of R.A. No. 8180 is a deregulated market where competition can be corrupted and where market forces can be manipulated by oligopolies.[54]

The Honorable Court, therefore, declared R.A. No. 8180 unconstitutional because: "(1) it gave more power to an already powerful oil oligopoly; (2) it blocked the entry of effective competitors; and (3) it will sire an even more powerful oligopoly whose unchecked power will prejudice the interest of the consumers and compromise the general welfare."[55]

As discussed in Section VIII.A above, the assailed regulation in the present case raises similar concerns discussed in *Tatad*. The nationality-based restriction imposed by the PCAB effectively bars the entry of new players, particularly foreign firms, in the construction industry in violation of the constitutional policy against unfair competition.

3. GOVERNMENT RULES AND REGULATIONS MUST COMPLY WITH THE ANTI-TRUST PRINCIPLE IN ARTICLE XII, SECTION 19 OF THE CONSTITUTION.

[54] Emphasis added.
[55] *Tatad v. Secretary of the Department of Energy*, G.R. No. 124360 and G.R. No. 127867, 3 December 1997.

In striking down R.A. No. 8180, the Honorable Court articulated what we may henceforth call the "anti-trust principle" of the Constitution—

> Section 19, Article XII of our Constitution is anti-trust in history and in spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of section 19, Article XII of our Constitution which cannot be violated by R.A. No. 8180.[56]

Article XII, Section 19 of the Constitution is a **directly enforceable constitutional principle**, as was demonstrated in *Tatad*. The provision articulates the State policy in a strong negative language—that "[n]o combinations in restraint of trade or unfair competition shall be allowed." This express prohibition has two significant implications. First, the prohibition has a *nullifying function* such that any act which contravenes the State policy must necessarily be declared unconstitutional, and hence void. Second, the prohibition has a *compulsory function* such that every government regulation must take into account, and be consistent with, the enunciated State policy. The prohibition imposes an obligation to incorporate the State policy in every government regulation.

Thus, courts must exercise, at a minimum, **substantial inquiry**, if not **careful scrutiny**, whenever a regulation has demonstrably an anti-competitive object or effect. The Honorable Court itself has articulated, and employed, this

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[56] *Tatad v. Secretary of the Department of Energy*, G.R. No. 124360 and G.R. No. 127867, 5 November 1997.

higher standard in *Tatad* when it stated that anti-competitive regulations deserve its "**careful scrutiny**" and that "laws which barricade the entry points of new players in the market should be **viewed with suspicion.**"[57]

This higher standard essentially means that courts cannot rely on the principle of judicial deference to administrative interpretation or presumption of validity in the face of a regulation that has demonstrably anti-competitive object or effect. Since barriers to entry are "viewed with suspicion" and, thus, treated as a suspect category of regulations, courts must determine whether the government agency has provided a satisfactory explanation and substantial justification for the offending regulation. Mere assertions or conclusory statements will not suffice. The government agency must show that the regulation seeks to fulfill an important and substantial State interest, which cannot be achieved through other less restrictive means.

As discussed in Section VIII.A above, the assailed regulation imposes substantial barriers to the entry of foreign firms in the construction industry, contrary to the anti-trust principle of the Constitution. Given its anti-competitive regulation, PCAB has the burden to show that the nationality requirement seeks to fulfill an important and substantial State interest, which cannot be achieved through other less restrictive means.

The PCAB miserably failed to meet this burden.

In its *Petition for Certiorari*, the PCAB justifies the distinction it made between domestic and foreign contractors in its issuance of contractor's licenses on two grounds. First, the PCAB claims that the distinction is "consistent with the reasonable necessity of ensuring

[57] Emphasis added.

continuous and updated monitoring and regulation of foreign contractors—who are distinct from local contractors since they are not based in the Philippines and thus may be situated beyond the reach of [the PCAB] and the government for possible enforcement of the contractor's liability/warranty under existing laws and regulations…"[58] Second, the PCAB argues that the distinction is also "consistent with Section 14, Article 12 of the 1987 Constitution which mandates that 'the practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.'"[59]

The foregoing reasons, however, do not equate to an important and substantial State interest, which cannot be achieved through other less restrictive means.

The government's purported interest in applying contractors' warranty laws and regulating the practice of profession deserves no merit when weighed against the detrimental impact of the assailed regulation on the construction industry. The uneven playing field created by the the current regulatory scheme has led to restricted competition because competent and technologically up-to-date foreign contractors are excluded from offering their services to the industry. Consequently, the industry suffers from exorbitant costs of construction services due to the limited supply of firms offering the same.

Moreover, the government interest in "continuous and updated monitoring and regulation of foreign contractors" can be achieved without denying the foreign firms the same benefits given to domestic firms (*i.e.* continuing authority to engage in contracting activities for 1 year). Concerns over ensuring the foreign firms' performance of their contractual

[58] Petition for Review on Certiorari, p. 12.
[59] Petition for Review on Certiorari, p. 12.

obligations should not be an upfront disqualification or eligibility issue since it can be addressed through other means under existing laws.[60]

It is also worthy to note that the supposed government interest in limiting the practice of profession to Filipino citizens is inapplicable to construction. As correctly pointed out by Respondent MWCI, contracting for purposes of engaging in construction activities is not a profession as (i) construction is not in the list of professions regulated by the Professional Regulatory Commission; and (ii) under existing laws, rules and regulations, a 'professional' refers to an individual, and not a corporation or firm.[61] The PCAB thus has no basis to deprive foreign firms of the same benefits granted to domestic firms on the pretext that these firms are "professionals" that must be distinguished accordingly.

[60] New Civil Code, Articles 2047, 1723-1725; Government Procurement Reform Act, Section 62(b); 2012 IRR of the BOT Law, Section 12.8.
[61] See Comment/Opposition to the Petition for Review on Certiorari, pp. 24-26.

IX.

CONCLUSION

Governments often erect the most pernicious barriers to competition. These barriers include tariffs and state subsidies, burdensome licensing and advertising restrictions, and policies inspired by rent-seeking.[62] These barriers to competition, more commonly referred to as "public restraints", harm consumer welfare just as much as private restraints. In fact, the harmful effects of public restraints can often last much longer. As a competition system achieves success in penalizing private restraints, firms increase the efforts devoted to obtaining public restraints.[63] For instance, incumbents enjoying competitive advantage and extra-normal profits from anti-competition regulations will wastefully spend resources on non-productive activities to ensure that these advantages are maintained. Thus, focusing exclusively on private restraints leaves a gaping hole in the antitrust enforcement net. [64]

To achieve the objectives of a national competition policy, the Government should address public restraints as much as it enjoins private restraints. For instance, in the case where state-controlled enterprises operate in direct or indirect competition with private enterprises, government policy should be consistent with the principle of competitive neutrality. This means that the Government must ensure a level playing field for all industry players regardless of

[62] Timothy J. Muris, "State Intervention/State Action – A U.S. Perspective," delivered before Fordham Annual Conference on International Antitrust Law & Policy, 24 October 2003.
[63] Timothy J. Muris, "State Intervention/State Action – A U.S. Perspective," delivered before Fordham Annual Conference on International Antitrust Law & Policy, 24 October 2003.
[64] Timothy J. Muris, "State Intervention/State Action – A U.S. Perspective," delivered before Fordham Annual Conference on International Antitrust Law & Policy, 24 October 2003.

whether these players are controlled by the private sector or the State.

The government must advocate a level playing field where no market participant is given undue advantages that would allow it to gain market share over otherwise more effective and efficient competitors. Economically sound policies should not give incumbents competitive advantages for tenuous reasons such as nationality alone. Claims of protecting the interest of the public through regulatory action should be evaluated in terms of the resulting incentive distortions that reduce competition and the countervailing efficiencies arising from said regulation. Discriminating in favor of certain market participants without valid economic basis or policy rationale tends to reward poor performance, reduce competitive pressure, and distort incentives to innovate.

In the case of the assailed regulation, its stated objectives can and should be achieved in other ways which do not necessarily favor certain players and lessen competition in the construction industry. Restrictive rules which do not take into consideration market competition are very likely to diminish both short-run and long-run efficiency improvements. Consumer welfare, which in this case refers to the welfare of both households and other businesses, is maximized when competition allows consumers to access and choose the most efficient producers, regardless of the service provider's nationality. Indeed, it is a settled principle in economics that if there are many players in the market, healthy competition will ensue. The competitors will try to outdo each other in terms of quality and price in order to survive and profit. Competition therefore results in better quality products and competitive prices, which redound to the benefit of the public.

It is within this framework that the Honorable Court must determine the validity of the assailed regulation. The Honorable Court must exercise **substantial inquiry** and, as in *Tatad*, **careful scrutiny**, in light of the anti-competitive effect of the assailed regulation.

The assailed regulation violates Article XII, Section 19 of the Constitution insofar as it creates substantial barriers to the entry of new players, particularly foreign contractors, in the construction industry, thus inhibiting the formation of a truly competitive market. The current regime unfairly favors domestic contractors to the detriment of foreign contractors.

While the Honorable Court has no power to pass upon the wisdom of a governmental act, it is its sacred duty to uphold the Constitution and to strike down and annul an act that contravenes it. The Honorable Court in *Tatad* held that "the Constitution is a covenant that grants and guarantees *both* the political and *economic rights of the people*" such that the Court is mandated "to be the guardian not only of the people's political rights but their economic rights as well".[65] In striking down the provisions of the Downstream Oil Industry Deregulation Act of 1996, the Court said that it did so not because it disagrees with deregulation as an economic policy but because the law in its form violates the Constitution.

In view of the foregoing, the Honorable Court, once again, is called upon to rule in favor of the *economic rights of the people* and declare the assailed regulation as null and void.

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[65] *Tatad v. Secretary of the Department of Energy*, G.R. Nos. 124360 and 1278675, 5 November 1997.

X.

RELIEF

WHEREFORE, premises considered, it is respectfully prayed that the instant *Petition for Review on Certiorari* be **DISMISSED**, and Section 3.1, Rule 3 of the Revised Rules and Regulations Governing Licensing and Accreditation of Constructors in the Philippines be **DECLARED NULL and VOID**.

Pasig City for Manila, 19 December 2016.

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