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ARTICLES

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CONTENTS

ARTICLES

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ARTICLES IN THIS ISSUE

The 27th Volume of the **Journal of the Integrated Bar of the Philippines** contains four articles, a book review, and the regular summary of selected Supreme Court decisions in the different fields of law.

Featured as the lead article is *Towards a Federal Republic of the Philippines* by **JOSE V. ABUEVA**, former President of the University of the Philippines and now President of Kalayaan College at Riverbanks Center, Marikina. A noted political scientist, the author asserts that the single most important factor that has set us behind the so-called "tiger economies" in East Asia is not the degree of political freedom per se but the presence or lack of "good governance," which may be defined as responsive, efficient and effective policy-making and implementation under the rule of law. Good governance depends on effective political institutions (especially the executive and legislative), the political will of a determined leadership, effective and accountable political parties, and the support and cooperation of a dynamic business sector and civic-spirited citizens. Contending that there is a need for structural reforms in our political system, he proposes a federal system in order to transform the Filipino political system from its present centralized structure to the decentralized structure of a federal system with a parliamentary government.

In the second article, **ROGELIO A. VINLUAN**, Senior Partner at Abello Concepcion Regala & Cruz, and **VICTOR BASILIO N. DE LEON** and **PETER L. CALIMAG**, Associates in the same law firm, conduct a study of survey evidence, a term used to describe the result of a public opinion poll survey taken by statisticians and presented before a court as evidence to prove a particular fact in issue in trademark litigation. They point out

that unlike in the United States, survey evidence is seldom, if at all, used in Philippine trademark disputes largely because of the Hearsay Rule under which the presentation of survey evidence is legally objectionable as there is no opportunity to cross-examine the interviewees on the oral or verbal statements they allegedly made during the survey. While the writers concede that the use of survey evidence may be deemed to be indispensable in trademark litigation, resorting to it is not always practical in view of various factors attendant to conducting such a survey, namely, the high costs and time involved, as well as legal and procedural obstacles.

Next, **JOSE MARIO C. BUÑAG**, Senior Partner of Buñag Kapunan Migallos and Perez, discusses in *A Model Contract for Joint Ventures* the highlights of the recently concluded meeting of legal experts at the headquarters of the International Trade Center (ITC) in Geneva, Switzerland to consider the possibility of a model joint venture contract, particularly for small and medium-scale enterprises that are unable to afford the services of lawyers. The author represented the Philippines at this meeting of the ITC whose aim is to help developing countries improve their trade performance and ensure that the largest number of people benefit from its assistance.

The fourth article, *The Serrano Case*, by **JOSE ANSELMO I. CADIZ**, Executive Vice President & Governor for Bicolandia of the Integrated Bar of the Philippines, examines the case of *Serrano v. NLRC & Isetann Department Store*, which modified the *Wenphil* ruling respecting dismissals for cause but without due process. After giving his observations on the *Serrano* case, the author advocates a modification of the said ruling.

Next, **JOSE MARIA Z. CARPIO**, a private practitioner and former UNICEF consultant, reviews *The Moro Islamic Challenge: Constitutional Rethinking for the Mindanao Peace Process*, a book written by Soliman M. Santos, Jr.

The final item is a digest or summary of selected Supreme Court decisions covering the period July through December 2001 prepared by **TARCISIO A. DIÑO**, partner of Villareal Rosacia Diño and Patag. The digest is grouped under the following headings: (a) Agrarian Reform Law; (b) Civil Law; (c) Commercial Law; (d) Criminal Law; (e) Labor Law; (f) Land Laws; (g) Legal and Judicial Ethics; (h) Political Law; (i) Remedial Law; and (j) Taxation.

TOWARDS A FEDERAL REPUBLIC OF THE PHILIPPINES

*By Jose V. Abueva**

"A Federal Republic with a parliamentary government will improve governance, empower our people, and hasten the development of our country."

I. INTRODUCTION: THE NEED FOR STRUCTURAL REFORM OF OUR POLITICAL SYSTEM

Our Persistent Problems of Poverty and Ineffective Governance

When we regained our independence in 1946, the Philippines was ahead of many other new nation-states in the processes of de-colonization, development and democratization. In Asia we were perhaps second only to Japan in social, economic and political development. But from 1972 to 1986, after over 13 years of the Marcos dictatorship, crony capitalism, a politicized military, institutionalized corruption, economic protectionism, and heightened rebellion by the Communists and Moro secessionists, the country retrogressed.

In the last three decades the Philippines has fallen rapidly behind the "tiger economies" or newly industrializing countries (NICs) in Asia—South Korea, Taiwan, Singapore, Malaysia, and Thailand—in economic and human and social development.

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At the same time, China and India have been making giant strides in their industrialization and social and economic development despite their enormous population.

After the EDSA Revolution we were able to restore our democratic institutions and re-start our economy recovery, but our seriously weakened economy, political instability, unabated corruption, and rapid population growth have continued to stunt our efforts to achieve progress. Poverty, unemployment and underemployment, homelessness, injustice, low levels of social services, endemic corruption, rebellion, and criminality are still very much with us. Our leaders have not pushed for basic reforms to address the root of these problems.

"GOOD GOVERNANCE": A CRITICAL FACTOR IN SOCIAL AND ECONOMIC DEVELOPMENT

According to Freedom House, the Philippines is "high in political freedom and civil liberties," along with Japan, South Korea, Taiwan, India and Thailand. However, the Philippines is much lower in "human development," as measured by the UNDP, compared to democratic Japan, South Korea, Taiwan and Thailand, and to authoritarian Singapore and Malaysia. While the Philippines ranks higher in "human development" *vis-à-vis* India and China because of their much larger population, both countries have far larger and more dynamic economies that will better enable them to respond to their social and economic problems.

It appears that the single most important factor that has set us behind the so-called "tiger economies" in East Asia is not the degree of political freedom per se—democracy v. authoritarianism—but the presence or lack of "good governance." The latter may be defined as responsive, efficient and effective

policy-making and implementation under the rule of law. Good governance depends crucially on effective political institutions (especially the executive and legislative), the political will of a determined leadership, effective and accountable political parties, and the support and cooperation of a dynamic business sector and civic spirited citizens. Our "Soft State" prevents us from governing effectively to solve or alleviate our basic problems.

WEAK AND INEFFECTIVE POLITICAL LEADERS AND INSTITUTIONS

Our lack of good governance is traceable to our weak and ineffective political leaders and political institutions, especially the presidency and the Congress, the judiciary, the bureaucracy, and local governments. Our relatively democratic elections enable us to change our leaders from time to time but these have not made much difference in governance because elections cannot make our leaders accountable to the people in the absence of effective and accountable political parties that offer the people meaningful policy alternatives. Self-serving political leaders encourage lawlessness and cynicism among many citizens.

Our Ineffective and Unstable Presidential System

Under our presidential system, our one-term President cannot be held accountable for his or her performance since he or she cannot run for reelection. Due to separation of powers and checks and balances, personalistic politics (politics based on personalities, not on policy alternatives and performance), and the lack of cohesive political parties focused on issues and policy, the President and the Congress are often engaged in competition and conflict based on their personal interests in the making of policies and decisions.

The President and the Congress are often locked in a stalemate or gridlock in policy-making. They blame each other for failing to enact needed legislation. To pass the annual general appropriations bill and other major initiatives of the President, he or she has to agree to a lot of patronage, compromise, and wasteful congressional pork barrel. But even when good legislation is passed, it may suffer from lack of funding because of inadequate taxes and tax collection and the lack of political will and support to raise taxes and collect them. The President and the Congress also have difficulty in ensuring efficient and effective implementation by the national and local bureaucracies.

A one-term President is often tempted to seek a second term by amending the constitution. President Quezon did it in 1939. President Marcos who had a second and final term was not content; he extended his term indefinitely by becoming a dictator. President Ramos tried to lift the term limit on the presidency.

To remove the dictator Marcos, the citizens resorted to the extraordinary, spontaneous means of "people power" revolt known as the EDSA Revolution. In its wake, the Aquino government was threatened by several coup attempts by military rebels. To remove another corrupt president, Joseph Estrada, the President again resorted to "people power" known as EDSA II, which has resulted in an unstable presidency by Gloria Macapagal Arroyo.

In other words, a presidential system is inherently unstable. This is the conclusion drawn by political scientists who have studied the breakdown of many democracies with a presidential system. On the other hand, they have also concluded that democracies with a parliamentary system are more stable and productive. They observed that the United States is virtually the only outstanding example of a successful democracy with a presidential sytem.

Our Ineffective and Centralized Unitary System

Another major problem of governance is that in our unitary system the national government is highly centralized, slow, inefficient and unresponsive to the needs of the people in the various regions and local governments. National government institutions and agencies located in the National Capital Region dominate the governance of the whole country. Although local governments are supposed to enjoy local autonomy under the 1987 Constitution and the 1991 Local Government Code, they are in fact tightly controlled in many ways by the national government on which many of them have become habitually dependent for guidance and resources. Stifling controls by the national government inhibit local initiative and resourcefulness and yet they are ineffective in curbing corruption at either levels of government.

With most of the taxes preempted by the national government, the local governments lack revenues for their operations and services. Although many of the industries and businesses are located in the different regions, businessmen usually pay their taxes to the national government in the National Capital Region and not to the local governments in the regions where they derive their wealth. Local officials have to beg for their share of the national taxes.

In sum, there are serious structural problems in the relations and functioning of the executive department and the legislative department in our presidential system. There are also equally serious problems in the relations and workings of the national government and the local governments in our unitary system, given our far-flung archipelago in which travel and communication are difficult, time-consuming and increasingly more expensive. In both instances, the mediation between the state and society is weakened by the absence of cohesive and functional political parties, of an uninformed and politically disorganized citizenry, and the fragmentation of civil society organizations.

STRUCTURAL REFORM OF THE FILIPINO POLITICAL SYSTEM

To deal with our serious structural and systemic problems in governance, we are proposing major changes in our 1987 Constitution:

(1) a vertical restructuring—from the present centralized unitary system to a decentralized federal system;

(2) a horizontal restructuring—from the present presidential government with its separation of powers between the executive and legislative to a parliamentary government that would unify and coordinate those two functions in the parliament, and this principle will also apply to the new States of the Federal Republic;

(3) structural and functional reforms affecting the political party system and the electoral system;

(4) structural and functional reforms in the constitutional commissions concerned with the civil service, election administration, and auditing;

(5) structural and functional reforms in the federal and state bureaucracies.

We believe that these structural and systemic reforms will induce certain desired changes in the values, attitudes and conduct of our political leaders and citizens and in the performance of the affected governmental institutions, as well as the political parties. However, we cannot over-emphasize the need for our families, schools and colleges, private business, the church and religious organizations, civil society organizations, the media,

and cultural institutions to do much more to help the people improve their overall well-being and welfare, to develop a collective sense of national community and the common good, and to participate effectively in the democratic political process. We need to develop a civic culture that values responsible leaders and responsible citizens.

Lack of time and space compels us to present only the main arguments and features of the proposed changes to federalism and to parliamentary government which are elaborated in various papers and articles written by scholars and advocates.

II. WHY CHANGE OUR UNITARY SYSTEM TO A FEDERAL SYSTEM?

To summarize the theory of federalization underlying our proposal to transform the Filipino political system from its present centralized unitary structure to the decentralized structure of a federal system, let me restate our hypotheses as follows:

1. The Philippines has achieved sufficient national unity and democratization, including a measure of decentralization and local autonomy, as the basis for establishing a federal system. The latter will follow about a decade's transition of "regionalization" and increased local autonomy involving both the national government and the local governments.

2. Specifically, it has been the growing difficulties and frustration with the country's highly centralized unitary system that culminated in the 1987 Constitution's design for the development of participatory democracy, local autonomy, and

an active role for civil society in governance. (The latter was partly a reaction to the extreme centralization during the authoritarian regime that began in September 1972 and ended at the EDSA revolution in February 1986.)

3. Federalism will respond to the demands of local leaders for their release from the costly, time-consuming, stifling, and demoralizing effects of excessive centralization and controls by the national government in the present unitary system.

4. The structures and processes and responsibilities of the federation will challenge and energize the people and their state and local governments. Such further democratization will encourage creativity, initiative, and innovation, spur inter-state competition, and foster state and local self-reliance instead of continued dependency.

5. By removing the centralized structures that impose and sustain local dependence and stifle local initiative and resourcefulness, and thus providing greater freedom and home rule, a federal system will greatly increase the capacity of the people and the government to deal with the country's problems. They will be more interested in state and local governance closer to them that will deal with local poverty, unemployment, injustice, inadequate social services and infrastructure, and low productivity—the manifestations of under-development.

6. In a federal structure that will consolidate our 80 provinces into 8 to 10 larger, integrated and more

efficient and viable regions called states, substantial, faster and equitable development for the whole country is more likely to be achieved.

7. By participating in meaningful and challenging politics and governance at the state and local levels that impact directly on their lives, the people will be more empowered than if they continued to be alienated from their weak local governments and remained as spectators in the affairs of far away national government institutions in the nation's capital. Moreover, the people's liberty will be protected by the further dispersion of power in the government and the society.

8. By governing the nation through interdependence and interaction with the states as regional governments, using the national language and a global language (such as English), the federal government will be better able to achieve and sustain national unity and identity. At the same time, the states will be able to nurture, protect and enhance their regional cultures and institutions and also contribute to national cultural development. Together the federal government and the states will be able to develop and sustain the nation's cultural diversity and social pluralism.

9. By strengthening the nation-state's capacity to deal with its critical internal problems and to develop, a federal system will also be better able to respond to the external threats to national security and the challenges of globalization.

> 10. As a special metropolitan local government, Metro Manila, the present national capital, will have the structure of a state and will be able to deal more effectively with its problems as the nation's principal metropolis. A planned new federal capital at the former Clark Air Base in Central Luzon will enable the federal government to function more efficiently by having the principal institutions and offices of the federation located in proximity to one another and accessible to Metro Manila by rapid transit.

There are more conditions cited that would tend to favor the conversion of the unitary Filipino political system to a federal system. In this regard, it is in order to recall the conclusions drawn by two other Filipino advocates of federalism in the 1980s.

Referring to K.C. Wheare's theory in his book, FEDERAL GOVERNMENT, Rizal G. Buendia reached this conclusion which I quote with only minor editing:

> As far as the pre-conditions for federalism are concerned, the Philippines has relatively satisfied these, to wit:
>
> (1) a previous existence of the federating state as a former distinct colony and a nation-state with a distinct government of its own;
> (2) a divergence of economic interests with the federating unitary state leading to the desire of the component local governments to remain autonomous for certain economic, political and cultural purposes;

(3) geographical obstacles to effective unitary government, *i.e.*, large areas separated by bodies of water, mountains or other physical obstacles, poor communications, etc.;
(4) differences of culture, religion, language or nationality;
(5) dissimilarity of social institutions; and
(6) existence of different laws, norms, practices, and ways of life.

Citing Gabriel U. Iglesias' paper, "The Advantages of a Federal Form of Government," Buendia adds:

> Iglesias aptly describes the advantages of a federal structure for the country which are as follows:
>
> (1) it accords equal status and treatment to … the needs of all parts of the country regardless of their ethnic, religious, linguistic or geographical condition;
> (2) it leads to less pressure for separation from the nation-state as peculiar needs of various cultural groups are defined in accordance with their own customary and religious practices, and enhances the development of their resources based on their identified priorities;
> (3) it serves as an equalizing factor as it promotes a more balanced socio-eonomic and political development attuned to the needs of the region, enabling greater participation of the people … in the decision-making process;
> (4) it brings the government closer to the people and makes it sensitive to their problems and needs; and
> (5) it enhances national integration and unity.

Finally, Buendia sharply contrasts federalism with centralism thus:

> As federalism promotes democracy, centralism forces undue obedience. As federalism enhances Filipino nationhood, centralism forces unity and homogenization. As federalism expresses confidence in the ideals of liberty and freedom, centralism remains "the refuge of fear."

We should not go as far and overstate the case for federalism. Certainly, it is no panacea for solving our problems of governance. However, federalism offers a higher probability than our unitary system of enabling the people and the nation-state to realize the advantages and benefits stated above. A Federal Republic will improve governance, empower the people, and hasten our country's development.

III. WHY CHANGE TO A PARLIAMENTARY GOVERNMENT?

The case for a shift from our presidential system to a parliamentary system is summarized by Representative Florencio "Butch" Abad as follows in the study called *Shift*, published by the Ateneo de Manila University in 1997.

> Political institutions are critical in strengthening governmental effectiveness, particularly in developing countries like the Philippines. For this reason political institutional reforms cannot be, and should not be taken for granted, but must be made part and parcel of a comprehensive ... social, economic and political reform program.

> A strong case can be made that a parliamentary form of government is a more supportive evolutionary framework for developing effectiveness in governance and for consolidating democracy. From both the standpoints of theoretical predictability and empirical evidence, the parliamentary form of government has shown:
>
> (1) better ability to prevent gridlock and promote a cooperative relationship between the executive and legislature in policy-making;
> (2) greater capacity to ensure stability and continuity in governance and prevent military coups and extra constitutional action by the executive;
> (3) better capacity to ensure accountability in governance;
> (4) greater propensity to create a political environment conducive to the growth of coherent, disciplined and strong political parties, and
> (5) greater ability to encourage a multi-party setting and promote a more open and plural politics.

We should change the weakened President under the 1987 Constitution with a much stronger Prime Minister as the combined executive and legislative Head of Government in a parliamentary system. In our considered judgment, contrary to the intent of the framers of the 1935 and 1987 Constitutions and to popular expectation, the President of the Philippines is no longer a strong Chief Executive and Chief of State. First of all, the presidency has been weakened by constitutional restrictions on its powers instituted in reaction to the grave abuse of presidential power by the dictator Ferdinand Marcos. The blatant corruption of Marcos and President Joseph Estrada which led to their overthrow by a "people power" revolt has brought down the prestige of the highest office in the land. Moreover, because of the multiplicity of political parties

President Ramos and President Estrada were elected by a plurality vote, not by a majority vote of the citizens. Unless a dynamic and stable two-party system emerges, presidents will not obtain the mandate from a majority of the electorate.

Furthermore, as we struggle to consolidate our democracy after the Marcos dictatorship, the President has to reckon with the power of a politicized and assertive military and police that played crucial roles in the EDSA revolts that deposed Marcos and Estrada. The several coup attempts by military rebels against the Aquino administration and the various threats to the stability of the Arroyo administration, *vis-à-vis* the active role of the military and the police in maintaining law and order in the midst of rebellion and criminality, tends to weaken the presidency. These also divert huge amounts of scarce resources away from the administration's development programs.

Without the dependable and stable support of the President's political party and coalition in the Congress, she or he cannot govern steadily and effectively. The separation of powers and checks and balances between the President and the Congress often result in obstruction and delays that hamper legislation and policy-making. The fact that the Senators are elected nationwide like the President makes them feel that they too have a national mandate and the potential to be President someday, and this makes them assertive and even challenge the President to enhance their political stature. The President must also cope with the power of the House of Representatives and with the parochial concerns of many of the legislators. It would be better to have a unicameral Parliament.

With so many impoverished voters and the financial demands of hundreds of other candidates, the election of the President by the people nationwide is becoming excessively costly and corrupting. It takes billions to mount an effective

presidential campaign and this makes presidential candidates beholden to business tycoons and self-seeking financiers. Likewise, the nationwide senatorial elections and the congressional and local elections demand large sums of campaign resources. Consequently, elected officials are under pressure to use their power to recover their heavy expenses and repay their supporters.

In order to improve governance, we need to reform the structure, powers and functions of the executive and the legislative and also reform the political party system and the electoral system. To begin with, we propose the separation of the roles of the President as Head of Government and as Head of State, and then fuse the powers of the executive and the legislative in a unicameral parliamentary system.

Unlike under the 1935, 1973 and 1987 Constitutions, the Philippine President or *Presidente* in our Draft Constitution for a Federal Republic of the Philippines is not the Head of Government or Chief Executive and Head of State who is directly elected by the electorate nationwide. In sharp contrast, as in the parliamentary systems of India and Singapore, the *Presidente* is only the Head of State, a largely symbolic and ceremonial President, but still an important government official and national leader. He is elected directly by the members of the *Parlamento* (Parliament) and the members of the *Batasang Estados* (the State Assemblies) sitting together as one body, the *Asemblya Elektoral* (Electoral Assembly).

The combined legislative, executive and administrative powers of the Federal Government are vested in the *Parlamento* (Parliament) and the *Punong Ministro* (Prime Minister) who forms and heads the *Gabinete* (Cabinet) and the *Gobyerno* (the Government). We believe that this unified and dynamic parliamentary government will greatly facilitate: (1) the exercise

and coordination of governmental powers in pursuit of the desired policies and programs of the Government; (2) the change of the top governmental leadership whenever necessary; (3) the development of purposeful and effective political parties; and (4) the empowerment of the people in choosing their legislative-executive *Parlamentaryos* or members of Parliament. The accompanying change from our unitary system to a federal system will further empower the citizens.

The conflict between the President and the Congress and the gridlock in policy-making and decision-making that often mars the presidential system would be minimized in the parliamentary system. The relative ease in changing the Head of Government in the Parliament through the initiative of the Prime Minister or a vote of no confidence in him or her, unlike the extreme difficulty of removing the President by impeachment, should also make it unnecessary for the people to resort to the extraordinary means of "people power" and its consequent instability.

In view of the shift to a federal system and to a parliamentary government, some basic changes in the structure and functions of the Judiciary are likewise proposed. These include the division of the courts into Federal Court of Appeals -- to the State capitals, and the establishments of the Tribunal Konstitutional *(*Constitutional Tribunal) to decide on cases involving the constitutionality of laws and official decisions and actions, and conflicts among the *Federasyon* and the *Estados*, between and among the *Estados*, and between the state and the citizens.

At the same time, time-honored principles and practices ensuring the rule of law and independence of the judiciary, human rights and due process of law, and the selection of justices and judges are preserved in the revised article on the Judiciary.

IV. "A DRAFT CONSTITUTION FOR A FEDERAL REPUBLIC OF THE PHILIPPINES WITH A PARLIAMENTARY GOVERNMENT BY 2010"

Background

The pro-American Filipino *Federalistas* in the early years of American colonial rule advocated the annexation of the Islands as a State of the United States of America. However, the new colonial power did not like the idea. The Americans retained the centralized unitary system under Spanish colonial rule, which had been the system embodied in the Malolos Constitution. The Americans also adopted their presidential system in the Islands and governed through their resident Governor General until 1935. To ensure the approval of the 1935 Constitution in Washington, the Filipino framers adopted the familiar unitary system and presidential system.

Some leaders in Mindanao, among them Udtog Matalam and Reuben Canoy, would later advocate independence from the Republic of the Philippines, or a federal system that would grant Mindanao substantial regional autonomy. The Moro National Liberation Front and the Moro Islamic Liberation Front would advocate secession from the Republic and, alternatively, real regional autonomy. In 1981 Salvador Araneta published a draft constitution for a federal republic which he called the *Bayanikasan Constitution.* The provisions in the 1987 Constitution for creating the autonomous regions for Muslim Mindanao and the Cordilleras and for strengthening local autonomy responded to the increasing demands against excessive centralization and for federalization. Towards the 1992 presidential election, Senator John Osmeña, the *Laban ng Demokratikong Pilipino* and the *Lakas-NUCD-UMDP* advocated a shift to a federal system.

At the same time, the change from the presidential system to a parliamentary system has been gaining ground. In the 1986 Constitutional Commission, the *parliamentarists* lost to the *presidentialists* by only one vote. Speaker Jose de Venecia and the Philippine Constitutional Association (Philconsa) are pushing for change to a parliamentary government.

In the last three years a group of grassroots leaders connected with the NGOs *Kusog Mindanao* (Mindanao Force) and *Lihuk Pideral Mindanao* (Mindanao Federalist Movement), led by Rey Magno Teves, Lito Lorenzana, Gaudencio Sosmena, Jr. and Michael Mastura, among others, and Senator Aquilino Pimentel, Jr. have spearheaded a federalist movement that is spreading to the Visayas and some parts of Luzon. With research support from the Philippine office of the Konrad Adenauer Foundation of Germany, through Dr. Willibold Frehner, the movement is winning supporters across the country among other NGOs, local leaders, and academics. By joining advocates of parliamentary government, the Federal movement promises to become a broader, nationwide constitutional reform movement, the *Kilusang Pideral Pambansa* (National Movement for Federalism).

As one of the advocates of federalism in the academe, the author became involved in the movement. In September 2001 he was tasked with the writing of a "Draft Constitution for a Federal Republic of the Philippines with a Parliamentary Government by 2010." As chair of the Committee on Constitutional Continuity and Change of the Philippine Political Science Association formed in 1998, he has involved Committee members and others in the discussion and improvement of the draft. Convenors of the *Kilusang Pideral Pambansa* (KPP) then reviewed the document and adopted it as a common working draft for the movement's continuing advocacy.

The main federalist and parliamentary features of the "Draft Constitution for a Federal Republic of the Philippines with a Parliamentary Government by 2010" are summarized below.

MAIN FEATURES OF THE PROPOSED FEDERAL REPUBLIC OF THE PHILIPPINES WITH A PARLIAMENTARY GOVERNMENT IN THE DRAFT CONSTITUTION

General Nature

1. A constitutional democracy and a representative democracy or republic, with a federal structure and a parliamentary government.
2. Retains most of the state principles and policies and the bill of rights in the 1987 Constitution.
3. Adds a Bill of Duties and Responsibilities of citizens.
4. Adds an article on promoting the development of a meaningful, responsive, stable, and accountable party system and a more representative, efficient and responsible electoral system.
5. Directs the voters to vote for the political party of their candidates, rather than directly for their candidates, to emphasize political party responsibility and accountability for their party candidates and for the party's policy ideas.

Federal-State Relations and Inter-State Relations

1. Defines the respective powers of the *Federasyon* (the Federation and Federal Government), of the *Estados* (States), and their concurrent powers.
2. Consolidates the local governments in the existing 16 administrative regions, Metro Manila, and the Autonomous Region of Muslim Mindanao into 11 *Estados* or autonomous regional governments, namely: (1) Northern Luzon; (2) Cordillera,

(3) Central Luzon, (4) Metro Manila, (5) Southern Luzon, (6) Bicol, (7) East Visayas, (8) West Visayas-Palawan, (9) North-West Mindanao, (10) South Mindanao, and (11) Bangsamoro.

3. Upholds the supremacy of Federal law over State law in case of conflict, and vests residual powers in the *Parlamento* (Parliament).
4. Obligates the *Estados* to comply with and enforce the Federal Constitution and help maintain the integrity and independence of the Federal Republic.
5. Directs each *Estado* to respect the public acts, registries and judicial proceedings of all the other *Estados.*
6. Provides for the Federal capital to be located and developed in the area of the Clark Special Economic Zone (the former Clark Airbase in Pampanga).

The States-Local Government Relations

1. Defines the constituent local governments of each *Estado* (State) as the cities, municipalities and barangays within its territory, and the provinces in the *Estado* as its administrative subdivisions.
2. Vests local government with the authority and autonomy that will enable them to perform their functions efficiently and effectively, to attain their full potential as self-reliant communities, and to collaborate with the *Estados* and the *Federasyon* (the Federation) in achieving common goals for their mutual benefit.
3. Authorizes the *Batasang Estado* to frame a State constitution that shall be ratified by the people in the *Estado* in a plebiscite.
4. Favors the consolidation of local governments over their fragmentation, in order to make them effective and viable.
5. Authorizes the *Estado* and its local governments to create their own sources of revenues and collect them.

6. Authorizes the *Estado* and its local governments to have their just share of national taxes.
7. Authorizes the *Estado* and its local governments to have an equitable share in the utilization and development of the national wealth within their respective areas.
8. Enjoins the *Batasang Estado* (State Assembly) to enact a State and Local Government Code.
9. Calls for a liberal construction of the powers and functions of local governments.

The Batasang Estado *(State Assembly)*

1. Vests both legislative and executive powers in the unicameral *Batasang Estado* (State Assembly), the *Estado* having a parliamentary system like the *Federasyon* (Federation).
2. Provides for the election of as many *Diputados* or members of the *Batasang Estado* as the number of *Parlamentaryos* or members of the *Parlamento* elected in all the cities and municipalities comprising the provinces in the *Estado.*
3. Provides for the election of the *Diputados* in the same legislative districts where the *Parlamentaryos* or members of the *Parlamento* are elected.
4. Allows *Diputados* a term of office of five years unless the *Batasang Estado* is sooner dissolved and new elections are held.
5. Prohibits the *Diputados* from holding any other office and prevents conflict of interest in their actions.
6. Authorizes the *Gobernador Estado* (State Governor) as Head of Government of the *Estado* to approve or veto bills passed by the *Batasang Estado.*

The Gobernador Estado, Sangguniang Estado, *and* Gobyerno Estado *(The State Governor, the State Council, and the State Government)*

1. The *Gobernador Estado* is the Head of Government of the State elected by the *Diputados* or members of the *Batasang Estado.*

2. The *Gobernador Estado,* upon appointment by the *Presidente* (President of the Federal Republic), shall constitute the *Sangguniang Estado* (State Council or Cabinet) and form the *Gobyerno Estado* (State Government).
3. The *Diputados* shall make up at least three fourths of the *Secretaryos* or members of the *Sangguniang Estado; the rest may be individuals who are not Diputados.*
4. The *Gobernador Estado* and the *Sangguniang Estado* shall be responsible to the *Batasang Estado* for the program of the *Gobyerno Estado.*
5. The *Gobernador Estado* shall appoint the *Bise Gobernador, the Secretaryos* who will head the various executive departments, and a permanent or career Director General for each executive department of the State civil service.
6. The term of office of the *Gobernador Estado* shall end on the date of the election of his or her successor by the *Batasang Estado.*
7. On his or her own initiative, the *Gobernador Estado* may dissolve the *Batasang Estado* and call for a new election of *Diputados.*
8. If the *Gobyerno Estado* loses a vote of confidence in the *Batasang Estado,* the *Batasang Estado* shall be dissolved and a new election of *Diputados* shall be held.

The Presidente ng Pilipinas *(President of the Philippines)*

1. The *Presidente* as the Head of State symbolizes the sovereignty of the people and the unity and solidarity of the nation; no *Presidente* shall serve for a second term.
2. The *Presidente* is elected for a term of five years by the members of the *Parlamento* (Parliament) and all the *Gobernadores Estado* sitting together as the *Asemblya Elektoral* (Electoral Assembly).
3. The *Presidente* shall appoint the *Punong Ministro* (Prime Minister) following the latter's election by the *Parlamento* (Parliament).

4. The *Presidente* may address messages to the *Parlamento*; he or she receives the annual reports of the *Kataas-taasang Hukuman* (Supreme Court), the *Tribunal Konstitusyonal* (Constitutional Tribunal), the *Mataas na Hukumang Estado*, and the Federal Constitutional Commissions.
5. The *Presidente* shall appoint the *Gobernador Estado* following his or her election by the *Batasang Estado* (State Assembly); and shall accredit ambassadors and special envoys and receive ambassadors and diplomatic envoys duly accredited to the Federal Republic.
6. Upon the advice of the *Punong Ministro*, and not without such advice, the *Presidente* shall also exercise the following powers and functions: declare a state of war or national emergency; convene the *Parlamento* following the election of its Members; dissolve the *Parlamento* on the initiative of the *Punong Ministro*, or when the *Punong Ministro* loses a vote of confidence; call the *Parlamento* to a special session; promulgate all laws, treaties and international agreements; appoint the regular members of the Judicial and Bar Council; appoint the *Punong Mahistrado* (Chief Justice) and all Members of the *Kataas-taasang Hukuman* (Supreme Court); appoint the *Tagapangulo* (Chairperson) and all Members of the *Tribunal Konstitusyunal* (Constitutional Tribunal); appoint the Chairperson and members of Federal Constitutional Commissions; appoint the Chief of Staff and the heads of all the armed services; appoint other senior officers of the *Federasyon*.

Punong Ministro, Gabinete, and Gobyerno
(The Prime Minister, the Cabinet, and the Government)

1. The *Punong Minis*tro, the Head of Government of the Federal Republic of the Philippines, shall be elected by a majority of the *Parlamentaryos* or members of the *Parlamento* (Parliament).

2. The *Punong Ministro* and the *Gabinete* (Cabinet) under him or her shall be responsible to the *Parlamento* for the Program of Government.
3. The *Punong Ministro* may appoint a *Diputado Punong Ministro* (Deputy Prime Minister) from among the *Parlamentaryos;* and a Permanent Secretary for each ministry;
4. The *Punong Ministro, Diputado Punong Ministro* or any member of the *Gabinete* may resign from his or her position without vacating his or her seat in the *Parlamento;*
5. The *Punong Ministro* shall have control and supervision of all Federal ministries, bureaus, agencies, and offices and shall recommend to the *Presidente* the appointment of the judges of all Federal courts below the Supreme Court, the heads of Federal bureaus, agencies and offices, the officers of the armed forces of the Philippines from the rank of brigadier general or commodore, and all other Federal officers whose appointments are not otherwise provided for, and those whom the *Punong Ministro* may be authorized by law to appoint.
6. The *Punong Ministro* shall be the Commander-in-Chief of all armed forces of the Philippines. In case of invasion or rebellion, when the public safety requires it, the *Punong Ministro* may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the *Punong Ministro* shall submit a report in person or in writing to the *Parlamento.*

The Parlamento ng Pilipinas *(Parliament of the Philippines)*

1. The legislative and executive powers of the Federal Republic of the Philippines are vested in the unicameral *Parlamento ng Pilipinas* (Parliament of the Philippines) which shall be composed of not more than two hundred and fifty

Parlamentaryos (Members of Parliament or MPs), unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the *Estados* (States) and their constituent cities and municipalities, Metro Manila, and the Federal Capital.

2. The *Parlamento* shall exercise its exclusive and concurrent legislative and executive powers vested in the *Federasyon* (Federation) by the Constitution.
3. Seventy percent of all the *Parlamentaryos* shall be elected in the legislative districts from a party list of the registered political parties and thirty percent shall be elected nation-wide from a second party list of registered political parties other than those in the first party list.
4. The term of office of the *Parlamentaryos* shall be five years, which may be shortened in case of the dissolution of the *Parlamento* and the calling of a new election for its members.
5. The *Parlamento* may be dissolved by the *Presidente* on the initiative of the *Punong Ministro,* or by a vote of no confidence in the *Punong Ministro* delivered by a majority of the members of the *Parlamento;* either event shall be followed by the call of the *Presidente* for a new election for *Parlamentaryos* .
6. No *Parlamentaryo* shall serve for more than a total of fifteen years.
7. The *Parlamento,* unless sooner dissolved, shall continue for five years from the date of its first meeting and no longer.

The Judiciary

1. Judicial power is vested in the Federal courts and the *Estado* or State courts.
2. The *Kataas-taasang Hukuman,* the *Tribunal Konstitusyonal,* the Federal Court of Appeals, the *Sandiganbayan,* and the Court of Tax Appeals are under the jurisdiction of the *Federasyon (*Federation). The *Kataas-taasang Hukuman* shall have adminis-

trative supervision over all Federal courts and the personnel thereof, except the *Tribunal Konstitusyonal.*

3. The Regional Trial Courts, the Municipal Trial Courts, the Municipal Circuit Trial Courts, Municipal Trial Courts in the Cities, the *Sharia* Circuit Trial Courts and other inferior courts are under the jurisdiction of the *Estados* (the States). All State courts shall be under the administrative supervision of the *Mataas na Hukumang Estado* (State High Court) located in the capital city of the *Estado.*
4. The *Kataas-taasang Hukuman* shall have the same powers vested in the Supreme Court in the 1987 Constitution except that the jurisdiction of the lower courts will be vested in the *Estados,* and the *Tribunal Konstitusyonal* (Constitutional Tribunal) assumes jurisdiction in cases involving various issues of constitutionality.
5. The *Tribunal Konstitusyonal* shall have powers: to resolve conflicts between the *Federasyon* and the *Estados,* between and among the *Estados,* between a citizen or citizens of an *Estado* and another *Estado* and between government instrumentalities, and to rule on the constitutionality of the acts of Federal and State officers.
6. The Members of the *Kataas-taasang Hukuman* and the *Tribunal Konstitusyonal* and the judges of lower Federal courts shall be appointed by the *Presidente* from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy.
7. The *Tagapangulo* (Chairman) and Members of the *Mataas na Hukumang Estado* (State High Court) and the judges of other State courts shall be appointed by the *Gobernador Estado* (State Governor) from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy.
8. Within five years from the promulgation of this Constitution, the *Kataas-taasang Hukuman* shall supervise the full decentralization of the Federal Court of Appeals to the capital cities of

the *Estados* and the complete transfer of jurisdiction of the various lower courts from the *Kataas-taasang Hukuman* to the *Mataas na Hukumang Estados* (State High Courts).

V. WHEN IS THE BEST TIME TO REVISE OUR 1987 CONSTITUTION AND ADOPT A NEW CONSTITUTION?

Our present Constitution was barely six years old when we heard the first proposal to amend it. In 1997, it was proposed that we lift the constitutional term limits and allow elected officials, like President Ramos himself, to seek re-election in 1998. A well organized opposition to the self-serving amendments that could open the door to other unwanted changes blocked the initiative. Then President Estrada suggested amendments that would liberalize the economy or open it further to foreign participation in our age of globalization. This too was shot down by popular protest. In both instances, what prevailed were the people's good sense against changing the Constitution too soon, and for dubious reasons, and their lack of trust in their national leaders.

Recalling our national experience, the best time to write a new constitution is at a critical juncture, an epochal event, in our political history. The Filipino Revolution led to the Malolos Constitution. The 1935 Constitution began our decade transition under the Commonwealth to regain political independence in 1946. The 1971 Constitutional Convention was impelled by a public outcry for basic reforms. This was underlined by the resurgence of the communist movement with its New People's Army and the radical labor and student movement, in the wake of the unification and ascendancy of the People's Republic of China under Mao. The 1987 Constitution was of course the fruit of the long struggle against the Marcos dictatorship and the need for a new constitution to replace the illegitimate Marcos 1973 Constitution.

Our continuing economic crisis and the political turmoil that led to EDSA II and the siege on Malacañang on May 1, 2001 have aggravated our chronic problems of poverty, unemployment, injustice, rebellion, and criminality, and deepened our sense of political instability and lack of good governance. While these may not add up to another "best time" to rewrite the Constitution, they may very well suggest that we are approaching "a good time" for it. Meanwhile, basic constitutional reforms are being proposed, such as changing from presidential to parliamentary government and from the unitary to a federal system. Fundamental reform of our meaningless political parties and our electoral system is also becoming imperative. And there are many more good ideas being proposed for change.

In our considered view, however, we should be very deliberate in rewriting the 1987 Constitution. We need time for our people to study our experience under it. Time to study, discuss and debate the many ideas for change. We should not repeat the haste under pressure in making our present Constitution. There is also the practical reason that President Arroyo and her political coalition will object to changing the Constitution before 2004, for they would not wish for her to forego the opportunity of winning a full term of six years in that year. And whoever is elected President in 2004 will serve until 2010. Just as well.

Let us therefore aim to write a new constitution to take effect by 2010 at the latest. However, the process of constitutional study, discussion and change should be intensified and carried out nationwide. For the first time in a decade, a slim majority (52 percent) of the people in a national survey by Pulse Asia in December 2001 favored changing the 1987 Constitution. This is a significant shift in public opinion that may be expected to gain support in the coming years.

Various groups around the country are conducting studies on constitutional change and proposing and discussing specific changes. This particular endeavor of the *Pambansang Kilusang Pideral at Parlamentaryo* (the National Movement for Federalism and Parliamentary Government) is only one of them. Political leaders and parties should be asked to declare their position on the emerging issues of amending or revising the 1987 Constitution.

VI. CONCLUDING NOTE

The *Kilusang Pideral Pambansa* (*KPP*) advocates the adoption of a new Constitution for a Federal Republic of the Philippines with a parliamentary government by 2010.

Towards this vision and goal, the *KPP* will continue to hold meetings and workshops in various parts of the country to consult with leaders and members of civil society organizations and academic institutions on the issues and ideas for revising our 1987 Constitution. *KPP* will also consult more political, business and religious leaders and media practitioners.

To help *KPP* focus its ongoing consultations on constitutional reform, it asked the author to prepare a "Draft Constitution" for a Federal Republic of the Philippines with a parliamentary form of government. We have examined in this paper the main features of the "Draft Constitution" and the background and reasoning behind the proposed changes.

The "Draft Constitution" draws on the 1987 Constitution, on the article on citizens' duties of the 1973 Constitution, and on many other constitutions around the world. It reflects the constitutional reform ideas of the author, a few consultants, several colleagues in the *KPP* and in various universities, and the cumulative thinking

and reflections of many more scholars and political leaders in the country and abroad.

As a "Draft Constitution," the document is no more than a working draft subject to continual change and refinement as more and more people are involved in the collective process of reforming our political system. More than in the making of the 1935, 1973, and 1987 Constitutions, many more Filipinos in the coming years will have opportunities to learn why we need a new constitution and what changes and innovations it might have. We hope the study and improvement of the "Draft Constitution," among various other proposals, will create some of those opportunities.

Learning about political development and constitutional change over five decades, one is humbled by the tremendous intellectual and moral debt that has been incurred and grateful for the enduring hope and optimism about the future despite the past. We can surely look forward positively if, transcending ourselves, we can learn from the experience of more progressive nations and political systems around the globe.

SURVEY EVIDENCE IN TRADEMARK CASES: ADMISSIBILITY AND WEIGHT*

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I. INTRODUCTION

Trademark litigation often deals with issues such as likelihood of confusion between two marks, the existence of secondary meaning, the dilution of a trademark and genericness. Obviously, these issues involve questions of fact which are better ascertained and resolved in the marketplace than in the courtroom.

The questions of whether two marks are confusingly similar, whether a mark has acquired secondary meaning, whether a mark has become generic, and whether dilution has occurred are properly answered when there is sufficient evidence of public opinion. These questions cannot or should not be left solely to the discretion of the trier of fact.

Justice McFarland of the Supreme Court of Ontario, in a case of trademark infringement and passing off of a tradename,

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* This is a modified version of a lecture delivered by Atty. Rogelio A. Vinluan during a symposium on March 15-17, 2002 sponsored by the Asian Patent Attorneys Association and Fédération Internationale Des Conseils En Propriété Industrielle on March 15-17, 2002 at Newport Beach, California, U.S.A.

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gave the following opinion on the admissibility of survey evidence:

> Without such evidence, how am I to otherwise determine whether there is likely to be confusion when it is the law as I understand it – that what I think personally is immaterial? …
>
> To attempt to make such a determination without regard to evidence of what others may think or have said would to my mind be nothing more than an exercise in pure judicial fantasy and of not much assistance at all …
>
> Factual matters must be determined on the evidence and the only evidence before me was of a professionally conducted survey by experts in their field which was of greater assistance to the court than to proceed in the archaic fashion of parading any number of random witnesses before the court to perform precisely the same function as did the surveyor.[1]

The determination of public opinion is undoubtedly necessary in determining whether a likelihood of confusion exists, whether dilution has occurred or whether a mark has acquired secondary meaning. Judges often rely on their own perception of what the public pulse is, but this may or may not be determinative of the true and relevant public sentiment. In cases where these matters are in issue, the subjective mental association and reaction of prospective purchasers to the contending marks is often the central question to be answered. Evidence consisting of the testimony of the owner of the mark or of people with close

1 *Sun Life Assurance Co. of Canada v. Sunlife Juice Ltd.*, 22 CPR (3d) 244, 249 (Sup. Ct. of Ontario 1988), *as cited in* 80 TMR 71, at 71 (1990).

dealings with the mark, business and advertising records and other evidence that are presented to show confusion, dilution or secondary meaning merely appeal to the subjective impressions of the judge and are oft bereft of objectivity, being evidence presented by one of the contending parties in support of its position.

Viewed in the foregoing context, there is therefore a need for an objective and scientifically accurate means of showing prospective purchasers' mental associations with regard to competing marks in cases of confusing similarity, dilution, secondary meaning and other cases where the opinion of the relevant segment of the public is material to the final determination of the issue. It cannot be gainsaid that introducing a sample of the mental association of a whole class of purchasers affected by an issue, for example, of the likelihood of confusion between two marks, is fraught with concerns regarding the cumbersome nature of obtaining the information, the reliability and accuracy of the information and then the manner of presenting the same before the court. Thus, there is also the concomitant need that this material evidence should be convenient to obtain while at the same time truly reflective of the mental associations of the class of purchasers affected by the issue.

The medium by which the objective and accurate measure of public opinion may be conveniently presented before the court is through the use of survey evidence.

II. SURVEY EVIDENCE

a) Definition

Survey evidence is the term used to describe the result of a public opinion poll survey taken by statisticians and presented before a court as evidence to prove a particular fact in issue.

A poll or opinion survey is defined in the manual to include "interrogation of part of a population whose views or attitudes are … relevant to the litigation."[2] Technically speaking, a poll or opinion survey is a scientific method of presenting evidence of mental associations of a given group of people by asking a representative sample of the relevant target group. The value of survey evidence lies in the fact that it is the only practical manner by which to measure the characteristics of a large group of persons who cannot all be possibly asked to testify as witnesses at a trial.

Surveys are usually carried out by a team of individuals made up of a survey director who supervises the overall conduct of the survey, a survey supervisor who is charged with giving instructions to the interviewers, the interviewers who conduct the surveys and, of course, the interviewees. Surveys are often conducted through shopping mall studies, phone surveys, the Internet, and the like. Individuals gather data through written and oral questionnaires, telephone and personal interviews, and other methods.[3] In the field of trademark litigation, surveys are used to prove and disprove issues such as likelihood of confusion, secondary meaning, dilution and genericness.

In the United States, survey evidence was first sought to be used in trademark litigation as far back as the early twentieth century. However, the courts were reluctant to accept such evidence or find it persuasive. It was not until the 1950's that survey evidence was held to be admissible on the particular issue of likelihood of confusion.[4] Today, survey evidence is widely used in trademark infringement cases in the United States to the extent

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2 5 WEINSTEIN and BERGER, WEINSTEIN'S EVIDENCE 901-112 (1982).

3 Bird, Streamlining Consumer Survey Analysis: An Examination of the Concept of Universe in Consumer Surveys Offered in Intellectual Property Litigation, 88 TMR 269, at 269 and 270 (1998).

4 Edelman, Failure to Conduct a Survey in Trademark Infringement Cases: A Critique of the Adverse Inference, 90 TMR 746, at 747(2000).

that many of its courts are prone to draw an adverse inference against a plaintiff on the issue of likelihood of confusion if a survey is not introduced.[5]

b) Admissibility of Survey Evidence

In the United States, the use of survey evidence was initially challenged on many fronts. But the most notable objection to its admissibility is its hearsay character, inasmuch as a survey is based on statements made by persons outside of court who are not subject to cross-examination. To get a clearer picture on the evolution of survey evidence *vis-à-vis* the hearsay rule in the United States, a brief historical background and a discussion of the Federal Rules of Evidence (FRE) relating to hearsay are in order.

Rule 801 (c) of the FRE defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." A statement may be oral, written or a non-verbal act. As defined by Rule 801 (a) of the FRE, "a 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The hearsay rule provides that hearsay evidence is excluded as evidence mainly because it is not considered as a trustworthy statement.

The traditional underlying rationale of the hearsay rule has been explained by the U.S. Supreme Court as follows:

> The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally

5 *Ibid.*

> excluded because they lack the conventional indicia of reliability; they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subjected to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.[6]

Survey evidence was first objected to as being hearsay because of the fact that a survey or a public opinion poll is merely a compilation of hearsay statements or responses made by the interviewees. The courts believed that by using surveys the researchers were using all of the interviewees as witnesses and there was no opportunity to cross-examine them or to note their demeanor. However, later surveys were held to be admissible to show evidence of the interviewees' state of mind, which is an exception to the hearsay rule. Surveys were thus considered as a sampling of the outward manifestation of the physical fact to be proved (*i.e.*, state of mind) and thus involved no hearsay. As stated by the Federal Circuit Court of Appeals:

> The hearsay objection is not well-taken. The persons who did the interviewing testified as to the results of their surveys. Their testimony was offered solely to show what they found. Only the credibility of the persons who took the statements was involved and they were before the court. The technical adequacy of the surveys was a matter of the weight to be attached to them.[7]

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6 *Chambers v. Mississippi* 410 U.S. 284, 298, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

7 2 MCCARTHY, TRADEMARKS and UNFAIR COMPETITION 511 (1973), *citing Standard Oil Co. v. Standard Oil Co.* (1958, CA10) 252 F.2d 65, 76 A.L.R. 2d 600.

Rule 803 (3) of the FRE expressly considers statements showing the state of mind of the declarant as non-hearsay. This rule reads as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> x x x
>
> (3) then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Under this rule, an out-of-court statement, regardless of its truth, may imply knowledge, intention, physical or emotional feeling, or other state of mind of the declarant. If offered to prove such state of mind, the statement is not hearsay.

In a trademark infringement case, therefore, the statement of an interviewee as reflected in the survey result stating that he believes that a product bearing an infringing mark comes from a person who is not the true manufacturer of the product may be testified to by a witness and offered into evidence not to prove the act of infringement but that the interviewee, at the time of the survey, exhibited a confused reaction or state of mind as to the origin of the product involved.

That the response to a survey question is indicative of the interviewees' state of mind so as to be considered non-hearsay has been explained as follows:

> It has been said that "since the main objection to the reception of hearsay evidence, which has been defined as evidence which derives its value, not solely from the credit to be given the witness upon the stand, but in part from the veracity and competency of some other person, is that the declarant is not present and available for cross-examination, and this is obviated when the witness on the stand is considered as the declarant and the results of a poll or survey to which he testifies are considered merely as indicating the state of mind of the interviewees, thus eliminating the necessity that they be cross-examined, such 'state of mind' theory has been held to support the admissibility of the evidence in a number of decisions … it appearing in all these cases that the persons who did the interviewing, or some of them, appeared as witnesses and were available for cross-examination."[8]

But even if survey evidence is considered hearsay, such evidence may indirectly be admitted under Rule 703 of the FRE. Basically, Rule 703 recognizes that under appropriate circumstances, hearsay may be relied on as the foundation for the testimony of an expert. In particular, Rule 703 of the FRE permits an expert to testify as to an opinion or inference based on facts or data reasonably relied on by experts in a particular field which need not be admissible in evidence. Rule 703 reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those

8 76 A.L.R. 2d 630.

> perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Thus, under Rule 703 of the FRE, even if the statements of interviewees as reflected in a survey are considered hearsay, the testimony of an expert witness – *e.g.*, the survey supervisor – called upon to testify on the results of the survey is considered admissible.

Therefore, as far as U.S. trademark litigation is concerned, the admissibility of survey evidence is a settled matter. The issue in most trademark cases when survey evidence is introduced is focused on the validity of the techniques employed and the weight to be given to the survey results.

In the Philippines, however, unlike in the United States, survey evidence is seldom, if at all, used in trademark litigation. Apart from the time and costs involved in conducting a trademark survey, the Rules of Court present an obstacle to the use of survey evidence in the Philippines because of the hearsay rule. The hearsay rule is embodied in Section 36, Rule 130 of the Rules of Court, which reads:

> Sec. 36. *Testimony generally confined to personal knowledge; hearsay excluded.* – A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these rules.

Based on the aforementioned provision, the applicability of the hearsay rule is readily apparent. Essentially, the introduction

of survey evidence as a method of proving public opinion requires the admission of statements of the persons interviewed who are not present before the court and are therefore not subject to cross-examination. Hence, under the hearsay rule, the presentation of survey evidence is legally objectionable under the Rules of Court as there is no opportunity to cross-examine the interviewees on the oral or verbal statements they allegedly made during the survey. Otherwise stated, the hearsay rule operates to bar the testimony of a witness (*i.e.*, survey supervisor, interviewer, etc.) who merely recites based on the survey results what an interviewee has told him, whether orally or in writing.

Although the Rules of Court provide for eleven exceptions to the Hearsay Rule, survey evidence does not fall within the ambit of any of these exceptions. However, such evidence may be admissible based on the "independently relevant statements" doctrine.

Under this doctrine, the hearsay rule does not apply to independently relevant statements, or those statements which are relevant independently of whether they are true or not. In effect, the doctrine considers as admissible the presentation of relevant statements made out of court the purpose of which is not to prove the truth of the facts asserted therein but only the making of the statements. For the doctrine to operate as an exception to the hearsay rule, it must be established that 1) the out-of-court statements are not being offered to prove the truth of the facts asserted in the statements; and 2) the making of the statement must be independently relevant regardless of its truth or falsity.

Applying this doctrine to the use of survey evidence in trademark litigation, it may be stated that the testimony of a witness (*i.e.*, survey supervisor, interviewer) as to what the interviewee said during a survey is not being offered to show the truth of what the interviewee said but that the statements were in fact made by

the latter. In an unfair competition case, for example, a hearsay objection may be sufficiently addressed by arguing that the survey results are not being offered to prove the truth or falsity as to the issue of whether or not the a segment of the public was able to distinguish and differentiate the two trademarks. Instead, it may be posited that the survey results are being offered simply as evidence of the fact that the statements were made.

While we do not have a counterpart provision in our Rules of Court in respect of Rule 803 (3) of the FRE making a statement of the declarant's state of mind as non-hearsay, such statement, however, is obviously non-hearsay under the doctrine of independently relevant statements. If an out-of-court statement, regardless of its truth, is presented merely to prove the state of mind of the declarant, it is an independently relevant statement and is therefore non-hearsay. The consequential fact is the making of the statement, not the truth or falsity of the facts contained in the statement; otherwise stated, the statement has a legal significance independent of the declarant's desire or capacity to be accurate and truthful[9]. So viewed, such a statement would escape the hearsay rule because it is not offered for its truth, but to show circumstantially the state of mind of the declarant in question.[10]

An authority on remedial law, former Supreme Court Justice Florenz D. Regalado, supports the aforesaid view. As stated in his compendium on remedial law:

> Thus a witness may testify to the statements made by a person if, for instance, the fact that such statements were made by the latter would indicate the latter's mental state or physical condition. This is known as the doctrine of independently relevant

9 LILLY, AN INTRODUCTION TO THE LAW ON EVIDENCE 183 (2d Ed. 1987).

10 *Id*. at 192.

statements (31 C.J.S. 990-1005), that is, independent of whether the facts stated are true or not, they are relevant since they are the facts in issue or are circumstantial evidence of the facts in issue.[11]

III. PRESENTATION OF SURVEY EVIDENCE

a) Requisites of Survey Evidence

The party intending to offer survey evidence has the burden of laying a sufficient foundation or basis for the introduction of survey evidence. In order that the results of a survey may be given sufficient probative value, the proponent must first establish that the survey was conducted in an unbiased, reliable and accurate manner. Central to the matter of the weight to be given to this type of evidence are the techniques used by the data gatherers to obtain the data, that is, the opinion of the relevant sector of the public. The manner of obtaining the data should be impartial. There should be no showing that the techniques used by the data gatherers were biased to obtain a desired survey result in favor of a particular litigant, lest the result of the public opinion poll or survey be given little probative value by the court. "The admissibility of survey or sampling results depends upon two factors: necessity and trustworthiness. Necessity does not mean total inaccessibility of firsthand evidence; 'great practical inconvenience or the need for extended trial time or the expense' of more conventional methods of proof will support use of survey evidence."[12]

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11 II REGALADO, REMEDIAL LAW COMPENDIUM 620 (8th Ed. 2000)

12 5 WEINSTEIN and BERGER, WEINTEIN'S EVIDENCE 904-114 (1982), *citing United States v. Aluminum Co. of America,* 35 F. Supp. 820, 823 (S.D.N.Y. 1940), *Alexander v. Bowles*, 149 F.2d 93, 96 (9th Cir. 1945) and the Manual for Multidistrict Litigation 2.612 (1969).

There is no standard formula by which the public pulse may be ascertained, but there is a general agreement that the manner by which the survey was conducted will weigh heavily on the value that a court will give to the results of a particular survey. "The manner by which the survey was conducted is usually the most important aspect of establishing its reliability and accuracy. The proponent of the survey evidence must show that the survey was conducted in accordance with accepted principles of survey research, namely that: (1) the proper "universe" was selected and examined; (2) a representative sample was drawn from that universe; (3) a fair and correct method of questioning the interviewees was used; (4) the persons conducting the survey were recognized experts; (5) the data gathered was accurately reported; (6) the sample, the questionnaire, and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys; (7) the sample and the interviews were conducted independently of the attorneys in the case; and (8) the interviewers were adequately trained in the field and had no knowledge of the litigation or the purposes for which the survey was to be used."[13] The first three principles make up the survey's "design" component while the remaining principles make up its "implementation" component.

Even with the aforementioned guide on how to properly and professionally conduct a public opinion poll or survey, numerous questions still arise regarding the manner by which a survey should be or is conducted, like: What is a proper universe, a representative sample, a fair method, a recognized expert, an accurate report, a generally accepted standard and an adequately trained interviewer?[14] In addition to being able to show that the manner by which the survey or public opinion poll was taken

13 47 POF2d 677.

14 Weiss, The Use of Survey Evidence in Trademark Litigation: Science, Art or Confidence Game?, 80 TMR 71, at 78 (1990).

conforms to the standards that have been set, the proponent of the survey evidence should be able to answer these questions to the satisfaction of the judge and opposing counsel in order to successfully present survey evidence. Among the foregoing principles and standards, the selection of the proper "universe" and a representative sample therefrom is deemed to be the most important.

What is the proper "universe"? "A universe is a portion of the total population; it is selected because its characteristics are relevant to the proposition in question."[15] Put simply, the "universe" is the relevant segment of the whole population that may be questioned or polled with regard to the issue at hand. In trademark cases, the term "universe" usually refers to the purchasers or prospective purchasers of certain competing products. The selection of the proper class of people to survey will weigh heavily on the relevance of the survey and the eventual weight that a court may afford to the survey result. It is obvious that if the proper "universe" were not selected then the survey would not have achieved the desired result, which is to obtain the public pulse or the opinion or mental associations of the relevant segment of the public that is affected by the question in issue.

"After offering proof that the universe was properly selected, the party offering the survey into evidence must demonstrate that the sample – that is, the person questioned – was correctly selected and thus, the opinions that are found to exist in the sample may be attributable to the entire universe."[16] In other words, the sample must allow extrapolation of the results to the entire universe. The sample or the person questioned must have a relationship to the universe initially selected or segregated from the general public in order that the answers that a sample may

15 18 POF2d 315.

16 *Id*. at 316.

give to the questions posed to him or her are relevant to the question in issue, and thus to the survey itself. In determining whether the sample was well chosen by the poll-takers, there have been suggestions to use the following criteria: "(1) that the sample be large enough in numerical terms so that the probability that it is accurate is within acceptable limits of error; (2) that the sample is sufficiently representative of the population being studied (in terms of sex, age, geographic dispersion, race, etc.) so that all the relevant, identifiable segments of the population are proportionately represented; and (3) that the sample is free of any bias in the manner the survey was implemented, such as would seem reasonably likely to distort the results obtained."[17]

The importance of obtaining the correct sample cannot be overemphasized because the whole basis of the survey lies on having the correct sample, since the mental associations of the "universe" relevant to the issue at hand are inferred from the answers that the people who are part of the said sample give. The basis of any survey is the proposition that the sample is representative of the whole class or the "universe." Thus, it should logically follow that the results obtained by questioning a sample of the "universe" is reflective of the sentiment of the said "universe" and will be relatively the same even if the whole "universe" were questioned.

The techniques of sampling or sample-contacting (or questioning) are varied. Among these are personal interviews, telephone interviews, questionnaires sent out by mail or distributed personally.[18] Two kinds of sampling are usually used in conducting surveys or public opinion polls; these are: Random sampling and Purposive sampling. Random sampling, which is the most common, is a method where an estimate of the survey

17 *Id*. at 317 and 318.

18 *Id*. *citing* 76 A.L.R. 2d 619 at 316.

results is made from data or answers provided by a sample group, as if the results were obtained from all the members of the class of persons from which the sample group belongs. Purposive sampling is a method whereby the poll-taker initially determines certain characteristics which he or she believes will affect the answers of the sample to the questions asked of them and then selects for questioning persons embodying those characteristics in proportion to their relative frequency within the universe.[19]

The foundation for the reception of survey evidence is provided in part by the testimony of the survey director or planner, the survey supervisor (if any), the tabulator (if any), the interviewers and some of the respondents. The testimonies of the said parties are thus indispensable in the presentation of survey evidence.

The survey director should testify on the method used in selecting the representative sample from the universe and the basis for determining that such sample is representative. Also, he should testify on the formulation of the survey questions and the accuracy and impartiality of the answers elicited. The director must likewise testify on his overall supervision of the survey, the conduct thereof and the lack of bias on the part of his interviewers, as well as the mechanics of recording and the accuracy of the tabulation.[20]

As the individual responsible for instructing the interviewers on the conduct of the survey, the survey supervisor must also be made to testify. Apart from the instructions imparted to the interviewers, the supervisor must identify the survey sheet and procedure guide, confirm that the interviewers were not informed

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19 *Id.*

20 2 MCCARTHY, TRADEMARKS and UNFAIR COMPETITION 509-510 (1973 Ed.), *citing excerpts of material from* 8 Am Jur Trials, Trademark Infringement, Sec. 60.

of the survey's purpose and describe the experience and training of the interviewers.[21]

The tabulator of the survey results should be called to testify as to his qualifications, the methods he employed, the coding used and the statistical results of his tabulation.[22]

Necessarily, the persons who actually conducted the survey must also be presented. As the number of interviewers will vary according to the size and extent of the survey, the proponent thereof must be sure to call at least two or three interviewers representative of those who conducted the survey. Their testimony should focus on the method of conducting the interview, their lack of knowledge of the purpose of the survey and the accuracy of the responses that they record. They should also identify typical response sheets filled out during the interviews which should eventually be entered as exhibits during the course of the trial.[23]

Finally, a representative number of the persons interviewed must also be produced as witnesses. These participants should be asked to describe the way in which they were approached for the survey, the method of questioning employed and their answers to the questions asked. They should also confirm the accuracy of their answers and identify those answers on the survey sheets.[24]

b) Presentation of Survey Evidence - Objections

Judges and lawyers alike have not warmly received survey evidence mainly because of the varied questions that may be raised regarding the mechanics by which the survey proper was

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21 *Id*. at 510.

22 18 POF2d 305, 320.

23 *Id*.

24 *Id*.

conducted. Among the deficiencies that hamper the general acceptance of survey evidence are doubts regarding the questions that are asked in the survey; the manner by which the questions were presented to the sample or the respondents of the survey; the competence of the people conducting the survey; and the manner by which the data was collated, among others. With regard to the survey questions alone, there are numerous possibilities for objections by the court or the opposing counsel. The manner by which the questions were presented to the sample or respondents also elicits many objections.

To address the seemingly infinite number of objections which may be raised against the methodology or implementation of a survey, it has been suggested that the parties to a trademark litigation discuss and resolve all possible objections one may have against the other at the pre-trial stage to which the court may enter the appropriate orders. This procedure would surely save a lot of time and money and would simplify the parameters of a survey even before the same is taken.[25] It must be stressed, however, that the foregoing solution should in no way be made compulsory as there may be instances where a party would rather not present the results of his survey because the same turned out to be unfavorable to his position.

IV. ALTERNATIVES TO THE USE OF SURVEY EVIDENCE

Due to the nature of the issues involved in trademark litigation, the use of surveys and the presentation of survey evidence seem to be the most novel and effective means of establishing the existence of confusing similarity, secondary

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25 2 MCCARTHY, TRADEMARKS and UNFAIR COMPETITION 507 (1973 Ed.), *citing American Luggage Works v. United States Trunk Co.* (1957, DC Mass.) 158 F. Supp. 50, affd (CA1) 259 F.2d 69.

meaning and genericness. Before the use of survey evidence in the United States became a rule of thumb in trademark litigation, parties were constrained to resort to more traditional means of establishing confusing similarity, secondary meaning and genericness, such as evidence of actual confusion and the presentation of arguments based on clear inference arising from a comparison of the conflicting marks and the context of their use. As to proof of actual confusion, such proof is obviously hard to come by. Moreover, the task of finding persons who have actually been confused is cumbersome to say the least. Even assuming that persons claiming to have been confused are presented before the court, there is always the objection that they are not representative of the total number of people concerned. With respect to presenting arguments based on clear inferences, suffice it to say that the determination of the case would ultimately be addressed to the discretion of the judge who may not be in a position to gauge the true sentiment of the concerned segment of consumers. Therefore, the use of surveys and the presentation of survey evidence in trademark litigation is probably the most effective way of addressing the issues in such cases for so long as it is ensured that the survey is properly designed and implemented and that the proper witnesses are presented before the court.

V. CONCLUSION

It is regrettable that survey evidence is seldom, if at all, used in trademark cases in our courts. The benefits of survey evidence in trademark litigation are quite evident and cannot be overemphasized. There is no better evidence of whether a likelihood of confusion exists, whether a mark has acquired secondary meaning or whether dilution has occurred than survey evidence. These questions should not be left to the subjective impressions of the judge.

The admissibility of survey evidence in our courts – considering the settled state of the law in the U.S. and other countries – should not be subject to serious dispute. Our courts should consider survey evidence as admissible and limit the issues on the validity of the techniques used and the weight to be given to the survey results.

To obviate a hearsay objection to the admissibility of survey evidence and other objections relating to the validity and weight of the evidence, compliance with the following conditions is indispensable: "(1) The testimony is offered not to show the truth of what interviewees said but to show their state of mind; (2) There is no impeaching of the interviewers' sincerity, narrative ability, perception, and memory; (3) There is no showing that the interviewees were influenced by leading questions, the environment in which the questions were asked, or the personality of the investigator; and (4) There is a showing that other ways of getting evidence on the same point are either impractical or burdensome."[26]

26 18 POF2d 305, 323.

A MODEL CONTRACT FOR JOINT VENTURES

*By Jose Mario C. Buñag**

Last January 10, 2002, at the headquarters of the International Trade Centre (ITC) at 54, rue de Montbrillant, Geneva, Switzerland, legal experts from 33 countries assembled to discuss the possibility of a model joint venture contract, particularly for small and medium-scale enterprises ("SMEs"), which are the ones largely unable to afford the services of lawyers, let alone high-powered law firms with an international practice. Twenty-six more experts were expected to send in written comments. It was a noble endeavor and a challenging concept one would expect from the ITC.

The ITC is not exactly a household name, especially in these parts which would be more familiar with the World Bank and perhaps the World Trade Organization (WTO) due to the long debates about it. Actually, it has a tie-up with WTO, which, together with the United Nations Conference on Trade and Development (UNCTAD), operates the ITC as a subsidiary. As its mission statement puts it, the ITC is "a technical cooperation organization whose mission is to support developing and transition economies, and particularly their business sectors, in their efforts to realize their full potential for developing exports and improving import operations with the ultimate goal of achieving sustainable development."[1]

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1 The information in this paragraph came from the ITC publication "ITC, Your Partner in International Trade and Business Development."

Launched in 1964, the ITC determined that its first priority was to help least developed countries improve their trade performance. Its second priority was to ensure that the largest number of people benefit from its assistance. No wonder then that the ITC's assistance has been felt more keenly in places like Africa where it successfully developed the trade promotion program of the Common Market for Eastern and Southern Africa (COMESA). In terms of legal documentation, in 1999 the ITC spearheaded and sponsored the preparation of a model contract and users' guide on the international commercial sale of perishable goods. Hence, the ITC is no stranger to the model contract concept and the preparation of a model joint venture contract is but another step in the ITC's continuing efforts to assist in the development of trade and business, particularly in developing countries.

The origin of the project is traced to a 1998 survey made by the ITC on what developing countries needed to spur development. Perhaps, not surprisingly, the survey showed a need first for model contracts (87%) and specifically for joint venture agreements (78.1%). It was a close second to sale/purchase contracts. In Africa, 81.4% said they needed a model joint venture contract. In Asia, it was 75%. It was also confirmed in a different study[2] that foreign direct investments took the form, more often than not, of joint ventures. Hence, joint ventures play a significant role in developing economies. In China over 70% of foreign investments came in via joint ventures. Of course, part of the reason is, as will be noted below, nationalistic laws and policies.

Like all grand human ventures from the Suez Canal to the Eiffel Tower, the project was greeted with some misgivings. Too ambitious. Impossible to cover all kinds of joint ventures. Irreconcilable company laws. But the pro-bono committee was inexorably formed and unhesitatingly plowed on.

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2 Kaplan, Research on Joint Ventures' Statistical Data.

Invitations were sent to experts from various countries to join the pro-bono committee which would draft the contract (the author represented the Philippines) and as stated at the start, the actual assembly took place in Geneva on January 10, 2002. The day before, an informal meeting was held with the ITC officials among delegates from developing countries already in Geneva to, among others, sound out their views on the project and the meeting the next day.

The initial ground work for the meeting was performed splendidly by the known Swiss Firm, Lalive and Partners ("Lalive"). Lalive prepared a Guidance Note or *Note d'Orientation* ("Note") as a starting point and frame of reference for the delegates. (Incidentally, the meeting was conducted in English and French, the latter duly translated for the benefit of the non-French speakers.)

After a preliminary explanation on the purpose of the Note and the rationale for the upcoming assembly, the Note begins with a basic classification of joint ventures from the standpoint of purpose which may be either the "joint performance of a single contract or the organization of a long-term co-operation between the parties." It is recognized that there are different substantial issues to be faced in either category and it was the proposal of Lalive to limit the model to the second category principally on the ground that several models already existed for the first.

The Note then proceeds to explain that focusing on the second category readily discloses a fundamental distinction on the legal nature of the co-operation, which distinction leads to two (2) main types of joint ventures regardless of the activity carried out:

1. Contractual Joint Ventures where there is no legal entity created and where the contract alone regulates the co-operation between the joint

venturers. Here, only one instrument is necessary, the joint venture contract or agreement; and

2. Incorporated Joint Ventures where a legal entity with a personality separate from the joint venturers, either a corporation or a partnership, is created to carry out the joint venture activities. Here, more than one instrument is necessary and the joint venture agreement is oftentimes a preparatory instrument or vehicle although it may also function as the stockholders' agreement. In some cases, the joint venture agreement is overtaken and disappears unless it remains in existence to regulate the parties' activities, as when the joint venture involves several companies in different countries.

The Note suggests that instead of two (2) models for each type, only one model covering both kinds of joint ventures should be prepared. (There was some dissent that this was not possible and would only lead to confusion.)

Another possible classification between Production Joint Ventures and Distribution Joint Ventures was considered capable of being covered by the single model and need not be specifically addressed, subject to what the members of the committee would say at the forthcoming meeting (the members said nothing which was interpreted as an affirmation of the Note's statement). The same sentiment was expressed with respect to the possibility of preparing a model for each industry, *e.g.*, transportation, mining, etc. The model should be sufficiently flexible to adapt to the specific industry to be covered by the joint venture.

In terms of intended users, the Note states that these would be individuals and SMEs, whatever their origin. But what attracted

a great deal of discussion was the Note's further statement of its intention to disregard state-owned enterprises which allegedly involved specific regulations which would unduly complicate the model. Due to the questions raised and the apparent prevalence of the state's participation in joint ventures in many countries, it was decided to have another look at this issue.

The meeting of the experts convened as scheduled on 10 January at the ITC offices on rue de Montbrillant. It was an impressive conglomeration of legal talents from different countries and different legal systems. But they were one in their desire to hammer out a model contract for use in all parts of the world and jurisdictions.

The meeting followed the outline of topics prepared by Lalive whose representatives at the meeting guided the discussions. The topics were obviously headings for the actual provisions that would be found in the model (the "Model"):

- Parties
- Preamble – Objectives of the Parties
- Definitions
- Object and Purpose of the Joint Venture
- The Main Obligations of the Parties - Contributions
- Management/ Internal Decisions
- Representation of the Joint Venture
- External Liability
- Internal Liability
- Liability for Debts Incurred before the Incorporation of the Joint Venture Company
- Guarantees between Partners
- Profits and Losses
- Corporate or Partnership Rights
- Use of the Joint Venture's Assets and

Acquisition of its Products by the Partners in Their Own Interest
- Relationship between the Activities of the Joint Venture and Other Activities of the Partners
- New Partners, Loss and Transfer of Partner Status
- Termination of the Joint Venture
- Miscellaneous Provisions
- Appendices

It was not of course expected that a one day meeting could tackle all the topics but an attempt was made to be comprehensive. Neither could the author within the limited confines of this article discuss everything that was taken up; he will therefore only give a flavor of the discussion. For hardly had the experts finished introducing themselves to each other when one of them raised as a preliminary issue the definition of a joint venture, arguing that it would be unwise to proceed any further unless the meeting agreed on a definition. A working definition was agreed upon for purposes of the discussion; the author did not take down the exact wording but remembers the presence of the elements of agreement of two or more parties to cooperate and bring resources to carry out a certain activity together.

It was also brought out at this point as it was taken up in the informal January 9 meeting that in many cases, parties are forced into joint ventures because of state policy or a country's nationalistic constitution or nationalization laws. Where the law limits a foreigner's equity participation to say, 30% or 40%, the foreigner has no choice but to find a joint venture partner. The Philippines is replete with examples of this. The wisdom of such policies or statutes will remain debatable but their existence affects the kind of joint venture that parties will put up, if at all.

The author remembers a Japanese company which came to seek his advice and was all set to put up a factory in the Philippines until it found out it could not completely own the land on which the factory would stand. It could only own 40% of the land holding company. It was, of course, explained what arrangements could legally be made to ensure that its interests are protected, to no avail. The meeting ended then and there and the Japanese company was heard of no more.

The observation was then made that there are more incorporated joint ventures than contractual ones. Various reasons were proffered for this, the most obvious of course, being the limited liability protection afforded by the corporate entity. The author called attention to the tax aspects of the matter, that a contractual joint venture is generally (with some exceptions) taxed as a corporation. Hence, unless there are compelling reasons for the contractual type, the parties are better off incorporating to avail of the limited liability feature of the Corporate solution. The author suggested that the Commentary that will accompany the Model contain a warning on the tax implications of the form of joint venture contemplated by the parties.

It is interesting to bring up at this point an observation of one who wrote in his comments. This commentator thought the committee should at the outset decide between the "bare bones" or the "belt and braces" approach in drafting the Model. The "bare bones" approach leaves the parties with just the framework and gives them the chance to add provisions for their specific needs. Its disadvantage lies in the possibility of legally untrained parties drafting specific clauses themselves. The "belts and braces" approach, on the other hand, which the commentator preferred, has all the clauses and leaves the parties with the option of deleting clauses not applicable to their particular situation. The committee chose the middle ground.

Parties

There was a spirited discussion on how to call the parties to the contract considering for instance that the word "partners" which easily lent itself as a handy term to describe the parties had definite legal (and tax) implications.

Indeed, one of those who wrote in comments proposed that a joint venture should come on its own and be distinguished from corporations and partnerships.

Preamble

All the experts agreed that the preamble and objective of the parties can only be drafted by the parties themselves. The Commentary can only give drafting advice and supply examples.

Definitions

The Guidance Note suggested that apart from the usual definitions, this section should provide explanation which might be necessary for certain technical terms like "Board of Directors," "Shareholders" or "shareholders meeting."

Object and Purpose of Joint Venture

The preamble sets forth the expectation of the parties; this provision describes the purpose of the joint venture, what the parties decided to achieve together. Again, this is best drafted by the parties and the Model would be limited to giving advice and examples.

It is in this paragraph or section that the Model should set forth the legal form or vehicle that the joint venture will take by

providing alternative clauses for a Contractual Joint Venture or an Incorporated Joint Venture.

Main Obligations – Contributions

The Model will define the main obligations of each party under the agreement and the core of their obligations will be each party's contributions which can take any of the following forms:

- cash
- services
- physical assets with or without transfer of title
- intellectual property

The Model should provide standard clauses or examples for certain kinds of contributions, *e.g.*, raw materials, goodwill, technology, etc.

Additional contributions may also be dealt with here.

In this connection, it was noted the possibility of using all or part of contributions in kind for capitalizing the joint venture company may be excluded or limited by applicable company laws. (In the Philippines, goodwill or clientele cannot be used to pay for shares[3]). A possible conflict between the joint venture agreement and the company law thus arises. It may therefore be advisable in cases where a joint venture company is chosen to check on the company law which will apply. The group found very interesting the case cited by a delegate from a South American country where the joint venturers who came from Country A and Country B respectively decided to incorporate in Country C, the place where they wanted to sell the joint venture's products.

3 Sec. 62, Corporation Code.

On this topic, the experts took up the distinction between core and non-core distribution. It was also raised in regard to contributions in kind what would be the liability of the party whose contribution was defective. Perhaps the joint venture itself will be affected and may have to be terminated in case the defect is material.

Management/Internal Decision

The Model must contain provisions on how the joint venture, whether contractual or incorporated, will be managed, including allocation of powers and responsibilities among the co-venturers. It was envisaged that this Section will provide at least the frame for the following:

- description of persons or bodies acting for the joint venture, duration of functions and renewal thereof
- allocation of powers and responsibilities
- procedures for corporate organs
- renumeration of party in charge of management

This led to the issue that occupied the participants for some time--deadlocks, how to break them. A write-in commentator listed the following options:

- independent referee
- casting vote given to one party
- arbitration
- termination of the joint venture

What seems to have found favor with the committee was the mechanism known here as "put and call," which effectively terminates the joint venture in an orderly and fair-to-both-parties

fashion. The assumption is the parties are hopelessly deadlocked and one of them has to go. The initiating party then offers to buy out the other party and sets the price. Because such party knows the other party can call, *i.e.*, reverse the situation and instead buy out the initiating party at the price it set, there is a guarantee the price will be fair and reasonable. The initiating party will not set it so high as it may be paying it, nor so low that the other party may do the purchase at a bargain. The author has heard of an instance when the put and call was actually done in the Philippines. In that case, the put was called and the initiating party ended up selling out of the joint venture. Apparently, the initiating party was confident the other party would not be able to raise the funds to call; unfortunately for it, the other party was resourceful enough and found a funder.

In the Philippines where the foreign party is almost always in the minority because of nationalistic laws and policies, protection to such party against possible tyranny by the majority is provided by a veto power which the SEC has long ago sanctioned and ruled legal. Hence, for fundamental issues, such as amendments of the articles and by laws, as well as important decisions, such as the budget, a super majority is demanded, which is more than the majority required by the law. Hence, for instance, where the law requires a 2/3 vote, the joint venture agreement and the articles would require a 3/4 vote.

Representation of the Joint Venture

The provisions on representation highlights the distinction between the Contractual Joint Venture and the Incorporated Joint Venture. In a Contractual Joint Venture, a party may continue to represent itself or the joint venture and the matter is governed largely by the joint venture agreement. An Incorporated Joint Venture has only itself to represent to third parties and the applicable company law and the articles of incorporation take over to regulate the situation.

The Note expects the Commentary to set out the principles applicable to the issue of representation but it warns that such principles cannot over-ride the provisions of applicable law.

External Liability

The Model as well as the Commentary should be clear that once the existence of a joint venture is disclosed or made public, the parties thereto are liable to third parties for acts of whoever is managing the joint venture done in the name of the joint venture.

Internal Liability

It is imperative that the joint venture agreement regulate the internal liability which means the allocation, between or among the parties, of the debts of the joint venture. The following will have to be addressed:

- portion each party must bear
- recourse among the parties
- time bars to claims
- defense against recourse for contract violations, willful act or gross negligence

The provision should properly include a duty by a party to notify the others of a claim against it by a third party, mutual assistance and perhaps sharing of litigation costs.

Debts prior to Incorporation

Debts prior to incorporation pertain to the parties and are normally transferred to and assumed by the joint venture company.

Guarantees between Partners

This clause covers guarantees *such as securities or bank guarantees* obtained by the parties to secure their internal liability. If the party to the joint venture is a subsidiary, the parent may provide a comfort letter or letter of support.

Profits and Losses

An agreement to share profits and losses in proportion to contributions or equally regardless of contributions, would be *de riguer* in the Contractual Joint Venture. In Incorporated Joint Ventures, company law will apply in declaring and paying dividends. The Model may suggest an agreement to recapitalize the company in case of losses.

Corporate or Partnership Rights

The rights that will be important to a joint venturer are:

- to information on all matters affecting the joint venture
- to participate in the decision-making process

In the Contractual Joint Venture, these rights would normally be independent of the value and nature of the contributions. Lalive suggests that the Model and the Commentary might mention the possibility of making the voting rights proportionate to the value of the contribution.

In Incorporated Joint Ventures, stockholders' rights are governed by the applicable company law, together with the articles of incorporation, the stockholders' agreement and the joint venture agreement. The agreements, being contractual, would not

bind stockholders not parties thereto. The validity of these agreements depends on the applicable company law.

Use of Joint Venture Assets and Acquisition by Parties of Joint Venture Products

The parties must deal here with questions on whether or not they or any of them can use joint venture assets, including intellectual property rights, in their individual capacities whether for personal or professional reasons. Such use is generally forbidden as covered by the standard non-competition clause.

In Incorporated Joint Ventures, such use would also be forbidden by company law provisions against dissipation of assets or by regulations governing publicly-traded securities, even if provided for in the joint venture agreement.

While not extensively discussed at the meeting, a non-competition clause should be part of the Model.

Relationship between the Joint Venture Activities and Other Activities of the Co-Venturers

Joint venture parties should refrain from activities that would impact adversely on the joint venture. They thus bind themselves to a general duty of diligence and loyalty to the joint venture. Lalive comments, however, that such an agreement are more frequent in civil law jurisdictions and may appear too general for common law lawyers. This is one of the problems of "cultural differences" the Model must deal with.

New Partners, Loss and Transfer of Partner Status

Joint ventures are really like partnerships and joint venture agreements are contracts *intuitu personae.* In partnership law, this

is called *delectus personae.* The entry of new joint venture parties should therefore be by unanimous consent or at least a qualified majority.

The Incorporated Joint Venture presents some problems due to the intervention of the company law which the joint venture cannot escape. Under most company laws, restrictions on transfers of shares are not favored and are the exceptions. Lalive thus proposes that the Commentary point out that, in general, the joint venture agreement may not limit entry into the joint venture company in a manner contrary to applicable law. Any limitation must be anticipated in the articles of incorporation. The Model should also anticipate resort to the capital markets which may involve issuance of new securities and admission of new members.

The joint venture agreement must also regulate the cases when a party is excluded and the procedure to be followed for the exclusion. Unanimous approval should be required for this decision and the Commentary must deal with two (2) questions:

1. Will the exclusion terminate the joint venture? The answer will depend on the number of parties, the purpose of the joint venture and the role of the party to be excluded in the venture.

2. In the negative, how will the compensation of the excluded party be calculated?

For Incorporated Joint Ventures again the applicable company law must govern and the calculation of the corporation must be foreseen in the articles, together with the shareholders' agreement. A right of first refusal or a preferential right to acquire the shares of the excluded party is a normal feature provided the same

is allowed by the company law. It should be noted that some company laws limit, or even forbid limits on, transferability of shares.

The Commentary needs to mention that in most jurisdictions, the insolvency of a person triggers enforcements measures against the assets of such person, including his shares in the joint venture company. The joint venture agreement must provide for insolvency and possibly make it an automatic cause for the insolvent's exclusion.

Joint venture agreements must provide for transfer of status of a joint venture party. In Contractual Joint Ventures, the principle of *intuitu personae* would justify the requirement of unanimous consent unless a qualified majority is agreed upon.

For Incorporated Joint Ventures, company laws will again govern. In the Philippines, right of first refusal provisions are *de riguer* and a standard feature of articles of incorporation of joint venture companies.

Death and Succession of Joint Venture Party

Death of a joint venture party spawns a host of difficult legal questions. As the Model and the Commentary cannot possibly provide detailed solutions, it will be sufficient to indicate the following:

1. Participation in the joint venture may be transferred to the heirs who should therefore be bound by the joint venture agreement.

2. The heirs can reject the inheritance or refuse to get involved in the joint venture, in which case the issue of compensation will come up.

3. In the Incorporated Joint Venture, the shares are transmissible. In the Philippines, said shares are subject to the right of first refusal, provided it says so in the articles.

A subsidiary which is a party of a joint venture may be acquired and its owners changed. The joint venture agreement should therefore provide for the consequences of such an occurrence. This may even be a cause for exclusion.

Termination

The Model should provide the grounds for termination of the joint venture, such as achievement of the purpose, death or departure of a party or even unilateral cancellation after notice. The Model should then lay down the rules for winding up.

In case of an Incorporated Joint Venture, the applicable law will prevail although it should be noted in the Commentary that the liquidation of the initial joint venture does not mean the end of the joint venture company which may continue to exist.

Miscellaneous Provisions

- Severability clause
- Amendments
- Force majeure
- Governing law
- Disputes: courts or arbitration
- Notices

Appendices

- Shareholders' agreement
- Articles of incorporation and by-laws, if necessary

- Other agreements, *e.g.*, licensing agreements, distribution agreements, etc.

Some attention was spent on how to call the articles of incorporation of the Incorporated Joint Venture, as different jurisdictions called them different names. Apparently, the French use the term "statutes" and the Latins "*estatutos.*" Somebody suggested "constitutive documents," a term used in loan agreements but when the committee was reminded that common law also uses memorandum of association, it settled with articles of incorporation.

As the meeting ended, it was agreed that Lalive would proceed to draft the Model on the basis of the discussions and inputs and for the experts to re-gather in Geneva to tackle the draft. It was felt that a face to face meeting would be more productive than for the experts to simply write in their comments. It is hoped that the Model should be in use before the year 2002 ends.

THE SERRANO CASE

By Jose Anselmo I. Cadiz[*]

One of the most difficult problems in labor relations is the imposition of disciplinary action on an erring employee. This is more especially so when the penalty to be imposed is termination from employment. According to the Labor Code, an employer may terminate an employee from employment under the following circumstances, as stated in Arts. 282, 283 and 284:

> ART. 282. *Termination by employer*. – An employer may terminate an employment for any of the following causes:
>
> (a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
>
> (b) Gross and habitual neglect by the employee of his duties;
>
> (c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;
>
> (d) Commission of a crime or offense by the employee against the person of his employer

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or any immediate member of his family or his duly authorized representative; and

(e) Other causes analogous to the foregoing.

ART. 283. *Closure of establishment and reduction of personnel.* – The employer may also terminate the employment of any employee due to the installation of labor saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

ART. 284. *Disease as ground for termination.* – An employer may terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his health as well as to

> the health of his co-employees: Provided, that he is paid separation pay equivalent to at least one (1) month salary or to one-half (½) month salary for every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.

This article attempts to discuss some decisions of the Supreme Court on termination without the 30-day notice requirement or without due process of law under Arts. 283 and 282, respectively, with particular emphasis on the significant cases of *Ruben Serrano v. National Labor Relations Commission and Isetann Department Store*,[1] and *Wenphil Corporation v. National Labor Relations Commission and Roberto Mallare*.[2]

In February of 1989, the High Court in the *Wenphil* case promulgated a decision which sustained the termination of an employee with just cause but without due process yet ordered the payment of an indemnity to the employee in the amount of P1,000.00.

In previous rulings, the High Court ordered the reinstatement of an employee to his previous employment if he was not accorded due process.[3] Likewise, Book V, Rule XIV, Sec. 1 of the Omnibus Rules Implementing the Labor Code states:

> *Security of tenure and due process.* No worker shall be dismissed except for a just or authorized cause provided by law and after due process.

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1 G.R. No. 117040, 27 January 2000.

2 170 SCRA 69 (1989).

3 *Rance v. National Labor Relations Commission*, 163 SCRA 279 (1988); *Liberty Cotton Mills Workers Union v. Liberty Cotton Mills, Inc.*, 90 SCRA 391 (1979).

In the *Wenphil* case, the High Court ruled:

> By the same token, the conclusion of the public respondent NLRC on appeal that private respondent was not afforded due process before he was dismissed is binding on this Court. Indeed, it is well taken and supported by the records. However, it can not justify a ruling that private respondent should be reinstated with back wages as the public respondent NLRC so decreed. . . . With such finding, it would be arbitrary and unfair to order his reinstatement with back wages.
>
> The Court holds that the policy of ordering the reinstatement to the service of an employee without loss of seniority and the payment of his wages during the period of his separation until his actual reinstatement but not exceeding three (3) years without qualification or deduction, when it appears he was not afforded due process, although his dismissal was found to be for just and authorized cause in an appropriate proceeding in the Ministry of Labor and Employment, should be re-examined. It will be highly prejudicial to the interests of the employer to impose on him the services of an employee who has been shown to be guilty of the charges that warranted his dismissal from employment. Indeed, it will demoralize the rank and file if the undeserving, if not undesirable, remains in the service.
>
> Thus in the present case, where the private respondent, who appears to be of violent temper, caused trouble during office hours and even defied his superiors as they tried to pacify him, should not be rewarded with re-employment and back wages. It

> may encourage him to do even worse and will render a mockery of the rules of discipline that employees are required to observe. Under the circumstances, the dismissal of the private respondent for just cause should be maintained. He has no right to return to his former employer.
>
> However, the petitioner must nevertheless be held to account for failure to extend to private respondent his right to an investigation before causing his dismissal. The rule is explicit as above discussed. The dismissal of an employee must be for just or authorized cause and after due process. Petitioner committed an infraction of the second requirement. Thus, it must be imposed a sanction for its failure to give a formal notice and conduct an investigation as required by law before dismissing petitioner from employment. Considering the circumstances of this case petitioner must indemnify the private respondent the amount of P1,000.00. The measure of this award depends on the facts of each case and the gravity of the omission committed by the employer.[4]

The High Court applied the *Wenphil* ruling in all subsequent cases where there was a denial of due process but there was just cause in terminating an employment[5]. This was until the doctrine enunciated by the High Court *en banc* in the *Serrano* case, in January 2000.[6]

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4 Note 2, *supra*, at 75-76.

5 *Manuel v. N.C. Construction Supply*, 282 SCRA 326 (1997); *Sebuguero v. NLRC*, 248 SCRA 532 (1995); *Villarama v. NLRC*, 263 SCRA 280 (1994); *Sampaguita Garments Corp. v. NLRC*, 233 SCRA 260 (1994); *Aurelio v. NLRC*, 221 SCRA 432 (1993); *Cathedral School of Technology v. NLRC*, 214 SCRA 551 (1992); *Kwikway Engineering Works v. NLRC*, 195 SCRA 526 (1991); *Great Pacific Life Assurance Corp. v. NLRC*, 187 SCRA 694 (1990); *Cariño v. NLRC*, 185 SCRA 177 (1990); *Rubberworld (Phils.), Inc. v. NLRC*, 183 SCRA 421 (1990); *Seahorse Maritime Corp. v. NLRC*, 173 SCRA 390 (1989).

6 Note 1, *supra*.

In the *Serrano* case, Mr. Ruben Serrano, head of the Security Checkers Section of Isetann Department Store, was terminated from employment effective on the same day that he received his notice of termination from the respondent company, due to retrenchment under Art. 283 of the Labor Code. Thus, Mr. Serrano's termination letter was dated and received by him on October 11, 1991 and his termination from employment was effective on the very same date. Under Art. 283 of the Labor Code, retrenchment to prevent losses can only be effective at least one (1) month from notice to the affected worker.

The High Court in the *Serrano* case ruled:

> The need is for a rule which, while recognizing the employee's right to notice before he is dismissed or laid off, at the same time acknowledges the right of the employer to dismiss for any of the just causes enumerated in Art. 282 or to terminate employment for any of the authorized causes mentioned in Arts. 283-284. If the *Wenphil* rule imposing a fine on an employer who is found to have dismissed an employee for cause without prior notice is deemed ineffective in deterring employer violations of the notice requirement, the remedy is not to declare the dismissal void if there are just or valid grounds for such dismissal or if the termination is for an authorized cause. That would be to uphold the right of the employee but deny the right of the employer to dismiss for cause. Rather, the remedy is to order the payment to the employee of full backwages from the time of his dismissal until the court finds that the dismissal was for a just cause. But, otherwise, his dismissal must be upheld and he should not be reinstated. This is because his dismissal is ineffectual.

> For the same reason, if an employee is laid off for any of the causes in Arts. 283-284, *i.e.*, installation of a labor-saving device, but the employer did not give him and the DOLE a 30-day written notice of termination in advance, then the termination of his employment should be considered ineffectual and he should be paid backwages. However, the termination of his employment should not be considered void but he should simply be paid separation pay as provided in Art. 283 in addition to backwages.[7]

Thus, the High Court in the *Serrano* case, in modifying the doctrine laid down in *Wenphil* has ordered the payment of full backwages if the termination from employment is for an authorized cause under Art. 283 of the Labor Code, or for a just cause under Article 282 of the Labor Code, but without the 30-day notice, or without due process, respectively. In either case, the employee should not be reinstated to employment. The departure from the *Wenphil* doctrine is shown by the fact that under the latter case, a failure to observe due process and the 30-day notice rule will merit a sanction of an indemnity ranging from the amount of P1,000.00[8] to P10,000.00.[9]

OBSERVATIONS ON THE SERRANO DOCTRINE

The complaint in the *Serrano* case was initially filed in December 1991. The case was finally resolved by the Supreme Court in January 2000, after more than eight (8) years. Thus, in said case, the respondent company was made to pay full backwages for a period of more than eight (8) years in addition to separation pay of one (1) month for every year of service, and proportionate

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7 Note 1, *supra* at 13-14.

8 Note 2, *supra* at 76.

9 *Reta v. NLRC*, 232 SCRA 613 (1994).

13th month pay. Justice Artemio Panganiban opined that the advent of the *Wenphil* doctrine more than 10 years ago which imposed a fine for violation of the due process requirement under Art. 282, and for violation of the 30-day notice requirement under Art. 283, both of the Labor Code, has not deterred violations of these requirements. Justice Panganiban claims that "monetary sanctions are too insignificant, too niggardly, and sometimes even too late."[10]

It is true that under Art. 283 of the Labor Code, which enumerates the authorized causes for terminating an employee, an indemnity ranging from P1,000.00 to P10,000.00 is too small a price to pay for an employer's omission to provide the 30-day notice required by law to be given to an employee about to be terminated from employment. As Justice Vicente Mendoza opined in the *Serrano* case, the 30-day notice is "to give him time to prepare for the eventual loss of his job."[11] Thus, unlike in Art. 282, where the termination from employment arises out of a misdeed of an employee, under Art. 283, the loss of employment is due to factors independent of an employee's behavior or conduct. Thus, redundancy is invoked because of duplication of functions, or abolition of unnecessary positions. On the other hand, retrenchment and closure are mostly due to the economic setbacks suffered by the employer. The Supreme Court is thus correct that a more drastic sanction like the payment of full backwages to the employee must be imposed against the employer.

However, it is here that the line is drawn. Termination from employment for just causes under Art. 282 of the Labor Code must be viewed differently. For easy reference, the just causes invoked under said Art. 282 are the following: serious misconduct or willful disobedience by the employee of the lawful orders of the

10 *Better Builders Inc., et al. v. National Labor Relations Commission*, 283 SCRA 242, 254 (1997).

11 Note 1, *supra*, at 15.

employer, gross and habitual neglect of duties, fraud or willful breach of trust of the employer, commission of a crime against the employer or his immediate family or authorized representative and other analogous cases. Therefore, under the preceding enumeration, the termination from employment of the employee is caused entirely by his own doing. In other words, said factors are totally beyond an employer's control.

It is unfair that an employer's failure to observe due process in terminating an employee, which probably arises from lack of legal advice, would compel him to pay full backwages. The dismissed employee in fact will have a chance to ventilate his case through a position paper, or a full blown trial, if necessary, before the Labor Arbiter. Therefore, in the event that in the latter case, it takes more than eight (8) years from the filing of the complaint for the High Court to decide it, just like in the *Serrano* case, an employer will be required to pay 104 months salary (8 years x 13 months, inclusive of 13th month pay). If an employee is receiving P8,000.00 a month, this translates to a stagerring P832,000.00 as penalty. This is too steep a price to pay for an employer who, for example, fires an employee on the spot, out of rage, because the latter attempted to rape his daughter or murdered his son.

The resolution of cases may take longer to decide than eight (8) years since in the case of *St. Martin Funeral Homes v. National Labor Relations Commission, et al.*,[12] the High Court ruled that all appeals from the National Labor Relations Commission (NLRC) must be initially filed with the Court of Appeals rather than the Supreme Court. Another layer has therefore been added in the appeals process of decisions originating from the Labor Arbiter. Thus, instead of appealing directly to the Supreme Court, litigants must initially appeal decisions of the NLRC to the Court of Appeals. Of course, dissatisfied litigants can always appeal the

12 295 SCRA 494 (1998).

decisions of the Court of Appeals to the Supreme Court. This new layer will add at least two years to the length of time that cases initially filed before the Labor Arbiter will be finally resolved, if brought to the High Court for review. Under this circumstance, the penalty of full backwages, which will be imposed on an employer who terminated an employee for just cause but without due process, will definitely be burdensome, bordering on confiscation.

The *Serrano* doctrine should therefore be modified. Termination from employment for authorized causes under Art. 283 of the Labor Code but without the required 30-day notice will still be penalized with an award of full backwages to the employee. However, for dismissal from employment for just causes under Art. 282 of the Labor Code but without due process, it is submitted that the penalty of full backwages is too severe a penalty on the employer. In such case, perhaps the application of the *Wenphil* doctrine which imposes upon the erring employer a penalty ranging from P1,000.00 to P10,000.00 could be more appropriate.

THE MORO ISLAMIC CHALLENGE: CONSTITUTIONAL RETHINKING FOR THE MINDANAO PEACE PROCESS

By Soliman M. Santos, Jr.

UP Press, 2001
234 pages

A book review by Jose Maria Z. Carpio*

At no time is our quest for peace more pressing than now as we enter into a new year—2002. The litany of violence, hostage-takings and terrorist attacks that we all saw in 2001 is too long to recite here. Yes, around the nation, and around the world—with September 11 forever etched in our being, peace has remained an impossible dream.

2002 gives us a second chance for peace. In our own homeland, we find yet another light for peace in Sol's ***The Moro Islamic Challenge: Constitutional Rethinking for the Mindanao Peace Process***.

This book covers a wide range of cross-cutting issues and insights on our "Mindanao/Muslim/Moro Problem" as readily borne by its extensive bibliography and footnotes. To my knowledge, this is the most comprehensive treatment of the subject so far. And Sol's thesis is singularly most daring.

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Sol believes that for peace to be finally achieved in Mindanao, "[t]he Moro (Muslim Filipino) aspiration for an Islamic system of life and governance in predominantly Muslim areas in the Mindanao island region of Southern Philippines can and should be accommodated by the Philippine constitutional system."

Hence, he proposes these two provisions for integration in the Constitution:

> a) There shall be created a special Islamic region to meet the aspiration for a system of life and governance suitable and acceptable to the Bangsamoro people who opt for it. This region shall exercise maximum autonomy with independent legislative, executive and judicial powers under an Islamic system, as the Philippine constitutional system shall not be practiced there. This region shall be established pursuant to a peace agreement which shall have constitutional status as defining, among others, the relations of constitutional association between the region and the Bangsamoro people, on one hand, and the Republic and the Filipino people, on the other hand. The constitutional arrangements shall include personal or cultural autonomy for Moros outside the region and guarantees for the protection of human rights;
>
> b) Indigenous tribal peoples may opt for a high degree of autonomy in their ancestral lands where indigenous tribal systems shall prevail and the Philippine constitutional system shall not be practiced. This arrangement shall be established through a peace pact or some other mutually acceptable instrument which shall have constitutional status as defining the relations between the tribe and the Republic.

In support of his constitutional formulation, Sol draws much from distinguished political philosopher James Tully's STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (Cambridge, 1995). This is Tully's trail-blazing attempt to establish the "critical attitude or spirit in which justice can be rendered to the demands of cultural recognition." It takes its lead from aboriginal claims in North America.[1]

In particular, Sol adapts to the Philippine experience Tully's critique of "modern constitutionalism" as structurally inadequate to meeting minority and cultural aspirations. Modern constitutionalism refers to the "one people, one government, one territory" assimilationist theory that had its beginnings in the American Declaration of Independence and the United States Constitution and after which our constitutional system was structured. It is precisely for this reason, as Sol shows, that the GRP (Government of the Republic of the Philippines) has boxed every peace talks "within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines" or "within the framework of national unity and development," resulting ultimately in the loss of more lives and a nation farther away from peace.

Then, in respect of the Bangsamoro aspiration as sought by the Moro Islamic Liberation Front (MILF), Sol employs Tully's central argument for inter-cultural constitutional negotiation and accommodation of demands for cultural recognition.

"What is needed, therefore," Sol submits, "is for the GRP-MILF peace negotiations to be refashioned as constitutional negotiations. Otherwise, the peace talks become just a shadow play of positioning in the political realm, masking the real play being prepared in the realm of armed conflict."

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1 *See* Duncan Ivison, Does the Spirit of *Haidi Gwaii* Fly Only at Dusk? at http://muse.jhu.edu/journals/theory_&_event/v001/1.1r_ivison.html.

A peace agreement or peace pact with constitutional status is certainly easier said than done. More so, given the conservatism among the general populace against "tinkering" with the Constitution due to the Marcos experience and in light of the failed Presidential attempts for constitutional change—*CHA-CHA* (Charter Change) by Mr. Ramos and Mr. Estrada's *CONCORD* (Constitutional Correction for Development). Hence, Sol suggests a process of constitutional dialogue between the Filipino and Bangsamoro peoples.

To ensure a positive outcome, Sol outlines three "conventions or principles": mutual recognition of equality, consent by each people, and cultural continuity of each one's respective customary ways and forms of government. These he again draws from Tully's STRANGE MULTIPLICITY.

Fine. But the problem of the actual legal mechanisms (amendment or revision, nationalized ratification) for constitutional change needs to be reckoned with. Sol notes and explains this matter, but leaves its solution to the "peace-agreement-cum-constitutional package" he hopes the current peace process could achieve, which thereafter "might create its own dynamic for effecting constitutional change." Sol also cites the critical role of civil society in a broader Mindanao Peace Process based on a tri-people approach (Christian Filipino, Moro, Lumads).

In any event, a paradigm shift, as it were, to "constitutional negotiations" would already be a big step to take. Yes, indeed. For as Rizal wrote over a century ago in his essay *The Philippines, A Century Hence*: "(I)t is better to keep pace with the desires of a people than to give way before them: the former brings sympathy and love, the latter contempt and anger."[2]

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2 Translation by Guadalupe Fores-Ganzon of the Spanish original *"Filipinas Dentro De Cien Años"* which was published in *La Solidaridad* in installments from September 30, 1889 to February 1, 1890.

Precisely, Sol exhorts us in closing that "(a)s many are made to 'rest in peace,' the case for peace cannot yet be rested."

SUBJECT GUIDE AND DIGESTS SUPREME COURT DECISIONS

(July to December 2001)

Prepared By Tarcisio A. Diño*

Agrarian Reform

Civil Law

Commercial Law

Criminal Law

Labor Law

Land Laws

Legal Ethics

Political Law

Remedial Law

Taxation

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AGRARIAN REFORM LAW

Tenancy Relationship. Elements. (*Bejasa v. CA, G.R. No. 108941, Jul. 6, 2000*).

Department of Agrarian Reform Adjudication Board (DARAB) (a) The case at bar for the maintenance of peaceful possession of the premises by private respondent (awardee of the land), is an incident of the earlier decision of the DARAB upholding said respondent's entitlement to the award under the Comprehensive Agrarian Reform Law (CARL). Hence, the DARAB, which as a rule has jurisdiction to try and decide any agrarian dispute or any incident involving the implementation of CARL continues to have jurisdiction over the case. (*Centeno v. Centeno, G.R. No. 140825, Oct. 13, 2000*).

(b) The DARAB has no jurisdiction to grant private respondents (as beneficiaries of the agrarian reform program and tenants of the adjoining land) a right of way over petitioner's network of private roads intended for its exclusive use. There is no tenancy relationship between the parties. *(Laguna Estates Dev. Corp. v. CA, G.R. No. 119357, Jul. 5, 2000)*

Agricultural Land. Conversion to residential, commercial, industrial or some other urban purposes. (*Bunye v. Aquino, G.R. No. 138979, Oct. 9, 2000*).

Res Judicata. The doctrine, which embraces: [i] "bar by prior judgment" under par. (b) of Rule 39, Sec. 47 of the 1997 Rules of Civil Procedure; and [ii] "conclusiveness of judgment" under par. (c) thereof, applies to both judicial and administrative proceedings. (*Ocho v. Bernardino, G.R. No. 137908, Nov. 22, 2000*).

CIVIL LAW

GENERAL PRINCIPLES

Conflict of Law. The divorce, subsequent marriage, execution of will and death of a Filipino who became an American citizen long before and at the time of the foregoing incidents, are governed by foreign law. (*Llorente v. CA, G.R. No. 124371, Nov. 23, 2000*).

PERSONS AND FAMILY RELATIONS

MARRIAGE

Annulment Due to Psychological Incapacity. The personal medical or psychological examination of respondent is not a requirement for a declaration of psychological incapacity. Guidelines governing the application and interpretation of Art. 36 of the Family Code. Failure of respondent to provide material support to, and his resort to physical abuse and abandonment of, his family are not sufficient to establish *psychological incapacity* on his part. (*Marcos v. Marcos, G.R. No.136490, Oct. 19, 2000*).

Need for Declaration of Nullity. The first and second marriages of private respondent, contracted in 1977 and 1979, respectively, are governed by the provisions of the Civil Code. Whether a judicial declaration of nullity of a void marriage is necessary, the Civil Code contains no express provision to that effect. Originally, in *People v. Mendoza (1954)*, and *People v. Aragon (1957)*, the Court held that no judicial declaration is necessary to establish the nullity of a void marriage. Both cases involved the same factual milieu. Accused contracted a second marriage during the subsistence of his first marriage. After the death of his first wife, accused contracted a third marriage during the subsistence

of the second marriage. The second wife initiated a complaint for bigamy. The Court acquitted the accused on the ground that the second marriage is void, having been contracted during the existence of the first marriage. Since the second marriage is void, and the first one terminated by death of his wife, there are no two subsisting valid marriages to sustain conviction for bigamy. In *Gomez v. Lipana (1970),* and *Consuegra v. GSIS (1971),* however, the Court recognized the right of the second wife who entered into the marriage in good faith, to share in their acquired estate and in the proceeds of the retirement insurance of the husband. The Court observed that although the second marriage can be presumed to be void *ab initio* as it was celebrated while the first marriage was still subsisting, still there was a need for judicial declaration of such nullity of the second marriage. And since the death of the husband supervened before such declaration, the Court upheld the right of the second wife to share in the estate they acquired, on the grounds of justice and equity. But in *Odayat v. Amante (1977),* the Court adverted to *Aragon* and *Mendoza* as precedents. The Court held that no judicial decree is necessary to establish the invalidity of void marriages. This ruling was affirmed in *Tolentino v. Paras (1983).* Yet again in *Wiegel v. Sempio-Dy (1986),* the Court held that there is a need for a judicial declaration of nullity of a void marriage. In *Yap v. Court of Appeals (1986),* however, the Court found the second marriage void without need of judicial declaration, thus reverting to the *Odayat, Mendoza* and *Aragon* rulings. The confusion under the Civil Code was put to rest under the Family Code. The Court rulings in *Gomez, Consuegra,* and *Wiegel* were eventually embodied in Art. 40 of the Family Code which expressly requires a judicial declaration of nullity of marriage. In *Terre v. Terre (1992)* and in *Domingo v. Court of Appeals (1993),* the Court, applying *Gomez, Consuegra* and *Wiegel,* categorically stated that a judicial declaration of nullity of a void marriage is necessary. In *Apiag v. Cantero* (1997), on the issue of the nullity of the first marriage, the Court, applying *Odayat, Mendoza* and *Aragon,* held that since the second marriage took place and all the children

thereunder were born before the promulgation of the *Wiegel* and the effectivity of the Family Code, there is no need for a judicial declaration of nullity of the first marriage pursuant to the prevailing jurisprudence at that time. Similarly, in the present case, the second marriage of private respondent was entered into in 1979, before *Wiegel*. At that time, the prevailing rule was found in *Odayat*, *Mendoza* and *Aragon*. The first marriage of private respondent being void for lack of license and consent, there was no need for judicial declaration of its nullity before he could contract a second marriage. In this case, therefore, the Court concluded that private respondent's second marriage to petitioner was valid. Moreover, the Court found that the provisions of the Family Code could not be retroactively applied to the present case, for to do so would prejudice the vested rights of petitioner and of her children. As held in *Jison v. Court of Appeals*, the Family Code has retroactive effect unless there be impairment of vested rights. (*Ty v. Court of Appeals, G.R. No. 127406, Nov. 27, 2000*). In another case involving bigamy, where the bigamous marriage was contracted during the effectivity of the Family Code, it was held that a judicial declaration of nullity of a void marriage is necessary before one can contract a second marriage. One who enters into a subsequent marriage without first obtaining such judicial declaration is guilty of bigamy. (*Mercado v. Tan, G.R. No. 137110, Aug. 1, 2000*).

Damages in Action for Annulment. There can be no action for damages between husband and wife merely because of breach of a marital obligation. (*Ty v. CA, G.R. No. 127406, Nov. 27, 2000*).

Conjugal Partnership Property. As a general rule, all property acquired by the spouses during the marriage, regardless of in whose name the same is registered, is presumed to belong to the conjugal partnership of gains, unless it is proved that it pertains exclusively to the husband or the wife. Fishpond lease right granted solely in the name of the wife but during the lawful existence of

her marriage was held to be not her paraphernal property. (*Diancin v. CA, G.R. No. 119991, Nov. 20, 2000*). Similarly, land acquired through sales patent under Com. Act No. 141 by the wife whose application was approved and whose payment of the purchase was made during her marriage, was declared to be conjugal property. (*Isabela College, Inc. v. Heirs of Tolentino-Rivera, G.R. No. 132677, Oct. 20, 2000*).

Administration of Conjugal Property. Art. 124 of the Family Code contemplates a situation where the spouse is absent, or separated in fact or has abandoned the other, or whose consent is withheld or cannot be obtained. Proceedings thereunder are governed by the rules of summary judicial proceedings. But said rule does not apply to cases where the non-consenting spouse is incapacitated or incompetent to give consent, as where the subject spouse is in a comatose or semi-comatose condition. In such case, the proper remedy is a judicial guardianship proceedings under Rule 93 of the Rules of Court. (*Uy v. CA, G.R. No. 109557, Nov. 29, 2000*).

Dissolution of Conjugal Partnership. After the death of either of the spouses, no complaint for collection of indebtedness chargeable against the conjugal partnership can be brought against the surviving spouse. Instead, the claim must be made in the proceedings for the liquidation and settlement of the conjugal property. (*Alipio v. CA, G.R. No. 134100, Sept 29, 2000*).

Code of Muslim Personal Laws of the Philippines (Pd 1083) (*Malang v. Hon. Moson, G.R. No. 119064, Aug. 22, 2000*).

PROPERTY

Accion Reivindicatoria. Action to recover the right of possession and to be declared owner of the subject land. (*Cutanda v. Heirs of Cutanda, G.R. No. 109215, Jul. 11, 2000*).

Tax Declaration. A mere tax declaration does not vest ownership of the property upon the declarant. (*Santos v. Santos, G.R. No. 139524, Oct. 12, 2000*).

Possessor/Builder in Good Faith. With regard to rented land, lessees and sublessees are neither possessors nor builders in good faith. They know that their occupancy of the premises continues only during the life of the lease or sublease and, they cannot as a matter of right recover the value of their improvements from the lessor nor retain the premises until they are reimbursed. Their rights are governed by Art. 1678 of the Civil Code which allows reimbursement to lessees of up to ½ of the value of their improvements, if the lessor so elects. (*Spouses Virgilio v. Patricia, Inc. G.R. No. 134651, Sept. 18, 2000*).

Co-Ownership. Prescription between co-owners. (*Santos v. Santos, G.R. No. 139524, Oct. 12, 2000*). Right of Pre-emption. After the physical division of the lot among the brothers, the community ownership terminated; and the right of pre-emption or redemption for each brother was no longer available. (*Spouses Si v. CA, G.R. No. 122047, Oct. 12, 2000*).

Partition. An action to demand partition is imprescriptible or cannot be barred by laches. (*Santos v. Santos, G.R. No. 139524, Oct. 12, 2000*).

Restrictive Covenants in Subdivisions. The restrictive covenant subject matter of this case is not intended for the benefit of adjacent homeowners but to prescribe the uses of the building, *i.e.*, to ensure, among other things, that the structures built on the subdivision project would prevent overcrowding and promote privacy among subdivision dwellers. Petitioners' argument that their immediate neighbors did not oppose the construction work; and that the expansion is necessary to accommodate the individual families of their children must fail. Neither can petitioners claim

good faith as the restrictive covenants are explicitly written in the contract to sell and annotated at the back of the transfer certificate of title. Since the expansion constructed exceeds the floor area limits of the restrictive covenant, petitioners can be required to demolish the structure to the extent that it exceeds the prescribed floor plan. The ruling in *Ayala Corporation v. Ray Burton Development Corporation (294 SCRA 48),* which merely adjudged the payment of damages in lieu of demolition does not apply to this case. (*Fajardo v. Freedom to Build, Inc. G.R. No. 134692, Aug. 1, 2000*).

Easement of Right of Way. The easement in the instant case is both (1) as easement by grant or voluntary easement and (2) an easement by necessity or legal easement. A legal easement is one mandated by law, constituted for public use or for private interest, and becomes a continuing property right. As a compulsory easement, it is inseparable from the estate to which it belongs, as provided for in Art. 617 of the Civil Code. The essential requisites for easement to be compulsory are: [i] the dominant estate is surrounded by other immovables and has no adequate outlet to a public highway; [ii] proper indemnity has been paid; [iii] the isolation was not due to acts of the proprietor of the dominant estate; [iv] the right of way claimed is at a point least prejudicial to the servient estate; and [v] to the extent consistent with the foregoing rule, the distance from the dominant estate to a public highway may be the shortest. It is settled that the needs of the dominant estate determine the width of the easement. Conformably then, petitioner ought to demolish whatever edifice obstructs the easement in view of the needs of private respondents' estate. (*Villanueva v. Hon. Velasco, G.R. No. 130845, Nov. 27, 2000).*

MODES OF ACQUIRING OWNERSHIP

DONATION

Crucial in resolving whether the donation is *inter vivos* or *mortis causa* is the intention of the donor to transfer ownership of

the property upon the execution of the deed. The donation in this case was *inter vivos* in light of the following: (i) the donation was made out of the donor's love and affection for the donee; (ii) the reservation of lifetime usufruct which indicated that the donor intended to transfer the naked ownership over the properties, as there was no need for such reservation if the donor and his spouse remained the owners thereof; (iii) the donor reserved sufficient properties for his maintenance in accordance with his standing in society, indicating that he intended to part ownership of the properties donated; and (iv) the donee accepted the donation. Donation *mortis causa*, being in the form of a will, are not required to be accepted by the donee during the donor's lifetime. A valid donation, once accepted, becomes irrevocable, except on account of officiousness, failure by the donee to comply with the charge imposed by the donation, or ingratitude. (*Spouses Gestopa v. CA, G.R. No. 111904, Oct. 5, 2000*).

SUCCESSION

Wills. The clear intent of the decedent to bequeath his property to his second wife and children by her is glaringly shown in the will he executed. Since the decedent was a foreigner, Philippine law on family rights and duties, status, condition and legal capacity did not govern. Whether the will is intrinsically valid and who shall inherit from the decedent are issues best proved by foreign law which must be pleaded and proved. As a guide, however, the trial court should note that whatever public policy or good customs may be involved in our system of legitimes, Congress did not intend to extend the same to the succession of foreign nationals. (*Llorente v. CA, G.R. No. 124371, Nov. 23, 2000*).

Partition *Inter Vivos* may be done for as long as legitimes are not prejudiced. The legitime of compulsory heirs is determined after collation, as provided for in Art. 1061 of the Civil Code. (*Zaragosa v. CA, G.R. No. 106401, Sept. 29, 2000*)

Rule on Proximity. Right of Representation. The rule on proximity is a concept that favors the relatives nearest in degree to the decedent and excludes the more distant ones except when and to the extent that the right of representation can apply. (*Bagunu v. Piedad, G.R. No. 140975, Dec. 8, 2000*).

Collation. (*Nazareno v. CA, G.R. No. 138842, Oct. 18, 2000*)

OBLIGATIONS

Extraordinary Inflation exists when there is a decrease or increase in the purchasing power of the Philippine currency which is unusual or beyond the common fluctuation in the value of said currency, and such increase or decrease could not have been reasonably foreseen or was manifestly beyond the contemplation of the parties at the time of the establishment of the obligation. The supervening event of extraordinary inflation is never assumed. While there was decline in the purchasing power of the Philippine currency from the period 1966 to 1986, such cannot be considered as extraordinary; rather, it was a normal erosion of the value of the Philippine pesos which is characteristic of most currencies. The effect of extraordinary inflation are not to be applied without an official declaration thereof by competent authorities. (*Singson v. Caltex (Philippines), Inc., G.R. No. 137798, Oct. 4, 2000*).

Payment. The right to specify which among his various obligations to the same creditor is to be satisfied first rests with the debtor. Under the law, if the debtor does not declare at the time he makes payment which among his debts with his creditor the payment is to be applied, no payment is to be made to a debt that is not yet due and the payment has to be applied first to the debt most onerous to the debtor. The lease over the Fairview Wet Market property is the most onerous among all the obligations of petitioner to respondent in this case. Hence, the ejectment case based on alleged failure to pay the rentals (as the payment of the debtor

was applied to obligations other than the rental then due) was without basis and should have been dismissed. (*Faculdo v. Regalado, G.R. No. 123855, Nov. 20, 2000*).

Compensation. Debt distinguished from mere claim. (*Republic v. Sandiganbayan, G.R. No. 128606, Dec. 4, 2000*).

Novation. Incompatibilities between the old and the new obligations included variance in the principal amount of the obligation; and positive as well as negative covenants found in one contract and not in the other. Since the earlier loan obligation was extinguished by novation, the Indemnity Agreement, an accessory obligation, was necessarily extinguished also, pursuant to Art. 1296 of the Civil Code. (*Security Bank and Trust Company, Inc. v. Cuenca, G.R. No. 138544, Oct. 3, 2000*).

CONTRACTS

Perfection. (a) Consent. [i] JPU could not have validly given consent to the contract of sale, as he was not even conceived yet at the time of its alleged perfection. LC could not have acted as representative of JPU. In the first place, she did not have the right to represent JPU for lack of legal authority to do so. Without authority from the court, no person can make a valid contract in behalf of a minor. (*Pua v. CA, G.R. No. 134992, Nov. 20, 2000*). [ii] When one of the parties is unable to read, or if the contract is in a language not understood by him, and mistake or fraud is alleged, the person enforcing the contract must show that the terms thereof have been fully explained to the former. (*Unican Food Products Manufacturing, Inc. v. CA, G.R. No. 125497, Nov. 20, 2000*).

(b) Form. [i] The Civil Code upholds the spirit over the form, and an agreement will be deemed to exist, provided the essential requisites are present, *viz.*: proof of consent, subject matter and cause. It is generally obligatory in whatever form it may

have been entered into. (*Cordial v. Miranda, G.R. No. 135495, Dec. 14, 2000*). [ii] Even with a duly executed written document purporting to be a contract of sale, the Court cannot rule that the subject contracts of sale are valid, when the evidence presented in the courts below show that there had been no meeting of the minds between the supposed seller and corresponding buyers of the parcels of land in this case. Due execution of documents representing a contract is one thing, but perfection of the contract is another. (*Santos v. Heirs of Mariano, G.R. No. 143325, Oct. 24, 2000*).

Simulated Contracts. The execution of the three documents on the same day and other relevant facts in this case sustain the allegation that the contract of sale was simulated and that private respondents received no consideration for it. The said documents were executed by the parties for the sole purpose of obtaining a bank loan and to present the subject lot as collateral, free from any prior lien. (*Spouses Bartimeo v. Court of Appeals, G.R. No. 136857, Nov. 22, 2000).* Simulated sale. (*Unican Food Products Manufacturing, Inc. v. CA, G.R. No. 125497, Nov. 20, 2000).*

Rescission. Automatic, Extra-Judicial. Stipulation for the automatic cancellation of the vendee's rights in the event of his breach of the agreement, without the necessity of prior notice or judicial declaration - upheld. (*Gomez v. CA, G.R. No. 120747, Sept. 21, 2000*). But when a valid objection is raised, a judicial determination of the issue of extra-judicial rescission is still necessary prior to a takeover. In the present case, however, respondents did not deny that there was breach of contract; they merely argued that the stipulation allowing rescission and recovery of possession is void. Hence, such stipulation which is in the nature of a resolutory condition may validly be enforced. (*SBMA v. Universal International Group of Taiwan, G.R. No. 131680, Sept. 14, 2000).*

Statute of Frauds covers a verbal agreement that by its terms is not to be performed within a year from the making thereof.

(*Viewmaster Construction Corp. v. Roxas, G.R. No. 133576, Jul. 13, 2000)*. Applies only to *executory* and *not to completed, executed or partially executed contracts*. (*Cordial v. Miranda, G.R. No. 135495, Dec. 14, 2000).*

Interest. Computed from the time of judicial demand, the date the complaint was filed. (*Bayer Philippines, Inc. v. CA, G.R. No. 109269, Sept. 15, 2000)*. No interest shall be due unless expressly stipulated in writing. *(Pilipinas Hino, Inc. v. CA, G.R. No. 126570, Aug. 18, 2000).*

SALES

Contract to Sell. The parties to a contract to sell are not prohibited from stipulating other lawful conditions, aside from full payment of the purchase price, upon which transfer of ownership depends. (*Gomez v. CA, G.R. No. 120747, Sept. 21, 2000).*

Earnest Money. Respondents did not give the P1 Million as "earnest money" contemplated in Art. 1842 of the Civil Code. Said amount was merely a deposit of what would eventually become an earnest money or down payment, should a contract of sale be made by them. (*San Miguel Properties, Inc. v. Spouses Huang, G.R. No. 137290, Jul 31, 2000).*

Contract of Sale. The stages of a contract of sale are: (i) *negotiation*, covering the period from the time the prospective contracting parties indicate interest in the contract to the time the contract is perfected; (ii) *perfection*, which takes place upon the concurrence of the essential elements of the sale which are the meeting of the minds of the parties as to the object of the contract and upon the price; and (iii) *consummation*, which begins when the parties perform their respective undertakings under the contract, culminating in the extinguishment thereof. In this case, the parties never got past the negotiation stage. The alleged "indubitable evidence"

of a perfected sale cited by the appellate court was nothing more than offers and counter-offers which did not amount to any final arrangement having the essential elements of a contract of sale. The parties failed to agree on the terms of payment, an essential element before a valid and binding contract of sale can exist. Although the Civil Code does not expressly state that the parties must also agree on the terms or manner of payment of the price, the same is needed, otherwise there is no sale; and a disagreement on the manner of payment is tantamount to a failure to agree on the price. (*San Miguel Properties, Inc. v. Spouses Huang, G.R. No. 137290, Jul 31, 2000*).

Damages in Lieu of Specific Performance and/or Rescission. (*Ayala Corp. v. Rosa-Diana Realty and Development Corporation, G.R. No. 134282, Dec. 1, 2000*).

Double Sales. To merit protection under Art. 1544, second paragraph of the Civil Code, the second buyer must act in good faith in registering the deed. He must have no knowledge of any defect in the title of the property sold. (*Bayoca v. Nogales, G.R. No. 138201, Sept. 12, 2000*).

Deed of Sale of Receivables. (*State Investment House, Inc. v. CA, G.R. No. 130365, Jul. 14, 2000*).

Capacity to Buy. The prohibition against agents purchasing property in their hands for sale or management does not apply if the principal consents to the sale of the property. (*Distajo v. CA, G.R. No. 112954, Aug. 25, 2000*).

Exclusive Distributorship Agreement. Petitioner committed a breach of the exclusive distributorship agreement by directly dealing with private respondent's customer. (*Bayer Philippines, Inc. v. CA, G.R. No. 109269, Sept. 15, 2000*).

LEASE

Security Deposit. Security deposit properly applied to unpaid rentals in this case. (*Tala Realty Services Corp. v. Banco Filipino Savings and Mortgage Bank, G.R. No. 137980, Nov. 15, 2000*).

Renewal of Lease. Implied New Lease. (*Lhuillier v. CA, G.R. No. 128058, Dec. 19, 2000; Unican Food Products Manufacturing, Inc. v. CA, G.R. No. 125497, Nov. 20, 2000*).

Improvements By Lessee. The parties agreed that all improvements introduced by the lessee would accrue to the benefit of the owner at the end of the lease, without reimbursement. This stipulation, not being contrary to law, morals, public order or public policy, binds the parties and is the law between them. (*Lhuillier v. CA, G.R. No. 128058, Dec. 19, 2000*).

Sub-Lease. As mere sub-lessees, petitioners derive their right from the sub-lessor whose termination of contract with the lessor necessarily ended the sublease contract. Hence, after the termination of the contract of lease, the continued stay of petitioners in the premises was merely by tolerance of the respondents (lessors) and it became unlawful after they ignored the lessor's demand to leave. (*Spouses Virgilio v. Patricia, Inc. G.R. No. 134651, Sept. 18, 2000*).

MORTGAGE

Equitable Mortgage. In determining whether a deed absolute in form is a mortgage, the court is not limited to the written memorials of the transaction. The decisive factor is the intention of the parties, as shown not necessarily by the terminology used in the contract but by all the surrounding circumstances, such as the relative situation of the parties at that time, their attitude, acts, conduct, declarations, the negotiation between them leading to the deed and, generally, all pertinent facts having a tendency to fix

and determine the real nature of their design and understanding. Art. 1602 of the Civil Code enumerates the instances when a contract, regardless of its nomenclature, may be presumed to be an equitable mortgage. The existence of any one of said circumstances, not the concurrence nor an overwhelming number of such circumstances, is sufficient for a contract of sale to be presumed an equitable mortgage. The provision also applies even to a contract purporting to be an absolute sale, as in this case, if indeed the real intention of the parties is that the transaction shall secure the payment of a debt or the performance of any other obligation. (*Spouses Reyes v. CA, G.R. No. 134166, Aug. 25, 2000*).

Right of Redemption Distinguished from Equity of Redemption. The right of redemption exists only in the case of extra-judicial foreclosure. Act 3135 grants the mortgagor the right of redemption within one (1) year from the registration of the sheriff's certificate of foreclosure sale. No such right is recognized in a judicial foreclosure, except only where the mortgagee is the Philippine National Bank (PNB) or a bank or banking institution. In the event of judicial foreclosure, if the mortgagee is not PNB or a bank or banking institution, the foreclosure sale, when confirmed by an order of the court, shall operate to divest the rights of all the parties to the action and vest their rights in the purchaser. There then exists only what is known as the *equity of redemption* which is simply the right of the defendant mortgagor to extinguish the mortgage and retain ownership of the property by paying the secured debt within the 90-day period after the judgment becomes final, or even after the foreclosure sale but prior to its confirmation. (*Huerta Alba Resort, Inc. v. Court of Appeals, G.R. No. 128567, Sept. 1, 2000*).

Extra-Judicial Foreclosure of Mortgage. Notice and publication requirements as well as venue of proceedings. (*Langkaan Realty Development, Inc. v. United Coconut Planters Bank, G.R. No. 139437, Dec. 8, 2000*).

SURETYSHIP

Novation. A surety agreement is strictly construed against the creditor, and every doubt is resolved in favor of the solidary debtor. The creditor must get the consent of the surety to any material alteration in the loan agreement covered by his suretyship. Hence, petitioner bank cannot hold herein respondent liable for loans obtained in excess of the amount or beyond the period stipulated in the original agreement, absent any clear stipulation that respondent waived his right to be notified thereof, or to give consent thereto. This is especially true where, as in this case, respondent was no longer the principal officer or major stockholder of the corporate debtor at the time the amended obligations were incurred. Respondent's obligation as a surety should be deemed extinguished, pursuant to Art. 2079 of the Civil Code, which specifically states that an extension granted to the debtor by the creditor without the consent of the guarantor extinguishes the guaranty. Distinguish this case from *Philamgen v. Mutuc*, where the Court sustained the stipulation binding the surety not only to the specified term of the loan, but to any extension thereafter made, without notice to the surety, who *waived the right to be notified of any renewal or extension of the bond which may be granted under this indemnity agreement*. That the Indemnity Agreement is a continuing surety does not authorize the bank to extend the scope of the principal obligation inordinately. Distinguish the ruling on this point from the *Dino v. CA* case, where the surety agreement contained an unequivocal stipulation that "in case of any extension or renewal of the bond, we equally bind ourselves to the Company under the same terms and conditions as herein provided without the necessity of executing another indemnity agreement for the purpose and that *we hereby equally waive our right to be notified of any renewal or extension of the bond which may be granted under this indemnity agreement*." Moreover, in the *Dino* case, the surety agreement specifically provided that "each suretyship is a continuing one which shall remain in full force and effect *until this bank is notified of its*

revocation." No similar provision is found in the present case. (*Security Bank and Trust Company, Inc. v. Cuenca, G.R. No. 138544, Oct. 3, 2000*).

TRUSTS

Implied Trust. For the provision of Art. 1448 of the Civil Code to apply, the price must be paid by another for the purpose of having a beneficial interest of the property. (*Viewmaster Construction Corporation v. Roxas, G.R. No. 133576, Jul. 13, 2000*).

COMPROMISE

This Agreement entered into by a person not duly authorized to do so by the principal is void and has no legal effect. The same is true as regards the judgment based on said agreement. A void contract does not become valid and enforceable merely because it is based on a judgment upon a compromise and the same can be impugned in any proceeding. (*Anacleto v. Van Twest, G.R. No. 131411, Aug. 29, 2000*).

EXTRA-CONTRACTUAL OBLIGATIONS

QUASI-DELICT

Vicarious Liability of Employer. At the time of the accident, "D" was an employee of respondent though his name was no longer included in respondent's payroll. Likewise, D acted within the scope of the authority given him. Third parties are not bound by the allegation that the driver was authorized to operate the jeep only when the employer's children were on board the vehicle. Moreover, respondent's claim that he had exercised the diligence of a good father of a family is not borne out by the evidence. Once a driver is proven negligent in causing damages, the law presumes the vehicle owner equally negligent and imposes upon the

latter the burden of proving proper selection of employee as a defense. (*Cartesiano v. Nuval, G.R. No. 138054, Sept. 28, 2000*).

Negligence. The driver of the oncoming Nissan Pathfinder was liable and the driver of the u-turning taxicab was also guilty of contributory negligence. That the driver of the Nissan vehicle had no opportunity to avoid the collision is of his own making and should not relieve him of liability. Malfunction or loss of brake is not a fortuitous event. Even assuming *arguendo* that loss of brakes is an act of God, by reason of their negligence, the fortuitous event became humanized, rendering the Nissan driver liable for the ensuing damages. (*Thermochem Inc. v. Naval, G.R. No. 131541, Oct. 20, 2000*).

Medical Malpractice. A form of negligence which consists in the failure of a physician or surgeon to apply to his practice of medicine that degree of care and skill which is ordinarily employed by the profession generally, under similar conditions, and in like surrounding circumstances. In order to successfully pursue such a claim, a patient must prove that the physician or surgeon either failed to do something which a reasonably prudent physician or surgeon would have done, or that he or she did something that a reasonably prudent physician or surgeon would not have done, and that the failure or action caused injury to the patient. There are thus four elements involved in medical negligence cases, namely: duty, breach, injury, and proximate causation. It is the breach of duty which constitutes actionable malpractice. Inasmuch as the causes of the injuries involved in malpractice actions are determined only in the light of scientific knowledge, it has been recognized that expert testimony is usually necessary to support the conclusion as to causation. However, under the doctrine of *res ipsa loquitor*, expert testimony may be dispensed with, as when the following requisites are present: (i) the accident was of a kind which does not ordinarily occur unless someone is negligent; (ii) the instrumentality or agency which caused the injury was un-

der the exclusive control of the person in charge; and (iii) the injury suffered must not have been due to any voluntary action or contribution of the person injured. In this case, while the patient died just a few hours after professional medical assistance was rendered, there is really nothing unusual or extraordinary about his death. Prior to his admission, the patient already had recurring fevers and chills for five days unrelieved by the analgesic, antipyretic, and antibiotics give him by his wife. This shows that he had been suffering from a serious illness and professional medical help came too late for him. (*Reyes v. Sisters of Mercy Hospital, G.R. No. 130547, Oct. 3, 2000*).

DAMAGES

Actual and Compensatory. (a) For actual and compensatory damages to be awarded, there must be competent proof constituting evidence of the actual amount thereof, such as receipts showing the expenses incurred on account of the incident. (*People v. Gopio, G.R. No. 133925, Nov. 29, 2000*). There must be competent proof of the actual amount of loss, duly supported by receipts. Considering that the actual damages claimed by private respondents were based only on job estimate and a photo showing the damage to the truck, there is absence of competent proof on the specific amounts of actual damages suffered. (*Viron Transportation Co., Inc. v. De los Santos, G.R. No. 138296, Nov. 22, 2000*). While the testimony of private respondent that he had made promotions of the product in some provinces was not rebutted by petitioner, no receipts covering such expenditures were adduced in evidence and private respondent's testimony thereon was not corroborated. Actual damages cannot be presumed, but must be duly proved with reasonable degree of certainty. (*Bayer Philippines, Inc. v. CA, G.R. No. 109269, Sept. 15, 2000*). Respondent's refusal to answer adequately for damages forced petitioners to litigate and incur expenses. Compensatory, moral and exemplary damages as well as attorney's fees were allowed in this case. (*Cartesiano v. Nuval, G.R. No. 138054, Sept. 28, 2000*).

(b) However, where it was clearly established that the claimants were members of indigenous communities, the Court, cognizant of the informal market system prevailing in said communities, allowed reasonable claims for expenses incurred in relation to traditional burial practices and damages for loss of earning capacity of the deceased, even though the prosecution did not present documentary evidence to support its claim for damages. (*People v. Bangcado, G.R. No. 132330, Nov. 28, 2000*).

Moral Damages. The person claiming moral damages must prove the existence of bad faith by clear and convincing evidence, for the law always presumes good faith. It is not enough that one merely suffered sleepless nights, mental anguish, serious anxiety as a result of the actuations of the other party. Invariably, such action must be shown to have been willfully done in bad faith or with ill motive. (*Ace Haulers Corp. v. CA, G.R. No. 127934, Aug. 23, 2000*).

COMMERCIAL LAW

CORPORATION LAW

Pre-Emptive Right. *(Republic v. Sandiganbayan, G.R. No. 128606, Dec. 4, 2000).*

Treasury Shares. Converting the sequestered shares in question to treasury shares will result in: [i] the outstanding shares so converted becoming property of the issuing corporation and will cease to earn dividends; [ii] the retained dividends on those shares going to the issuing corporation as a whole; and [iii] the voting rights of those shares cannot be exercised; hence, the voting strength of the other shares remaining issued and outstanding being enhanced to the extent of the outstanding shares thus converted to treasury. *(San Miguel Corporation v. Sandiganbayan, G.R. Nos. 104637-38, Sept. 14, 2000).*

Intra-Corporate Dispute. *(Pascual v. Court of Appeals, G.R. No. 138542, Aug. 25, 2000).*

Foreign Corporations. (a) There is no general rule or governing principle as to what constitutes "doing" or "engaging in" or "transacting" business in the Philippines. Each case must be judged in the light of its peculiar circumstances. Participating in the bidding process (involving the opportunity to develop and operate a modern marine container terminal within the Subic Bay Freeport Zone) constitutes "doing business" because it shows the foreign corporation's intention to engage in business here for which a license is required. In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether or not it should get a license to do business in the Philippines. The primary purpose of a license requirement is to compel a foreign corporation

desiring to do business within the Philippines to submit itself to the jurisdiction of the Philippine courts and to enable the government to regulate their activities in this country. *(Hutchison Ports Philippines Limited v. Subic Bay Metropolitan Authority, G.R. No. 131367, August 31, 2000).*

(b) As a general rule, unlicensed foreign non-resident corporations cannot file suits in the Philippines. The licensing requirement, however, was never intended to favor domestic corporations who enter into solitary transactions with unwary foreign firms and then repudiate their obligations simply because the latter are not licensed to do business in the Philippines. After contracting with a foreign corporation, a domestic firm is estopped from denying the former's capacity to sue. *(Subic Bay Metropolitan Authority v. Universal International Group of Taiwan, G.R. No. 131680, Sept. 14, 2000).*

Piercing of Corporate Veil. (a) The organization of subsidiary corporations as what was done here is usually resorted to for the aggrupation of capital, the ability to cover more territory and population, the decentralization of activities best decentralized, and the securing of other legitimate advantages. But when the mother corporation and its subsidiary cease to act in good faith and honest business judgment, when the corporate device is used by the parent corporation to avoid its liability for legitimate business obligations of the subsidiary, and when the corporate fiction is used to perpetrate fraud or promote injustice, the law steps in to remedy the problem. *(Reynoso, IV v. CA, G.R. Nos. 116124-25, Nov. 22, 2000).*

(b) That MHC is an incorporator of MHICL and owns 50% of its capital stock is not enough reason to pierce the veil of corporation fiction between MHICL and MHC. *(The Manila Hotel Corp. v. NLRC, G.R. No. 120077, Oct. 13, 2000).*

LAW ON INTELLECTUAL PROPERTY

Trademark. Ordinarily, the ownership of a trademark or trade name is a property that the owner is entitled to protect as mandated by the Trademark Law. However, when a trademark is used by a party for a product in which the other party does not deal, the use of the same trademark on the latter's product cannot be validly objected to. The certificate of registration confers upon the trademark owner the exclusive right to use its own symbol only to those goods specified in the certificate, subject to the conditions and limitations stated therein. *(Canon Kabushiki Kaisha v. CA, G.R. No. 120900, Jul. 20, 2000).*

Paris Convention. Under the Convention of Paris for the Protection of Industrial Property, there is no automatic protection afforded an entity whose trade name is alleged to have been infringed through the use of that name as a trademark by a local entity. Guidelines for the implementation of Article 6b of the Treaty of Paris. (*id.*)

Patent. Revival of Patent Application. *(Schuartz v. CA, G.R. No. 113407, Jul. 12, 2000).*

USURY LAW

Usurious Interest. "Installment paper purchase" transactions employed as a scheme to circumvent the law. The contracts should be declared void. In usurious loans, the creditor can always recover the principal debt. However, the stipulation on the interest is considered void thus allowing the debtor to claim the whole interest paid. *(Investors Finance Corp. v. Autoworld Sales Corp., G.R. No. 128990, Sept. 21, 2000).*

INSURANCE

Fire Policy. Coverage. *(Rizal Surety & Insurance Co. v. CA, G.R. No. 112360, Jul 18, 2000).*

Life insurance. *(Philippine American Life Insurance Co. v. CA, G.R. No. 126223, Nov. 15, 2000).*

TRUST RECEIPTS LAW

Violation. The law is violated whenever the person in whose favor a trust receipt was issued fails: (1) to return the goods covered by the trust receipt; or (2) to return the proceeds of the sale of the said goods. The foregoing acts constitute estafa punishable under Article 315 (1) (b) of the Revised Penal Code. *(Metropolitan Bank and Trust Co. v. Tonda, G.R. No. 134436, Aug 16, 2000).*

Not Trust Receipts Transaction. In this case, the transaction between the parties was a simple loan, not a trust receipts agreement. Petitioners received the merchandise (materials) for their construction project. It was only a day after receipt of the merchandise that petitioners went to the bank to apply for a loan to pay for the merchandise for which the bank required the execution of trust receipts. *(Colinares v. CA, G.R. No. 90828, Sept. 5, 2000).*

INVESTMENT COMPANY

The transaction between petitioners and respondent was one involving not a loan but purchase of receivables at a discount, well within the purview of "investing, reinvesting or trading in securities" which an investment company is authorized to perform and does not constitute violation of the General Banking Act. Indubitably, what is prohibited by law is for investment companies to lend funds obtained from the public through receipts of deposit, which is a function of banking institutions. Here, the funds

supposedly "lent" to petitioners have not been shown to have been obtained from the public by way of deposits, hence, the inapplicability of banking laws. *(Bañas v. Asia Pacific Finance Corporation, G.R. No. 128703, Oct. 18, 2000).*

PUBLIC UTILITY

Shipyard is a public utility. *(JG Summit Holdings, Inc. v. CA, G.R. No. 124293, Nov. 20, 2000).*

JOINT VENTURE

A joint venture is governed by the laws on contract and on partnership. A joint-venture that would engage in the business of operating a public utility, such as a shipyard, must observe the proportion of 60%-40% Filipino-foreign capitalization. *(id.)*

CRIMINAL LAW

FELONIES

Duty of the Court in Cases of Excessive Penalty. Considering that the accused: [i] was only 21 years old when she committed the crime of kidnapping penalized by *reclusion perpetua;* [ii] did not maltreat the child victim; and [iii] had been in preventive detention since 1991, the Court recommended that she be granted either a commutation of sentence or executive clemency. *(People v. Acbangin, G.R. No. 117216, Aug. 9, 2000).* Likewise, the Court recommended the grant of executive clemency to the accused-appellant convicted of rape penalized by *reclusion perpetua,* as he is already 72 years old, suffering from an acute heart ailment that requires a heart-bypass operation and has served a term of imprisonment consistent with the ends of retributive justice. *(People v. Del Rosario, G.R. No. 134581, Oct. 26, 2000).*

Attempted Distiguished from Frustrated Felony. *(People v. Albacin, G.R. No. 133918, Sept. 13, 2000).*

Conspiracy as a Mode of Committing Felony. While there is no evidence of previous agreement between the appellants to kill the victims, their simultaneous acts in stoning the victims indubitably show unity of purpose, and intent to harm the victims. *(People v. Sinda, G.R. No. 115247-48, Dec. 1, 2000).* Conspiracy may be inferred from the acts of the accused before, during and after the commission of the crime which indubitably point to a joint purpose, concert of action and community of interest. *(People v. Listerio, G.R. No. 122099, Jul. 5, 2000).* The existence of conspiracy makes the act of one the act of all. Hence, the accused-appellant was held liable for three counts of rape and three counts of frustrated homicide on account of a clear conspiracy among the three accused found guilty of committing, one after the other, rape and

then homicide. *(People v. Honra, G.R. No. 136012-16, Sept. 26, 2000).* However, a finding of conspiracy does not make each of the accused-appellants liable for as many crimes of murder as there are conspirators. *(People v. Birayon, G.R. No. 133787, Nov. 29, 2000).* In an indictment based on conspiracy, the acquittal of a conspirator does not absolve the co-conspirator from criminal liability. If the prosecution fails to prove conspiracy, the alleged conspirators should be individually responsible for their respective acts. *(People v. Figueroa, G.R. No. 134056, Jul. 6, 2000).*

JUSTIFYING CIRCUMSTANCES

Self-Defense. - Not established. *(People v. Casturio, G.R. No. 128819, Nov. 20, 2000; People v. Nacario, G.R. No. 137049, Nov. 29, 2000; People v. Briones, G.R. No. 128127, Oct. 23, 2000).* When the accused invokes self-defense or accident to avoid criminal liability, he thereby admits having caused the death of the victim. He must therefore prove by clear and convincing evidence the justifying circumstance he invokes. If he fails, his conviction is inevitable. In this case, the theory of the prosecution was sustained that: if "A" indeed shot "T" by accident, the natural reaction expected of him would be to immediately see to it that "T" be brought to a hospital or get medical attention at the quickest time possible. Instead "A" left "T," who was supposed to be his good friend, lying dead on the floor for several hours. If indeed he and "T" both had their hands on the gun and there was no telling who actually pulled the trigger, "A" should have seen to it that no one else would touch that gun barehanded to preserve the fingerprints on it. Instead, he gave the gun to SPO4 "N" who had no concern for preserving the fingerprints on the gun. Not only that, "A" also handed the gun to Mayor "JE". Thus, one tangible piece of evidence that could have proven his claim of self-defense or accident was unfortunately lost. *(People v. Antonio, G.R. No. 128900, Jul. 14, 2000).*

Defense of Relative. Not given credence. *(People v. Mana-ay, .G.R. No. 132717, Nov. 20, 2000; People v. Barrameda, G.R. No. 130177, Oct. 11, 2000).*

Fulfillment of Duty. *(Balanay v. Sandiganbayan, G.R. No. 112924, Oct. 20, 2000).*

CIRCUMSTANCES THAT EXEMPT FROM CRIMINAL LIABILITY

Insanity. The defense of insanity must be raised at the earliest opportunity. *(People v. Ocfemia, G.R.No. 126135, Oct. 25, 2000).*

CIRCUMSTANCES WHICH MITIGATE CRIMINAL LIABILITY

Generally, mitigating circumstances are personal to an accused in whose favor they are determined to exist and cannot be enjoyed by his co-conspirators or co-accused. *(People v. Barro, G.R. No. 118098, Aug 17, 2000; People v. Barreta, G.R. No. 120367, Oct. 16, 2000).*

Minority. The Court upheld the claim of minority even without any other proof to corroborate such testimony, especially as the prosecution failed to present contradictory evidence. *(People v. Chua, G.R. Nos. 126255-56, August 31, 2000).*

Voluntary Surrender. Appellants' move "to clear their names" is not equivalent to voluntary surrender. For a surrender to be voluntary, it must be spontaneous and should show the intent of the accused to submit himself unconditionally to the authorities, either because he acknowledges his guilt or he wishes to save the government the trouble and expense necessarily included for his search and capture. *(People v. Bayotas, G.R. No. 136818,*

Dec. 19, 2000; People v. Caber, Sr., G.R. No. 129252, Nov. 28, 2000). This circumstance was not appreciated where, at the time of his surrender, accused-appellant already had a pending warrant of arrest 5 days before his surrender. *(People v. Taraya, G.R. No. 135551, Oct. 27, 2000).*

Lack of Education. *(People v. Zinampan, G.R. No. 126781, Sept. 13, 2000).*

Incomplete Self-Defense. Privileged mitigating. *(People v. Librando, G.R. No. 132251, Jul 6, 2000).*

Fulfillment of duty or lawful exercise of right. Privileged mitigating. *(People v. Ulep, G.R. No. 132547, Sept 20, 2000).*

Passion and Obfuscation. The act of the victim of demanding that the accused-appellant, among others, vacate her land and transfer elsewhere ... was not unlawful and unjust as she was exercising her right to her land. The exercise of a lawful right cannot be a proper source of obfuscation that may be considered a mitigating circumstance. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000; People v. Bayotas, G.R. No. 136818, Dec. 19, 2000).*

Vindication of a grave offense. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).*

AGGRAVATING CIRCUMSTANCES

Treachery. The attendance of treachery qualifies the killing to murder. As such, treachery must be specifically alleged in the information and established by proof beyond reasonable doubt. *(People v. Aquino, G.R. No. 130613, Oct. 5, 2000).*

(a) To be appreciated, treachery should normally attend the inception of the aggression. *(People v. Aquino, G.R. No. 130613,*

Oct. 5, 2000). However, in this case, treachery was established, though no one positively testified on how the victim was killed – as the lifeless body of the victim, a 15-year old deaf-mute, eloquently showed how she was attacked by her assailant. *(People v. Rendaje, G.R. No. 136745, Nov. 15, 2000).* Treachery was established in the following cases: [i] The accused-appellant suddenly and unexpectedly grabbed the hair of the victim and simultaneously hacked her to death. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).* [ii] The victim (9-month pregnant) was taking a bath when accused-appellant suddenly forced himself into the flimsy structure which served as bathroom and, without warning, repeatedly stabbed the victim. Even as the victim was already forcing herself out of the bathroom, accused-appellant ruthlessly assaulted her from behind. And, as the victim was able to flee and was being lifted into the jeepney to be brought to the hospital, accused-appellant caught up with her, dragged her out, kicked her while helpless on the ground, and stabbed the already beaten up victim. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).* [iii] The victim was riding a jeepney that was moving on a busy street with people around when the accused-appellant suddenly appeared and stabbed him. *(People v. Bayotas, G.R. No. 136818, Dec. 19, 2000).* [iv] Accused-appellant fired at the victim behind the latter's back; and even if the victim sensed the danger to his life, that did not diminish the suddenness of the attack. *(People v. Abendan, G.R. No. 131813, Sept. 29, 2000).*

(b) Treachery, not established: [i] There is no treachery just because the attack is sudden and unexpected, for the attack could have been done on impulse or as a reaction to an actual or imagined provocation offered by the victim. Provocation of the accused by the victim negates the presence of treachery, even if the attack may have been sudden and unexpected. *(People v. Templo, G.R. No. 133569, Dec. 1, 2000).* [ii] It is not only the sudden attack which qualifies the killing to murder. There must be a conscious and deliberate adoption of the mode of attack for a specific

purpose. In this case, all the evidence shows is that the incident was an impulse killing. It was a spur-of-the-moment crime. One who, in the heat of passion, loses his reason and self-control, cannot consciously employ a particular means, method, or form of attack in the execution of the crime. *(People v. Antonio, G.R. No. 128900, Jul. 14, 2000).* However, in his *concurring and dissenting opinion*, Justice Puno observed that treachery attended the killing of "T"; and the accused-appellant should be held guilty of murder. He stressed that the murder weapon was a 9 mm Beretta Model 92F pistol with a laser sight. The victim sustained a single gunshot wound on the forehead, between his eyes. He was shot at close range. He explained that the victim had absolutely no opportunity to defend himself from the aggression of accused-appellant and that "means, method and manner of execution were deliberately and consciously adopted by the offender." (*id.*). Treachery cannot qualify a killing to murder if the solitary eyewitness did not see the commencement of the assault. *(People v. Macaliag, G.R. No. Aug. 9, 2000).*

(c) When treachery is present in the special complex crime of robbery with homicide, it is to be regarded as a generic aggravating circumstance. *(People v. Cando, G.R. No. 128114, Oct. 25, 2000).*

Abuse of Superior Strength (a) Qualifies killing to murder, as when an armed man with a deadly weapon attacks an unarmed and defenseless woman *(People v. Bohol, G.R. 130587, Jul. 12, 2000);* or, a 22-year-old male with a deadly weapon assaults an old woman with failing eyesight and unarmed. However, since treachery was already appreciated as a qualifying circumstance, abuse of superior strength was deemed absorbed therein. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).*

(b) As a generic aggravating circumstance, capable of being proved and taken into consideration in imposing the sentence, even if it is not alleged in the information. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).*

Nighttime. An aggravating circumstance, when deliberately and intentionally sought by accused-appellants to help them realize their evil intentions. *(People v. Arizobal, G.R. No. 135051-52, Dec. 14, 2000; People v. Talo, G.R. No. 125542, Oct. 25, 2000).* Nocturnity does not become a modifying factor when the place is adequately lighted, and thus could no longer insure the offender's immunity from identification or capture. *(People v. Macaliag, G.R. No. Aug. 9, 2000).* **Nighttime** and **Uninhabited Place** were treated in this case as just one aggravating circumstance. *(People v. Librando, G.R. No. 132251, Jul 6, 2000).*

Dwelling. *(People v. Talo, G.R. No. 125542, Oct. 25, 2000).* Considered an aggravating circumstance in robbery with homicide. *(People v. Arizobal, G.R. No. 135051-52, Dec. 14, 2000).*

Recidivism. To prove recidivism, it is necessary to allege the same in the information and to attach thereto certified copies of the sentences rendered against the accused. Absent such allegation in the information, however, the trial court may still consider recidivism as an aggravating circumstance if the accused does not object to the presentation of evidence thereon. *(People v. Molina, G.R. No. 134777-78, Jul. 24, 2000).* Previous convictions do not make the accused-appellant a recidivist until and unless such convictions are already final. *(People v. Abendan, G.R. No. 131813, Sept. 29, 2000).*

Evident Premeditation. *(People v. Sabado, G.R. No. 135963, Nov. 20, 2000).* Inherent in crimes against property, but may be considered in robbery with homicide, if there is premeditation to kill besides stealing. *(People v. Cando, G.R. No. 128114, Oct. 25, 2000).*

Band. Not aggravating unless there is proof that at least four (4) of the five perpetrators of the crime were armed. *(People v. Arizobal, G.R. No. 135051-52, Dec. 14, 2000).*

Cruelty. The physical evidence shows that the victim suffered first and second degree scalding burns covering 72% of the body surface, caused by accused-appellant's repeated acts of pouring boiling water on the victim while they were allegedly embroiled in a quarrel. Clearly, the sheer number, and severe nature and extent of the wounds suffered by the victim attest to their deliberate infliction. The wounds and scalding burns listed in the autopsy report were inflicted at different times but did not immediately result in death, as some of the wounds were still in the process of healing at the time of autopsy. The nature and extent of those injuries undoubtedly caused terrible sufferings to the victim for a long period of time, resulting in a slow and painful death. A person is to be held to contemplate and be responsible for the natural consequences of her own acts. If she inflicts wounds of such a gravity as to put the life of the victim in jeopardy, and death follows as a consequence, it does not alter the nature nor diminish the criminality of the acts to prove that other causes cooperated in producing the fatal result. *Es que es causa de la causa es causa del mal causado.* He who is the cause of the cause is the cause of the evil caused. Accused-appellant's atrocious character, which transfixes the soul with such horror and revulsion, truly merits the severest condemnation. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).* In another case, the victim was already weak and almost dying when accused-appellant inserted the cassava trunk inside her private organ. *(People v. Benito, G.R. No. 128002, Oct. 10, 2000).*

Public Position. Abuse of public position was aggravating in robbery. *(Fortuna v. People, G.R. No. 135784, Dec. 25, 2000).* Was not appreciated in this case. *(People v. Bangcado, G.R. No. 132330, Nov. 28, 2000).*

ALTERNATIVE CIRCUMSTANCES

Relationship shall be taken into consideration only when the offended party is the spouse, ascendant, descendant,

legitimate, natural, or adopted brother or sister, or relative by affinity in the same degree of the offender. That the victim is the maid of the accused appellant – is not aggravating. *(People v. Ocfemia, G.R. No. 126135, Oct. 25, 2000).*

Intoxication. Not proven or appreciated in these cases. *(People v. Dumaguing, G.R. No. 135516, Sept 20, 2000; People v. Bato, G.R. No. 127843, Dec. 15, 2000).*

PERSONS CRIMINALLY LIABLE

Accomplice. "B" was the driver of the jeepney used by the three accused-appellants to go to the scene of the crime. He waited for them and after they had accomplished their mission, helped two of the accused-appellants get away. *(People v. Chua, G.R. Nos. 126255-56, Aug. 31, 2000).*

Accessories. Under par. 3, Art. 19 of the Revised Penal Code (RPC), there are only two (2) classes of accessories, of which, are public officers who, acting with abuse of their public functions, harbor, conceal or assist in the escape of the principal of a crime which is not a light felony. Appellant is one such public officer, and he abused his public function when he failed to effect the immediate arrest of accused and to conduct a speedy investigation of the crime committed. *(People v. Antonio, G.R. No. 128900, Jul. 14, 2000).* Accessories who are exempt from criminal liability by reason of relationship under Article 20 of the RPC. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).*

PENALTIES

IN GENERAL

Retroactive Effect of Penal Laws. Penal laws shall have a retroactive effect insofar as they favor the person guilty of a felony,

who is not a *habitual criminal* as defined in Rule 5, Art. 62 of the RPC. Thus, in this case, the trial court convicted the accused-appellant for: [i] murder for which the trial court (in light of its appreciation of attendant aggravating circumstances) imposed the death penalty; and [ii] illegal possession of firearm and ammunition for which the penalty of *reclusion perpetua* under P.D. No. 1866 was imposed – both crimes committed in 1995. Ruling out all generic aggravating circumstances found by the trial court, the Court applied R.A. No. 8294 (which took effect on Jul. 6, 1997) to the cases of the accused, to the extent that it was favorable to him. Thus, the accused may no longer be separately charged with illegal possession or use of unlicensed firearm and should be punished only for the crime of murder. Under R.A. No. 8294, the use of unlicensed firearm should only be considered as an aggravating circumstance for the crime of murder. Moreover, such aggravating circumstance could not even be appreciated because its retroactive application would be unfavorable to the accused, since the higher penalty of death would necessarily be imposed. *(People v. Valdez, G.R. No. 127753, Dec. 11, 2000; People v. de la Cruz, G.R. No. 118967, Jul. 14, 2000).*

APPLICATION OF PENALTIES

Complex Crimes. Under Article 48 of the RPC, there is a complex crime when: [i] a single act constitutes two or more grave or less grave felonies, or [ii] when an offense is a necessary means for committing the other. (a) In a complex crime, although two or more crimes are actually committed, they constitute only one crime in the eyes of the law, *i.e., murder with abortion* – (the stabbing and killing of the victim which caused likewise the death of the fetus arising from the single criminal intent of killing the victim). The penalty for the more serious crime shall be imposed, the same to be applied in its maximum period. As between murder and unintentional abortion, murder is the more serious crime penalized by *reclusion perpetua* to death. Death being the maximum or

the greater penalty must be imposed, and since this is an indivisible penalty, the presence of mitigating or aggravating circumstances is inconsequential. *(People v. Lopez, G.R. No. 136861, Nov. 15, 2000).* (b) In the instant case, accused-appellant committed separate crimes of rape and frustrated homicide. They do not constitute a complex crime of "rape with frustrated homicide." Neither does this case fall under Art. 335 of the RPC, which provides for the special complex crime of rape with homicide, as the law does not contemplate consummated rape with frustrated homicide. *(People v. Honra, G.R. No. 136012-16, Sept. 26, 2000).*

EXTINCTION OF CRIMINAL LIABILITY

Death. The death of the appellant pending appeal and prior to the finality of conviction totally extinguishes his criminal liability and civil liabilities arising from the crime. The criminal case against him and not the appeal should be dismissed. *(People v. Abungan, G.R. No. 136843, Sept. 28, 2000; People v. Pacaña, G.R. No. 97472-73, Nov. 20, 2000).*

Amnesty distinguished from PARDON. *(People v. Patriarca, G.R. No. 135457, Sept 29, 2000).*

CIVIL LIABILITY

Civil Indemnity, Moral and Exemplary Damages. (a) The term "heirs" entitled to civil indemnity and moral and exemplary damages is limited to the deceased's "spouse, legitimate, and illegimate ascendants and descendants" per definition in Article 2206 of the Civil Code. In this case, since the heirs of the deceased are not known, the award of civil indemnity and moral and exemplary damages should be disallowed. *(People v. Mercado, G.R. No. 116239, Nov. 29, 2000).* (b) The heirs are entitled to an indemnity of P50,000, for which the four appellants are solidarily liable. *(People v. Mana-ay, G.R. No. 132717, Nov. 20, 2000; People v.*

Matibag, G.R. No. 110515, Jul 18, 2000). Thus, the trial court erred in ordering each appellant to pay P50,000, or a total of P200,000 as civil indemnity. (c) Under present case law, the award of P50,000 for civil indemnity is mandatory upon the finding of the fact of murder. Moral damages, *vis-à-vis* compensatory damages or civil indemnity, are different from each other and should thus be awarded separately. The indemnity authorized by our criminal law as civil liability *ex delicto* for the offended party, is itself equivalent to actual or compensatory damages in civil law. It is not to be considered moral damages thereunder, the latter being based on a different jural foundation and assessed by the court in the exercise of sound discretion. *(People v. Bangcado, G.R. No. 132330, Nov. 28, 2000).* (d) Civil indemnity in robbery with homicide – P100,000. *(People v. Serenilla, G.R. No. 1130224-24, Dec. 15, 2000).* In rape with homicide – P100 thousand. *(People v. Tuangco, G.R. No. 130331, Nov. 22, 2000).* In qualified rape – P75,000. *(People v. Brondial, G.R. No. 135517, Oct. 18, 2000).*

Loss of Earning Capacity. Under Article 2206 of the Civil Code, in addition to civil indemnity for the death of the victim, the accused-appellants are also jointly and severally liable for the loss of earning capacity of the deceased and such indemnity should be paid to the heirs of the latter. *(People v. Sirad, G.R. No. 130594, Jul. 5, 2000).*

Moral Damages. P50,000 awarded in robbery with homicide without need of proof or pleading the basis thereof. *(People v. Serenilla, G.R. No. 1130224-24, Dec. 15, 2000).* P50,000 awarded in qualified rape without need of proof. *(People v. Brondial, G.R. No. 135517, Oct. 18, 2000).*

Exemplary Damages. May be imposed when the crime is committed with one or more aggravating circumstances. *(People v. Listerio, G.R. No. 122099, Jul. 5, 2000).*

Subsidiary Civil Liability of Other Persons. There is no good ground to order a separate hearing to determine the subsidiary liability of petitioner. To do so would entail a waste of both time and resources of the trial court as the requisites for the attachment of subsidiary liability of the employer had already been established, viz.: (i) the existence of an employer-employee relationship (ii) the employer is engaged in some kind of industry, land transportation industry in this case as the jeep driven by accused was admittedly a passenger jeep (iii) the employee has already been adjudged guilty of the wrong act and found to have committed the offense in the discharge of his duties and (iv) the said employee is insolvent. *(Catacutan v. Heirs of Kadusale, G.R. No. 131280, Oct. 18, 2000).*

SPECIFIC CRIMES

CRIMES AGAINST NATIONAL SECURITY

Qualified Piracy. Not established. *(People v. Aranas, G.R. No. 123101, Nov. 22, 2000).*

CRIMES COMMITTED BY PUBLIC OFFICERS

Knowingly Rendering Unjust Judgment (Art. 204 and 205 of the Revised Penal Code) Requisites. *(De Vera v. Hon. Pelayo, G.R. No.137354, Jul. 6, 2000).*

Malversation of Public Funds. *(Rueda, Jr. v. Sandiganbayan, G.R. No. 129064, Nov. 29, 2000).*

CRIMES AGAINST PERSONS

Rape with Homicide. Special complex crime *(People v. Alarcon, G.R. No. 133191-93, Jul. 11, 2000).* Article 335 of the RPC, as amended by R.A. No. 7659, provides that, when by reason or on

the occasion of the rape of a woman under 12 years of age, a homicide is committed, the penalty shall be death. *(People v. Hermoso, G.R. No. 130590, Oct. 18, 2000).* Because of the finding of conspiracy, the imposition of two death penalties upon each of the accused-appellants is correct. *(People v. Tuangco, G.R. No. 130331, Nov. 22, 2000).*

Qualified Rape. Punishable by death. (a) Rape committed against a child below seven (7) years old, under Art. 335 of the RPC, as amended by R.A. No. 7659. In the instant case, while the information alleged that the victim was 5 years of age, the prosecution failed to present her birth certificate. Even if the victim's age was not contested by the defense, proof of age is critical considering that the victim's age at the time of the rape was just two (2) years less than seven (7) years. Given the similarities in physical features and attributes between a 5-year old child and a 7-year old, an independent proof of age is necessary to convince the Court that the victim was indeed below 7 years of age when she was raped, in order to justify the imposition of the death penalty. The evidence on record shows that other than the testimonies of the victim and her grandmother, no independent proof was presented to show that the victim was below 7 years when she was raped. As such, the lower court should have imposed the penalty of *reclusion perpetua* and not death. *(People v. Mayorga, G.R. No. 135405, Nov. 29, 2000; People v. Marquez, G.R. No. 137408-10, Dec. 8, 2000).*

(b) Rape of a victim who is [i] under 18 years of age and [ii] the offender is her parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common law spouse of the parent of the victim. *(People v. Brondial, G.R. No. 135517, Oct. 18, 2000; People v. Dumaguing, G.R. No. 135516, Sept 20, 2000).* In *People v. de la Cruz, G.R. Nos. 131167-68, Aug. 23, 2000,* the minority of the victims was proven by the testimony of their mother that was never challenged by the accused. However, in a separate opinion, it was stressed that

recent rulings of the Court relative to the rape of minors require indubitable proof of the age of the victim. There must be independent evidence proving the age of the victim (especially if such age is only a few years from majority age of 18), other than the latter's testimony or even that of her mother or the absence of denial by the accused. (*id.*).

(c) In several cases, qualified rape was not established and the imposition of the death penalty was not sustained, as both of the qualifying circumstances of minority of the victim and her relationship to the offender were not alleged in the information *(People v. Gianan, G.R. Nos. 135288-93, Sept. 15, 2000);* or, the minority of the victim *(People v. Baybado, G.R. No. 132136, Jul 14, 2000),* or the relationship of the victim to the offender *(People v. Nogar, G.R. No. 133946, Sept. 27, 2000; People v. Gutierrez, G.R. No. 132772, Aug. 31, 2000; People v. Francisco, G.R. No. 136252, Oct. 20, 2000)* was not alleged, or properly alleged in the information: [i] The statement that the victim "is the minor daughter" of the offender is not enough. It is essential that the information must state the exact age of the victim at the time of the commission of the crime. The offender's admission that he is the victim's father and that the latter was a minor under 18 years at the time of the commission of the rape cannot cure the defect of absence of allegation in the information. *(People v. Baniguid, G.R. No. 137714, Sept. 8, 2000).* [ii] So, also, the allegation in the information that the victim is the "niece" of the offender is not specific enough. If the offender is merely a relation – not a parent, ascendant, step-parent, or guardian or common-law spouse of the mother of the victim – it must be alleged in the information that *he is a relative by consanguity or affinity [as the case may be] within the third civil degree. (People v. Banihit, G.R. No. 132045, Aug. 25, 2000).* The information charged the accused of raping *"his daughter"* when, in truth, the relationship between the accused and the offended party is that of *stepfather* and *stepdaughter. (People v. Mendez, G.R. No. 132546, Jul. 5, 2000).* [iii] The information alleged that the accused-appellant is the

stepfather of the complainant where, in fact, he and the complainant's mother were just *"live-in partners*." *(People v. Villaraza, G.R. No. 131848-50, Sept 5, 2000)* or *common-law spouses (People v. Garcia, G.R. Nos. 137379-81, Sept. 29, 2000).* The relationship of stepdaughter and stepfather presupposes a legitimate relationship between the victim's mother and the offender, *i.e.*, they were married after the marriage of the victim's mother to her father was dissolved. A stepdaughter is the daughter of one's wife or husband by a former marriage, or, a stepfather is the husband of one's mother by virtue of a marriage subsequent to that of which the person spoken of is its offspring. *(People v. Melendres, G.R. Nos. 133999-4001, August 31, 2000).* [iv] Such relationship was not stated in the "cause of accusation," or in the narration of the act or omission constituting the offense, but only in the preamble or opening statement of the complaint. *(People v. Madraga, G.R. No. 129299, Nov. 15, 2000).* (v) The prosecution failed to present independent proof of the age of the victim, aside from testimonial evidence from the victim or her relatives, even though her age was not contested by the defense. *(People v. Digma, G.R. No. 127750-52, Nov. 20, 2000; People v. Tundag, G.R. Nos. 135695-96, Oct. 12, 2000);* or the victim's age was not properly and sufficiently proved beyond reasonable doubt. *(People v. Tundag, G.R. Nos. 135695-96, Oct. 12, 2000).*

Qualified Rape Punishable by *Reclusion Perpetua* to Death. (a) Rape committed in full view of the relatives of the victim within the third civil degree of consanguinity. Not established, because this qualifying circumstance was not pleaded in the information or in the complaint against the accused. *(People v. Cajara, G.R. No. 122498, Sept. 27, 2000).* (b) Rape committed by two or more persons. *(People v. Juarez, G.R. No. 128158, Sept. 7, 2000; People v. Alarcon, G.R. No. 133191-93, Jul. 11, 2000).* (c) Rape committed with the use of a deadly weapon. *(People v. Alviano, G.R. No. 133985, Jul.10, 2000)* aggravated by: [i] the alternative circumstance of relationship (victim being the daughter of the offender) duly proven *(People v. Navida, G.R. No. 132239-40, Dec. 4, 2000);* or

[ii] nighttime and ignominy *(People v. Bumidang, G.R. No. 130630, Dec. 4, 2000)* – for which the death penalty was imposed.

Statutory Rape. Rape of a woman below twelve years old. Proof of force, intimidation or consent is absolutely unnecessary, not only because force is not an element of statutory rape, but the absence of consent is conclusively presumed when the woman is below twelve years. *(People v. Castillo, G.R. No. 130205, Jul. 5, 2000).* The age of the victim, being an essential element of the offense, must unquestionably be proved by the prosecution. *(People v. Gopio, G.R. No. 133925, Nov. 29, 2000).*

Forcible Abduction with Rape. The Court has affirmed convictions for forcible abduction with rape qualified by the use of deadly weapon in cases where the use of deadly weapon was alleged in the information with respect to the crime of forcible abduction, or with respect to the complex crime of forcible abduction and rape, or to the portion referring to the crime of rape. Accordingly, to justify the imposition of the death penalty in this case, the use of deadly weapon should be alleged with respect to the rape or with respect to both the forcible abduction and rape. Since, in this case, this qualifying circumstance was alleged only with respect to the commission of the forcible abduction, it cannot be taken to qualify the crime of rape. The use of a deadly weapon can be appreciated only as a generic aggravating circumstance. *(People v. Talo, G.R. No. 125542, Oct. 25, 2000).*

Parricide. *(People v. Operaña, Jr., G.R. No. 120546, Oct. 13, 2000).*

Murder. (a) The trial court convicted accused-appellant of homicide aggravated by abuse of superior strength. This is an obvious error. Abuse of superior strength, which was alleged in the information, qualified the killing to murder. *(People v. de la Rosa, G.R. No. 133443, Sept. 29, 2000).* (b) Killing qualified by

evident premeditation. *(People v. Matibag, G.R. No. 110515, Jul. 18, 2000; People v. Samolde, G.R. No. 128551, Jul. 31, 2000).* (c) Murder - not established. *(People v. Guillermo, G.R. No. 111292, Jul. 20, 2000; People v. Balinad, G.R. No. 126036, Sept. 7, 2000).* Accused-appellant acquitted. *(People v. Castillo, G.R. No. 130205, Jul. 5, 2000).*

Homicide. While accused-appellant is to be commended for promptly responding to the call of duty when he stopped the victim from his potentially violent conduct and aggressive behavior, he cannot be exonerated from overdoing his duty during the second stage of the incident – when he fatally shot the victim in the head, perhaps in his desire to take no chances, even after the latter slumped to the ground due to multiple gunshot wounds sustained while charging at the police officers. *(People v. Ulep, G.R. No. 132547, Sept 20, 2000).*

Frustrated Homicide. *(People v. Arcillas, G.R. No. 126817, Dec. 27, 2000).*

CRIMES AGAINST PERSONAL LIBERTY

Kidnapping for Ransom. *(People v. Yambot, G.R. No. 120350, Oct. 13, 2000; People v. Bangcado, G.R. No. 132330, Nov. 28, 2000).*

Kidnapping with Murder. There was actual restraint of the victim's liberty when he was taken at gunpoint from Pasig to accused-appellant's apartment in Tanay. The crime was committed in 1994, after the amendment of the RPC on December 31, 1993 by R. A. No. 7659, which pertinently provides that when the victim is killed or dies as a consequence of the detention or is raped, or is subjected to torture or dehumanizing acts, the maximum penalty of death shall be imposed. Under the said amendment, the kidnapping and murder or homicide can no longer be complex under Art. 48 of the RPC, nor be treated as separate crimes, but shall be punished as a special complex crime under the last paragraph of

Art. 267 of the RPC, as amended by R.A. No. 7659. *(People v. Mercado, G.R. No. 116239, Nov. 29, 2000).*

CRIMES AGAINST PROPERTY

Robbery with Homicide. (a) A crime against property and not against persons - homicide being merely an incident of the robbery with the latter being the main purpose and object of the criminals. As such, treachery cannot be validly appreciated as an aggravating circumstance under Art. 14 of the RPC. The offenders did not commit two (2) separate counts of robbery with homicide but only a *delito continuado*, as the ransacking of the two (2) houses and the killing of the victims were not entirely disconnected and distinct acts of depredation. *(People v. Arizobal, G.R. No. 135051-52, Dec. 14, 2000).* The robbery itself must be established as conclusively as any other essential element of the crime. *(People v. Dizon, G.R. No. 131506, Sept. 6, 2000; People v. Mucam, G.R. No. 137276, Jul. 13, 2000; People v. Palijon, G.R. No. 123545, Oct. 18, 2000).*

(b) When homicide is committed as a consequence or on the occasion of robbery, all those who took part as principals in the robbery will also be held guilty as principals of the special complex crime of robbery with homicide, although they did not actually take part in the homicide, unless it clearly appears that they endeavored to prevent the homicide. The trial court erred in convicting the accused-appellants of the crime of *robbery in band with multiple homicide.* There is no such crime in the RPC and in the statutes. *Robo con homicidio* is killing of a human being for the purpose of robbery. Homicide is used in Art. 294 of the RPC in a generic sense. Under said provision, the term "homicide" comprehends murder, double homicide and multiple homicide, while band is considered as a mere generic aggravating circumstance. The crime of robbery with homicide remains fundamentally the same regardless of the persons killed in connection with robbery. *(People v. Carrozo, G.R. No. 97913, Oct. 12, 2000).*

(c) The suspects engaged the policemen in a gunfight either to defend possession of their loot, or to escape after the commission of the robbery, or both. The killing of one of the policemen was a necessary consequence of the commission of robbery. In robbery with homicide, there must be a direct relation, an intimate connection between robbery and the killing, whether the latter be prior or subsequent to the former or whether both crimes be committed at the same time. *(People v. Arapok, G.R. No. 134974, Dec. 8, 2000; People v. Barreta, G.R. No. 120367, Oct. 16, 2000).*

Robbery aggravated by abuse of public position. Police officers perpetrated the crime of robbery. *(Fortuna v. People, G.R. No. 135784, Dec. 25, 2000).*

Arson. The *corpus delicti* rule is satisfied by proof of the bare occurrence of the fire and of its having been intentionally caused. *(People v. Oliva, G.R. No. 122110, Sept. 26, 2000).*

Usurpation of Real Property *(Quinao v. People, G.R. No. 139603, Jul. 14, 2000).*

Estafa. Misappropriation of funds or personal property received in trust. Criminal intent is not a necessary ingredient of embezzlement under Art. 315, (b)(1) of the RPC. It is the breach of confidence or infidelity in the conversion or diversion of trust funds that takes the place of the usual element of fraud or deceit in other forms of estafa. *(Dayawon v. Judge Badilla, A.M. No. MTJ-00-1309, Sept. 6, 2000).*

Estafa. Postdating or issuing a check. Art. 315, (d)[2] of the RPC, as amended by P.D. No. 818 and R.A. No. 4885. *(People v. Panganiban, G.R. No. 133028, Jul. 10, 2000).* Elements: [i] The offender post-dated or issued a check in payment of an obligation contracted at the time of the postdating or issuance; [ii] At the said time, the offender had no funds in the bank or funds depos-

ited were not sufficient to cover the amount of the check; and [iii] The payee has been defrauded. In view of the amendment by R.A. No. 4885, the following are no longer elements of estafa: (a) knowledge of the drawer that he has no funds in the bank or that the funds deposited by him are not sufficient; and (b) failure to inform the payee of such circumstance. The drawer of the dishonored check is given three days from receipt of dishonor to deposit the amount necessary to cover the check. Otherwise, a *prima facie* presumption of deceit will arise which must then be overcome by the accused. In this case, there is no evidence that deceit accompanied the issuance of the check. It was not shown that a notice of dishonor was sent to accused-appellant. On the contrary, complainant's affidavit showed that he filed his complaint on the same day the check was dishonored. Complainant admitted that he knew at the time of the issuance of the check that it was not funded and that the money to cover it was still to come from Switzerland. He likewise admitted that accused-appellant informed him twice – before the check's due date and days thereafter – that the money from Switzerland had not arrived. Hence, there is no proof that complainant was defrauded. Indeed, the evidence adduced by the parties shows that the P100,000 given by the complainant to accused-appellant was a loan and the liability of accused-appellant was merely civil. *(People v. Holzer, G.R. No. 132323, Jul. 20, 2000).* In another case, no damage was sustained by private complainant by reason of appellant's issuance of his check, as it was not proved that appellant received something of value from private complainant. Appellant had no obligation to pay him, or to make good the SBTC check. The evidence consisting of the invoices, deliveries of materials and the bounced MBTC checks relate to the delivery of construction materials to unidentified persons, all of whom were not authorized by appellant and the bounced MBTC checks issued to pay such deliveries were not of appellant. *(People v. Tan, G.R. No. 120672, Aug. 17, 2000).* Still, in another case, the guilt of accused-appellant as co-principal (by conspiracy) was not proven. Accused-appellant

cannot be presumed to have knowledge of the non-existence or insufficiency of the funds in the bank account of the other accused (the drawer of the checks) at the time the latter issued the post-dated checks, as such legal presumption applies only to the drawer or issuer of the check. In sum, the accused-appellant was not proven to be privy to the act of the accused drawer/issuer in issuing the checks. Evidence shows her interest and participation in the consummation of the transaction but does not suffice to establish a conspiracy in estafa. *(People v. Dizon, G.R. No. 130742, Jul. 18, 2000).* Estafa under Art. 315 (2)(a), RPC. *(Marcelo v. Court of Appeals, G.R. No. 128513, Dec. 27, 2000).*

Estafa and large-scale swindling under PD No. 1689. Involving the "Ponzi Scheme." Representation that future profits or income of an enterprise shall be a certain sum made by one who knows that actually there will be none, or that they will be substantially less than what was represented, constitutes an actionable fraud where the hearer believes and relies on the representation to his injury. *(People v. Menil, G.R. No. 115054-66, Sept. 12, 2000).*

CRIMES AGAINST CIVIL STATUS OF PERSONS

Bigamy. *(Te v. Court of Appeals, G.R. No. 126746, Nov. 29,2000; Mercado v. Tan, G.R. No. 137110, Aug. 1, 2000). See also* **Marriage** under **Civil Law**

CRIMES AGAINST HONOR

Libel. General rule: Every defamatory imputation is presumed to be malicious. Exception: a fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature. Petitioner cannot insist that the case against him is confidential in nature because it has already been ruled that complaints are public records which may be published as such

unless the Court directs otherwise in the interest of morality or decency. Unlike proceedings in the Supreme Court, where disciplinary proceedings for lawyers and judges are confidential in nature, the Office of the Ombudsman has no such confidentiality rule. *(Judge Ocampo v. Sun-Star Publishing, Inc., G.R. No. 133575, Dec. 15, 2000).*

QUASI-OFFENSES

Criminal Negligence. In negligence cases, the offended party (or his heirs) has the option between an action for enforcement of civil liability based on *culpa criminal* under Art. 100 of the RPC and an action for recovery of damages based on *culpa aquiliana* under Art. 2176 of the Civil Code. However, Art. 2177 of the Civil Code precludes the recovery of damages twice for the same negligent act or omission. Consequently, a separate civil action for damages lies against the offender in a criminal action, whether or not he is criminally prosecuted and found guilty or acquitted, provided that the offended party is not allowed (if the offender is actually charged criminally) to recover damages on both scores, and would be entitled in such event only to the bigger award of the two, assuming the awards made in the two cases vary. *(Ace Haulers Corporation v. Court of Appeals, G.R. No. 127934, Aug. 23, 2000).*

OTHER PENAL OR RELATED LAWS

ANTI-GRAFT AND CORRUPT PRACTICES ACT

(a) Entering on behalf of the government into any contract or transaction, manifestly and grossly disadvantageous to the same whether or not the public officer profited or will profit thereby - in relation to sale of fire extinguishers to the Land Transportation Commission now the LTO. *(Sajul v. Sandiganbayan, G.R. No. 135294, Nov. 20, 2000).*

(b) Graft cases involving transactions of the highway engineering districts of the then Ministry of Public Works and Highways. *(Grefalde v. Sandiganbayan, G.R. No. 136502, Dec. 15, 2000).*

(c) Sec. 3, par. (e), as amended, provides as one of the elements that the public officer should have acted by causing any undue injury to any party, including the Government, or by giving any private party unwarranted benefits, advantage or preference in the discharge of his functions. Petitioner's act of issuing the certification which did not indicate what kind of taxes "TNC Nos. 3011-0001" and "0000-000" stand for was not a criminal act. *Nullum crimen nulla poena sine lege.* There is no crime where there is no law punishing it. *(Evangelista v. People, G.R. Nos. 108135-36, Aug. 14, 2000).*

PROBATION

There is nothing in Sec. 9, par. (c) which qualifies "previous conviction" as referring to conviction for a crime which is entirely different from that for which the offender is applying for probation or a crime which arose out of a single act or transaction as petitioner would have the court to understand. *(Pablo v. Hon. Castillo, G.R. No. 125108, Aug. 3, 2000).*

OBSTRUCTING OR DELAYING ARREST OF SUSPECTS UNDER PD 1829

Violation of, not established. More important than conventional adherence to general rules or criminal procedure is respect for the citizen's right to be free not only from arbitrary arrest and punishment but also from unwarranted and vexatious prosecution. *(Posadas v. Hon. Ombudsman, G.R. No. 131493, Sept. 29, 2000).*

DANGEROUS DRUGS ACT

(a) The penalty prescribed in Sec. 9 of R.A. No. 6425 will apply only if the quantity of dangerous drugs involved falls within

par. (1), Sec. 20, as amended, *i.e.*, 750 grams or more. Sec. 17 of R.A. 7659 does not prescribe any fine in cases involving a quantity of less than 750 grams. *(People v. Flores, G.R. No. 137491, Nov. 23, 2000).*

(b) The penalty for illegal sale and delivery of dangerous drugs (either prohibited or regulated) of 750 grams or more consists of two (2) indivisible penalties, that is *reclusion perpetua* to death. Applying Art. 63 of the RPC, there being no mitigating nor aggravating circumstance that attended the commission of the offense, the lesser penalty of *reclusion perpetua* should be imposed. *(People v. Banawor, G.R. No. 131927, Sept 20, 2000).*

(c) Violation, not established. The Court, like the Solicitor General (which recommended acquittal), was perplexed by the evidence for the prosecution which showed that the request for laboratory examination preceded the confiscation of the drugs. *(People v. Leodones, G.R. No. 138735, Nov. 22, 2000).*

(d) Defense of "frame-up" given credence. *(People v. Tan, G.R. No. 133001, Dec. 14, 2000).*

(e) Illegal Sale of Dangerous Drugs, elements: [i] identity of the buyer and seller, the object and consideration; [ii] the delivery of the thing sold and the payment thereof. What is fatal to the prosecution of a dangerous drugs case is the non-presentation of the poseur-buyer if there is no other eyewitness to the illicit transaction. In this case, the other members of the team that conducted the buy-bust operation testified in court that they witnessed the consummation of the illegal sale perpetrated by accused-appellant. *(People v. Uy, G.R. No. 129019, Aug. 16, 2000; People v. Montano, G.R. No. 130836, Aug. 11, 2000; People v. Zaspa, G.R. No. 136396, Sept 21, 2000).* Under Sec. 4 of the Act, the selling or acting as broker in a sale of marijuana and other prohibited drugs consummates the crime. Specifically, it punishes the mere

act of delivery of prohibited drugs. In every prosecution for the illegal sale of dangerous drugs, what is material and indispensable is the submission of proof that the sale of illicit drug took place. Proof of actual payment of money or the presence of marked money is not an indispensable requisite for conviction. *(People v. Cuba, G.R. No. 133568, Jul 24, 2000; People v. Banawor, G.R. No. 131927, Sept 20, 2000; People v. Zaspa, G.R. No. 136396, Sept 21, 2000).*

(f) Maintenance of a drug den. *(People v. Dumaguing, G.R. No. 135516, Sept 20, 2000).*

ILLEGAL RECRUITMENT

(a) Illegal Recruitment on a Large Scale. *(People v. Saulo, G.R. No. 125903, Nov. 15, 2000; People v. Fajardo, G.R. No. 128583, Nov. 22, 2000).*

(b) Illegal Recruitment on a Large Scale and Estafa. The fact that accused returned a portion of the sum of money each complainant paid to her does not negate the crime of estafa. Criminal liability for estafa is not affected by compromise or novation of contract, for it is a public offense which must be prosecuted and punished by the Government on its own motion even though complete reparation should have been made of the damage suffered by the offended party. *(People v. Ladera, G.R. No. 131922, Nov. 15, 2000; (People v. Banzales, G.R. No. 132289, Jul. 18, 2000).*

(c) Illegal Recruitment and Estafa. *(People v. Ordoño, G.R. Nos. 12953 & 143533-35, Jul. 10, 2000).*

(d) R.A. No. 8042, otherwise known as The Migrant Workers and Overseas Filipinos Act of 1995 *(People v. Gamboa, G.R. No. 135382, Sept 29, 2000).*

CARNAPPING

There is no crime of *Carnapping with Homicide.* The proper denomination is *Carnapping* as defined and penalized by R.A. No. 6539, Secs. 2 and 14. Under Sec. 14, the penalty for carnapping, in case the owner, driver or occupant of the carnapped vehicle is killed in the course of the commission of the carnapping shall be *reclusion perpetua* to death. Considering that at the time of the commission of the crime the death penalty was suspended, the accused were only sentenced to *reclusion perpetua. (People v. Sirad, G.R. No. 130594, Jul. 5, 2000; People v. Calabroso, G.R. No. 126368, Sept. 14, 2000).*

BOUNCING CHECKS LAW

(a) For violation of *Batas Pambansa Blg*. 22 (BP 22) to be committed, the following elements must be present: (1) the making, drawing, and issuance of any check to apply for account or for value; (b) the knowledge of the maker, drawer, or issuer that at the time of issue there are no sufficient funds in or credit with the drawee bank for the payment of such check in full upon presentment; (c) the subsequent dishonor of the check by the drawee bank for insufficiency of funds or credit or dishonor for the same reason had not the drawer without any valid cause, ordered the bank to stop payment. For liability to attach, it is not enough that the prosecution establish that a check was issued and that the same was subsequently dishonored. The prosecution must also prove that the issuer, *at the time of the check's issuance, had knowledge that that he did not have sufficient funds or credit in the bank for payment thereof upon its presentment*. Since this element involves a state of mind which is difficult to verify, Sec. 2 of BP 22 creates a presumption *juris tantum* that the second element *prima facie* exists when the first and the third elements of the offense are present. *(Ting v. Court of Appeals, G.R. No. 140665, Nov. 13, 2000).* If not rebutted, it suffices to sustain a conviction. Why and to whom the check was

issued is irrelevant in determining culpability. The terms and conditions surrounding the issuance of the checks are also irrelevant. Unlike in estafa under the RPC, BP 22 does not require proof that the check was issued in payment of an obligation, or that there was damage. In this case, the Court modified the penalty imposed on petitioner by the trial court, deleting the prison sentence and imposing instead a fine double the amount of the check issued. *(Lim v. People, G.R. No. 130038, Sept. 18, 2000).* But the presumption does not arise when the issuer pays the amount of the check or makes arrangement for its payment within 5 banking days after receiving notice that such check has not been paid by the drawee. Full payment of the amount appearing in the check within 5 banking days from notice of dishonor is a complete defense. *(Ting v. Court of Appeals, G.R. No. 140665, Nov. 13, 2000).* The gravamen of the offense punished by B.P. 22 is the act of making and issuing a worthless check that is dishonored upon its presentation for payment. Petitioner's argument that the subject check was issued without consideration is inconsequential. *(Ong v. People, G.R. No. 139006, Nov. 27, 2000).*

(b) While Sec. 2 of BP Blg. 22 does not state that the notice of dishonor be in writing, taken in conjunction with Sec. 3 of the law, i.e., "that where there are no sufficient funds in or credit with such drawee bank, such fact shall always be explicitly stated in the notice of dishonor or refusal," a mere oral notice of demand to pay would appear to be insufficient for conviction under the law. *(Domagsang v. CA, G.R. No. 139292, Dec. 5, 2000).*

(c) The notice of dishonor must actually be sent and received by the petitioner to afford her the opportunity to avert prosecution under BP 22. To prove mailing, the prosecution presented a copy of the demand letter as well as the registry return receipt. However, no attempt was made to show that the demand letter was indeed sent through registered mail nor was the signature on the registry return receipt authenticated or

identified. The prosecution seems to have presumed that the registry return receipt was proof enough that the demand letter was sent through registered mail and that the same was actually received by petitioners or their agents. If, in addition to the registry receipt, it is required in civil cases that an affidavit of mailing as proof of service be presented, then with more reason should it be held in criminal cases that a registry return receipt alone is insufficient as proof of mailing. *(Ting v. Court of Appeals, G.R. No. 140665, Nov. 13, 2000).*

ILLEGAL POSSESSION OF FIREARM

(a) Under R.A. No. 8294 which took effect on July 6, 1997. Direct assault with multiple attempted homicide was committed in this case. Hence, appellant can no longer be held liable for illegal possession of firearms. Moreover, since the crime committed was direct assault and not homicide or murder, illegal possession of firearms cannot be deemed an aggravating circumstance. *(People v. Ladjaalam, G.R. Nos. 136149-51, Sept 19, 2000).*

(b) The use of unlicensed firearm in the commission of murder or homicide is a qualifying circumstance. Consequently, it must be specifically alleged in the information, otherwise the accused cannot be sentenced to death for illegal possession of firearm in its aggravated form without violating his right to be informed of the nature and cause of the accusation against him. *(De la Peña v. Judge Empaynado, Jr., A.M. No. MTJ-96-1075, Nov. 27, 2000).*

YOUTHFUL OFFENDER

(People v. Candelario, G.R.No. 125550, Jul. 11, 2000).

REVISED FORESTRY CODE (PD No. 705)

The fact of possession by the appellant of the subject pieces of *Antipolo* and *Dita* lumber, as well as his subsequent failure to produce the legal documents as required under existing forest laws and regulations constitute criminal liability for violation of P.D. No. 705, a crime that is considered *malum prohibitum. (People v. Dator, G.R. No. 136142, Oct. 24, 2000).*

LABOR LAW

WELFARE LEGISLATION

Employees Compensation. For sickness and the resulting disability or death to be compensable, it must be an occupational disease (hereafter "Occupational Disease") listed under Annex "A" of the Amended Rules on Employees Compensation; otherwise, the claimant or employee concerned must prove that the risk of contracting the disease was increased by the working condition. For Occupational Diseases, i.e., cardiovascular diseases, including *atherosclerotic heart disease, atrial fibrillation, cardiac arrhythmia,* no further proof of casual relation between the disease and claimant's work is necessary. (*Salmone v. Employees' Compensation Commission, G.R. No. 142392, Sept. 26, 2000*).

LABOR RELATIONS

National Labor Relations Commission (NLRC). Rehabilitation and Labor Cases. The power to hear and decide labor disputes is deemed suspended when the Securities and Exchange Commission puts the corporation under rehabilitation. (*Rubberworld [Phils.], Inc. v. NLRC, G.R. No. 128003, Jul 26, 2000*).

Voluntary Arbitrator. Labor Arbiter. By express provision of law, illegal termination disputes fall within the exclusive original jurisdiction of Labor Arbiters. Absent express stipulation to the contrary in the collective bargaining agreement, the phrase "all disputes" of the parties that may be referred to a voluntary arbitrator should be construed as limited to areas of conflict traditionally within the jurisdiction of voluntary arbitrators, *i.e.*, disputes relating to contract-interpretation, contract implementation, or interpretation or enforcement of company personnel policies. Illegal termination disputes do not fall under any of the

aforementioned categories of disputes cognizable by voluntary arbitrators. (*Vivero v. CA, G.R. No. 138938, Oct. 24, 2000*).

Labor Dispute. The moment the Secretary of Labor assumes jurisdiction over a labor dispute in an industry indispensable to national interest and issues an assumption order, any intended or impending strike is automatically enjoined, without the Secretary of Labor having to issue another order directing the striking workers to return to work. Defiance of such assumption/return-to-work orders of the Secretary of Labor is a valid ground for loss of the employment status of any striking union officer or member. (*Telefunken Semiconductors Employees Union-FFW v. CA, G.R. Nos. 143013-14, Dec. 18, 2000*).

Labor Organization. Contract Bar Rule. If a collective bargaining agreement (CBA) has been duly registered in accordance with Article 231 of the Labor Code, a petition for certification election or a motion for intervention can only be entertained within 60 days prior to the expiry date of such agreement. In this case, the petition for certification election was filed outside the 60-day freedom period. Hence, the filing thereof was barred by the existence of a valid CBA. Consequently, there is no legitimate representation issue and the filing of the petition for certification election did not constitute a bar to the ongoing negotiation. (*Colegio de San Juan de Letran v. Association of Employees and Faculty of Letran, G.R. No. 141471, Sept. 18, 2000*).

Unfair Labor Practice of Employer. Refusal to Bargain. The company's refusal to make counter-proposal to the union's proposed CBA is an indication of its bad faith. (*id.*).

Employer-Employee Relationship. T" worked continuously for "A", not only as "arador" on "pakyaw" basis, but as a regular farmhand doing backbreaking jobs for "A's" business. "T" and his family resided in the plantation. If he was a mere "pakyaw" worker

or independent contractor, then there would be no reason for "A" to allow them to live inside her property for free. (*SSS v. CA, G.R. No. 100388, Dec. 14, 2000*).

POST EMPLOYMENT

Managerial Prerogative. Employers have the freedom to regulate, according to their discretion and best judgment, all aspects of employment, including work assignment, working methods, processes to be followed, working regulations, transfer of employees, work supervision, lay-off of workers and the discipline, dismissal and recall of workers. In general, management has the prerogative to discipline its employees and impose appropriate penalties on erring workers pursuant to company rules and regulations. (*Philippine Airlines, Inc. v. NLRC, G.R. No. 115785, Aug. 4, 2000*)

Termination of Employment. (a) Managerial Employees. Petitioner held the position of Manager in the Health Division. Her duties, among others, were to detect fraudulent activities and irregularities within her Division and thereafter report the same to management. Her position demanded that she manage, control and take responsibility over activities in her department. It required a high degree of responsibility, including unearthing of fraudulent and irregular activities. This she failed to do. Her bare, unsubstantiated and uncorroborated denial of her participation in the anomalies did not prove her innocence nor disprove her alleged guilt. On the contrary, such denial or failure to rebut the serious accusations hurled against her militated against her innocence and strengthened the averment of private respondents. (*Nokom v. NLRC, G.R. No. 140043, Jul. 18, 2000*).

(b) Regular Employee. While it may appear that the work of petitioners was seasonal, the fact that they have worked for many years, some for over 20 years performing services necessary and

indispensable to LUTORCO's business, serves as badge of regular employment. That petitioners did not work continuously for one whole year but only for the duration of the tobacco season does not detract from their being considered as regular employees since in a litany of cases the Court has already settled that seasonal workers who are called to work from time to time and are temporarily laid off during off-season are not separated from service in said period, but are merely considered on leave until re-employed. (*Abasolo v. NLRC, G.R. No. 118475, Nov. 29, 2000*).

(c) Project Employees. Those whose employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee; or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season. The length of service of a project employee is not the controlling test of employment tenure but whether or not the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee. (*D.M. Consunji, Inc. v. NLRC, G.R. No. 116572, Dec. 18, 2000*).

(d) Backwages. Financial Assistance. (*Telefunken Semiconductors Employees Union-FFW v. CA, G.R. Nos. 143013-14, Dec. 18, 2000*).

(e) Waivers and Quitclaim are binding on the parties, if voluntarily entered into by the workers and represent a reasonable settlement of their claims. They may not later be disavowed simply because of a change of mind. However, when the voluntariness of the quitclaim or release is put in issue, the claim of the employee may still be given due course. The employer has the burden of proving that the quitclaim was voluntarily entered into by the employee. The fact that the employee was not physically coerced or intimidated does not necessarily imply that he freely and voluntarily consented to the terms of the quitclaim.

Consent may be vitiated not only through intimidation or violence but also by mistake or undue influence or fraud. (*Philippine Carpet Employees Association v. Philippine Carpet Manufacturing Corp.*).

LAND LAWS

Registration of Imperfect Title. (a) Under the public land act, judicial confirmation of imperfect title required possession *en concepto de dueño* since time immemorial, or since July 26, 1894. Under C.A. No. 141, this requirement was retained. However, on June 22, 1957, R.A. No. 1942 was enacted, amending C.A. No. 141, and providing that adverse possession for a period of only 30 years was sufficient. On January 25, 1977, P.D. No. 1073 was issued, further amending C.A. No. 141, particularly, Secs. 48 (b) and (c), Chapter VIII, making them applicable only to *alienable and disposable lands* of the public domain which have been in open, continuous, exclusive and notorious possession and occupation by the applicant himself or thru his predecessor-in-interest under a *bona fide* claim of acquisition of ownership, since June 12, 1945. Unless a public land is reclassified and declared as *alienable and disposable,* occupation thereof in the concept of owner, no matter how long ago, cannot confer ownership or possessory rights. (*Public Estates Authority v. CA, G.R. No. 112172, Nov. 20, 2000; Spouses Geminiano v. Alros, G.R. No. 135527, Oct. 19, 2000*).

(b) An applicant seeking to establish ownership of land must conclusively show that he is the owner in fee simple, for the standing presumption is that all lands belong to the public domain of the State, unless acquired from the Government either by purchase or by grant, except land possessed by an occupant and his predecessors since time immemorial, for such possession would justify the presumption that the land had never been part of the public domain, or that it had been private property even before the Spanish conquest. In this case, the land in question is admittedly public. (*id.*)

(c) To prove that the land in question formed part of the alienable and disposable lands of the public domain, petitioners

relied on the printed words which read: "This survey plan is inside Alienable and Disposable Land Area, Project No. 27-B as per L.C. Map No. 22623, certified by the Bureau of Forestry on January 3, 1968," appearing on the Survey Plan. Such notation does not constitute a positive government act validly changing the classification of the land in question. Verily, a mere surveyor has no authority to reclassify lands of the public domain. (*Menguito v. Republic, G.R. No. 134308, Dec. 14, 2000*).

(d) The applicant failed to prove specific acts showing the nature of its possession and that of its predecessors in interest. The applicant must present specific acts of ownership to substantiate the claim and cannot just offer general statements which are mere conclusions of law. (*Republic v. CA, G.R. No. 130174, Jul. 14, 2000*). Actual possession of land consists in the manifestation of acts of dominion over it of such a nature as a party would naturally exercise over his own property. The bare assertion of witnesses that the applicant of land had been in open, adverse and continuous possession of property for over 30 years is hardly the well-nigh incontrovertible evidence required in cases of this nature. In fact, applicant's possession over subject parcels of land was contradicted by several oppositors, who claimed that they were in open, exclusive, adverse and continuous possession of the areas respectively claimed by them and said parcels of land were personally cultivated by them. (*Republic v. CA, G.R. No. 115747, Nov. 20, 2000*).

(e) In this case, the land in question is admittedly public. The respondent has no title thereto at all. His claim of ownership is based on mere possession by himself and his predecessors-in-interests, who claim to have been in open, continuous, exclusive and notorious possession of the land in question, under a bona fide claim of ownership for a period of at least 50 years. However, the survey plan for the land was approved only in 1992, and respondent paid the realty taxes thereon in October 1992, shortly before the filing of the suit below for damages with injunction.

Hence, respondent must be deemed to begin asserting his adverse claim to Lot 5155 only in 1992. Moreover, Lot 5155 was certified as alienable and disposable on March 27, 1972, per certificate of the Department of Environment and Natural Resources. It is obvious that respondent's possession has not ripened into ownership. (*Public Estates Authority v. CA, G.R. No. 112172, Nov. 20, 2000*).

Compulsory Registration. The land covered by compulsory registration under the Cadastral Act and declared public land can no longer be the subject of registration by voluntary application under PD 1529. (*Republic v. CA, G.R. No. 130174, Jul. 14, 2000*).

Motion to Intervene in a land registration case cannot be allowed. A party wishing to be heard should ask for the lifting of the order of general default, and then if lifted, file an opposition to the application for registration. This is so because proceedings in land registration are *in rem* and not *in personam*, the sole object being the registration applied for, not the determination of any right connected with the registration. (*Dolfo v. Register of Deeds, G.R. No. 133465, Sept. 25, 2000*).

Certificate of Title. (a) Cancellation. If a person or entity obtains a title which includes by mistake or oversight land which cannot be registered under the Torrens System or over which the buyer has no legal right, said buyer does not, by virtue of said certificate alone, become the owner of the land illegally or erroneously included. In fact when an area is erroneously included in a relocation survey and in the title subsequently issued, the said erroneous inclusion is null and void and of no effect. And on rare occasion where there is such an error, the courts may decree that the certificate of title be cancelled and a correct one issued to the buyer. (*Veterans Federation of the Philippines v. CA, G.R. No. 119281, Nov. 22, 2000*).

(b) Amendment (*Rudolf Lietz Holdings, Inc. v. Register of Deeds, G.R. No. 133240, Nov. 15, 2000*).

Conveyances Subsequent to Original Registration. No transfer shall be registered unless the owner's certificate of title is produced along with the instrument of transfer and the registration of the deed of conveyance serves as the operative act to convey land registered under the Torrens system. However, in this case, the Court confirmed the ruling that the "Confirmation of Deed of Absolute Sale" was a valid instrument attesting to the sale of the land and its registration, which resulted in the issuance of the transfer certificate of title. (*Declaro v. CA, G.R. No. 119747, Nov. 27, 2000*).

Reconstitution of Title (R.A. No. 26). A petition for reconstitution of a lost or destroyed certificate of title must be published in the Official Gazette and posted at the main entrance of the provincial and the municipal buildings of the place where the property is situated. This requirement is mandatory and jurisdictional. Without such publication and posting at the main entrance of both the municipal and the provincial edifices, the trial court decision granting the reconstitution is void. RA No. 26 lays down the special requirements and procedure that must be followed before jurisdiction may be acquired over a petition for reconstitution of title. In the present case, the notice of hearing of respondent's petition for reconstitution was not posted at the main entrance of the provincial building. Clearly, the trial court did not acquire jurisdiction over the case. The publication of the notice of hearing in the Official Gazette does not justify the respondent's failure to comply with the legal requirement of posting at the main entrance of both the municipal and the provincial buildings. *(Republic v. Estipular, G.R. No. 136588, Jul. 20, 2000).*

Action for Reconveyance, a legal remedy granted to a landowner whose property has been wrongfully or erroneously registered in another's name, must be filed within ten years from the issuance of the title, since such issuance operates as a constructive notice. Such action filed in this case after 30 years from the regis-

tration of the "Confirmation of Deed of Absolute Sale" is barred by laches. (*Blanco v. Sandiganbayan, G.R. No. 136757-58, Nov. 27, 2000*). In an action for reconveyance, the decree of registration is respected as incontrovertible. What is sought is the transfer of the property, in this case the title thereof, which has been wrongfully or erroneously registered in another person's name, to its rightful owner or to one with a better right. Reconveyance, however, is not available to respondents, because they have not shown a title better than that of petitioners. As earlier shown, the former have not proven any title that may be judicially confirmed. (*Spouses Geminiano v. Alros, G.R. No. 135527, Oct. 19, 2000*).

Reversion. A suit for the reversion of property to the State may be instituted only by the Office of the Solicitor General. (*id.*).

Assurance Fund is intended to relieve innocent persons from the harshness of the doctrine that a certificate is conclusive evidence of an indefeasible title to land. Petitioners did not suffer any prejudice because of the operation of this doctrine. (*Spouses Francisco v. National Treasurer, G.R. No. 143281, Aug. 3, 2000*).

LEGAL AND JUDICIAL ETHICS

LAWYERS

In Government Service. A lawyer who holds a government position may not be disciplined as a member of the bar for misconduct in the discharge of his duties as a government official. However, if the misconduct also constitutes violation of the Code of Professional Responsibility or the lawyer's oath or is of such character as to affect his qualification as a lawyer or shows moral delinquency on his part, such individual may be disciplined as a member of the bar for such misconduct. By certifying as true and correct the SoVs in question, respondent committed a breach of Rule 1.01 of the Code which stipulates that a lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct. By express provision of Canon 6, this is made applicable to lawyers in the government service. In addition, the lawyer's oath to "do no falsehood" was likewise violated. (*Pimentel v. Llorente, Adm. Case No. 4680, Aug. 29, 2000*).

Account for Funds of Client. The highly fiduciary relation of attorney and client requires that respondent lawyer should promptly account for the funds which he received and held for the benefit of his client. The client has the right to know how the funds were used or disbursed by his counsel. (*Cunanan v. Atty. Rimorin, ADM. Case No. CBD-98-518, Aug. 23, 2000; Basas v. Atty. Icawat, A.C. No. 4282, Aug. 24, 2000*). The lawyer's right to be paid for his legal services cannot be exercised whimsically by appropriating for himself the money intended for his clients. (*Rivera v. Atty. Angeles, A.C. No. 2519, Aug. 29, 2000*).

Conflict of Interest. When a lawyer agrees to represent the defendant and later on, also the plaintiff in the same case, he can no longer serve either of his said clients faithfully, as his duty to

the plaintiff necessarily conflicts with his duty to the defendant. (*Sibulo v. Atty. Cabrera, ASM. Case No. 4218, Jul. 20, 2000*).

Willful Disobedience to Lawful Orders. The lawyer's failure to submit proof of service of appellant's brief to the Solicitor General and his failure to submit the required comment manifest willful disobedience to the lawful orders of the Supreme Court, a clear violation of the canons of professional ethics. (*In re Vicente Y. Bayani, A.C. No. 5307, Aug. 9, 2000*).

Improper Conduct. Respondent has achieved a remarkable feat of character assassination. His verbal darts, albeit entertaining in a fleeting way, are cast with little regard for truth. He does nothing more than to obscure the issues, and his reliance on the fool's gold of gossip betrays only a shocking absence of discernment. (*Yared v. Hon. Ilarde, G.R. No. 1147732, Aug. 1, 2000*).

Substitution of Counsel. A verbal substitution of counsel albeit impliedly granted by respondent judge, contravenes Sec. 26 of Rule 138 of the Rules of Court which prescribes the requirements for change of attorneys, namely: written consent of the client filed in court and written notice of the substitution to the adverse party. (*Requierme v. Judge Yuipco, A.M. No. RTJ-98-1427, Nov. 27, 2000*).

Simple Negligence. Counsel's negligence in filing a defective notice of appeal and defective motions for reconsideration and in not elevating nor advising herein petitioner to elevate adverse orders to the higher court for review is undisputed, but it cannot be said that there was sheer absence of real effort on his part to defend his client's cause amounting to gross negligence. (*Gacutan-Fraile v. Domingo, G.R. No. 138518, Dec. 15, 2000*).

JUDGES

***Ex Parte* Proceedings**. An *ex parte* ocular inspection without notice to nor presence of the parties and after the case had already been decided was highly improper. If respondent judge entertained doubts that she wished to clarify after the trial had already terminated, she should have ordered *motu propio* the reopening of the trial for the purpose, with due notice to the parties, whose participation therein is essential to due process. (*Adan v. Judge Abucejo-Luzano, A.M. No. MTJ-00-1298, Aug. 3, 2000*).

Unjust Judgment. A charge of rendering an unjust judgment will not prosper against a judge acting in good faith. Absent the element of bad faith, an erroneous judgment cannot be the basis of a charge for any said offenses - mere error of judgment not being a ground for disciplinary proceedings. (*Spouses Daracan v. Judge Natividad, A.M. No. RTJ-99-1447, Sept. 27, 2000*).

Prompt Disposition of Cases. Sec. 15, Article VII of the Constitution provides that all cases filed before the lower courts must be decided or resolved within three (3) months from the date of submission. Non-observance of this mandate constitutes a ground for administrative sanction against the defaulting judge. (*Mosquera v. Judge Legaspi, A.M. RTJ-99-1511, Jul. 10, 2000*). If respondent judge felt he could not decide the case within the reglementary period, all he had to do was to ask for a reasonable extension of time to decide the case. The Court, cognizant of the caseload of judges and mindful of the difficulty encountered by them in the seasonable disposition of cases, would almost always grant the request. (*Villanueva v. Estoque, A.M. No. RTJ-99-1494, Nov. 29, 2000*).

Bias and Prejudice. (a) Mere suspicion that the judge is partial to one of the parties is not enough; there must be evidence to prove the charge. Respondent judge's efforts to have the parties

arrive at an amicable settlement is not evidence of partiality. Petitioner's claim that respondent judge was biased is belied by his failure to move for respondent judge's inhibition. (*Soriano v. Hon. Angeles, G.R. No. 109920, August 31, 2000; Spouses Daracan v. Judge Natividad, A.M. No. RTJ-99-1447, Sept. 27, 2000*). Respondent judge showed partiality when she called counsels for plaintiff and third party defendants to her chambers during a pre-trial conference and requested them not to oppose the Motion to Lift. (*Maunlad Savings and Loan Association, Inc. v. Court of Appeals, G.R. No. 114942, Nov. 24, 2000*). In intervening on behalf of the defendants, respondent judge failed to live to the mandate that a judge should not only be impartial but must also appear impartial. While a judge may, to promote justice, prevent waste of time or clear-up some obscurity, properly intervene in the presentation of evidence during trial, it should always be borne in mind that undue interference may prevent the proper presentation of the cause or the ascertainment of truth. (*Requierme, Jr. v. Yuipco, A.M. No. RTJ-98-1427, Nov. 27, 2000*). To successfully disqualify a judge on the ground of bias or partiality, there must be concrete proof that a judge has a personal interest in the case and his bias is shown to have stemmed from an extra-judicial source. This precept springs from the presumption that a judge shall decide on the merits of a case with an unclouded vision of its facts. Thus, an erroneous ruling on the grant of a bail alone does not constitute evidence of bias. Likewise, respondent judge's reliance on the order of confinement even if erroneous is not sufficient to point to the conclusion that he was manifestly partial to the defense. (*People v. Hon. Gako, Jr., G.R. No. 135045, Dec. 15, 2000*).

(b) Voluntary Inhibition. When a suggestion is made of record that the judge might be induced to act in favor of one party or with bias or prejudice against a litigant arising from circumstances reasonably capable of inciting such a state of mind, the judge should conduct a careful self-examination. He should exercise his discretion in a way that the people's faith in the courts

of justice is not impaired. A salutary norm is that he should reflect on the probability that the losing party might nurture at the back of his mind the thought that the judge unmeritoriously tilted the scales of justice against him. (*Villanueva v. Estoque, A.M. No. RTJ-99-1494, Nov. 29, 2000*). When a judge should inhibit himself from a case. (*Viewmaster Construction Corp. v. Roxas, G.R. No. 133576, Jul. 13, 2000*).

Incompetence and Gross Ignorance of the Law. (a) Respondent issued the search warrant on the ground that complainant allegedly failed to pay the purchase price of the vehicles, contrary to the averments in the application for search warrant which cited violation of law and regulation involving tax exemption privileges. (*Dizon v. Judge Veneracion, A.M. No. RTJ-97-1376, July 20, 2000; Spouses Daracan v. Judge Natividad, A.M. No. RTJ-99-1447, Sept. 27, 2000*).

(b) The failure to issue a pre-trial order as required under Sec. 14 of Rule 20 of the Rules of Court cannot be excused by alleged heavy case load of the judge. (*Maunlad Savings and Loan Association, Inc. v. Court of Appeals, G.R. No. 114942, Nov. 24, 2000*).

Disciplinary Proceedings. Disciplinary proceedings and criminal actions against judges do not complement, supplement, or substitute judicial remedies, whether ordinary or extraordinary. An inquiry into their civil, criminal and administrative liability may be made only after the available remedies have been exhausted and decided with finality. Moreover, a party litigant abuses the process of the court by prematurely resorting to administrative disciplinary action or criminal prosecution of a judge even before the judicial remedies are settled. (*Caguioa v. Judge Laviña, A.M. No. RTJ-00-1553, Nov. 20, 2000*).

Contempt. The role of a judge in relation to those who appear before his court must be one of temperance, patience and courtesy. (*Commissioner Rodriguez v. Judge Bonifacio,*

A.M. No. RTJ-99-1510, Nov. 6, 2000). A judge who is commanded at all times to be mindful of his high calling and his mission as a dispassionate and impartial arbiter of justice is expected to be a cerebral man who deliberately holds in check the tug and pull of purely personal preferences which he shares with his fellow mortals. (*Cañas v. Hon. Castigador, G.R. No. 139844, Dec. 15, 2000*).

POLITICAL LAW

FUNDAMENTAL POWERS OF THE STATE

Expropriation. (a) The requirements of E.O.1035, *i.e.*, conduct of feasibility studies, information campaign and detailed engineering/surveys are not conditions precedent to the issuance of a writ of possession against the property being expropriated. The requirements for the issuance of a writ of possession, once the expropriation case is filed, are expressly and specifically governed by Sec. 2, Rule 67 of the 1997 Rules of Civil Procedure. Pursuant to said rule and the *Robern Development Corporation* case, the only requisites for authorizing immediate entry in expropriation proceedings are: (i) the filing of a complaint for expropriation sufficient in form and substance; and (ii) the making of a deposit equivalent to the assessed value of the property subject to expropriation. The owners of the expropriated land are entitled to legal interest on the compensation eventually adjudged from the date the condemnor takes possession of the land until the full compensation is paid to them or deposited in court. *(Biglang-awa v. Judge Bacalla, G.R. No. 139927 and 139936, Nov. 22, 2000).*

(b) The acquisition of an easement of right-of-way falls within the power of eminent domain. (*Camarines Norte Electric Cooperative, Inc. v. CA, G.R. No. 109338, Nov. 20, 2000).*

BILL OF RIGHTS

Due Process. A denial of due process suffices to cast on the official acts taken by whatever branch of government the impression of nullity. A decision rendered without due process is void *ab initio* and may be attacked directly or collaterally. *(Uy v. CA, G.R. No. 109557, Nov. 29, 2000).*

Freedom from Unreasonable Searches and Seizures. (a) Requirements for the Valid Issuance of Search Warrant: [i] The warrant must be issued upon probable cause; [ii] Probable cause must be determined by the judge himself and not by the applicant or any other person; [iii] In determining probable cause, the judge must examine under oath or affirmation the complainant and such witnesses as the latter may produce; and [iv] The warrant issued must particularly describe the place to be searched and the persons or things to be seized. A description of the place to be searched is sufficient if the officer with the warrant can, with reasonable effort, ascertain and identify the place intended and distinguish it from other places in the community. Search warrants are not issued on loose, vague or doubtful basis of fact, nor on mere suspicion or belief. In this case, most of the items listed in the warrants fail to meet the test of particularity, especially since the witness had furnished the judge photocopies of the documents sought to be seized. The search warrant is separable, and those items not particularly described may be cut off without destroying the whole warrant. *(Uy v. BIR, G.R. No. 129651, Oct. 20, 2000).*

b) The protection against illegal search and seizure covers both innocent and guilty alike against any form of high-handedness of law enforcers. The "plainview" doctrine (which may justify a search without warrant) applies only where the police officer is not searching for evidence against the accused, but inadvertently comes across an incriminating object. Just because the marijuana plants were found in an unfenced lot does not prevent the appellant from invoking the protection afforded by the Constitution. The right against unreasonable searches and seizures is the immunity of one's person, which includes his residence, papers and other possessions. For a person to be immune against unreasonable searches and seizures, he need not be in his home or office, within a fenced yard or private place. *(People v. Valdez, G.R. No. 129296, Sept. 25, 2000).*

(c) In case of consented searches or waiver of the constitutional guarantee against obtrusive searches, it is fundamental that to constitute waiver, it must first appear that the right exists; the person involved had knowledge, either actual or constructive, of the existence of such right; and the said person had an actual intention to relinquish the right. The third condition did not exist in the instant case. Neither was the search incidental to a valid warrantless arrest. *(People v. Figueroa, G.R. No. 134056, Jul. 6, 2000).* An alleged consent to a warrantless search and seizure cannot be based merely on the presumption of regularity in the performance of duty. This presumption, by itself, cannot prevail against the constitutionally protected rights of an individual, and zeal in the pursuit of criminals cannot ennoble the use of arbitrary methods that the Constitution itself abhors. *(People v. Baula, G.R. No. 132671, Nov. 15, 2000).*

Freedom of the Press. Academic Freedom. Campus Journalism. Sec. 7 of the Campus Journalism Act prohibits the expulsion or suspension of a student solely on the basis of articles he or she has written, except when such article materially disrupt class work or involve substantial disorder or invasion of the rights of others. The power of the school to investigate is an adjunct of its power to suspend or expel. It is corollary to the enforcement of rules and regulations and the maintenance of a safe and orderly environment conducive to learning. That power, like the power to suspend or expel, is an inherent part of the academic freedom of institutions of higher learning guaranteed by the Constitution. *(Miriam College Foundation, Inc. v. Court of Appeals, G.R. No. 127930, Dec. 15, 2000).*

Rights During Custodial Investigation. (a) Procedure that police authorities shall observe in effecting arrests and conducting investigations. Under Art. III, Sec. 12(1) of the Constitution, a suspect in custodial investigation must be: (i) informed of his right to remain silent; (2) warned that anything he says can and

will be used against him; and (3) told that he has the right to counsel, and that if he is indigent, a lawyer will be appointed to represent him. In this case, accused-appellant was given no more than a perfunctory recitation of his rights, signifying nothing more than a feigned compliance with the Constitutional requirements. *(People v. Samolde, G.R. No. 128551, Jul. 31, 2000).* It is always incumbent upon the prosecution to prove at the trial that, prior to in-custody questioning, the confessant was informed of his constitutional rights. The presumption of regularity of official acts does not prevail over the constitutional presumption of innocence. Hence, in the absence of proof that the arresting officers complied with the above constitutional safeguards, extra-judicial statements, whether inculpatory or exculpatory, made during custodial investigation, are inadmissible not only against the declarant but more so against third persons. This is so even if such statements are gospel truth and voluntarily given. Such statements are useless except as evidence against the very police authorities who violated the suspect's rights. *(People v. Figueroa, G.R. No. 134056, Jul. 6, 2000).*

(b) Custodial Investigation. [i] The protection under Sec. 12, Art. III of the Constitution begins when a person is taken into custody for investigation of his possible participation in the commission of a crime, or from the time he is singled out as a suspect in the commission of the crime, although not yet in custody. Custodial investigation begins when it is no longer a general inquiry into an unsolved crime but starts to focus on a particular person as a suspect, *i.e.*, when the police investigator starts interrogating or exacting a confession from the suspect in connection with an alleged offense. The place of interrogation is not determinative of the existence or absence of custodial investigation but the tone and manner of questioning by the police authorities. Thus, there was custodial investigation when the police authorities, upon their arrest of some of the accused, immediately asked them regarding their participation in the commission of the crime, even while they were still walking along the highway on their way to the police

station. This is in line with prevailing jurisprudence and the provisions of R.A. No. 7438, that the requisites of a custodial investigation are applicable even to a person not formally arrested but merely invited for questioning. *(People v. Bariquit, G.R. No. 122733, Oct. 2, 2000).*

(c) However, spontaneous statements voluntarily given, as where appellant orally admitted killing the victim before the barangay captain (who is neither a police officer nor a law enforcement agent), do not fall under custodial investigation. Such admission, even without the assistance of a lawyer, does not violate appellant's constitutional rights. *(People v. Dano, G.R. No. 117690, Sept. 1, 2000; People v. Mayorga, G.R. No. 135405, Nov. 29, 2000).*

Right to Information. A self-executory Constitutional provision which any citizen can invoke before the courts. However, Congress may provide for reasonable conditions upon the right of access to information, like in R.A. No. 6713, otherwise known as the "Code of Conduct and Ethical Standards for Public Officials and Employees," which took effect on March 25, 1989. This law provides that, in the performance of their duties, all public officials and employees are obliged to respond to letters sent by the public within fifteen (15) working days from receipt thereof to ensure the accessibility of all public documents for inspection by the public within reasonable working hours, subject to the reasonable claims of confidentiality. *(Gonzales v. Narvasa, G.R. No. 140835, Aug. 14, 2000).*

RIGHTS OF THE ACCUSED

(a) **Right to Counsel**. Extra-judicial Confession. To be admissible in evidence, must be: (i) voluntary; (ii) made with the assistance of *competent and independent counsel*; (iii) express; and (iv) in writing. A suspect's confession, whether verbal or non-

verbal, when taken without the assistance of counsel, without a valid waiver of such assistance, regardless of the absence of coercion or the fact that it had been voluntarily given, is inadmissible in evidence, even if appellant's confession were gospel truth. *(People v. Dano, G.R. No. 117690, Sept. 1, 2000).* Admission *(People v. Samolde, G.R. No. 128551, Jul. 31, 2000).*

(b) **Right Against Self-Incrimination**. The essence of this right is testimonial compulsion or the giving of evidence against oneself through a testimonial act. Hence, an accused may be compelled to submit to physical examination and have a substance taken from his body for medical determination as to whether he was suffering from a disease that was contracted by his victim without violating this right. *(People v. Banihit, G.R. No. 132045, Aug. 25, 2000; People v. Continente, G.R. Nos. 100801-02, Aug. 25, 2000).*

(c) **Right to be Heard** by himself and counsel and to present evidence for his defense. In this case, the non-appearance of counsel for the accused on the scheduled hearing was not construed as waiver by the accused of his right to present evidence for his defense. Denial of due process can be successfully invoked where no valid waiver of rights had been made as in this case. *(People v. Yambot, G.R. No. 120350, Oct. 13, 2000).* In another case, the accused-appellant validly waived his right to present evidence. This is in consonance with the doctrine that everyone has a right to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquished without infringing on any public right, and without detriment to the community at large. *(People v. Banihit, G.R. No. 132045, Aug. 25, 2000).*

(d) **Speedy Disposition of Cases**. [i] The determination of whether an accused had been denied the right to speedy trial depends on the surrounding circumstances of each case. Although

it took about 8 years before the trial of this case was resumed, such delay did not amount to violation of petitioner's right to speedy trial considering that such delay was not be attributable to the prosecution. *(Sumbang v. Gen. Court Martial, G.R. No. 140188, Aug. 3, 2000)*. Factors to consider in determining whether or not such right has been violated: length of delay, reasons for such delay, assertion or failure to assert such rights by the accused and the prejudice caused by the delay. *(Blanco v. Sandiganbayan, G.R. No. 136757-58, Nov. 27, 2000)*. [ii] Speedy Trial Act of 1998 (R.A. 8493). The authority of the Secretary of Justice to review resolutions of his subordinates even after an information has already been filed in court does not present an irreconcilable conflict with the 30-day period prescribed in Sec. 7 of the Speedy Trial Act of 1998. *(Solar Team Entertainment, Inc. Hon. How, G.R. No. 140863, Aug. 22, 2000).*

(f) **Double Jeopardy**. Evolution of doctrine. Appeal by the Government from verdicts of acquittal. As mandated by the Constitution, statutes and cognate jurisprudence, an acquittal is final and unappealable on the ground of double jeopardy, whether it happens at the trial court level or before the CA. In general, the rule that a remand to a trial court of a judgment of acquittal brought before the Supreme Court on certiorari cannot be had unless there is a finding of mistrial, as in *Galman v. Sandiganbayan. (People v. Hon. Velasco, G.R. No. 127444, Sept. 13, 2000).*

CITIZENSHIP

If an alien [i] gave or donated his money to a citizen of the Philippines so that the latter could invest it in the purchase of private agricultural lands, or [ii] purchased private agricultural lands for a citizen of the Philippines, such acts, provided they are done in good faith, do not violate our laws. What was prohibited by the Anti-Dummy Law and the Retail Trade Law then prevailing were the acquisition by an alien for himself of private lands in the

Philippines, and his conduct of retail trade, respectively. *(Chan Sui Bi v. CA, G.R. No. 129507, Sept. 29, 2000).*

EXTRADITION

Private respondent does not have the right to notice and hearing during the evaluation stage of the extradition process, for the following reasons: (i) P.D. No. 1069 which implements the RP-US Extradition Treaty provides the time when an extraditee shall be furnished a copy of the petition for extradition as well as its supporting papers, *i.e.*, after the filing of the petition for extradition in the extradition court. There is no provision in the above law and treaty which gives an extraditee the right to demand from the Secretary of Justice copies of the extradition request from the US government and its supporting documents and to comment thereon while the request is still undergoing evaluation. (ii) All treaties, including the RP-US Extradition Treaty, should be interpreted in light of their intent. The RP-US Extradition Treaty calls for an interpretation that will minimize if not prevent the escape of extraditee from the long arm of the law and expedite their trial. (iii) The Executive Department, thru the Department of Foreign Affairs and the Department of Justice, has steadfastly maintained that the RP-US Extradition Treaty and P.D. No. 1069 do not grant the private respondent a right to notice and hearing during the evaluation stage of the extradition process. This understanding of the treaty is shared by the US government, the other party to the treaty. Other countries with similar extradition treaties with the Philippines have expressed the same interpretation adopted by the Philippines and US governments. [iv] An extradition proceeding is *sui generis.* It is not a criminal proceeding that will call into operation all the rights of the accused guaranteed by the Bill of Rights. *(Secretary of Justice v. Hon. Lantion, G.R. No. 139465, Oct. 17, 2000).*

ELECTION LAWS

Voter's Registration Act of 1996 (R.A. No. 8189) *(De Guzman v. COMELEC, G.R. No. 129118, Jul 19, 2000).*

Party-List System. Under this system, any national, regional or sectoral party or organization registered with the COMELEC may participate in the election of party-list representatives who, upon their election and proclamation, shall sit in the House of Representatives as regular members. To determine the winners in a Philippine-style party-list election, the Constitution and R.A. No. 7941 mandate at least four invariable parameters: *First*, the twenty percent allocation – the combined number of all party-list congressmen shall not exceed 20% of the total membership of the House of Representatives, including those elected under the party-list. The 20% allocation is not mandatory but merely a ceiling. *Second*, the two percent threshold – only those parties garnering a minimum of 2% of the total valid votes cast for the party-list system are "qualified" to have a seat in the House of Representatives. *Third*, the three-seat limit – each qualified party, regardless of number of votes it actually obtained, is entitled to a maximum of three seats; that is, one "qualifying" and two additional seats. *Fourth*, proportional representation – the additional seats which a qualified party is entitled to shall be computed "in proportion to their total number of votes." *(Veterans Federation Party v. COMELEC, G.R. No. 134781, Oct. 6, 2000).*

House of Representatives Electoral Tribunal (HRET). Under Art. VI, Sec. 17 of the Constitution, the HRET has sole and exclusive jurisdiction over all contests relative to the election, returns, and qualifications of members of the House of Representatives. Once a winning candidate is proclaimed, takes his oath, and assumes office as a member of the House of Representatives, COMELEC's jurisdiction over protests relating to his election, returns and qualifications ends, and the HRET's own jurisdiction begins. *(Guerrero v. COMELEC, G.R. No. 137004, Jul. 26, 2000).*

Candidates for Elective Public Office. (a) Certificate of Candidacy. Use of Nickname. Under the second paragraph, Sec. 74 of the Omnibus Election Code, three kinds of votes are considered stray: (i) a vote containing initials only (ii) a vote which is illegible, and (iii) a vote which does not sufficiently identify the candidate for whom it is intended. The first category of stray votes is not to be qualified by the third category in the sense that votes in initials only may be counted for a candidate provided that the initials sufficiently identify the candidate voted for. *(Villarosa v. The HRET, G.R. No. 143351, Sept. 14, 2000).* In a concurring dissenting opinion, Justice Gonzaga-Reyes observed that the initials "JTV" were used by petitioner as a nickname, for purposes of being voted upon. There is no law or rule that prohibits the adoption of initials as a nickname; nor is there a requirement that the initials adopted by a person as a nickname strictly correspond to his or her own initials. Petitioner is the wife of Jose T. Villarosa and could legally present or identify herself as "Mrs. JTV". Therefore, the applicable provision of law is Sec. 211, par. 13 of the Omnibus Election Code, which sets out the rule for the appreciation of votes using nicknames. Said rule establishes that a nickname alone is a valid vote, provided: (i) it is that by which a candidate is generally or popularly known in the locality, and (ii) there is no other candidate with the same nickname running for the same office. (*id.*)

(b) Residency Requirement. Inasmuch as private respondent has proven that he, together with his family had actually resided in a house he bought in 1973 in Cagayan de Oro City; had actually held office there during his three terms as provincial governor of Misamis Oriental, the provincial capitol being located therein; and had registered as a voter in the city during the period required by law – he could not be deemed "a stranger or newcomer" when he ran for and was voted as city mayor. Petitioners put much emphasis on the fact that Cagayan de Oro City is a highly urbanized city whose voters cannot participate in the provincial elections. Such political subdivisions and voting restrictions, however, are simply

for the purpose of parity of representation. The classification of an area as a highly urbanized or independent component city does not completely isolate its residents, politics, commerce and other businesses from the entire province – and vice versa – especially when the city is located at the very heart of the province itself, as in this case. *(Torayno v. COMELEC, G.R. No. 137329, Aug. 9, 2000).*

Failure of Election. The trial court has no jurisdiction to declare a failure of election, which power is vested exclusively in the COMELEC sitting *en banc*. Conditions for declaring a failure of elections. *(Carlos v. Hon. Angeles, G.R. No. 142907, Nov. 29, 2000).* Petition to declare failure of elections or annul election results distinguished from election protest. *(Banaga v. COMELEC, G.R. No. 134696, Jul. 31, 2000).*

Commission on Elections (COMELEC). The COMELEC, sitting *en banc*, does not have the requisite authority to hear and decide election cases, including pre-proclamation controversies in the first instance. This power pertains to the Divisions of the COMELEC. Any decision by the COMELEC *en banc* as regards election cases decided by it in the first instance is null and void. *(Soller v. COMELEC, G.R. No. 139853, Sept. 5, 2000).*

(b) Both the Supreme Court and the COMELEC have concurrent jurisdiction to issue writs of certiorari, prohibition, and mandamus over decisions of trial courts of general jurisdiction in election cases involving elective municipal officials. The Court that takes jurisdiction first shall exercise exclusive jurisdiction over the case. *(Carlos v. Hon. Angeles, G.R. No. 142907, Nov. 29, 2000).*

Election Protest. The non-payment of the proper filing fees is no longer excusable and is a valid ground for the dismissal of election protests. (*Soller v. COMELEC, G.R. No. 139853, Sept. 5, 2000).* When there is an allegation in an election protest that would require the perusal, examination or counting of ballots as evidence,

it is the ministerial duty of the trial court to order the opening of the ballot boxes and the examination and counting of ballots deposited therein. (*Miguel v. COMELEC, G.R. No. 136966, July 5, 2000).*

LEGISLATIVE DEPARTMENT

Franchise. Philippine Amusement and Gaming Corporation (PAGCOR). A historical study of its creation, growth and development will readily show that it was never given a legislative franchise to operate jai-alai. *(Del Mar v. PAGCOR, G.R. No. 138298, Nov. 29, 2000).*

THE JUDICIAL DEPARTMENT

(a) **Heirarchy of Courts**. The instant petition ought not to have been filed directly with the Supreme Court. While the Court has concurrent jurisdiction with the RTC and the CA to issue writs of certiorari, this concurrence is not to be taken as an unrestrained freedom of choice concerning the court to which application for the writ will be directed. There is after all a hierarchy of courts. A direct invocation of the Court's original jurisdiction to issue the extraordinary writ is allowed only when there are special and important reasons clearly and specifically set out in the petition. *(SGMC Realty Corp. v. Office of the President, G.R. No. 126999, Aug. 30, 2000*). There is no reason why the instant petition could not have been brought before the CA, thereby bringing under the competence of said court all matters relative to the action, including the incidents thereof. *(Yared v. Hon. Ilarde, G.R. No. 1147732, Aug. 1, 2000).*

(b) **Judicial Review**. The Supreme Court has the discretionary power to take cognizance of the petition at bar where the issues have generated an oasis of concern, even days of disquiet in view of the public interest at stake. (*Del Mar v. PAGCOR,*

G.R. No. 138298, Nov. 29, 2000). The Supreme Court has inherent power to suspend its own rules in a particular case in order to do justice. For equitable considerations, the Court has relaxed the application of otherwise stringent rules by giving due course to appeals filed out of time, treating petitions for certiorari as petitioners for review, and remanding the case for trial even though their previous dismissal had become final. *(Anacleto v. Van Twest, G.R. No. 131411, Aug. 29, 2000).*

(c) ***Locus Standi***. A party suing as a taxpayer must specifically prove that he has sufficient interest in preventing the illegal expenditure of money raised by taxation. In line with the liberal policy of the Court on *locus standi* when a case involves an issue of overarching significance to society, the Court finds the petitioners, as members of the House of Representatives, to have legal standing to file the petitions at bar, as they claim that the operation of jai-alai constitutes an infringement by PAGCOR of the legislature's exclusive power to grant franchise. *(Del Mar v. PAGCOR, G.R. No. 138298, Nov. 29, 2000)*. The question of standing is whether a party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issue upon which the court so largely depends for illumination of difficult constitutional questions." A citizen acquires standing only if he can establish that he has suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action. A taxpayer is deemed to have a standing to raise a constitutional issue when it is established that public funds have been disbursed in alleged contravention of the law or the Constitution. Thus, a taxpayer's action is properly brought only when there is an exercise of Congress of its taxing or spending power. In the final analysis, the Court retains the power to decide whether or not it will entertain a taxpayer's suit. In the case at bar, there being no exercise by Congress of its taxing or

spending power, petitioner cannot be allowed to question the creation of the PCCR in his capacity as a taxpayer. *(Gonzales v. Narvasa, G.R. No. 140835, Aug. 14, 2000).* There is a difference between the rule on real-party-in-interest and the rule on standing. In the case at bar, petitioner has sufficiently alleged constitutional ramifications in the questioned public bidding that merit the attention of the Court. Moreover, the prospects of financial gains arising from the award of the sale of PHILSECO is enough personal stake in the outcome of the controversy to vest upon petitioner the *locus standi* to file the petition for mandamus. A winning bidder has personality to initiate proceedings to prevent setting at naught his right. *(JG Summit Holdings, Inc. v. CA, G.R. No. 124293, Nov. 20, 2000).*

(d) **Decision**. Faithful adherence to the requirements of Sec. 14, Art. VIII of the Constitution is a paramount component of due process and fair play. (*Yao v. CA, G.R. No. 132428, Oct. 24, 2000).* Although a memorandum decision is permitted under certain conditions, it cannot merely refer to the findings of fact and the conclusion of law of the lower court. The court must make a full findings of fact and conclusion of law of its own. *(Ong v. CA, G.R. No. 113006, Nov. 23, 2000).* There is no hard and fast rule as to the form of a decision. Whether or not the trial court chooses to summarize the testimonies of the witnesses of both parties is immaterial. What is called for is that the judgment must be written in the official language, personally and directly prepared and signed by the judge and that it should contain clearly and distinctly a statement of facts proved or admitted by the parties and the law upon which the judgment is based. *(People v. Ordoño, G.R. Nos. 12953 & 143533-35, Jul. 10, 2000).*

CIVIL SERVICE

Career Executive Service Officers (CESO). Appointments, assignments, reassignments, and transfers in the CESO are based

on rank. Security of tenure in the CESO is thus acquired with respect to rank and not to position. Mobility and flexibility in the assignment of personnel, to better cope with the exigencies of public service, is the distinguishing feature of the CESO. *(Secretary of Justice v. Bacal, G.R. No. 139382, Dec. 6, 2000).*

NATIONAL ECONOMY

Fishpond Lease. The Fisheries Act prohibits the holder of a fishpond permit from transferring or subletting the fishpond granted to him, without the previous consent or approval of the Secretary of Agriculture and Natural Resources. *(Diancin v. CA, G.R. No. 119991, Nov. 20, 2000).*

ADMINISTRATIVE LAW

Administrative Cases. (a) Right to Counsel. Said right is not imperative in administrative investigations. *(Sebastian, Sr. v. Hon. Garchitorena, G.R. No. 114028, Oct. 18, 2000).* (b) Due Process. The essence of due process in administrative proceedings is simply the opportunity to explain one's side or an opportunity to seek reconsideration of the action or ruling complained of. A formal or trial-type hearing is not at all times essential to due process, the requirements of which is satisfied where parties are afforded fair and reasonable opportunity to explain their side. The filing of position papers and supporting documents fulfills the requirements of due process. *(Damasco v. NLRC, G.R. No. 115755, Dec. 4, 2000).* (c) Exhaustion of Administrative Remedies. No appeal need be taken to the Office of the President from the decision of a department head because the latter is in theory the alter ego of the former. There is greater reason for not requiring prior resort to the Office of the President in this case since the administrative decision sought to be reviewed is that of the President himself. *(Secretary of Justice v. Bacal, G.R. No. 139382, Dec. 6, 2000).*

Housing and Land Use Regulatory Board (HLURB). (a) An aggrieved townhouse buyer may seek protection from the HLURB under P.D. No. 957, otherwise known as "Subdivision and Condominium Buyers' Protective Decree." A direct resort to the Supreme Court questioning the Arbiter's refusal to issue writ of execution is improper and premature. The 1996 Rules of Procedure of the HLURB provides that the decision of the Arbiter is reviewable by the Board of Commission. In turn, any party may appeal the Board of Commissioner's decision to the Office of the President. From the decision of the Office of the President, the aggrieved party can resort to the CA. *(Atty. Cole v. Court of Appeals, G.R. No. 137551, Dec. 26, 2000).*

(b) At present, decisions of the HLURB are appealable to the Office of the President within 15 calendar days from receipt thereof. *(SGMC Realty Corp. v. Office of the President, G.R. No. 126999, Aug. 30, 2000).*

COMELEC - as an administrative body. Its powers may be classified into: [i] those pertaining to its adjudicatory or quasi-adjudicatory functions and [ii] those which are inherently administrative and sometimes ministerial in character. COMELEC Resolution No. 2987, which provides for the rules and regulations governing the conduct of the required plebiscite, was not issued pursuant to the COMELEC's quasi-judicial functions but merely as an incident of its inherent administrative functions over the conduct of plebiscites; thus, said resolution may not be deemed a "final order" reviewable by certiorari by the Court. Any question pertaining to the validity of said resolution may be well taken in an ordinary action before the trial courts. *(Salva v. Hon. Makalintal, G.R. No. 132603, Sept. 18, 2000).*

Subic Bay Metropolitan Authority (SBMA). Bids and Awards of Contracts. HPPL has not sufficiently shown that it has a clear and unmistakable right to be declared the winning bidder

with finality, such that the SBMA can be compelled to negotiate a Concession Contract with HPPL. The SBMA Board Resolution declaring HPPL as the winning bidder is subject to the control and supervision of the Office of the President. All projects undertaken by SBMA require that approval under Letter of Instruction (LOI) No. 620 dated October 27, 1997. The President may, within his authority, overturn or reverse any award made by the SBMA Board of Directors for justifiable reasons. The discretion to accept or reject a bid, or even recall the award thereof, is of such wide latitude that the courts will not generally interfere with the exercise thereof by the executive department, unless it is apparent that such exercise of discretion is used to shield unfairness or injustice. *(Hutchison Ports Philippines Ltd. v. SBMA, G.R. No. 131367, Aug 31, 2000).*

Pollution Adjudication Board (PAB). The PAB has not been divested of its authority (under R.A. No. 3931 entitled "An Act Creating the National Water and Air Pollution Control Commission," as amended by P.D. No. 984) to hear pollution cases connected with mining operations - by virtue of the subsequent enactment of R.A. No. 7942 (Philippine Mining Act of 1995) and in relation to E.O. No. 192, Series of 1987 (The Reorganization Act of the DENR). While the mines regional director has express administrative and regulatory powers over mining operations and installations, it has no adjudicatory powers over complaints for violation of pollution control statutes and regulations. Such powers pertain to the PAB. *(Republic v. Marcopper Mining Corp., G.R. No. 137174, Jul. 10, 2000).*

Public Bidding. In according the KHI/PHI the right to top, the Asset Privatization Trust (APT) violated the rule on competitive public bidding. While it may be argued that the right to top was aimed at giving the best financial advantage to the government, the manner by which the right was conceived and arrived at in this case manifested bias in favor of KHI, clearly brushing

aside the rule on fair competition and completely disregarded the stipulation in the JVA between NIDC and KHI to comply with the 60%-40% capitalization arrangement whereby KHI, the foreign investor, would be able to exercise its right of first refusal to the extent of only 40% of the total capitalization of PHILSECO. Thus, KHI, whose investment exposure was already diminished to only 2.59% of the total PHILSECO shares, was given the privilege, through its nominee PHI, of exercising the right to top the highest bid to 87.67% of those shares or definitely over and above its 40% contractual right to PHILSECO shares under the JVA. Consequently, the APT rendered nugatory the constitutional and contractual proscriptions clearly to favor a foreign investor. *(JG Summit Holdings, Inc. v. CA, G.R. No. 124293, Nov. 20, 2000).*

PUBLIC OFFICERS

Notary Public. (a) A notary public is not prohibited from acting at the same time as witness to the document notarized by him. The only exception is when the document is a will. *(Solarte v. Atty. Pugeda, A.C. No. 47512, July 31, 2000).* The party acknowledging a document must appear before the notary public or any other person authorized to take acknowledgments of documents. Notarization is not an empty routine. It converts a private document into a public one and renders it admissible in court without further proof of its authenticity. *(Coronado v. Atty. Felongco, A.C. No. 2611, Nov. 15, 2000).*

Sheriff. As an officer of the court, respondent sheriff was tasked to enable a prevailing party to benefit from the judgment. After 9 years, complainant is entitled to realize the law's promise that his right to possession would be vindicated as speedily as possible to preserve peace and order in the community. *(Valencia v. Valeña, A.M. No. P-00-1409. Aug. 16, 2000).* Respondent is guilty of misconduct for his failure to prepare an estimate of expenses to be incurred in executing the writ, for which he must seek the court's

approval; to render an accounting; and to issue official receipt for the total amount he received from the judgment debtor; and for deducting from the money he should have deposited in court the amount for expenses the former incurred. *(Tan v. Dael, A.M. No. P-00-1392, Jul. 13, 2000).* Only the payment of sheriff's fees can be lawfully received by a sheriff and acceptance of any other amount is improper, even if it were to be applied for lawful purposes. A sheriff acts irregularly when he submits his Sheriff's Partial Report and Sheriff's Return without liquidating the amounts previously received. *(Ignacio v. Payumo, A.M. No. P-00-1396, Oct. 24, 2000).*

COMMISSION ON AUDIT

Hiring of Private Lawyers by Government Agencies. COA Circular No. 86-255 dated April 1, 1986 restricts government agencies and instrumentalities from hiring private lawyers to render legal services or handle their cases and provides that no funds shall be disbursed for payment to private lawyers unless prior to the hiring of said lawyer, there is written conformity and acquiescence from the Solicitor General or the Government Corporate Counsel. *(Polloso v. Hon. Gangan, G.R. No. 140563, Jul. 14, 2000).*

LOCAL GOVERNMENT

Recall. The Resolution providing for recall is no longer applicable inasmuch as the respondent had already vacated the office of Vice-Mayor to which the recall was directed and has assumed the position of Mayor. Even if the Preparatory Recall Committee were to reconvene to adopt another resolution for the recall of respondent, this time as Mayor, the same would still not prosper since no recall shall take place within one (1) year from the date the official assumes office or one (1) year immediately preceding a regular election. *(Afiado v. COMELEC, G.R. No. 141787, Sept. 18, 2000).*

Internal Revenue Allotments. The President of the Philippines may not withhold portions or alter any internal revenue allotments legally due the local government units. *(Pimentel v. Aguirre, G.R. No. 132988, Jul. 19, 2000).*

SANDIGANBAYAN

Jurisdiction. (a) As construed in *Garcia, Jr. v. Sandiganbayan*, P.D. No. 1606 creating the Sandiganbayan gave it limited jurisdiction that did not include jurisdiction over petitions for prohibition, mandamus and *quo warranto.* After the *Garcia* decision, Congress enacted R.A. No. 7975 (*An Act Strengthening the Functional and Structural Organization of the Sandiganbayan, Amending for that Purpose Presidential Decree No. 1606, as Amended*), which took effect on 6 May 1995. Sec. 4 (c) thereof expanded the jurisdiction of the Sandiganbayan to include jurisdiction to issue the writs of *mandamus,* prohibition, *certiorari, habeas corpus*, injunction, and other ancillary writs and processes in aid of its appellate jurisdiction. *(Abbot v. Hon. Mapayo, G.R. No. 134102, Jul. 6, 2000; Alarilla v. Hon. Sandiganbayan, G.R. No. 136806, Aug. 22, 2000).*

(b) **Sequestered Assets**. The jurisdiction of the Sandiganbayan to pass upon the parties' compromise agreement is beyond dispute. The compromise agreement does not deal merely with private interest; it involves sequestered shares of stock – and the parties expressly acknowledged the need to obtain the approval of the Sandiganbayan. (*San Miguel Corporation v. Sandiganbayan, G.R. Nos. 104637-38, Sept. 14, 2000).*

SEQUESTRATION

San Miguel Corporation (SMC). SMC shares were sequestered in 1986 and the government filed Civil Case No. 0033 in 1987 to determine whether they are part of the alleged ill-gotten wealth of former President Marcos and his cronies. Said case has

remained unresolved by the Sandiganbayan. The delay is no longer tolerable for it locks in billions of pesos which could well rev-up the sputtering economy. The Sandiganbayan must not be the burial ground of cases of far-reaching importance. *(San Miguel Corporation v. Sandiganbayan, G.R. Nos. 104637-38, Sept. 14, 2000).*

OMBUDSMAN

(a) **Jurisdiction**. The Ombudsman has no jurisdiction to entertain criminal charges filed against a judge of the regional trial court relative to his handling cases before the court. The determination of whether a judge has maliciously delayed the disposition of the case is exclusively a judicial function. *(De Vera v. Hon. Pelayo, G.R. No. 137354, Jul. 6, 2000).*

(b) **Investigative Powers**. The duty of a government prosecutor to prosecute crimes does not preclude him from refusing to file an information when he believes there is no *prima facie* evidence to do so. The Court will not intervene in this case. The power to withdraw the information already filed is a mere adjunct or consequence of the Ombudsman's overall power to prosecute. *(Espinosa v. Office of the Ombudsman, G.R. No. 135775, Oct. 19, 2000).* It has been the consistent policy of the Supreme Court not to interfere with the Ombudsman's exercise of his investigative powers. *(Mamburao, Inc. v. Office of the Ombudsman, G.R. No. 139141-42, Nov. 15, 2000).* It is not for the Court to review the Ombudsman's exercise of discretion in prosecuting or dismissing a complaint filed before his Office. *(Blanco v. Sandiganbayan, G.R. No. 136757-58, Nov. 27, 2000).*

REMEDIAL LAW

COURTS

Regional Trial Court (RTC). Jurisdiction. (a) The amended complaint sought to enjoin petitioners from rescinding the contract and taking over the property. While possession was a necessary consequence of the suit, it was merely incidental. The main issue was whether SBMA could rescind the Agreement, a dispute incapable of pecuniary estimation; hence, within the jurisdiction of the RTC. (*SBMA v. Universal International Group of Taiwan, G.R. No. 131680, Sept. 14, 2000*). (b) The original complaint (for specific performance and damages) of K against Q was within the jurisdiction of the trial court. The amended complaints with regard to Q alleged substantially the same causes of action against Q and new causes of action against G (the condominium project developer) and its officers. Insofar as the causes of action directed against Q, they were still within the jurisdiction of the trial court. Yet, with regard to the causes of action against G and its officers, the Housing and Land Use Regulatory Board (HLURB) had jurisdiction over them pursuant to Sec. 1, PD 1344. Anyway, the filing of the first amended complaint did not result in ousting the trial court of its jurisdiction over the entire case because it retained jurisdiction over the cause of action filed against Q. (*Que v. CA, G.R. No. 135442, Aug. 31, 2000*).

Forum Non Conveniens. A Philippine court or agency may assume jurisdiction over the case if it chooses to do so provided: [i] The Philippine court is one to which the parties may conveniently resort to; [ii] The Philippine court is in a position to make an intelligent decision as to the law and the facts; and [iii] The Philippine court has or is likely to have power to enforce its decision. In this case, all the incidents occurred outside the Philippines. All acts complained of took place in China. And

the decision of the NLRC would have no binding effect on the employer, that was incorporated under the laws of China and was not even served with summons. However, if private respondent were an "overseas contract worker", a Philippine forum, specifically the POEA, not the NLRC, would protect him. (*The Manila Hotel Corp. v. NLRC, G.R. No. 120077, Oct. 13, 2000*).

CIVIL PROCEDURE

GENERAL PRINCIPLES

Liberal Interpretation of Procedural Rules. (*Maunlad Savings and Loan Association, Inc. v. CA, G.R. No. 114942, Nov. 24, 2000) (Yao v. CA, G.R. No. 132428, Oct. 24, 2000*).

ORDINARY CIVIL ACTIONS

Cause of Action. Based on document. Sec. 7, Rule 8 of the 1997 Rules of Civil Procedure should be read in conjunction with Sec. 9 of Rule 130 of the Revised Rules of Evidence. While the specific denial in the original answer was not under oath and thus gave rise to the implied admission of the genuineness and due execution of the contents of the promissory note, private respondent, thru his testimony, was able to put in issue and present parol evidence to controvert the terms of the promissory note. The presentation of the contrariant evidence for and against the imputation of genuineness and due execution undoubtedly cured or clarified, as the case may be, whatever defects in the pleadings or vagueness in the issues there might have been as presented in the original answer. (*Maunlad Savings and Loan Association, Inc. v. CA, G.R. No. 114942, Nov. 24, 2000*).

PARTIES

Indispensable Party. In an action for quieting of title, recovery of possession and ownership of a parcel of land, and damages,

the mortgagee of the equipment and other improvements located on the land is not an indispensable party, if the said mortgagee does not claim any right to ownership or possession of such real estate. (*Republic v. Heirs of Magdato, G.R. No. 137857, Sept. 11, 2000*).

Death of a Party. Under Sec. 16, Rule 3 of the Rules of Court, only in a pending case is the counsel of a party required to inform the court in case the client dies or becomes incapacitated or incompetent. A pending case necessarily implies that the court has already acquired jurisdiction over the person of the party who died or became incapacitated or incompetent. (*Nery v. Leyson, G.R. No. 139306, Aug. 29, 2000*).

VENUE

Improper venue is not a ground for the dismissal of the complaint *motu proprio,* as the same may be waived, unlike absence of jurisdiction. (*Rudolf Lietz Holdings, Inc. v. Register of Deeds, G.R. No. 133240, Nov. 15, 2000*).

PROCEDURE IN REGIONAL TRIAL COURTS

KINDS OF PLEADINGS

Compulsory Counterclaim. (a) Counterclaim for storage fees and damages premised on violation of the same distributorship agreement sued upon in the complaint. (*Bayer Philippines, Inc. v. CA, G.R. No. 109269, Sept. 15, 2000*).

(b) The claim that petitioner is entitled to the right of redemption under Section 78 of R.A. No. 337, since private respondent's predecessor-in-interest is a credit institution – is in the nature of a compulsory counterclaim which should have been averred in petitioner's answer to the complaint for judicial foreclosure. (*Huerta Alba Resort, Inc. v. CA, G.R. No. 128567, Sept. 1, 2000*).

(c) A compulsory counterclaim cannot be the subject of a separate action but should be asserted in the same suit involving the same transaction or occurrence, which gave rise to it. It presupposes the existence of a claim against the party filing the counterclaim. Hence, when there is no claim against the counterclaimant, the counterclaim is improper and must be dismissed. More so, when the complaint is dismissed at the instance of the counterclaimant. Test to determine whether a counterclaim is compulsory or not. (*Financial Building Corp. v. Forbes Park Association, Inc., G.R. No. 133119, Aug. 17, 2000*).

(d) The cause of action pleaded in the second civil case are different from those raised in the first civil case and such causes could not have been raised as compulsory counterclaims therein, as they arose after the filing of the complaint in the first case. (*Arenas v. CA, G.R. No. 126640, Nov. 23, 2000*).

PARTS OF A PLEADING

(a) Verification. The court may order the correction of the pleading if verification is lacking or act on the pleading although it is not verified. (*Uy v. The Land Bank of the Philippines, G.R. No. 136100, Jul 24, 2000*).

(b) Certification Against Forum Shopping. [i] Certifications executed by lawyers of the petitioners are not correct and could have warranted the outright dismissal of their actions. But the Court relaxed the rule in order to resolve the petitions on their merits as a matter of social justice involving labor and capital. (*Damasco v. NLRC, G.R. No. 115755, Dec. 4, 2000; Mactan-Cebu International Airport Authority v. CA, G.R. No. 139945, Nov. 27, 2000*). [ii] Certification in a petition for review signed by only one of the spouses was held sufficient as the decision assailed by them relates to a case filed against petitioner-spouses over property in which they had a common interest. (*Mr. & Mrs. Dar v. Hon. Alonzo, G.R. No. 143016, August 30, 2000*).

(c) Lack of certification against forum shopping is a ground for dismissal and, generally, not curable by the submission thereof after the filing of the petition. In some cases though, the Court deemed the belated filing of the certification as substantial compliance with the requirement. (*Uy v. The Land Bank of the Philippines, G.R. No. 136100, Jul 24, 2000*).

FILING AND SERVICE OF PLEADINGS

(a) Service of notice or other pleadings which are required by the rules to be furnished to the parties must be made at their last known address on record. If they are represented by counsel, such notices shall be sent instead to the counsel's last given address on record in the absence of a proper and adequate notice to the court of a change of address, unless service upon the party himself is ordered by the court. (*Thermochem Inc. v. Naval, G.R. No. 131541, Oct. 20, 2000*).

(b) Service by registered mail is complete upon actual receipt thereof by the addressee. The best evidence to prove this mode of service is a certification from the postmaster not only that the notice was issued or sent but also as to how, when and to whom the delivery was made. (*Abrajano v. CA, G.R. No. 1270787, Oct. 13, 2000*).

(c) Explanation of Service. Service by registered mail "due to limitations in time and distance" is sufficient. (*Security Bank and Trust Company, Inc. v. Cuenca, G.R. No. 138544, Oct. 3, 2000*).

(d) Notice of *lis pendens*. Statutory bases: Rule 13, Sec. 14 of the 1997 Rules of Civil Procedure and Sec. 76 of P.D. No. 1529. From these provisions, it is clear that such notice is proper only in actions: [i] to recover possession of real estate; [ii] to quite title; [iii] to remove clouds of doubt thereon; [iv] for partition; and [v] any other proceedings in court directly affecting title to land or the

use or occupation thereof or the building thereon. A notice of *lis pendens* may be cancelled only on two grounds: [i] if the annotation was for the purpose of molesting the title of the adverse party, or [ii] when the annotation is not necessary to protect the title of the party who caused it to be recorded. (*Yared v. Hon. Ilarde, G.R. No. 1147732, Aug. 1, 2000*).

SUMMONS

Service. (*Umandap v. Judge Sabio, G.R. No. 140244, Aug. 29, 2000*). Substituted Service. The pertinent facts and circumstances attendant to the service of summons must be stated in the proof of service or Officer's Return; otherwise, any substituted service made in lieu of personal service cannot be upheld. (*Hamilton v. Levy, G.R. No. 139283, Nov. 15, 2000*).

MOTIONS

Notice, Service and Return. (a) As a rule, motions must comply with Secs. 4, 5 and 6 of Rule 15 of the Rules of Court, requiring notice to be sent at least three (3) days before the hearing, directed to the parties concerned, stating the time and place of hearing of the motion, with proper proof of notice thereof. Non-compliance with such requirements renders the motion a mere scrap of paper. (*Requierme, Jr. v. Yuipco, A.M. No. RTJ-98-1427, Nov. 27, 2000; Maunlad Savings and Loan Association, Inc. v. CA, G.R. No. 114942, Nov. 24, 2000*). Same requirements apply to motions for reconsideration. (*PCI Bank v. CA, G.R. No. 120739, Jul. 20, 2000*).

(b) This case, however, falls within the exception to the above rule for it is petitioner's life and liberty that are at stake. The trial court has sentenced him to suffer the penalty of *reclusion perpetua* and his conviction attained finality on the basis of mere technicality. It is but just that petitioner be given the opportunity to defend himself and pursue his appeal. (*Basco v. CA, G.R. No. 125290, Aug. 9, 2000*).

MOTION TO DISMISS

(1) **Grounds**. (a) **Forum-shopping**. From petitioner's motion before the trial court and her petition before the CA, it is clear that there is forum-shopping. The motion and the petition before the CA pertain to the same subject – amendment of the compromise agreement. Said motion had not yet been resolved by the trial court when the CA petition was filed. Forum-shopping occurs not only when a final judgment in one case will amount to *res judicata* in another, but also when the elements of *litis pendentia* are present. The filing of multiple suits involving the same parties for the same cause of action, either simultaneously or successively, for the purpose of obtaining a favorable judgment amounts to forum-shopping. (*Quinsay v. CA, G.R. No. 127058, August 31, 2000*). There is forum shopping whenever, as a result of an adverse decision in one forum, a party seeks a favorable opinion (other than by appeal or certiorari) in another. (*PEZA v. Hon. Vianzon, G.R. No. 131020, Jul. 20, 2000*). A party is not permitted to pursue simultaneous remedies in two different fora. This practice ridicules the judicial process, plays havoc with the rules of orderly procedure, and is vexatious and unfair to the other parties to the case. (*Heirs of Penaverde v. Heirs of Penaverde, G.R. No. 131141, Oct. 20, 2000*).

(b) **Conclusiveness of Judgment**. The rule precludes the relitigation of a particular fact or issue in another action between the same parties based on a different claim or cause of action. The previous judgment is conclusive in the second case, only as to those matters actually and directly controverted and determined and not as to matters merely involved therein. (*Rizal Surety & Insurance Co. v. CA, G.R. No. 112360, Jul 18, 2000*).

(c) ***Res Judicata. Stare Decisis***. The doctrine of the law of the case has certain affinities with, but is clearly distinguishable from, the doctrines of *res judicata* and *stare decisis*, principally on the ground that the rule of the law of the case operates only in the particular

case and only as a rule of policy and not as one of law. The ruling covered by the doctrine of law of the case is adhered to in the single case where it arises, but is not carried into other cases as a precedent. On the other hand, under the doctrine of *stare decisis,* once a point of law has been established by the court, that point of law will, generally, be followed by the same court and by all courts of lower rank in subsequent cases where the same legal issue is raised. (*Ayala Corp. v. Rosa-Diana Realty and Development Corp., G.R.No. 134282, Dec. 1, 2000*). In this instance, the "law of the case" holds that petitioner has the *equity of redemption* without any qualification whatsoever, that is, without the right of redemption. Whether or not the "law of the case" is erroneous is immaterial. It still remains the law of the case. (*Huerta Alba Resort, Inc. v. CA, G.R. No. 128567, Sept. 1, 2000*).

(d) **Lack of Cause of Action**. There was no need to plead such ground in a motion to dismiss or in the answer since the same was not deemed waived if it was not pleaded. (*Financial Building Corp. v. Forbes Park Association, Inc., G.R. No. 133119, Aug. 17, 2000*). In a motion to dismiss based on failure to state a cause of action, there cannot be any question of fact or doubt or difference as to the truth or falsehood of acts, simply because there are no findings of fact in the first place. What the trial court merely does is to apply the law to the facts as alleged in the complaint, assuming such allegations to be true. Therefore, a decision dismissing a complaint based on failure to state a cause of action necessarily precludes a review of the same decision on questions of fact. (*China Road and Bridge Corp. v. CA, G.R. No. 137898, Dec. 15, 2000*).

(2) **Principles**. (a) In the event that a defending party has a ground for dismissal and a compulsory counterclaim at the same time, he must choose only one remedy. If he decides to file a motion to dismiss, he will lose his compulsory counterclaim. But if he opts to set up his compulsory counterclaim, he may still

plead his ground for dismissal as an affirmative defense in his answer. The latter option is obviously more favorable to defendant. (*Financial Building Corp. v. Forbes Park Association, Inc., G.R. No. 133119, Aug. 17, 2000*).

(b) Sec. 6, Rule 16 of the 1997 Rules specifically provides that a preliminary hearing on the affirmative defenses may be allowed only when no motion to dismiss has been filed. Sec. 6 must be viewed in light of Sec. 3 of the same Rule, which requires courts to resolve a motion to dismiss and prohibits them from deferring its resolution on the ground of indubitability. Clearly, Sec. 6 disallows a preliminary hearing of affirmative defenses once a motion to dismiss has been filed. (*California and Hawaiian Sugar Co. v. Pioneer Insurance and Surety Corp., G.R. No. 139273, Nov. 28, 2000*).

(c) Order denying motion to dismiss - is interlocutory and cannot be the subject of the extraordinary petition for *certiorari* or *mandamus*. The remedy of the aggrieved party is to file an answer and to interpose as defenses the objections raised in his motion to dismiss, proceed to trial, and in case of an adverse decision, to timely file appeal. (*Far East Bank and Trust Company v. CA, G.R. No. 135548, Sept. 29, 2000*).

DISMISSAL OF ACTIONS IN INTERVENTION

The provision of Sec. 1, Rule 17 of the Rules of Court contemplates a complaint where there is a plaintiff and a defendant with real conflicting interests. The cases at bar, however, are different. They started as a Joint Petition for Approval of Compromise Agreement and Amicable Settlement. Known persons and entities claiming adverse interests on the subject shares were not impleaded. Yet, petitioners are aware that the subject shares of stock are sequestered and their ownership is still under litigation. Moreover, before petitioners can file their Manifestation of Withdrawal

of Joint Petition for Approval of Compromise Agreement and Amicable Settlement, respondents already filed their opposition which can be deemed as answers to the Joint Petition, hence, petitioners can no longer unilaterally withdraw their Joint Petition. Petitioners' contention that respondents cannot intervene as the case is not an action or suit cannot merit the assent of the Court. Regardless of its nature as an action or suit, the fault of the Joint Petition precisely lies in the attempt to bypass parties with legitimate interests on the subject shares. The existence of these parties was known to the petitioners yet they were not impleaded. Their failure to be impleaded is bad enough but worse still is petitioners' submission that since they were not impleaded, ergo, they could not intervene. It is now a must principle of justice that a right cannot arise from a wrong. Moreover the Sandiganbayan did not treat the Joint Petition as an action or suit but as a mere incident of Case No. 0033 where the respondents are party litigants. Furthermore, under the rules of intervention, the allowance or disallowance of a motion to intervene is addressed to the sound discretion of the court. The discretion of the court, once exercised, cannot be reviewed by certiorari nor controlled by mandamus, save in instances where such discretion has been so exercised in an arbitrary or capricious manner. (*San Miguel Corporation v. Sandiganbayan, G.R. Nos. 104637-38, Sept. 14, 2000).*

DEMURRER TO EVIDENCE

When a demurrer to evidence granted by a trial court is reversed on appeal, the reviewing court cannot remand the case for further proceedings. Rather, it should render judgment on the basis of the evidence proffered by the plaintiff. (*Radiowealth Finance Co. v. Spouses Vicente, G.R. No. 138739, Jul. 6, 2000*).

SUMMARY JUDGMENT

(a) Upon a motion for summary judgment, the sole function of the court is to determine whether or not there is an issue of

fact to be tried, and any doubt as to the existence of an issue of fact must be resolved against the movant. (*Garcia v. CA, G.R. No. 117032, Jul. 27, 2000*).

(b) Judgment on the Pleadings distinguished from summary judgment. The trial court may render a judgment on the pleadings even if there is pending before the same court, a third-party complaint. (*Narra Integrated Corp. v. CA, G.R. No. 137915, Nov. 15, 2000*).

JUDGMENTS, FINAL ORDERS

(a) "Final" judgment or order distinguished from judgment or order that has become "final and executory." A "final" judgment or order is one that finally disposes of a case, leaving nothing more for the court to do in respect thereto – such as an adjudication on the merits, which, on the basis of the evidence presented at the trial, declares categorically what the rights and obligations of the parties are and which party is in the right, or a judgment or order that dismisses an action on the ground of *res judicata* or prescription, for instance. It is to be distinguished from an order that is "interlocutory", or one that does not finally dispose of the case, such as an order denying a motion to dismiss under Rule 16 of the Rules of Court, or granting a motion for extension of time to file a pleading. As such, only final judgments or orders (as opposed to interlocutory orders), are appealable. Now, a "final" judgment or order in the sense just described becomes "final and executory" upon expiration of the period to appeal therefrom where no appeal has been duly perfected or, an appeal therefrom having been taken, the judgment of the appellate court in turn becomes final. It is called a "final and executory" judgment because execution at such point issues as a matter of right. (*Intramuros Tennis Club, Inc. v. PTA, G.R. No. 135630, Sept. 26, 2000; Corona International, Inc. v. CA, G.R. No. 127851, Oct. 18, 2000*).

(b) A judgment becomes final upon the lapse of the reglementary period of appeal if no appeal is perfected or motion for reconsideration or new trial is filed. The trial court need not pronounce the finality of the order as the same becomes final by operation of law. The trial court cannot even validly entertain a motion for reconsideration filed after the lapse of the period for taking an appeal. Thus, it does not matter that the opposing party failed to object to the timeliness of the motion for reconsideration or that the court denied the same on grounds other than timeliness, considering that at the time the motion was filed, the order had become final and executory. (*Testate Estate of Biascan v. Biascan, G.R. No. 138731, Dec. 11, 2000*).

[i] Public policy dictates that when a judgment becomes final and executory, the prevailing party should not be denied the fruits of his victory by some subterfuge devised by the losing party. (*Huerta Alba Resort, Inc. v. CA, G.R. No. 128567, Sept. 1, 2000*). [ii] Courts are duty-bound to put an end to controversies. Any attempt to prolong, resurrect or juggle them should be firmly struck down. The system of judicial review should not be misused and abused to evade the operation of final and executory judgments. (*Buaya v. Stronghold Insurance Co., Inc., G.R. No. 139020, Oct. 11, 2000*). [iii] A decision that has attained finality becomes the law of the case, regardless of any claim that it is erroneous. (id.). It can no longer be disturbed, altered, or modified; and this rule applies regardless of any possible injustice in a particular case. Facts or events bearing on the substance of the obligation subject of the action should ordinarily be alleged during the issue-formulation stage or otherwise by proper amendment, and proved at the trial; if discovered after the case has been submitted but before the decision is rendered, these must be proved after obtaining a reopening of the case; and if discovered after judgment has been rendered but before it becomes final, must be substantiated at a new trial which the court in its discretion may grant on the ground of newly discovered evidence, pursuant to Rule 37, Rules of Court. Once

the judgment becomes executory, the only other remedy left to attempt a material alteration thereof is that provided for in Rule 38 of the Rules of Court (governing petitions for relief from judgments), or an action to set aside the judgment on account of extrinsic, collateral fraud. There is no other permissible mode of preventing or delaying execution on equitable grounds predicated on facts occurring before finality of judgment. (*Pacific Mills, Inc. v. Hon. Padolina, G.R. No. 141013, Nov. 29, 2000*).

RELIEF FROM JUDGMENT

For a petition for relief to be entertained by the court, the petitioner must satisfactorily show that he has strictly complied with the provisions of Rule 38, that the said petition was filed within the reglementary period of 60 days after the petitioner learns of the judgment, final order, or other proceeding to be set aside, and not more than 6 months after such judgment or final order was entered, or such proceeding was taken. The reglementary period is reckoned from the time the party's counsel receives notice of the decision; for notice to counsel is notice to the party for purposes of Sec. 3, Rule 38. (*Mercury Drug Corp. v. CA, G.R. No. 138571, Jul. 13, 2000*).

EXECUTION, SATISFACTION AND EFFECT OF JUDGMENT

(a) **Motion for Execution**. Need for Hearing. Generally, no notice or even prior hearing of such motion for execution is required before a writ of execution can be issued when a decision has become final. However, there are circumstances in this case which made a hearing and the requisite 3-day notice of the same to the adverse party necessary. (*De Jesus v. Judge Obnamia, A.M. No. MTJ-00-1314, Sept. 7, 2000*).

(b) **Enforcement of Foreign Judgment**. In this jurisdiction, a valid judgment rendered by a foreign tribunal may be recognized

insofar as the immediate parties and the underlying cause of action are concerned so long as it is convincingly shown that: [i] there has been an opportunity for a full and fair hearing before a court of competent jurisdiction; [ii] that trial upon regular proceedings has been conducted, following due citation or voluntary appearance of the defendant and under a system of jurisprudence likely to secure an impartial administration of justice; and [iii] there is nothing to indicate either a prejudice in court and in the system of laws under which it is sitting or fraud in procuring the judgment. (*Philippine Aluminum Wheels, Inc. v. Fasgi Enterprises, Inc., G.R. No. 137378, Oct. 12, 2000*).

(c) **Discretionary Execution**. May be allowed subject to the following conditions: [i] there must be a judgment or final order; [ii] the trial court must have lost jurisdiction over the case; [iii] there must be "good reasons" to allow execution; and [iv] such good reasons must be stated in a special order after due hearing. (*Intramuros Tennis Club, Inc. v. PTA, G.R. No. 135630, Sept. 26, 2000; Corona International, Inc. v. CA, G.R. No. 127851, Oct. 18, 2000*).

(d) **Execution Long Overdue**. (*Spouses Gerardo v. CA, G.R. No. 121104, Nov. 27, 2000*). Appellant's penchant for resurrecting the same issue x x x, in the present recourse, deserves the severest condemnation as it was designed solely to further derail the execution of the decision of the court *a quo*. (*Buaya v. Stronghold Insurance Co., Inc., G.R. No. 139020, Oct. 11, 2000*).

APPEAL FROM THE RTC

Appellate Docket Fees. The failure to pay the appellate docket fee does not automatically result in the dismissal of the appeal or affect the court's jurisdiction, the dismissal being discretionary on the part of the appellate court. Furthermore, under Sec. 5 of Rule 141 of the Rules of Court, the appellate court may extend the time for the payment of the docket fees if appellant is

able to show that there is a justifiable reason for his failure to pay the correct amount of docket fees within the prescribed period. (*Yambao v. CA, G.R. No. 140894, Nov. 27, 2000*).

Notice of Appeal. The 1997 Rules of Civil Procedure, which took effect on July 1, 1997, provide that a notice of appeal must be filed within the 15-day reglementary period from receipt of the decision or order appealed from and the docket and other lawful fees must also be paid within the same period. (*Chan v. CA, G.R. No. 138758, Jul. 6, 2000; Barangay 24 of Legaspi City v. Imperial, G.R. No. 140321, Aug. 24, 2000).*

Wrong Mode of Appeal. On the 14th day following his receipt of the adverse RTC judgment, petitioner opted to file a motion for reconsideration. Subsequently, he received a copy of the RTC's order denying his motion for reconsideration, on which date, he had only one day left, within which to file with the CA a petition for review. However, on said date, petitioner filed a notice of appeal. He palpably availed of the wrong mode of appeal. And since he never instituted the correct one, he lost it. *(Yao v. CA, G.R. No. 132428, Oct. 24, 2000).*

PETITION FOR REVIEW FROM THE RTC TO THE CA

Copies of Assailed Decision. A petition for review filed before the CA must contain a certified true copy or duplicate original copy of the assailed decision, final order or judgment. *(Lee v. CA, G.R.No. 136421, Nov. 23, 2000).* However, the other supporting papers attached to the petition are not required to be certified true copies as well. In this case, the Contract to Sell, which is the center of the controversy, was reproduced verbatim in the MTC Decision, a duplicate original of which was attached to the Petition. Moreover, a certified true copy of the Contract was attached to the Motion for Reconsideration. Hence, the appellate court erred in denying due course to the Petition. *(Cusi-Hernandez*

v. Spouses Diaz, G.R. No. 140436, Jul. 18, 2000). Substantial compliance with requirement. *(Uy v. BIR, G.R. No. 129651, Oct. 20, 2000).*

APPEALS TO THE CA

Appellate Docket Fees. With the exception of Sec. 1 (b), which refers to the failure to file notice of appeal or the record of appeal within the reglementary period, the grounds enumerated in Rule 50, Sec. 1, are merely directory and not mandatory. Despite the jurisdictional nature of the rule on payment of docket fee, the appellate court still has the discretion to relax the rule in meritorious cases, as in this case, where appellant was, from the start, ready and willing to pay the correct docket fee, but was unable to do so due to the error of an officer of the court in computing the correct amount. *(Ayala Land, Inc. v. Spouses Carpo, G.R. No. 140162, Nov. 22, 2000).* The power of discretionary dismissal of appeal should be used in accordance with the tenets of justice and fair play and with a great deal of circumspection, taking into consideration all attendant circumstances. *(Tedora v. CA, G.R. No. 142021, Nov. 29, 2000).*

Late Appeal. A motion contesting a late appeal may be filed before the appellate court even after the transmittal of the records therein. The legality of the appeal may be raised at any stage of the proceedings in the appellate court, and the latter is not precluded from dismissing the petition on the ground of its being out of time. A recognition of the merit of the petition does not necessarily carry with it any assumption or conclusion that it has been timely filed. *(Manila Memorial Center, Inc. v. CA, G.R. No. 137122, Nov. 15, 2000).*

Motion for Reconsideration. A motion for reconsideration is not *pro forma* just because it reiterated the arguments earlier passed upon and rejected by the appellate court. The Court has explained that a movant may raise the same arguments, precisely

to convince the court that its ruling was erroneous. *(Security Bank and Trust Co., Inc. v. Cuenca, G.R. No. 138544, Oct. 3, 2000).*

APPEAL BY CERTIORARI TO THE SUPREME COURT

Petition for Review on Certiorari (Rule 45). (a) Factual questions may not be raised in a petition for review on certiorari. *(American President Lines, Ltd. v. CA, G.R. No. 110853, Jul 31, 2000; Telefunken Semiconductors Employees Union-FFW v. CA, G.R. Nos. 143013-14, Dec. 18, 2000).*

(b) Exceptions to the rule: [i] When the factual findings complained of are devoid of support from the evidence on record or the assailed judgment is based on a misappreciation of facts. *(Metropolitan Bank and Trust Co. v. Tonda, G.R. No. 134436, Aug. 16, 2000)*; [ii] When the factual findings of the RTC and the CA are opposite. *(Cordial v. Miranda, G.R. No. 135495, Dec. 14, 2000).*

(c) The failure of petitioner to attach an authentic copy of the CA Decision, which he claims annulled the trial court decision, is an added reason why this petition should be denied. *(Buaya v. Stronghold Insurance Co., Inc., G.R. No. 139020, Oct. 11, 2000).*

(d) Petition filed under Rule 45 of the Rules of Court, alleging that the appellate court and regional trial court acted with grave abuse of discretion amounting to lack of jurisdiction, should be dismissed outright, for being a wrong remedy. Nevertheless, in the interest of justice, the Court considered the petition and the issues therein as if they were properly brought by way of a special civil action for certiorari under Rule 65. *(Spouses Gerardo v. CA, G.R. No. 121104, Nov. 27, 2000).*

ORIGINAL CASES BEFORE THE CA

Under Rule 46, Sec. 7 of the 1997 Rules of Civil Procedure, when the respondent in an original action filed with the court fails

to file its comment, the case may be decided on the basis of the evidence on record without prejudice to disciplinary action against the disobedient party. Concomitant thereto is the rule that pursuant to Rule 51, Sec. 1 (b) (1), where no comment is filed upon the expiration of the period to comment in an original action or a petition for review, the case shall be deemed submitted for decision. Both provisions are applicable to a petition for review filed with the Supreme Court as provided in Rule 56, Sec. 2 (a) of the Rules. *(Thermochem Inc. v. Naval, G.R. No. 131541, Oct. 20, 2000).*

ANNULMENT OF JUDGMENTS OR FINAL ORDERS

(a) Exclusive Jurisdiction of CA. The CA has exclusive jurisdiction over actions for annulment of trial court decisions. An RTC has no authority to annul the final judgment of a co-equal court. *(Nery v. Leyson, G.R. No. 139306, Aug. 29, 2000).*

(b) There is no such remedy as annulment of the judgment of the HLURB or the Office of the President by the CA. Assuming *arguendo* that the annulment petition can be treated as a petition for review under Rule 43 of the 1997 Rules of Civil Procedure, the same should have been dismissed by the CA, because no error of judgment was imputed to the HLURB and the Office of the President. Fraud and lack of jurisdiction are beyond the province of petitions under Rule 43, as it covers only errors of judgment. *(Atty. Cole v. CA, G.R. No. 137551, Dec. 26, 2000).*

(c) A judgment can be the subject of an action for annulment on two grounds: [i] the judgment is void for want of jurisdiction or lack of due process of law; or [ii] the judgment has been obtained by fraud. An action to annul a final judgment on the ground of fraud will lie only if the fraud is *extrinsic* or *collateral* in character. The decision of the trial court cannot be annulled on the basis of petitioner's allegation that the purported deed of sale of the property under scrutiny was dubious and forged, for this kind of fraud,

if there is any, is intrinsic, and not extrinsic. The use of forged instrument or perjured testimonies during trial is not extrinsic fraud, because such evidence does not preclude the participation of any party in the proceedings. *(Bobis v. CA, G.R. No. 113796, Dec. 14, 2000).*

PROVISIONAL REMEDIES

Preliminary Injunction. Requisites for its issuance. *(Public Estates Authority v. CA, G.R. No. 112172, Nov. 20, 2000).* The Rules do not require that issues be joined before preliminary injunction may issue. It may be granted at any stage of an action or proceeding prior to the judgment or final order. *(PCIBank v. CA, G.R. No. 103149, Nov. 15, 2000).* Courts should avoid issuing a writ of preliminary injunction which would in effect dispose of the main case without trial. *(Mizona v. CA, G.R. No. 120985, Dec. 4, 2000).*

Replevin. Return of property seized and counterbond. *(Serg's Products, Inc. v. PCI Leasing and Finance, Inc., G.R. No. 137705, Aug. 22, 2000).*

SPECIAL CIVIL ACTIONS

Injunction. (a) Requisites. Injunction may be issued when the following are established: [i] the invasion of the right is material and substantial; [ii] the right of complainant is clear and unmistakable; and [iii] there is an urgent and permanent necessity for the writ to prevent serious damage. "Status quo" refers to the conditions existing at the time of the filing of the case. In this instance, SSI was still in actual physical possession of the property in question as the lessee thereof. Although PEZA sent SSI a letter purportedly cancelling the lease agreement and demanding SSI to vacate the premises, said demand was never effectively implemented due to the filing of the present action for injunction. *(PEZA v. Hon. Vianzon, G.R. No. 131020, Jul. 20, 2000).*

(b) Judgments in actions for injunction are not stayed by the pendency of an appeal taken therefrom. This rule has been held to extend to judgments decreeing the dissolution of a writ of preliminary injunction, which are immediately executory. *(Intramuros Tennis Club, Inc. v. PTA, G.R. No. 135630, Sept. 26, 2000).*

(c) The remedy of injunction can no longer be availed of where the act to be prevented had long been consummated. *(Zabat v. CA, G.R. No. 122089, Aug. 23, 2000).*

(d) Government infrastructure projects. P.D. No. 1818 and Supreme Court Circulars Nos. 13-93 and 68-94 prohibit the issuance by any court of any injunction that would delay the process of a government infrastructure project. *(Caguioa v. Judge Laviña, A.M. No. RTJ-00-1553, Nov. 20, 2000).*

Prohibition is not an appropriate remedy since the body sought to be enjoined no longer exists. *(Gonzales v. Hon. Narvasa, G.R. No. 140835, Aug. 14, 2000).*

Quo Warranto may be brought only by the Solicitor General, or a public prosecutor, or a person claiming to be entitled to the public office or position usurped or unlawfully held or exercised by another. *(Serg's Products, Inc. v. PCI Leasing and Finance, Inc., G.R. No. 137705, Aug. 22, 2000).* The person suing must show that he has a clear right to the office allegedly held unlawfully by another. *(Sec. of Justice v. Bacal, G.R. No. 139382, Dec. 6, 2000).*

Certiorari. (a) Period for Filing Petition. [i] The prevailing rule now under A.M. No. 00-2-03-SC gives a party a fresh 60-day period from receipt of the resolution denying his motion for reconsideration within which to file a petition for certiorari. This latest amendment took effect on September 1, 2000. Before the said amendment, Sec. 4, Rule 65, as amended by Circular No. 39-98, provided that the 60-day period for filing a petition for certiorari

shall be interrupted by the filing of a motion for reconsideration or new trial. In the event of the denial of the motion, the petitioner only has the remaining period within which to file the petition. *(Narzoles v. NLRC, G.R. No. 141959, Sept. 29, 2000; Systems Factors Corp. v. NLRC, G.R. No. 143789, Nov. 27, 2000).* [ii] The new rule under A.M. No. 00-2-03-SC should be deemed applicable to this case. Statutes regulating the procedure of the courts will be construed as applicable to actions pending and undetermined at the time of their passage. *(Systems Factors Corp. v. NLRC, G.R. No. 143789, Nov. 27, 2000).*

(b) Action challenging the RTC with grave abuse of discretion may be instituted either in the CA or the Supreme Court. Both have original concurrent jurisdiction. Certiorari is an extraordinary remedy available only when there is no appeal, nor any plain, speedy or adequate remedy in the ordinary course of law. While ordinarily, certiorari is unavailing where the appeal period has lapsed, there are exceptions. Among them are [i] when public welfare and the advancement of public policy dictates; [ii] when the broader interest of justice so requires; [iii] when the writs issued are null and void; or [iv] or when the questioned order amounts to an oppressive exercise of judicial authority. The questioned orders of the probate court nullifying the sale to S after it approved the sale and after its order of approval had become final and executory amount to oppressive exercise of judicial authority, a grave abuse of discretion amounting to lack of jurisdiction. *(Chua v. CA, G.R. No. 1211438, Oct. 23, 2000).*

(c) The writ of certiorari cannot be used to correct a lower tribunal's evaluation of the evidence and factual findings. *(Soriano v. Hon. Angeles, G.R. No. 109920, August 31, 2000).*

Mandamus is not the proper remedy to question the legality of the exercise of the right to top by private respondent. It does not lie to compel the award of a contract subject of bidding

to an unsuccessful bidder. It may not be availed to direct the exercise of judgment or discretion in a particular way or retract or reverse an action already taken in the exercise of either. *(JG Summit Holdings, Inc. v. CA, G.R. No. 124293, Nov. 20, 2000).* The issuance of the writ of execution pending appeal being a clear duty of respondent Judge in this case, may be the subject of mandamus. *(Uy v. Hon. Santiago, G.R. No. 131237, July 31, 2000).*

Habeas Corpus. A speedy and effectual remedy to relieve persons from unlawful restraint. Its objective is to inquire into the legality of one's detention and, if found illegal, to order the release of the detainee. It will not issue when the person in whose behalf the writ is sought is out on bail or is in the custody of an officer under process issued by a court or judge or by virtue of a judgment or order of a court of record that has jurisdiction to issue the process, render the judgment, or make the order. *(In re Petition of Garcia, G.R. No. 141443, Aug. 30, 2000).* The period for perfecting appeals in habeas corpus cases is now 15 days from notice of the judgment or order. *(Tung v. Rodriguez, G.R. No. 137571, Sept. 21, 2000).* Once a person detained is duly charged in court, he may no longer question his detention through a petition for the issuance of a writ of *habeas corpus.* His remedy would be to quash the information and/or warrant of arrest duly issued. The writ of *habeas corpus* should not be allowed after the party sought to be released had been charged before any court. The term "court" includes quasi-judicial bodies like the Deportation Board of the Bureau of Immigration. *(Commissioner Rodriguez v. Judge Bonifacio, A.M. No. RTJ-99-1510, Nov. 6, 2000).*

Contempt. (a) Indirect Contempt. Sec. 4 of Rule 71 of the 1997 Rules of Civil Procedure explicitly lays down the manner in which indirect contempt proceedings may be filed, requiring among others that the same be made through a verified petition. *(Commissioner Rodriguez v. Judge Bonifacio, A.M. No. RTJ-99-1510, Nov. 6, 2000).*

(b) Under Sec. 6, Rule 71, the court has the discretion either to impose a fine of not exceeding P1,000 or imprisonment of not more than 6 months, or both, for indirect contempt. Sec. 7 of the same rule provides for indefinite incarceration in civil contempt proceedings to compel a party to comply with the order of the court. This may be resorted to where the attendant circumstances are such that the non-compliance with the court order is an utter disregard of the authority of the court which has then no other recourse but to use its coercive power. However, the power to punish for contempt should only be exercised on the preservative and not on the vindictive principle. *(Quinio v. CA, G.R. No. 113867, Jul. 13, 2000; United Homeowners v. Justice Sandoval-Gutierrez, A.M. No. CA-99-30, Oct. 16, 2000).* A party cannot be held in indirect contempt for disobeying an order which is not addressed to him. *(Cañas v. Hon. Castigador, G.R. No. 139844, Dec. 15, 2000; United Homeowners v. Justice Sandoval-Gutierrez, A.M. No. CA-99-30, Oct. 16, 2000).*

Escheat. Bank deposits. *(Republic v. CA, G.R. No. 95533, Nov. 20, 2000).*

EJECTMENT

(a) Execution Pending Appeal. Only the execution of the Metropolitan Trial Court's judgment pending appeal with the RTC may be stayed by a compliance with the requisites provided in Rule 70, Sec. 19 of the 1997 Rules of Civil Procedure. Once the RTC has rendered a decision in its appellate jurisdiction, such decision shall, under Rule 70, Sec. 21, be immediately executory, without prejudice to an appeal, via a petition for review, to the CA and/or the Supreme Court. *(Uy v. Hon. Santiago, G.R. No. 131237, July 31, 2000).*

(b) Remand of Final Decision for Execution. Since the RTC affirmed *in toto* the decision of the MTC in an ejectment suit and

the affirming decision had become final and executory, the case should be remanded to the MTC for execution. The only exception is the execution pending appeal, which can be issued by the RTC under Sec. 8 of Rule 70 or by the CA or the Supreme Court under Sec. 10 of the same Rule. Sec. 1, Rule 39 of the 1997 Rules of Civil Procedure does not authorize the appellate court which has resolved the appeal to order the execution of its own judgment. What is authorized is the execution of the judgment of the court of origin even before the remand to the latter by the appellate court of the records of the case, solely on the basis of the certified true copy of the judgment of the appellate court and the entry thereof. *(Jason v. Judge Ygaña, A.M. No. RTJ-00-1543, Aug. 4, 2000).*

(c) Case Deemed Submitted for Resolution. There was no error in declaring the ejectment case submitted for decision based solely on the complaint, upon failure of petitioner to appear at the preliminary conference. Under Adm. Circular No. 28 dated July 3, 1989, submission of memoranda is not a mandatory requirement. Failure of petitioner to submit her memoranda after having been required to submit the same does not preclude the RTC from rendering judgment on the basis of the entire records of the proceedings in the court of origin. The fact that the court also sent a copy of the order to petitioner does not mean that the reglementary period shall be reckoned from the date of receipt of said order by petitioner. The rule is that it is the date of receipt by counsel from which the reglementary period must be counted, it being the counsel's responsibility, not the client's, to file the required memorandum in due time. *(Tubiano v. Raso, G.R. No. 132598, Jul. 13, 2000).*

(d) Enforcement of Writ of Execution. Under the Rules of Court, immediate enforcement of a writ of execution in ejectment cases is carried out by giving the defendant notice of such writ, and making a demand that defendant comply therewith within a reasonable period, normally from 3 to 5 days, and it is only after

such period that the sheriff enforces the writ by the bodily removal of the defendant and his personal belongings. And if demolition is involved, there must first be a hearing on motion and due notice for the issuance of a special order under Sec. 14 of Rule 39. *(Lu v. Judge Siapno, A.M. MTJ-99-1199, Jul. 6, 2000)*. Sec. 9, Rule 141 requires that the sheriff's estimate of expenses in the execution of a writ should be approved by the judge. *(Canlas v. Sheriff Balasbas, AM No. P-99-1317, Aug. 1, 2000).*

SPECIAL PROCEEDINGS

Judicial Settlement of Estate. Claims of Compulsory Heirs. Since the intestate court had ascertained in the settlement proceedings who the lawful heirs are, there is no need for a separate or independent action to resolve claims of legitimate children of the deceased. The court first taking cognizance of such proceeding acquires exclusive jurisdiction to resolve all questions concerning the settlement of the estate to the exclusion of all other courts or branches of the same court. *(Chan Sui Bi v. CA, G.R. No. 129507, Sept. 29, 2000)*. Claims of title to, or right of possession of, personal or real property, made by the heirs themselves, by title adverse to that of the deceased, or made by third persons, cannot be entertained by the probate court. In this case, however, private respondent who refused to vacate the house and lot being eyed as part of the estate of the deceased, cannot be considered an "outside party" for he is one of the compulsory heirs of the former. As an exception, when the parties are all heirs of the decedent, it is optional upon them to submit to the probate court the question of title to the property. Here, the probate court is competent to decide the question of ownership. *(Cortes v. CA, G.R. No. 117417, Sept 21, 2000).*

Settlement of Estate. The order of the probate court authorizing, or subsequently approving, the absolute sale of property of the estate in favor of a specified buyer constitutes a final determination of the rights not only of the buyer and the estate but also of

any heir or party claiming to be prejudiced by the sale. *(Chua v. CA, G.R. No. 1211438, Oct. 23, 2000).*

CRIMINAL PROCEDURE

PROSECUTION OF OFFENSES

Information. (a) Sufficient: [i] Even when the date of commission of rape is not stated with certainty, as the date of commission is not an element of said crime and what is essential, being the occurrence of rape, not the time of its commission. *(People v. Castillo, G.R. No. 130205, July 5, 2000; People v. Cabigting, G.R. No. 131806, Oct. 20, 2000).* [ii] Even when rape and frustrated homicide were charged in a single information. *(People v. Honra, G.R. No. 136012-16, Sept. 26, 2000).* [iii] An information alleging conspiracy can stand even if only one person is charged, but the court cannot pass verdict on the co-conspirators who were not charged in the information. *(Garcia v. CA, G.R. No. 134730, Sept. 18, 2000).* In the cases referred to in [i] and [ii] above, no timely motion to quash was filed and the accused-appellant actively participated in the trial of the cases.

(b) Designation of Offense. It is not the designation of the offense in the information that is controlling but the allegations therein which directly apprise the accused of the nature and cause of the accusation against him. [i] An information was sufficient where it clearly charged the accused of raping his niece, who was a minor, although in the preamble, it stated that the accused was being charged with the rape of a woman under 12 years of age or who was demented. *(People v. Banihit, G.R. No. 132045, Aug. 25, 2000).*

Amendment of Information. The amendment of the information for rape in order to allege the relationship of accused-appellant to the victim is clearly substantial in character and can

no longer be done without violating the constitutional rights of the accused-appellant, who had previously pleaded to the information for simple rape. *(People v. Sandoval, G.R. No. 132625-31, Dec. 18, 2000).*

PROSECUTION OF CIVIL ACTION

Prejudicial Question. (a) A prejudicial question has been defined as one based on a fact distinct and separate from the crime but so intimately connected with it that it determines the guilt or innocence of the accused; and for it to suspend the criminal action, it must appear not only that said case involves facts intimately related to those upon which the criminal prosecution would be based but also that in the resolution of the issues raised in the civil case, the guilt or innocence of the accused would necessarily be determined. The rationale behind the principle of suspending a criminal case in view of the prejudicial question is to avoid two conflicting decisions. As discussed above, the concept of a prejudicial question involves a civil and a criminal case. There is no prejudicial question when one case is administrative and the other is civil. *(Te v. CA, G.R. No. 126746, Nov. 29,2000).*

(b) Based on petitioner's complaint-affidavit, an information for bigamy was filed against respondent. Thereafter, respondent initiated a civil action for the judicial declaration of absolute nullity of his first marriage on the ground that it was celebrated without a marriage license. Respondent then filed a motion to suspend the proceedings in the criminal case for bigamy, invoking the pending civil case for nullity of his first marriage as a prejudicial question to the criminal case. Art. 40 of the Family Code, which was already effective at the time of the celebration of the second marriage, requires a prior judicial declaration of the nullity of a previous marriage before a party may remarry. The clear implication is that it is not for the parties, particularly the accused, to determine the validity or invalidity of the marriage. The civil case for the

declaration of nullity of marriage is not a prejudicial question. *(Bobis v. Bobis, G.R. No. 138509, Jul 31, 2000).*

(c) As a rule, a criminal action may be suspended upon showing that a prejudicial question determinative of the guilt or innocence of the accused is the very issue to be decided in a civil case pending in another tribunal. However, such suspension cannot be allowed if it is apparent that the civil action was filed as an afterthought for the purpose of delaying the ongoing criminal action. This is especially so in cases where the trial court trying the criminal case has authority to decide such issue, and the civil action was instituted merely to delay the criminal proceeding and thereby multiply suits and vex the court system with unnecessary cases. *(First Producers Holdings Corp. v. Co, G.R. No. 139655, Jul. 27, 2000).*

PRELIMINARY INVESTIGATION

Executive Function. Preliminary investigation is an executive, not a judicial function. Sec. 4, Rule 112 of the Rules of Court recognizes the authority of the Secretary of Justice to reverse the resolution of the provincial or city prosecutor or chief state prosecutor upon petition by a proper party. Judicial review of the resolution of the Secretary of Justice is limited to a determination of whether there has been grave abuse of discretion amounting to lack or excess of jurisdiction, considering that the full discretionary authority has been delegated to the executive branch in the determination of probable cause during a preliminary investigation. *(Metropolitan Bank and Trust Company v. Tonda, G.R. No. 134436, Aug 16, 2000).*

Absence of Preliminary Investigation. Waiver of. (a) Absence of, or incomplete, preliminary investigation *does not* impair the validity of the information *(People v. Deang, G.R. No. 128045, Aug. 24, 2000)* or complaint or the jurisdiction of the court over the

case *(People v. Madraga, G.R. No. 129299, Nov. 15, 2000)*, and does not constitute a valid ground for a motion to quash the information. *(Raro v. Sandiganbayan, G.R. No. 108431, Jul. 14, 2000).*

(b) The right to preliminary investigation is waived when the accused fails to invoke it before or at the time of entering a plea on arraignment. *(People v. Palijon, G.R. No. 123545, Oct. 18, 2000; People v. Deang, G.R. No. 128045, Aug. 24, 2000).*

Preliminary Investigation by a Municipal Trial Court Judge. When a preliminary investigation is conducted by a municipal trial court judge, he is obligated, upon conclusion of the preliminary investigation, to transmit to the provincial or city fiscal, for appropriate action, the resolution of the case which must contain a brief statement of findings of fact and of the law supporting said resolution and attach thereto: [i] the warrant, if the arrest is by virtue of a warrant; (ii) the affidavits and other supporting evidence of the parties; (iii) the undertaking or bail of the accused (iv) the order of release of the accused and cancellation of his bail bond, if the resolution is for the dismissal of the complaint. *(Directo v. Bautista, A.M. No. MTJ-99-1205, Nov. 29, 2000).*

Injunction. (a) As a general rule, the Court will not issue writs of prohibition or injunction, preliminary or final, to enjoin or restrain, criminal prosecution. With more reason will injunction not lie when the case is still at the stage of preliminary investigation or reinvestigation. However, in extreme cases, the Court laid the following exceptions: [i] when the injunction is necessary to afford adequate protection to the constitutional rights of the accused; [ii] when it is necessary for the orderly administration of justice or to avoid oppression or multiplicity of actions; [iii] when there is a prejudicial question which is *subjudice*; [iv] when the acts of the officer are without or in excess of authority; [v] where the prosecution is under an invalid law, ordinance or regulation; [vi] when double jeopardy is clearly apparent; [vii] where the Court

has no jurisdiction over the offense; [viii] where it is a case of persecution rather than prosecution; [ix] where the charges are manifestly false and motivated by lust for vengeance; and [x] when there is clearly no prima facie case against the accused and a motion to quash on that ground has been denied. *(Samson v. Hon. Guingona, G.R. No. 123504, Dec. 14, 2000; Tirol v. COA, G.R. No. 133954, Aug. 3, 2000).*

BAIL

(a) Not a matter of right with respect to persons charged with a crime the penalty for which is *reclusion perpetua*, life imprisonment, or death when the evidence of guilt is strong. When bail is discretionary, a hearing, whether summary or otherwise, should be conducted by the court. *(People v. Hon. Gako, Jr., G.R. No. 135045, Dec. 15, 2000).*

(b) Contrary to prescribed procedures, respondent judge approved the applications for bail of accused whose cases were not only pending in other courts but who were likewise arrested and detained outside his territorial jurisdiction and it does not appear that the judges having jurisdiction over the case were absent or otherwise unavailable to act upon their applications for bail. Worse, respondent judge ordered the release of the accused without the corresponding bail bond being posted. *(Santiago v. Judge Jovellanos, Adm. Matter No. MTJ-00-1289, Aug. 1, 2000).*

ARREST

Arrest without a warrant, null and void. Only courts could decide the question of probable cause since the students were not being arrested in *flagrante delicto. (Posadas v. Hon. Ombudsman, G.R. No. 131493, Sept. 29, 2000).* The legality of an arrest affects only the jurisdiction of the court over the person of the accused and will not negate the validity of his conviction duly proven

beyond reasonable doubt. *(People v. Gopio, G.R. No. 133925, Nov. 29, 2000).* An accused, as in this case, is estopped from questioning any defect in the manner of his arrest if he fails to move for the quashing of the information before the trial court, or if he voluntarily submits himself to the jurisdiction of the court by entering a plea, and by participating in the trial. *(People v. Madraga, G.R. No. 129299, Nov. 15, 2000; People v. Palijon, G.R. No. 123545, Oct. 18, 2000).*

ARRAIGNMENT AND PLEA

(a) Suspension of Arraignment. Procedurally speaking, after the filing of the information, the court is in complete control of the case and any disposition therein is subject to its sound discretion. The decision to suspend arraignment to await the resolution of an appeal with the Secretary of Justice is an exercise of such discretion. *(Solar Team Entertainment, Inc. v. Hon. How, G.R. No. 140863, Aug. 22, 2000).*

(b) Plea. [i] A conditional plea of guilty, or one entered by the accused on the condition that a certain penalty be imposed upon him, is equivalent to a plea of not guilty requiring a full-blown trial before judgment may be rendered. *(People v. Madraga, G.R. No. 129299, Nov. 15, 2000).* [ii] Non-capital Offenses. A plea of guilty not merely joins the issue of the complaint or information, but amounts to an admission of guilt and of the material facts alleged in the complaint or information and in this sense takes the place of the trial itself. Such plea removes the necessity of presenting further evidence and for all intents and purposes the case is deemed tried on its merits and submitted for decision. When the accused pleads guilty to a non-capital offense, the court may receive evidence from the parties to determine the penalty to be imposed. While the present Rules of Court makes it mandatory for the court, when the accused pleads guilty to a capital offense, to take additional evidence as to the guilt of the accused and the

circumstances attendant upon the commission of the crime after the entry of the plea of guilty, that is not so in non-capital offenses. In the latter, the reception of evidence is discretionary with the court. *(People v. Flores, G.R. No. 137491, Nov. 23, 2000).* [iii] Capital Offenses. Three things are enjoined of the trial court after a plea of guilty to a capital offense is entered by the accused: (i) conduct a *searching inquiry* into the voluntariness and full comprehension of the consequences of his plea; (ii) require the prosecution to present evidence to prove the guilt of the accused and the precise degree of his culpability through the requisite quantum of evidence; and (iii) ask the accused if he desires to present evidence in his behalf and allow him to do so if he desires. Said procedure is mandatory and any judge who fails to observe it commits grave abuse of discretion. Here, the trial court failed to mention and explain clearly to the appellant the elements of the crime of rape with homicide as charged in the information. It failed to emphasize that his plea of guilty would not, under any circumstance, affect or reduce the death penalty, the imposition of which is *mandatory* under Sec. 111 of R.A. No. 7659. Additionally, the trial court failed to apprise the appellant of the civil liability (*e.g.*, indemnity, moral damages and exemplary damages) arising from the crime which shall be imposed on him. Although there is no definite rule as to how a trial judge may go about the matter of a proper "searching inquiry", it would be well for the trial court, for instance, to require the appellant to fully narrate the incident that spawned the charges against him, or by making him re-enact the manner in which he perpetrated the crime, or by causing him to furnish and explain to the court missing details of significance in order to determine, once and for all, his liability for the crime. *(People v. Templo, G.R. No. 133569, Dec. 1, 2000; People v. Hermoso, G.R. No. 130590, Oct. 18, 2000).*

BILL OF PARTICULARS

The remedy against an indictment that fails to allege the time of commission of the offense with sufficient definiteness is a

motion for a bill of particulars. The failure to move for specifications or the quashal of information on any of the grounds provided for in the Rules of Court deprives the accused of the right to object to evidence which could be lawfully introduced and admitted under an information of more or less general terms but which sufficiently charges the accused with a definite crime. *(People v. Marquez, G.R. No. 137408-10, Dec. 8, 2000).*

MOTION TO QUASH

At any time before entering his plea, the accused may move to quash the information on any of the grounds for a motion to quash. Failure to assert such grounds before the accused pleads to the information, either because he failed to file a motion to quash or failed to allege such grounds in his motion, shall be deemed a waiver thereof, except the following: [i] no offense is charged in the information; [ii] the court trying the case has no jurisdiction over the offense charged; [iii] the offense or penalty therefore has been extinguished; and [iv] the accused would be twice put in jeopardy. The special civil action for certiorari and prohibition is not the proper remedy to assail the denial of a motion to quash an information. *(Raro v. Sandiganbayan, G.R. No. 108431, Jul. 14, 2000).*

TRIAL

Discharge of Accused to be a State Witness. The discharge of an accused in order that he may be utilized as a state witness is expressly left to the sound discretion of the court. *(People v. Ex-Mayor Peralta, G.R. No. 121971, Oct. 16, 2000).* If the discharged witness should lack some of the qualifications enumerated by Sec. 9, Rule 119 of the Rules of Court, his testimony will not, for that reason alone, be discarded or disregarded. Stated differently, the improper discharge of an accused will not render inadmissible his testimony nor detract from his competency as a witness. Once the discharge is ordered, any future development showing that any,

some, or all, of the five conditions have not been actually fulfilled, may not affect the legal consequences of the discharge, and the admissibility and credibility of his testimony if otherwise admissible and credible. *(People v. Bariquit, G.R. No. 122733, Oct. 2, 2000).*

Deemed Trial *In Absentia*. The trial court did not render judgment against accused de la Torre, notwithstanding that he was arraigned and pleaded not guilty to both charges. Under the circumstances, he should be deemed to have been tried *in absentia* and, considering the evidence presented by the prosecution against him, convicted of the crime charged together with the appellant. *(People v. Listerio, G.R. No. 122099, July 5, 2000).* Trial *in absentia* cannot apply to the accused who have not been arraigned. *(People v. Taliman, G.R. No. 1099143, Oct. 11, 2000).*

Demurrer to Evidence. (a) With the grant by the RTC of the demurrer to evidence, the same constituted a valid acquittal and any further prosecution of petitioners on the same charge would expose them to being put twice in jeopardy for the same offense. A dismissal of a criminal case by the grant of a demurrer to evidence is not appealable. *(Ong v. People, G.R. No. 140904, Oct. 9, 2000).*

(b) From a denial of a demurrer to evidence, appeal in due time is the proper remedy, not certiorari, in the absence of grave abuse of discretion or excess of jurisdiction, or an oppressive exercise of judicial authority. Consequently, if denial of the demurrer to evidence is attended by grave abuse of discretion, the denial may be assailed through a petition for *certiorari.* In the instant case, there is no sufficient evidence to support a verdict of guilt against the petitioners. All documentary evidence submitted by the private complainant were uncertified photocopies, the signatures on which were either unidentified or unauthenticated. The due execution and authenticity of the documentary evidence presented not having been proved, and since they were mere photocopies,

the loss of the originals of which was not previously established, the same are clearly inadmissible in evidence. In this case, the prosecution's evidence against petitioners is grossly and patently insufficient to support a finding of guilt. Withal, it was grave abuse of discretion for the MTC to consider that there was a *prima facie* case against petitioners. *(Ong v. People, G.R. No. 140904, Oct. 9, 2000).*

JUDGMENT

Promulgation of a Judgment *In Absentia*. (a) General rule: The judgment in a criminal case must be promulgated in the presence of the accused, except where it is for a light offense, in which case it may be pronounced in the presence of his counsel or representative, and except where the judgment is for acquittal, in which case the presence of the accused is not necessary. A judgment of conviction cannot be executed and the sentence meted to the accused cannot be served without his presence. (b) Exception: Regardless of the gravity of the offense, promulgation of judgment *in absentia* is allowed, subject to the following requisites: [i] the judgment be recorded in the criminal docket; and [ii] a copy thereof shall be served upon the accused or counsel. All means of notification must be done to let the absent accused know of the judgment of the court, *viz.*: [i] the act of giving notice to all persons or the act of recording or registering the judgment in the criminal docket (which Sec. 6 incidentally mentions first - showing its importance); and [ii] the act of serving a copy thereof upon the accused (at his last known address) or his counsel. In this case, the solemn and operative act of recording was not done. Hence, even though the second kind of notification was satisfied when defense counsel received a copy of the decision, the promulgation of judgment *in absentia* was invalid. This being so, the period of appeal did not begin to run. The subsequent service of the copy of the judgment upon petitioner who admits having received a copy thereof, does not in any way cure the invalid promulgation of judgment. And

even if said decision was recorded in the criminal docket later, such piece-meal compliance with the Rules will not validate the initial promulgation that was invalid at the time it was made. The express mention in the provision of both requirements for a valid promulgation of judgment *in absentia* clearly means that they indeed must concur. *(Pascua v. CA, G.R. No. 140243, Dec. 14, 2000).*

NEW TRIAL

(a) The Court has occasionally relaxed the strict application of the rule that the acts of counsel bind the client in criminal cases, where the defendants, having otherwise a good case, were able to satisfy the Court that acquittal would in all probability have followed the introduction of certain testimonies, which were not submitted at the trial under improper or injudicious advice of incompetent counsel. Where there are very exceptional circumstances, a new trial may be granted. *(Abrajano v. CA, G.R. No. 120787, Oct. 13, 2000).*

(b) A new trial is justifiably denied where only impeaching evidence is sought to be introduced. The failure of the defense to present a witness by reason of the alleged inexperience of his lawyer is not a sufficient ground for a new trial. *(People v. Villanueva, G.R. No. 135330, Aug. 31, 2000).*

APPEAL

(a) An appeal taken by one or more of several accused shall not affect those who did not appeal, except insofar as the judgment of the appellate court is favorable and applicable to the latter. *(People v. Pacaña, G.R. No. 97472-73, Nov. 20, 2000; People v. Baltar, Jr., G.R. No. 125306, Dec. 11, 2000).*

(b) Under Sec. 1 (b), Rule 122 of the Rules on Criminal Procedure, the appeal of a judgment rendered by the RTC in its

original jurisdiction sentencing the accused to other than life imprisonment or death must be taken to the CA by the filing of a notice of appeal with the court which rendered the judgment or order appealed from, and by serving a copy thereof to the adverse party. The appeal to the Supreme Court in cases where the penalty imposed is life imprisonment or where a lesser penalty is imposed but involving offenses committed on the same occasion or arising out of the same occurrence that gave rise to the more serious offense for which the penalty of death or life imprisonment is imposed shall be by filing a notice of appeal with the court which rendered the judgment or order appealed from, and by serving a copy thereof upon the adverse party. It is only in cases where the accused is sentenced to death when the appeal of the decision to the Supreme Court is automatic. *(People v. Pajo, G.R. No. 135109-13, Dec. 18, 2000).*

(c) Under Sec. 8, Rule 124 of the Revised Rules of Court, a *motu propio* dismissal of appeal by the CA for failure of the appellant to file his brief requires that notice be first made to the appellant. The purpose of the notice is to give appellant the opportunity to state the reasons, if any, why the appeal should not be dismissed because of such failure, in order that the CA may determine whether or not the reasons, if given, are satisfactory. *(Sapad v. CA, G.R. No. 132153, Dec. 15, 2000).*

(d) The escape from prison or confinement, the act of jumping bail, or fleeing to a foreign country of the appellant results in the outright dismissal of his appeal. By such acts, appellant loses his standing in court. In this case, by filing fake bail bonds, appellants are deemed to have escaped from confinement even while their respective appeals were pending before the CA. In the normal course of things, their appeals should have been dismissed by the CA. However, this was not possible because their fake bail bonds were discovered only after the CA had already affirmed, reversed or modified their sentences. Hence, to

revert to the sentence imposed by the trial court would result in the absurdity that by filing fake bonds, appellants would enjoy the lower sentences imposed by the trial court. To avoid this blatant mockery of justice, the Court deemed it proper for the Court of Appeals to have continued to exercise jurisdiction over their appeals. Appellants having mocked and trumped the judicial process by filing fake bail bonds, they must be considered to have waived or forfeited their right to further review of the decisions of the trial court and the CA, respectively. *(People v. Del Rosario, G.R. Nos. 107297-98, Dec. 19, 2000).*

SEARCH WARRANT

When a search warrant is issued by one court but the criminal case by virtue of the warrant is raffled off to a branch of the court other than the one which issued the warrant, all incidents relating to the validity of the warrant should be consolidated with the branch trying the criminal case. *(Garaygay v. People, G.R. No. 135503, Jul 6, 2000).*

EVIDENCE

WHAT NEED NOT BE PROVED

Matters of Judicial Notice. Hearing is required for matters not falling under mandatory or discretionary judicial notice, such as the age of the victim, despite absence of objection of defense counsel. Generally, the age of the victim may be proven by his birth or baptismal certificate; or, in the absence thereof, upon showing that said documents were lost or destroyed, by other documentary or oral evidence sufficient for the purpose. *(People v. Tundag, G.R. Nos. 135695-96, Oct. 12, 2000).*

RULES OF ADMISSIBILITY

DOCUMENTARY EVIDENCE

Best Evidence Rule. *(W-Red Construction and Devt. Corp. v. CA, G.R. No. 122648, Aug. 17, 2000).* Requisites for secondary evidence to be admissible. *(Santos v. Santos, G.R. No. 139524, Oct. 12, 2000).*

Parol Evidence Rule. Sec. 9, Rule 130 of the Revised Rules of Court expressly requires that for parol evidence to be admissible to vary the terms of the written agreement, the mistake or imperfection thereof or its failure to express the true agreement of the parties should be put in issue by the pleadings. *(Pilipinas Bank v. CA, G.R. No. 141060, Sept. 29, 2000).*

TESTIMONIAL EVIDENCE

WITNESSES

(a) **Child**. A child, regardless of age, can be a competent witness if he can perceive and, perceiving, can make known his perceptions to others and that he is capable of relating truthfully facts upon which he is examined. *(People v. Mucam, G.R. No. 137276, Jul. 13, 2000; People v. Librando, G.R. No. 132251, Jul 6, 2000).* The determination of the competency and credibility of a child to testify rests primarily with the judge who sees the witness, notices her manner, her apparent possession or lack of intelligence, as well as her understanding of the obligation of an oath. *(People v. Pajo, G.R. No. 135109-13, Dec. 18, 2000).*

(b) **Illiterates** - must be treated with the broadest understanding, without in any way sacrificing the quest for truth. *(People v. de la Cruz, G.R. No. 118967, Jul. 14, 2000).* Intellectual weakness, no matter what form it assumes, is not a valid objection to the

competency of a witness, so long as the latter can still give a fairly intelligent and reasonable narrative of the matter testified to. *(People v. Trelles, G.R. No. 137659, Sept. 19, 2000).*

(c) **Deaf-Mute** - as a credible witness to rape with homicide. *(People v. Tuangco, G.R. No. 130331, Nov. 22, 2000).*

(d) **Mentally Ill** – qualified as witness. *(People v. Baid, G.R. No. 129667, July 31, 2000).*

(e) **Biased**. *(People v. Ulgasan, G.R. No. 131824-26, Jul. 11, 2000).* The fact that the doctor was hired by the family of the complainant to give expert testimony as a psychiatrist did not by that fact alone make her a biased witness. *(People v. Baid, G.R. No. 129667, July 31, 2000).*

(f) **Co-conspirator**. The general rule is that the testimony of a co-conspirator is not sufficient for conviction unless supported by other evidence. By way of exception, the testimony of a co-conspirator may, even if uncorroborated, be sufficient as when it is shown to be sincere in itself, because it was given unhesitatingly and in a straightforward manner, and is full of details which by their nature could not have been the result of deliberate after-thought. *(People v. Quibido, G.R. No. 136113, Aug. 23, 2000).*

(g) **Relationship**. The weight of the testimony of witnesses is not impaired by their relationship to the victim when there is no showing of improper motive on their part. *(People v. Birayon, G.R. No. 133787, Nov. 29, 2000; People v. De Guzman, G.R. No. 137806, Dec. 14, 2000).*

ADMISSIONS AND CONFESSIONS

(a) The extra-judicial statement of the accused assisted by the Municipal Mayor (who cannot be considered an independent

counsel) is inadmissible. Even assuming that the right to counsel was orally waived during custodial investigation, still the defect is not cured, as the Constitution requires that the waiver must be in writing and made in the presence of counsel. *(People v. Taliman, G.R. No. 1099143, Oct. 11, 2000).*

(b) The confession of the accused to the barangay captain, where the accused was already being singled out as the author of the crime, comes within the purview of custodial investigation. Made without the assistance of counsel, said confession is inadmissible in evidence. However, as the accused did not object promptly when the barangay captain was presented as a witness for the prosecution or when specific questions were asked regarding the confession, the accused is deemed to have waived his right to object to the inadmissibility of such testimony. *(People v. Hermoso, G.R. No. 130590, Oct. 18, 2000).*

(c) An extra-judicial confession may be given in evidence against the confessant but not against his co-accused as they are deprived of the right to cross-examine him. A judicial confession is admissible against the declarant's co-accused since the latter are afforded the opportunity to cross-examine the former. Moreover, when several accused are tried together for the same offense, the testimony of an accused implicating his co-accused is competent evidence against the latter. *(People v. Palijon, G.R. No. 123545, Oct. 18, 2000).*

(d) A plea for forgiveness may be considered as analogous to an attempt to compromise, which may be received in evidence as an implied admission of guilt, pursuant to Sec. 27, Rule 130 of the Rules of Court. *(People v. Yparraguire, G.R. No. 124391, Jul. 5, 2000).*

(e) An offer of compromise may be considered an implied admission under Sec. 27 of Rule 130 of the Rules of Court when

made by the accused himself. In this case, even if the purpose of the visit by the relatives of the accused-appellants were to negotiate a settlement, accused-appellants had nothing to do with it. *(People v. Bangcado, G.R. No. 132330, Nov. 28, 2000).*

Hearsay Rule. (a) A witness can testify only on those facts which he knows of his personal knowledge, that is, which are derived from his own perceptions. While the testimony of a witness regarding a statement made by another person, if intended to establish the truth of the fact asserted in the statement, is clearly hearsay evidence; it is otherwise if the purpose of placing said statement in the record is merely to establish the fact that the same was made or the tenor thereof. *(Sebastian, Sr. v. Hon. Garchitorena, G.R. No. 114028, Oct. 18, 2000).* Hearsay evidence, whether objected to or not, possesses no probative value. *(People v. Valdez, G.R. No. 127753, Dec. 11, 2000).* Newspaper reports are merely hearsay evidence. *(People v. Carungal, G.R. No. 123299, Sept 29, 2000).*

(b) Exceptions, include: [i] *Res gestae*. *(People v. Oposculo, G.R. No. 124572, Nov. 20, 2000)*; [ii] Statement to the witness which constitutes an extrajudicial admission of the accused. *(People v. Mayorga, G.R. No. 135405, Nov. 29, 2000)*; [iii] Dying Declaration. Requisites. A dying declaration does not require the signature of witnesses for its validity. *(People v. Templo, G.R. No. 133569, Dec. 1, 2000).* There is no rule that a person who heard something cannot testify on what she heard. A dying declaration need not be particularly directed only to the person inquiring from the declarant. Anyone who has knowledge of the fact of what the declarant said, whether it was directed to him or not, or whether or not he had made inquiries from the declarant, can testify thereto. *(People v. Valdez, G.R. No. 127753, Dec. 11, 2000).* [iv] Pedigree. The reputation or tradition existing in a family previous to the controversy in respect to pedigree of any of its members may be received in evidence if the witness testifying thereon be also a member of the family, either by consanguinity or affinity. The word "pedigree"

includes relationship, family genealogy, birth, marriage, death, and the dates when, and the places where these facts occurred, and the names of the relatives. Hence, the testimonies of the victim and her mother are sufficient to prove the victim's age. *(People v. Gopio, G.R. No. 133925, Nov. 29, 2000).*

BURDEN OF PROOF AND PRESUMPTIONS

Flight. As evidence of guilt *(People v. Sabado, G.R. No. 135963, Nov. 20, 2000)* but failure to flee does not prove innocence. *(People v. Bantayan, G.R. No. 137693, Dec. 14, 2000).*

Burden Of Proof. (a) The correct identification of the author of a crime and the actuality of its commission must be proved by the State beyond reasonable doubt on the strength of its own evidence and without solace from the weakness of the defense. *(People v. Arapok, G.R. No. 134974, Dec. 8, 2000).*

Presumptions. (a) The presumption of regularity in the performance of official duty cannot by itself overcome the presumption of innocence nor constitute proof beyond reasonable doubt. *(People v. Tan, G.R. No. 133001, Dec. 14, 2000).*

(b) **Police Blotter**. Entries in a police blotter, though regularly done in the course of the performance of official duty, are not conclusive proof of the truth of such entries and should not be given undue significance or probative value, for they are usually incomplete and inaccurate. Absence of any entry therein regarding any report or complaint on a particular incident and date is not conclusive proof that no such incident occurred in the locality on that date. *(People v. Ulgasan, G.R. No. 131824-26, Jul. 11, 2000).*

WEIGHT AND SUFFICIENCY OF EVIDENCE

Circumstantial Evidence. (a) Basic guidelines in the appreciation of circumstanstial evidence *(People v. Orcula, G.R. No. 132350, July 5, 2000).*

(b) Quantum of evidence sufficient to convict the accused. *(People v. Sirad, G.R. No. 130594, July 5, 2000).* For conviction based on circumstantial evidence to prosper, the prosecution must establish more than one circumstance indubitably linking the accused to the commission of the crime. *(People v. Baltazar, G.R. No. 129380, Oct. 19, 2000; People v. Rendaje, G.R. No. 136745, Nov. 15, 2000).*

(c) The following cases were sufficiently established by circumstantial evidence: [i] Homicide *(People v. Moyong, G.R. No. 135413-15, Nov. 15, 2000)*; [ii] Murder *(People v. Taliman, G.R. No. 1099143, Oct. 11, 2000; People v. Gonzales, G.R. No. 138402, Aug. 18, 2000)*; [iii] Rape with homicide *(People v. Hermoso, G.R. No. 130590, Oct. 18, 2000)*; [iv] Robbery with homicide *(People v. Dencio, G.R. No. 127849, Aug. 9, 2000)*. However, the circumstantial evidence in this case was found insufficient for conviction. *(People v. Abillar, G.R. No. 134606, Nov. 29, 2000).*

Motive. (a) A key element when establishing guilt through circumstantial evidence. Coupled with enough circumstantial evidence from which it may be reasonably inferred that the accused was the malefactor, motive may be sufficient to support a conviction. *(People v. Taliman, G.R. No. 1099143, Oct. 11, 2000).* When the evidence of the prosecution is weak, or merely circumstantial, it is necessary to prove motive; otherwise, the guilt of the accused becomes open to reasonable doubt. *(People v. Giganto, G.R. No. 123077, Jul. 20, 2000; People v. Castillo, G.R. No. 130205, July 5, 2000).* (b) Absence of motive for committing the crime does not preclude conviction therefor where there were reliable witnesses who fully and satisfactorily identified the accused as the perpetrator of the felony. *(People v. Jarandilla, G.R. Nos. 115985-86, August 31, 2000).* Proof of motive is not essential even in the absence of direct evidence to establish the identity of the accused. *(People v. Rendaje, G.R. No. 136745, Nov. 15, 2000).*

APPRECIATION OF EVIDENCE

CREDIBILITY OF WITNESSES

(a) Test of Credibility. There is no single test to determine with all exactitude the probity of testimony and the courts can only give conformity to the quotidian knowledge, observation and experience of man. The most positive testimony may be contradicted by the fact that it is contrary to common observation or experience or the common principles by which the conduct of mankind is governed. The courts are not required to believe that which they judicially know to be incredible. *(People v. Bacalso, G.R. No. 129055, Sept. 25, 2000).* Evidence to be believed must not only come from the mouth of a credible witness but must itself be credible. [i] In one case, the killing took place on the eve of a wedding. The prospective groom was one of those accused of the crime, while the prospective bride was a relative of the deceased. Given these facts, why should accused-appellants want to kill on the eve of a wedding and mar the joy of the occasion, when there was no sufficient reason to do so. Moreover, it appears that when the accused-appellants first arrived in 1986 in Barangay Dumarao to settle there, they lived in the house of the deceased and stayed there until they were able to build their own house. They did not have any quarrel. One of the accused-appellants said he and the deceased regarded each other as brothers. And even after the death of the victim, his widow went to the house of accused-appellants to borrow palay. Given these facts, why should accused-appellants kill the deceased? *(People v. Giganto, G.R. No. 123077, Jul. 20, 2000).* [ii] In another case, the son's response to the events was far from the natural reaction of one who just witnessed the grisly murder of his own mother. With all bitterness and indignation expected of a person similarly situated, it is quite odd that accused-appellant would keep the matter to himself and fail to disclose his knowledge of the crime to the police authorities, or even to any his relatives, despite his presence during the

investigation of the case. *(People v. Baula, G.R. No. 132671, Nov. 15, 2000).*

(b) Trial Court's Evaluation. As a rule, the trial court's assessment of the credibility of witnesses and their testimonies is binding on appellate courts, absent any fact or circumstance of weight and substance that may have been overlooked, misapprehended or misapplied. When the appeal primarily hinges on the issue of credibility of witnesses, the Court has held that, except for compelling reasons, it cannot disturb the manner the trial court calibrated the credence of witnesses because of their direct opportunity to observe the witnesses on the stand and detect if they were telling the truth. *(People v. Alverio, Jr., G.R. No. 135035, Nov. 29, 2000; People v. Francisco, G.R. No. 136252, Oct. 20, 2000; People v. Bantayan, G.R. No. 137693, Dec. 14, 2000).* However, this rule does not apply where one judge heard the testimony of the eyewitness and another penned the assailed decision. In such cases, the assessment on the credibility of witnesses would have to be received with caution on appeal. *(People v. Baula, G.R. No. 132671, Nov. 15, 2000; People v. Torres, Jr., G.R. No. 138046, Dec. 8, 2000).*

(c) Inconsistencies which refer only to *minor details* and *collateral matters* do not affect the veracity and weight of the testimonies, where there is consistency in relating the principal occurrence and positive identification of the assailants. A witness' testimony may likewise contradict that of another witness. As long as the contradiction involves minor details and collateral matters, the credibility of both witnesses will not be impaired. (*People v. Mercado, G.R. No. 116239, Nov. 29, 2000; People v. Cabigting, G.R. No. 131806, Oct. 20, 2000).* Discrepancies between the affidavit of a witness and his testimony in court does not necessarily discredit the witness because it is a matter of judicial experience that affidavits, being taken *ex-parte*, are almost always incomplete and often inaccurate. (*People v. Templo, G.R. No. 133569, Dec. 1, 2000*). The contradiction between the date of the commission of the crime as

alleged in the information and the testimony of the witness in this case was of *de minimis* importance. The testimony of a witness must be considered in its entirety. (*People v. Bergonio, G.R. No. 133981, Sept. 13, 2000).*

(d) Silence of the offended party in case of rape, or her failure to disclose her defilement without loss of time to persons close to her and to report the matter to the authorities, would not perforce warrant a conclusion that she was not sexually molested and that her charges against the accused are untrue or fabricated. Thus, [i] complainant's silence about the incident because of the accused-appellant's threat to kill her brothers and that she continued to live in the same house with the accused-appellant (*People v. Gonzales, G.R. No. 133859, Aug. 24, 2000)*; [ii] the complaint was made 11 years after the rape incident (*People v. Cano, G.R. No. 130631, Aug. 30, 2000)*; [iii] the victim waited for six (6) months before reporting the rape to the police. *(People v. Antonio, G.R. No. 128149, Jul. 24, 2000).* [iv] the crime was reported three (3) years after it was committed (*People v. Balmoria, G.R. No. 134539, Nov. 15, 2000*) - did not cast doubt on the credibility of the complainant, especially as no ill motive to falsely testify against the accused-appellant was shown. *(People v. Gopio, .G.R. No. 133925, Nov. 29, 2000; People v. Templo, G.R. No. 133569, Dec. 1, 2000).* Similarly, the affidavit of prosecution witness taken 22 days after the shooting incident (*People v. Antonio, G.R. No. 128149, Jul. 24, 2000).*

(e) Lone Witness' testimony was found credible, positive and sufficient to convict. For the truth is established not by the number of witnesses but by the quality of their testimony. (*People v. Zinampan, G.R. No. 126781, Sept. 13, 2000; People v. Listerio, G.R. No. 122099, July 5, 2000; People v. Matibag, G.R. No. 110515, Jul. 18, 2000; People v. Macaliag, G.R. No. Aug. 9, 2000; People v. Bangcado, G.R. No. 132330, Nov. 28, 2000).*

(f) Coached Witness. The argument that the victim had lost her credibility since she admitted that she was coached by her grandmother has no merit. The victim, an innocent and guileless 5-year old when the crime was committed against her, cannot be expected to recall every single detail of the brutal experience that she went through in the hands of the accused. At the time of her testimony, she had stopped schooling and did not have the gift of articulation. Besides, she testified on her harrowing experience two (2) years after the incident. *(People v. Mayorga, G.R. No. 135405, Nov. 29, 2000).*

(g) Testimony Credible in Part. The witnesses' identification of erstwhile accused as one of the perpetrators of the crime was not given credence by the trial court. That, however, did not entirely impugn her credibility as a witness as regards her identification of the appellants as the perpetrators of the crime. The settled rule is that the testimony of a witness may be believed in part and disbelieved in part as the corroborative evidence or improbabilities of the case may require. Even where the witness has been found to have deliberately falsified the truth in some particulars, it is not required that the whole of his testimony be rejected. *(People v. Alvarez, G.R. No. 121769, Nov. 22, 2000).*

IDENTIFICATION OF ACCUSED

(a) **Crime Scene**. The issue of illumination of the crime scene or its visibility is indispensable in the identification of a criminal offender. That the witness was able to recognize appellant by the light of the gas lamp is not far fetched. *(People v. de la Cruz, G.R. No. 118967, Jul. 14, 2000).*

(b) **Out-of-Court Identification**. "Totality of Circumstances Test." Police Line-up. In resolving the admissibility of and relying on out-of-court identification of suspects, the "totality of circumstances test" has been adopted, where the following factors

are considered: [i] the witnesses' opportunity to view the criminal at the time of the crime; [ii] the witnesses' degree of attention at that time; [iii] the accuracy of any prior description given by the witness; [iv] the level of certainty demonstrated by the witness at the identification; (v) the length of time between the crime and the identification; and [vi] the suggestiveness of the identification procedure. The "show-up" in this case may be suggestive, but it is not by itself a sufficient reason to reject the witnesses' identification of the accused. (*People v. Navales, G.R. No. 135230, Aug. 8, 2000).* Applying the *totality of circumstances test* to the case at bar, the Court ruled that there was no violation of the constitutional rights of the accused. The witness positively identified the three accused inside the jail. They were then in the company of other inmates. The police officers did not in any way influence the witnesses. All they did was to ask the witnesses to identify the three accused they saw riding the motorcycle. The identification took place only a few days after the incident. The uncounselled identification made at the police station did not foreclose the admissibility of the *independent in-court identification.* (*People v. Sirad, G.R. No. 130594, July 5, 2000).* Where only pictures of accused-appellant were shown for identification, the supposed positive identification was regarded as tainted almost like an uncounselled confession. *(People v. Faustino, G.R. No. 129220, Sept 6, 2000).* In another case, the identification of the accused by means of a *show-up,* fell short of the "*totality of circumstances*" test. Specifically, there was no prior description given by the witness to the police at any time after the incident; and the possibility that the police might have influenced the identification could not be discounted. In cases such as the instant one, when the identification made by the principal eyewitness was uncertain, a little extra effort on the part of the prosecution to acquire appropriate corroborative evidence would go far towards achieving the proper ends of justice. Whatever flaw attended the out-of-court identification of the accused-appellant could have easily been cured by a subsequent positive identification in court. Stated in another way, inadmissibility or unreliability

of an out-of-court identification should not necessarily foreclose the admissibility of an independent in-court identification. *(People v. Arapok, G.R. No. 134974, Dec. 8, 2000).*

[iii] **Police Line-up**. The assistance of counsel is not essential during a police lineup. *(People v. Torres, Jr., G.R.No. 138046, Dec. 8, 2000).*

[iv] **Inconsistencies**. Where eyewitnesses contradict themselves on a vital question, such as the identity of the offender, the element of reasonable doubt is injected and cannot be lightly disregarded. *(People v. Aranas, G.R. No. 123101, Nov. 22, 2000).*

Alibi. When an accused's alibi can only be confirmed by his relatives and friends who may not be impartial witnesses, his denial of culpability merits scant consideration, especially in the face of affirmative testimony of an eyewitness as to the accused's presence in the crime scene. *(People v.Macaliag, G.R. No. Aug. 9, 2000; People v. Sirad, G.R. No. 130594, July 5, 2000; People v. Rendaje, G.R. No. 136745, Nov. 15, 2000).*

PRESENTATION OF EVIDENCE

Offer and Objection. Under Sec. 36, Rule 132 of the Rules of Court, objection to evidence offered orally must be made immediately after the offer is made. In this case, the photocopy of the birth certificate was formally offered in evidence and marked to prove the fact of birth of the victim, and the fact that the victim was below 12 years old when she was ravished. The defense objected to the purpose for which the said evidence was being offered, but did not object to the presentation of the *photocopied* birth certificate. Having failed to raise a valid and timely objection against the presentation of this secondary evidence, the same became primary evidence, and was deemed admitted and binding on the other party. *(People v. Boras, G.R. No. 127495, Dec. 22, 2000).* Objections to

evidence must be made as soon as the grounds therefor become reasonably apparent. In the case of testimonial evidence, the objection must be made when the objectionable question is asked or after the answer is given if the objectionable features become apparent only by reason of such answer; otherwise, the objection is waived and such evidence will form part of the records of the case as competent and complete evidence. The trial court cannot just disregard evidence which would ordinarily be incompetent under the rules but has been rendered admissible by the failure of a party to object thereto. *(Maunlad Savings and Loan Association, Inc. v. Court of Appeals, G.R. No. 114942, Nov. 24, 2000).*

THE 1991 REVISED RULE ON SUMMARY PROCEDURE

(1) Under Sec. 1, A (1) of the Revised Rule on Summary Procedure, "all cases of forcible entry and unlawful detainer, irrespective of the amount of damages or unpaid rentals sought to be recovered," fall under the scope of the 1991 Rule on Summary Procedure. Under Sec. 19(d) of the said Rule, a petition for relief from judgment is a prohibited pleading. In their opposition to private respondent's motion to dismiss, appellants contended that, since the complaint sought damages in the amount of P118,000, summary procedure would not apply. Clearly, petitioners cited and relied upon the old Rule of Summary Procedure, which limited the application of the rule to ejectment suits involving damages or unpaid rentals not exceeding P20,000. This rule was no longer in effect at the time the civil case was filed. *(Sta. Lucia Realty and Development, Inc. v. CA, G.R. No. 120697, Oct. 16, 2000).*

(2) As clearly stated in Sec. 6, when the defendant fails to answer the complaint within the period provided, the court, *motu propio,* or on motion of the plaintiff, shall render judgment as may be warranted by the facts alleged in the complaint. *(Sordan v. Judge De Guzman, A.M. No. MTJ-00-1296, Oct. 5, 2000).*

(3) Motion for extension of time to file pleading is not allowed in the cases covered by this Rule (Sec. 19 [e]). *(Villanueva v. Estoque, A.M. No. RTJ-99-1494, Nov. 29, 2000).*

TAXATION

INCOME TAX

Deductions. Capital losses. The equity investment in shares of stock held by CBC in its Hongkong subsidiary is not an indebtedness and is a capital (not an ordinary) asset. Assuming that such equity investment has indeed become "worthless," the loss sustained is capital and not an ordinary loss. Capital loss can only be deducted from capital gains, if any, derived by the taxpayer during the same taxable year when the securities became "worthless." *(China Banking Corp. v. CA, G.R. No. 125508, Jul. 19, 2000)*

BUSINESS TAXES

Specific Tax. ***Ad Valorem*** **Tax**. Claim for tax credit. Credit Tax Numeric Codes. *(Evangelista v. People, G.R. No. 108135-36, Aug. 14, 2000).*

REAL PROPERTY TAX

Based on Actual Use. LRT Stations and carriageways. Under the Real Property Tax Code, real property is classified for assessment purposes on the basis of *actual use*, which is defined as "the purpose for which the property is principally or predominantly utilized by the person in possession of the property." Unlike public roads which are open for use by everyone, the LRT is accessible only to those who pay the required fare. It is thus apparent that petitioner does not exist solely for public service, and that the LRT carriageways and terminal stations are not exclusively for public use. Moreover, the charter of petitioner (E.O. No. 603) does not provide for any real estate tax exemption in its favor. Even granting that the national government indeed owns the

carriageways and terminal stations, the exemption would not apply because their beneficial use has been granted to petitioner, a taxable entity. *(Light Rail Transit Authority v. Central Board of Assessment Appeals, G.R. Nno. 127316, Oct. 12, 2000).*

Valuation of movable property. *(Cagayan Robina Sugar Milling Co. v. CA, G.R. No. 122451, Oct. 12, 2000).*

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