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Editorial Office
Integrated Bar of the Philippines
15 J. Vargas Avenue, Ortigas Center, Pasig City 1600
Telephone: (632) 631-3014/18
Fax: (632) 634-4697
Website: www.ibp.org.ph Email: journal@ibp.org.ph

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Synopsis

(The Articles in this Issue)

In this edition of the **IBP Journal**, seven articles grace its pages in an odyssey of insights and updates on select legal issues and concerns of the day, each contributing its share to the practical need to keep lawyers, advocates and scholars of the law abreast with the times.

The odyssey navigates across specific areas of law – human rights, legal reforms, legal and judicial practice, and jurisprudential updates.

In line with the temper of the times, the lead articles deal with the area of human rights protection, which has become the subject of unprecedented judicial initiatives and ground-breaking developments, highlighted by the launching of a Supreme Court-sponsored *National Consultative Summit on Extrajudicial Killings* and the promulgation of the rules on the *writ of Amparo.*

In the article "*The Dichotomy Between National Security and Human Rights in Philippine Setting,"* **Oscar G. Raro,** a litigation lawyer and human rights advocate, explores the historic contours of the built-in tension between national security, as invoked by the State, and human rights as guaranteed to every individual by the law of the land. Drawing lessons from history on the "predilection" of the State to sacrifice human rights in favor of national security, the author examines the recently-enacted "Human Security Act of 2007" and raises serious questions on specific provisions of the law which "directly diminish human rights already protected in existing statutes."

In "*International Humanitarian Law as an Evolving Field of Law,"* **Miriam Defensor-Santiago**, an incumbent member of the Philippine Senate and an avid scholar of international law, brings the discussion on human rights protection to the international context. The article traces the rapid evolution of the international rules governing the protection of persons and victims in armed conflicts now being referred to as "international humanitarian law." While sharing kinship with international human rights law, being founded on the same principle of respect for human life and dignity, international humanitarian law has evolved as a distinct body of rules, enforceable by "specific methods" under international law.

From human rights protection, the odyssey of insights and updates on select legal issues shifts to the dynamic area of legal reforms.

In *"ARMM: An Electoral Basket Case,"* **Nasser A. Marohomsalic**, a former Commissioner of the Commission on Human Rights and a leading Muslim scholar, dissects the electoral process in the Autonomous Region in Muslim Mindanao, describing it as "full of wonders that never cease to amaze." The article banks on research data from previous electoral exercises and the last May 14, 2007 elections to identify and explain the ills plaguing the conduct of polls in the area. After diagnosing the ills, the article comes up with a set of prescriptions for reforms – legal, administrative, and political – to clean up the electoral process and restore its value as a "fundamental requisite of popular government."

In the *"The Flunker: The Bar Examinations and the Miseducation of the Filipino Lawyer,"* law professor **Florin T. Hilbay** presents arguments for reforming the prevailing orientation and conduct of bar examinations in the country and their adverse impact on the quality of legal education. Citing practices in American law schools and conduct of foreign bar exams, the author – who placed first in the 1999 Philippine Bar Exams – proposes the abolition of the "bar topnotcher tradition" and the "substantial reduction of the bar exam subjects."

From legal reform, the odyssey turns to the more active arena of legal and judicial practice.

In the article *"Intellectual Property Rights Enforcement Issues for the Judiciary,"* **Reynaldo B. Daway** delves on the current issues and practices in the handling of IP (intellectual property) cases from the point of view of a member of the bench. The article presents case studies and judicial approaches in the enforcement of intellectual property rights, offering timely and valuable law practice literature for judges, public prosecutors and legal practitioners in the field.

In the "*Ethical Aspects of China Walls,"* **Victor P. Lazatin, Teodoro D. Regala, Sr. and Diane A. Desierto** – legal practitioners of an "institutional" law firm – tackle the fictional legal device used in American jurisdiction to prevent the disqualification of an entire law firm from handling a case arising from potential "conflict of interest" of one of its members. This device known as "China Wall" involves the use of internal screening process to prevent the disqualified member from participating in the case. While acknowledging that the "China Wall" legal device has yet to find its mark in Philippine jurisdiction, the article explores its viability as a "tool to resolve conflict of interest problems affecting Philippine law firms."

Finally, **Carmelo V. Sison,** a law professor, takes us to a comprehensive "*Survey of 2006 Supreme Court Decisions in Human Relations, Torts and Damages"* in a fitting culmination to the odyssey of select legal issues and updates of the day. (RIL)

The Dichotomy Between National Security and Human Rights in Philippine Setting

Oscar G. Raro[*]

Men will always rationalize their political preferences, customs, habits, and commitments, and there will never be a shortage of reasons for restricting individual freedom and liberty in the name of "higher goals".

Ferdinand E. Marcos
"The Democratic Revolution
in the Philippines," p. 71, 1977

No cause is more worthy that the cause of human rights. Human rights are more than legal concepts: they are the essence of man. They are what make man human. That is why they are called human rights: deny them and you deny man's humanity.

Jose W. Diokno
Lecture at Silliman University,
31 August 1981

I
Introduction: Questions Then and Now

More than a century ago, in July 1902, a band of men, armed with bolos and guns, snatched three men from their homes in the dead of night, brought them at the head of a nearby river, and while still manacled and helpless, hacked them to death in full view of at least four witnesses. The perpetrators were suspected as *ladrones*, but there was no evidence of robbery. The killing appeared senseless. But in this case, which happened in the barrio of *Malublub*, of the *pueblo* of *Leon,* of the province of *Iloilo*, the first recorded judicial categorization of this dastardly act as a human right violation came from the judge of the lower court who heard the case on

* A.B., Ll.B., University of the Philippines, Ll.M. (candidate) San Beda Graduate School of Law, Editor-in-Chief, *San Beda Graduate School of Law Journal*; Senior Partner, Macam Raro & Ulep Law Offices.

trial: "I can not attribute it to anything except the savagery of the nature of the men who did it, a reckless and entire disregard of human life and *human rights*."[1]

In a loose sense, we may take pride that our courts as early as the turn of the 20th century had conscious appreciation of what constitutes human rights contrary to some opinion that the concept took shape and gained in momentum in the aftermath of World War II.[2] The pride, however, is fleeting. Today, similar acts continue to be committed except that in most cases the players have changed: the *ladrones* became military hit squads, and the victims, journalists and activists. And while the *Malublub* incident provided no motive, the "motive" has now acquired such a nebulous and ungraspable monicker as "national security" and the victims, capriciously branded "enemies of the state."

May there be a point in the equation when human rights may be sacrificed in the altar of collective interests determined solely by those in power? Must there be a conflict between national security and human rights that the latter must succumb, not by validated necessity, but by sheer coercive force of state power? In a sense, when we pit national security against human rights, we resurrect the philosophical discourse on when the rights of some may be sacrificed for the good of the many. But must there be a conflict at all? Must human rights be sacrificed when they are protected by the rule of law?

Thus, this paper will explore the dichotomy of state interests on one hand, and the rights of the individual on the other. The term "national security" is used here, more often than not, in the context of anti-terrorism justifications by the government.[3] The term "human rights," on the other hand, is limited to a greater extent, to civil and political rights,[4] "national security" being more in friction with these rights than the broader and all-encompassing economic, social, and cultural rights.[5]

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1 United States v. Colombro, G.R. No. 3200, August 19, 1907, 50 Phil. 391 (1907) (Italics supplied).

2 R. Bilder, "An Overview of International Human Rights Law" in Guide to International Human Rights Practice, ed. Hurst Hannum 4 (Ardsley, NY: Transnational Publishers, Lc., 2004).

3 In contradistinction with the crimes against national security under the Revised Penal Code such as treason (Article 114, Revised Penal Code), conspiracy and proposal to commit treason (Article 115, Id.), misprision of treason (Article 116, Id.), espionage (Article 117, Id.), provoking war and disloyalty in case of war (Articles 118 to 121, Id.), piracy and mutiny on the high seas (Article 122, Id.), and qualified piracy (Article 123, Id.).

4 International Covenant on Civil and Political Rights (ICCPR).

5 International Covenant on Economic, Social and Cultural Rights (ICESCR).

II
National Security: Jaded Apologia for Non-Accountability or Camouflage for Fears?

As it was in the time of Marcos, so it was in the time of those who succeeded him to dish out "national security" as ready justification for the state's coercive actions against its citizens. But like a rabbit from a hat, the concept is, more often than not, illusional, to be civilized about it—delusional, to be blunt. And in rare moments when it becomes real, the reaction is an overkill.

Our people seemed to have short memories, but long in patience. That may be all right. What is not right is when forgetfulness amounts to apostasy from cherished political freedoms so bravely fought for and won in recent history, for which countless heroes, unsung and unknown, had made supreme sacrifices. An *aide-memoire* seemed appropriate.

National Security in the "New Society"

We recall that in the name of "national security":

1. During martial law, a kowtowing Supreme Court validated the power of the President and persons acting under his authority to cause the arrest or detention of those believed to be involved in crimes against national security by the expediency of an Arrest, Search and Seizure Order (ASSO).[6] In one case, it was even concluded that any inquiry into the validity of such arrests and detentions was "purposeless".[7]

2. Even after martial law was supposedly lifted, the Supreme Court still went along with the power of the President to order such arrest and preventive detention of persons covered by crimes for which the suspension of the privilege of the writ of habeas corpus still applies. The form of arrest, this time, mutated into the equally dreaded Presidential Commitment Order (PCO), which according to a still mesmerized Supreme Court was beyond judicial review.[8]

Thousands had languished in jail through ASSOs and PCOs because the President's determination of "national security risks" was left untouched, our Supreme Court then, casually brushing aside any question to such determination, as "political and non-justiciable question." Only the military knew at that time how many had been arrested and detained, and how many had been released or had died in jail.

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6 Sison v. Enrile, G.R. No. 49579. January 15, 1981, 190 Phil. 34 (1981).

7 Cruz v. Gatan, G.R. No. 44910, November 29, 1976, 74 S.C.R.A. 226 at 229 (1976).

8 Parong v. Enrile, G.R. 61388, April 20, 1983, 206 Phil. 392 (1983); Morales v. Enrile, G.R. 61016, April 26, 1983, 206 Phil. 466 (1983).

Any request for such list, even by such a prestigious organization as *Amnesty International* was turned down "because matters of *national security* were involved."[9] Ironically, the security of the State had not been placed in a more perilous situation, saved during war time, than during martial law. Wrote one author:[10]

> "The New People's Army (NPA) is the fighting arm of the Communist Party of the Philippines (CPP). It began with only a few hundred fighters in 1969. With the imposition of martial law its numbers grew quickly. Estimated strength in 1972 was 950 to 1,300 men.[11] In 1983 their strength was estimated by Western analysts to be 7,000 to 12,000. Defense Ministry officials claimed that estimation was an exaggeration, that the number was only 4,000 to 6,000, with about 2,500 armed.[12] The CPP claimed the number was 20,000. Regardless of actual size, the NPA did continue to grow and expand, operating in 63 of the Philippines' 73 provinces.[13]

Now as insurgents increased in power, involuntary disappearances and "salvaging" directed against those suspected of militant activities have intensified and remained unabated even after martial law was lifted. Jose W. Diokno then noted with increasing alarm:[14]

> "Of the rights of man, the most basic is the right to life. Since martial law was imposed on our country, that right has been violated more and more frequently—and increasingly so after martial law was supposedly lifted. From 1975 to 1979, Task Force Detainees of the Philippines (TFDP), the church-related organization which looks after the material and spiritual needs of political prisoners, documented 341 cases of "salvaging," the extrajudicial execution of suspects by military, police and paramilitary personnel, and 176 cases of involuntary disappearances of persons arrested and not heard from again, for a total of 507 cases, an average of about 100 cases a year. In 1980, however, TFDP documented 149 cases of salvaging and 53 cases of involuntary disappearances for a total of 202 cases, twice the first five-year average. And in the first six

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9 "...[T]he mission had requested, and were promised by leading officials of the Department of National Defense, a list of all prisoners detained under martial law, together with details of the charges against each prisoner. The mission noted with regret that they were later told that the list was not forthcoming as promised, because matters of national security were said to be involved. Amnesty International respectfully requests that a complete list should be made publicly available." (Report of an Amnesty International Mission to the Republic of the Philippines, 22 November – 5 December 1975, London: Amnesty International Publications, 1977, 2nd ed. Pp. 13-19)

10 C. McDougald, The Marcos File 161 (San Francisco Publishers, 1987).

11 Citing Washington Post, "Government Abuses Toughen Philippine Guerilla Movement," August 12, 1982, p. A20.

12 Citing Time magazine, "Red Areas in the Hills," May 14, 1984, p. 14.

13 Citing U.S. Senate Staff Report for the Committee on Foreign Relations, "The Situation in the Philippines," (Washington, D.C., October 1984), p. 24.

14 Lecture delivered at a Convocation on Human Rights at Siliman University on its 80th Founder's Day, August 21, 1981.

> months of this year, 1981, TFDP has documented 161 cases of salvaging and 12 cases of involuntary disappearances for a total of 173 cases, an increase of 150 over last year."

All these deaths and disappearances were the consequences of rationalizing national security risk. But as the records had shown, the risk to national security even increased when human rights are violated with such impunity and unaccountability. They remained unchecked by the refusal of the stymied majority of the members of the Supreme Court then to exercise judicial review over such executive rationalizations.[15] A noted constitutionalist would later observe:

> "Immunity of the executive from liability, however, is one thing; the legality of keeping a person under detention is another. The suspension of the privilege of the writ (of habeas corpus), while it prevents inquiry into the legality of the detention, *does not legalize the detention.* Once the suspension is lifted, the legality of the detention under the 1973 Constitution should be examined by the courts for the purpose of determining whether release should be ordered. For this purpose, *the standard of legality cannot be simply the good faith or bad faith of the executive. It must be something more objective.* Must the standard be the requirements for a valid warrant?"[16]

"National security" as camouflage for state violence seemed to have been the open and unpretentious excuse, insulated from judicial review, during Marcos time. In the early days of the Marcos regime, Chief Justice Roberto Concepcion resigned from the Supreme Court in disgust over the illogic and twisted justifications of the majority of his brethren in sustaining the validity of the 1973 Constitution in the *Javellana* case. The justification was actually that of expediency of deference (read as "obedience" if not "obeisance") to the executive department, by refusing to review the validity of the said constitution for being, you guessed it, a "political question."[17] Fourteen years later, or in 1987, he would be called upon to sit as member of the commission that would draft the 1987 Constitution under President Aquino. Still the judicial activist in his twilight years, Justice Concepcion would author the provision in the new Constitution substantially eroding the judicial excuse of "non-justiciability." The provision reads:

> "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and

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[15] There had been six Chief Justices during the time of Marcos: 1. Roberto Concepcion (June 17, 1966-April 18, 1973); 2. Querube Makalintal (October 21, 1973–December 22, 1975); 3. Fred Ruiz Castro (January 5, 1976–April 19, 1979); 4. Enrique Fernando (July 2, 1979-July 24, 1985); 5. Felix Makasiar (July 25, 1985-November 19, 1985); and 6. Ramon Aquino (November 20, 1985-March 6, 1986). Justice Claudio Teehankee, Sr. finally became Chief Justice during the time of President Corazon Aquino, after having been bypassed twice despite being the most senior sitting justice during the time of Marcos,. He served as Chief Justice from April 2, 1986 to April 18, 1988.

[16] J. Bernas, 1 The Constitution of the Republic of the Philippines: A Commentary 130 (1987), Italics ours.

[17] Javellana v. Executive Secretary, G.R. 36142, March 31, 1973, 151-A Phil. 35 (1973).

enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction *on the part of nay branch or instrumentality of the Government.*"[18]

The reasoning by Justice Concepcion was equally unpretentious as he stated in the deliberations of the Constitutional Commission:

"The Article on the Judiciary has determined that nothing involving abuse of discretion amounting to lack or excess of jurisdiction is beyond judicial review. I cannot accept the interpretation that anything related to national defense or national security is beyond the jurisdiction of the courts. That was always the main argument of Marcos—national interest, national welfare, national security, national defense. That was the reason Section 1 of the Article on the Judiciary specifies that judicial power includes the power to settle all controversies involving abuse of discretion amounting to lack of jurisdiction. The judicial power is meant to be a check against all powers of the government without exception, except that the judicial power must be exercised within the limits confined thereto. *A matter of national defense, national interest, national welfare is not necessarily beyond the jurisdiction of judicial power.*"[19]

Tama Na! Sobra Na! Palitan Na!

With this new expressed constitutional power of the judiciary, many thought that the human rights record of the Philippines would improve under President Aquino. Now, there is no hindrance for anybody questioning human rights abuses in the name of national security before the courts. But as in marriage that usually starts with high hopes and a life of bliss only to end up at times in broken dreams and expectations (together with broken dishes, if not broken noses), human rights abuses have gotten worse.

At the helm of a government on shaky footing, the Aquino administration, while not expressly endorsing them in the name of national security, allowed the proliferation of vigilante groups all over the country. These groups, which went by such grim and dreadful names as *Tadtad, Walang Patawad, Kuratong Baleleng*, and such seemingly innocuous tags as *Bantay Silingan, Alsa Masa,* and *Kadre,* among others, lorded it over in the countryside, as a "product of deliberate military policy."[20] Extrajudicial killings and executions of civilians by these groups were reported in Davao, Negros Occidental, North Cotabato, Cebu, Leyte, Misamis Occidental and Zamboanga del Sur. [21]

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[18] Const., Art. VIII, Sec. 1, (Italics ours).

[19] 1986, 3 Con-Com Records 645-46 (1986).

[20] R. Constantino, "Human Rights Update," Philippine Daily Globe, June 24, 1988, citing a report of the Lawyer's Committee on Human Rights entitled "Vigilantes in the Philippines: A Threat to Democratic Rule."

[21] *Id.*

Renato Constantino would report in his newspaper column[22] that then Secretary Fidel Ramos categorized the vigilante groups as "very important component of the national defense system," and that then Local Government Secretary Luis Santos would echo the assessment by characterizing such groups as "very potent weapon in the fight against communism and subversion." There were, in fact, instances when the military and the vigilante group maintained common detachment station[23] and jointly conduct police operation.[24] From all these, it is clear that "national security" remains as the justification. This state of communal affairs rendered as virtually nil the possibility of transgressions of human rights ever reaching the courts.

On a lesser scale involving the right of Marcos to return to the Philippines, the Supreme Court, during the time of President Corazon Aquino, would again defer to executive determination of "national security risk" with nary a shred of supporting evidence.

In *Marcos v. Manglapus,*[25] President Marcos sought to be allowed to return to the Philippines from Hawaii. The government of President Aquino refused for reasons of *national security* and public safety. The Marcoses went to the Supreme Court, asserting, among others, that "under international law, the right of Mr. Marcos and his family to return to the Philippines is guaranteed"[26] citing the provisions of the *Universal Declaration of Human Rights* as follows:

> "Article 13. (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> "(2) Everyone has the right to leave any country, including his own, *and to return to his country.*" (Italics supplied)

Likewise, the Marcoses cited the *International Covenant on Civil and Political Rights,* which had been ratified by the Philippines, the relevant provision of which reads:

> "Article 12
>
> "1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

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22 *Id.*

23 "The PC/Alsa Masa Detachment, which assisted Pat. Ganiera's team, was prompted to subdue Ranalan by shooting him. Ranalan was rushed to the Davao Doctors Hospital and later on transferred to Davao Medical Center where he was treated. Unfortunately, a few hours later, he died due to the gunshot wound he had sustained." (People v. Obedo, G.R. No. 123054, June 10, 2003, 451 Phil. 529 [2003]).

24 "At that time, some policemen and members of a vigilante group called Tadtad were already looking for accused-appellant. xxx xxx Rolito Sirot testified that accused-appellant fled upon learning that policemen and members of the Tadtad group were looking for him. The testimonies of Tagab and Sirot dovetail in material points." (People v. Payot, G.R. No. 119352, June 8, 1999, 367 Phil. 311 [1999]).

25 G.R. No. 88211, September 15, 1989, 177 S.C.R.A. 668 (1989).

26 *Id.* at 684.

"2) Everyone shall be free to leave any country, including his own.

"3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

"4) No one shall be arbitrarily deprived of the right *to enter his own country.*"

These are clear-cut provisions. However, the government of President Aquino, through the Solicitor General, opposed the petition on the "principal argument that the issue in this case involves a political question which is non-justiciable"[27] and the "primacy of the right of the State to national security over individual rights."[28]

But the Supreme Court, in a logic reminiscent of *Javellana,*[29] ruled that while the Court has jurisdiction of the case in view of the expanded power of the Supreme Court under the 1987 Constitution, that expanded power refers only to cases when there is grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch of instrumentality of the Government. The Court, in finding that the president *did not abuse her discretion* in refusing the return of Mr. Marcos, relied, not on the evidence presented as there was none, but on the *perception* culled from here and there:

"The Court cannot close its eyes to present realities and pretend that the country is not besieged from within by a well-organized communist insurgency, a separatist movement in Mindanao, rightist conspiracies to grab power, urban terrorism, the murder with impunity of military men, police officers and civilian officials, to mention only a few. The documented history of the efforts of the Marcoses and their followers to destabilize the country, as earlier narrated in this *ponencia* bolsters the conclusion that the return of the Marcoses at this time would only exacerbate and intensify the violence directed against the State and instigate more chaos.

xxx xxx xxx

"With these before her, the President cannot be said to have acted arbitrarily and capriciously and whimsically in determining that the return of the Marcoses poses a serious threat to the national interest and welfare and in prohibiting their return."[30]

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[27] *Id.* at 685.

[28] *Id.* at 686.

[29] *Supra.* Note 18.

[30] *Supra* Note 26 at 697.

This reasoning by the majority, prompted Justice Gutierrez, Jr. to dissent, wryly commenting in the process:

> "xxx xxx The majority of the Court has taken judicial notice of the Communist rebellion, the separatist movement, the rightist conspiracies, and urban terrorism. But is it fair to blame the present day Marcos for these incidents? *All these problems are totally unrelated to the Marcos of today and, in fact, are led by people who have always opposed him. If we use the problems of Government as excuses for denying a person's right to come home, we will never run out of justifying reasons.* These problems or others like them will always be with us."[31]

Justice Padilla, in his dissent, was more blunt and unforgiving:

> "xxx xxx It appears to me that the apprehensions entertained and expressed by the respondents, including those conveyed through the military, do not, with all due respect, escalate to proportions of national security or public safety. They appear to *be more speculative than real, obsessive rather than factual.* Moreover, such apprehensions even if translated into realities, would be 'under control,' as admitted to the Court by said military authorities, given the resources and facilities at the command of government. But, above all, the Filipino people themselves, in my opinion, will know how to handle any situation brought about by a political recognition of Mr. Marcos' right to return, and his actual return, to this country. The Court, in short, *should not accept respondents' general apprehensions, concerns and perceptions at face value*, in the light of a countervailing and even irresistible, specific, clear, demandable, and enforceable right asserted by a Filipino.[32]
>
> xxx xxx xxx
>
> "During the oral arguments in this case, I asked the Solicitor General how one could validly defend the right of former Senator Benigno S. Aquino, Jr., a Filipino, to return to the Philippines in 1983 and, at the same time, credibly deny the right of Mr. Marcos, also a Filipino, to return to the Philippines in 1989. I still have not found a satisfactory answer to that question. Instead, it has become clearer by the day that the drama today is the same drama in 1983 with the only difference that the actors are in opposite roles, which really makes one hope, in the national interest, that the mistake in 1983 should not be made to persist in 1989."[33]

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31 *Id.* at 710.

32 *Id.* at 719.

33 *Id.* at 721.

Here, what we have is a situation when despite the change in *dramatis personae*, the government still hides behind the enchanted realm of "national security." But the worse against the cause of human dignity has yet to come, taxing almost to breaking point the people's tendency to be calm in despair by a new government's seeming inexhaustible capacity to dismay.

Human Rights in an Era of "Stolen Presidency, Not Once But Twice"[34]

In January 2001, President Macapagal-Arroyo took the helm of government at the head of a popular, but peaceful, uprising *ala* Cory Aquino. President Arroyo's ascension forced President Estrada into a disgraceful exit. Barely two years into her inherited term, the *Asian Centre for Human Rights (ACHR)*[35] dubbed the human rights record of the Philippines as "spectacular on paper." Specifically, the ACHR reported, among others, that:

1. "The Philippine National Police (PNP) personnel often resort to summary executions of suspects, or "salvaging" while combating crimes. The PNP frequently explain these killings as the unavoidable result of armed encounters with suspects or escapees. The Philippines Commission on Human Rights found that the PNP members were the perpetrators of 27 percent of human rights violations involving deaths that it investigated between January and June 2002";[36]

2. "The Task Force Detainees of the Philippines documented extrajudicial executions of 44 persons through unlawful killings and massacre during January-December 2001 and 41 persons during January-December 2002. In addition, 5 individuals disappeared in 2001 while 12 individuals disappeared in 2002. The Philippines Commission on Human Rights investigated 55 complaints of killing between January to June 2002, compared with 40 complaints during the same period in June 2001";[37]

3. "The security forces have supported the establishment of many vigilante groups especially from Moro and indigenous Lumad communities. These vigilante groups are then integrated into the

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[34] "'The gravest thing that you (Ms. Arroyo) have done is that you have stolen the presidency, not once, but twice,' Roces said in a fighting speech at a conference in the historic Club Filipino in San Juan.

"She appeared to be referring to the then Vice President Arroyo's ascent to power in January 2001, after the ouster of President Joseph Estrada, and the defeat of her husband Fernando Poe Jr., Ms. Arroyo's closest rival to the presidency in the 2004 election." (Angry Susan Calls on GMA to Resign," Philippine Daily Inquirer, p.1.)

[35] Asian Centre for Human Rights (ACHR), "Human Rights Record of the Philippines: Spectacular on Paper (Consideration of the Second Periodic Report of the Philippines by the United Nations Human Rights Committee), November 3, 2003" [hereinafter, ACHR Report], available at Asian Centre for Human Rights website at http://www.achrweb.org/reports.htm (last visited 3 May 2007).

[36] ACHR Report, pp. 7-8.

[37] ACHR Report, p. 8.

Civilian Armed Forces Geographical Units (CAFGU). Some of the groups include the *Alamara* (in Bukidnon, Davao del Norte, Arakan Valley, and Davao City); the *Pulang Mandalagan Command* (in Davao del Norte); the *Black Fighters* (operating in Davao City); and the *Alsa Lumad* (in Davao Oriental). Also, 120 Ata tribesmen have been recruited into the CAFGU in 2002 in addition to the 400 recruited in 1997";[38] and

4. "Since February 2001 when President Gloria Arroyo took over, TFDP documented torture of 49 persons from February 2001 to December 2002, of which 37 occurred in 2002."[39]

Still reeling from widespread charges of electoral frauds[40] in the elections of 2004 which voted her for a "second term" in office, Arroyo is charged with insouciance or deliberate inaction, in the face of a spate of killings and unexplained disappearances of militants and activists. Jarred by the intensity of the attacks for such inaction both from domestic and international bodies, the president, in her State of the Nation Address on 24 July 2006, said:

"In the harshest terms I condemn political killings. We together stopped judicial executions with the abolition of the death penalty. We urge witnesses to come forward. Together we will stop extrajudicial executions. xxx xxx In those regions under the supervision of the 7th [Infantry] Division, Major General Jovito Palparan is battling the enemy. He will not back down until the communities emerge from the night and rise towards the dawn of justice and freedom."

Less than a month thereafter, or on 21 August 2006, she constituted the Melo Commission, a fact-finding body tasked to investigate the killings.[41] Five months later, on 22 January 2007, the Melo Commission would confirm the extrajudicial killings and disappearances even while it admitted being fluid about the numbers, *i.e.,* "*Task Force Usig* of the Philippine National Police listed down 111 killings which has since increased to 136. *Amnesty International*, mentions 244 victims. The group *Karapatan* is said to have counted at least 174 killings."[42]

But the more telling part of the Melo Report is that the president's paeans for Major General Jovito Palparan appeared to have been grossly mistaken. The Report, insofar as it relates to Palparan, stated:

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38 ACHR Report, pp. 9-10.

39 ACHR Report, pp. 2, 10.

40 "In the middle of 2005, Samuel Ong who is a former deputy director of the country's National Bureau of Investigation (NBI) claimed to have audio tapes of wiretapped conversations between President Arroyo and an official of the Commission on Elections. The contents of the tape allegedly proved, according to Ong, that the 2004 national election was rigged by Arroyo in order to win by around one million votes. On June 27, Arroyo admitted to inappropriately speaking to a Comelec official, claiming it was a 'lapse in judgment,' but denied influencing the outcome of the election. Attempts to impeach Arroyo failed later that year. "(Wikipedia, http:/ /en.wikipedia.org/wiki/Gloria_Macapagal-Arroyo [last visited 2 May 2007]).

41 Adm. Order No. 157 (2006).

42 Adm. Order No. 157 (2006).

1. "The rise in killings somehow became more pronounced in areas where General Palparan was assigned. The trend was so unusual that General Palparan was said to have left a trail of blood or bodies in his wake wherever he was assigned. He 'earned" the moniker '*Berdugo'* from activist and media groups for his reputation."[43]

2. "General Palparan, clearly the man in the center of the maelstrom, admits to having uttered statements openly encouraging persons to perform extrajudicial killings against those suspected of being communists, albeit unarmed civilians. Worse, he was reported to have 'expressed delight" at the disappearance of at least two persons, mere students, but who were suspected of being communists or activists."[44]

3. "Interviewed by Pia Hontiveros and Tony Velasquez on the TV Program '*Top Story*,' Gen. Palparan, when asked why he considered organizations like *Bayan Muna* as fronts for the NPA, responded, saying '*... a lot of the members are actually involved in atrocities and crimes ...*' When asked what evidence he had to support this allegation, he said that he had no evidence, but that '**he could feel it**.' "[45]

4. "General Palparan's numerous public statements caught on film or relayed through print media give the overall impression that *he is not a bit disturbed by the extrajudicial killings of civilian activists, whom he considers enemies of the state.* He admits having uttered statements that may have encouraged the said killings. He also obviously condones these killings, by failing to properly investigate the possibility that his men may have been behind them."[46]

5. "General Palparan's statements and cavalier attitude towards the killings inevitably reveals that *he has no qualms about the killing of those whom he considers his enemies, whether by his order or done by his men independently.* He mentions that if his men kill civilians suspected of NPA connections, 'it is their call,' obviously meaning that it is up to them to do so. This gives the impression that he may not order the killings, **but neither will he order his men to desist from doing so**. Under the doctrine of *command responsibility, General Palparan admitted his guilt of the said crimes when he made this statement.* Worse, he admittedly offers encouragement and 'inspiration' to those who may have been responsible for the killings."[47]

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43 Report by the Independent Commission to Address Media and Activist Killings, 22 January 2007, chaired by retired Associate Justice of the Supreme Court, Jose A.R. Melo (hereinafter, "Melo Report").

44 Melo Report, citing "Philippine Communists Call for Resumption of Talks," Reuter News, July 3, 2006.

45 *Id.*

46 *Id.*

47 *Id.*

One is left to wonder what will become of human rights in this country if the likes of Palparan—tasked as he was and praised as he is by no less than the president as the purveyor of our people's deliverance from "the night" to a "dawn of justice and freedom"—would be those upon which this government will depend for "national security." After all, no one is safe once Palparan "feels" that one is an "enemy of the state." Is our rule of law and our due process now made subservient to the "feelings" of those entrusted with such a solemn task of preserving national security?

But while the Commission, in an extreme balancing, if not acrobatic act, would implicate "perhaps some of the superior officers" of Palparan under the principle of command responsibility, it will stop short of naming names and would even credit the president "fortunately" and "as usual" being "on top of the situation" by "promptly recognizing the need for official state action to address what she felt was a disturbing rise in the number of killings of media men and activists." How does this compute with the Commission's view of command responsibility[48] (that it is also an "*omission* mode of individual criminal liability in *failing to prevent or punish*" the direct perpetrator) with the president's, not only omission, but plaudits and paeans for Palparan's "heroic activities"?[49]

The conclusions in the Melo Report on the military's seeming acquiescence to and, at times, participation in, extrajudicial killings would be confirmed later, albeit in more subdued language, by Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, who visited the Philippines from 12 to 21 February 2007. In his, "preliminary note" to the Human Rights Council of the United Nations, Alston noted the ease by which "most groups on the left of the political spectrum are labeled as 'front organizations' for armed groups whose aim is to destroy democracy"[50] and "the extent to which aspects of the Government's counter-insurgency strategy *encourage or facilitate* the extrajudicial killings of activists and other 'enemies' in certain circumstances."[51] The inaction by the government was labeled in the report as "institutional passivity" bordering on "abdication of responsibility" in the face of such large number of killings.[52]

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48 "The establishment of the International Criminal Tribunal for Yugoslavia (ICTY) by the United Nations Security Council has led to further international jurisprudence on the doctrine of command responsibility. ..... In Prosecutor v. Delalic ('the Celebici case'), the ICTY elaborated threefold requirement for the existence of command responsibility, which has been confirmed by jurisprudence: 1) the existence of a superior-subordinate relationship; 2) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and that the superior failed to take the reasonable measures to prevent and criminal act or to punish the perpetrator thereof. (Melo Report).

49 "(House Minority Leader Francis 'Chiz' Escudero] said that if the President was sincere in condemning political killings committed under her administration, she should not have praised Army Gen. Jovito Palparan, who has been implicated in the killings and disappearances of leftist militants. . . . . 'Instead of promoting Palparan, she should have investigated him for his alleged cases of human-rights violations in areas where he was assigned,' Escudero said." (Chiz says President Sells False Hopes, The Manila Times, July 26, 2006).

50 Preliminary Note on the visit of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to the Philippines (12-21 February 2007), pp. 3-4, [hereinafter, "Alston Report"].

51 Alston Report, at par. 8, pp. 3-4.

52 *Id.* at pars. 10-11, pp. 4-5.

In Alston's preliminary report more than a month thereafter, or on 27 March 2007, he painted a grimmer picture of Philippine officialdom's apathy: "[T]he military and many key officials have buried their collective heads in the sand and announced that business will continue as usual." xxx xxx Those government officials who must act decisively if the killings are to end, still refuse to accept that there is even a problem."[53] And finally, that "strong and consistent evidence leads to the conclusion that a significant number of these killings are due to the actions of the military."[54]

In a reaction to the Alston's Report by the World Council of Churches, the Foundation for Aboriginal and Islander Research Action, the International Indian Treaty Council, the Canadian Council of Churches, the Indian Council of South America and the Netherlands Center for Indigenous Peoples, by way of "oral intervention," noted that that the labeling of legal progressive organizations as "enemies of the state" has intensified because of the "continuing climate of impunity." The reaction further noted that "extrajudicial executions in the Philippines have reached an alarming rate and continue to increase, even after the country visit made by Prof. Philip Alston." Later events would seem to confirm this: As late as 2 May 2007, former President Corazon Aquino would express "deepest concern" over the abduction of Jonas Joseph Burgos, the son of newspaper publisher Joe Burgos, who was "allegedly kidnapped five days earlier by security forces."[55] This prompted Commission on Human Rights Chair Purificacion Valera-Quisumbing to announce that "upon the request of the Burgos family, she was summoning Armed Forces officials to shed light on Jonas' disappearance."[56]

There is a lesson to learn here: "national security" when trumpeted by those in power against individual liberties refers obviously to *their own security* of self-preservation, reducing the concept to mere jaded excuses to hide one's fears. This seemed to be the case for Marcos (for fear of an ending term), for Aquino (whose term had been rocked by a series of attempted *coups* and a returning Marcos), and for Arroyo (whose legitimacy to the office had been questioned both from the start of each term). This transports us to the next point: Where exactly are human rights placed in the society's scale of priorities to deserve a greater human value than "national security"?

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53 Statement by Professor Philip Alston, Special Raporteur on extrajudicial, summary or arbitrary executions, Human Rights Council, 28 March 2007 [hereinafter, "Alston Preliminary Report"].

54 Alston Preliminary Report, p. 7.

55 Philippine Daily Inquirer, May 3, 2007, "Cory to gov't: Where's Jonas?" p. 1, col. 1.

56 *Id.*

III
Human Rights: Inherent Filipino Value

The Filipinos cannot boast of great architectural reminders of the past as their neighbors' Angkor, Pagan, or Borobudur, nor are they beneficiaries of noble legends on which to found a nation.[57] However, this early period still affects the Filipinos today. In leadership style, the *"datus"* of yesteryears have probably changed little from pre-Spanish times until now where the leader "maintains peace and restores social equilibrium within the group and provides for the material wants of followers."[58] For the ordinary Filipino then the "protection of a powerful patron was essential social security–and a psychological security as well."[59] Borne out of this practice is the Filipino's reverence for such values as *"utang na loob,"* that at the risk of occasional affronts to his dignity as a person, he would rather observe than abandon. Perhaps, it is from this culture and psychology of dependence that the politics of patronage originated. Some had misunderstood this Filipino trait as meekness, but he knows it merely as loyalty and friendship.[60]

But the Filipino patience, as anybody's, may not be taxed to breaking point, and his dignity as a person may only be abused so much. For from the same heritage from the distant past is also another trait: the Filipino's inherent love for his own humanity. His history of dissent, resistance, revolt, rebellion, popular uprising, from Mactan to EDSA, is testament to his love for freedom and respect for human dignity.

Our *Florante at Laura (1839)*, *Noli Me Tangere* (1887) and *El Filibusterismo* (1891), among others, are as enduring legacies of our past as Angkor, Pagan, or Borobudur. For in those ancient literature of protest were embedded traces of proof of the Filipino's awareness of the dignity of the individual. In verse 284 of *Florante at Laura,* for example, are these words by Francisco Balagtas: *"(Kung nalalagay ka, ang mamatuwirin,/ sa laot ng madlang sukat ipagtaksil,/* ***dili ang dangal mong dapat na lingapin,****/ mahigit sa walang kagandaha't ningning?)*[61] In *Noli Me Tangere*, Rizal, speaking through Elias in reply to Ibarra's naïve query on what should constitute "reforms," said: "For example: More *respect for human dignity*, *more guarantees for the individual's safety*, less power to the armed forces, less privileges for this body which easily abuses

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57 Wurfel, Filipino Politics: Development and Decay 2 (Ateneo de Manila University Press, 1998).

58 *Id.* citing W. Bierntzki, "Bukidnon Datuship in the Upper Pulangi River Valley," in F. Claver et al., Bukidnon Politics and Religion, IPC Papers No. 11 (Quezon City: Ateneo de Manila, 1973).

59 *Id.*. at p. 3.

60 T. A. Agoncillo, History of the Filipino People 9 (8th Ed., 1990).

61 Florante at Laura," by Francisco Balagtas, available at http://www.geocities.com/Athens/Parthenon/8075/florante.txt (last visited 3 May 2007); Francisco Baltazar conceived of this work to embody the longings and aspirations of the Filipino even while he clothed it in literary allegory to escape cencorship. (T. A. Agoncillo, The Revolt of the Masses: The Story of Bonifacio and the Katipunan 19 [Philippine Studies Reprint Series, 1996]).

its power."[62] In *El Filibusterismo*, Rizal put in the lips of Padre Florentino, in his last conversation to the dying Simoun, the following words: "I do not mean to say that our freedom is to be won by the blade of the sword; the sword enters very little now in modern destinies, yes, but we must win it, deserving it, raising the intelligence and the *dignity of the individual*, loving the just, the good, the great, even dying for it, and when a people reach that height, God provides the weapon, and the idols fall, the tyrants fall like a house of cards and liberty shines with the first dawn."[63]

Emilio Jacinto in his *Kartilla* for the *Katipunan*, would write as its fourth teaching: "*All men are equal*, be the color of their skin black or white. One may be superior to another in knowledge, wealth and beauty, *but cannot be superior in being*."[64] In 1897, in the mountain fastnesses of *Biak-na-Bato* in Bulacan, General Emilio Aguinaldo in his continued call to arms, issued a manifesto bewailing the reason for the revolution, among which being that individual security which must depend on *"natural rights"* depends instead "on the irresponsible will of any of those in authority."[65] Article 19 of the Malolos Constitution of 1899[66] prohibits the "Filipino who may be in the full enjoyment of his *civil and political rights*" from being "hindered in the free exercise of the same."[67] Despite the relatively extensive enumeration of particular rights in the Malolos Constitution, protection of human rights in all its possible hues and shades were likewise deemed protected when such enumerated rights were made open-ended in Article 28 thereof: "The enumeration of the rights provided for in this title does not imply the denial of other rights not expressly mentioned." Jose W. Diokno would later echo, in understandably more modern phrasing: "And regardless of who our parents are and what they own, all of us are born equally naked and helpless, yet each with his own mind, his own will and his own talents. Because of these facts, all of us have an *equal right to life, and share the same inherent human dignity*."[68]

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62 Elias here might just as well be discussing the concept of national security and human rights in that while human rights remain inherent, national security, when invoked by "those in power" is, more often than not, subject to abuse. (Jose Rizal, Noli Me Tangere (trans. Ma. Soldedad Lacson-Locsin) 324 [1996]).

63 Jose Rizal, El Filibusterismo (trans. Ma. Soldedad Lacson-Locsin) 313 (1996).

64 "Maitim man o maputi ang kulay ng balat, lahat ng tao'y magkakapantay; mangyayaring ang isa'y hihigtan sa dunong, sa yaman, sa ganda...; ngunit di mahihigtan sa pagkatao."; Also see T. A. Agoncillo, History of the Filipino People 161 (8th Ed., 1990); Jacinto advocated the cultivation of awareness of pagbabagong puri in his writings. He was aiming not only for a political rebirth of the Filipino nation but a moral renaissance or reawakening as well. As one of the "three pens" of the Katipunan–the other two were Bonifacio and Pio Valenzuela–Jacinto's ideas preached the equality and the innate dignity of every man. In his Kartilla, which was adopted by Bonifacio for the Katipunan, he wrote: Poor rich, ignorant, wise all are equal and are true brethren. The Rules of the Association of the Sons of the People which he wrote are moral guidelines which even non-Katipuneros can follow." (Augusto V. de Viana, Ph.D., National Historical Institute, "Emilio Jacinto: The Underrated Hero," Manila Times, September 26, 2006.)

65 M. Kalaw, The Development of Philippine Politics 90 [1926]).

66 Concluded at Barasoin, Malolos, 20 January 1899; "Sanctioned" for compliance by Emilio Aguinaldo, President of the Revolutionary Government on the following day 21 January 1899.

67 Malolos Const., Art. 19 (Id. at 431, Appendix D).

68 J. Diokno, A Nation for Our Children (ed. Priscila S. Manalang) 3 (1987).

Thus, the adoption and proclamation of the *Universal Declaration of Human Rights* by the General Assembly of the United Nations on December 10, 1948 may be argued to have merely confirmed what Filipinos have always been conscious about all along. Compare, for example, the above-quoted article IV of Jacinto's *Kartilla* with Article 1 of the Declaration which states: "*All human beings are born free and equal* in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." This concept of *equality in rights and dignity* is, in fact, the fountainhead of all the rights in the Declaration, a concept which we, Filipinos, have long recognized as *inherent* by the fact of our being human.

It is perhaps no coincidence that as early as 1951, we already recognized the effective force of the *Declaration*, at a time when the rights therein declared were considered by other countries as merely unbinding statement of aspirations.[69] In *Borovsky v. Commissioner of Immigration*,[70] the Supreme Court said:

> "Morover, by its Constitution (Art. II, sec. 3) the Philippines "adopts the generally accepted principles of international law as part of the law of Nation." And in a resolution entitled *"Universal Declaration of Human Rights"* and approved by the General Assembly of the United Nations of which the Philippines is a member, at its plenary meeting on December 10, 1948, the right to life and liberty and all other fundamental rights as applied to all human beings were proclaimed. It was there resolved that "All human beings are born free and equal in degree and rights" (Art. 1); that "Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, nationality or social origin, property, birth, or other status (Art. 2); that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law" (Art. 8); that "No one shall be subjected to arbitrary arrest, detention or exile" (Art. 9)"

And in *Chirskoff v. Commissioner of Immigration*[71]

"In the last mentioned cases we held that foreign nationals, not enemy, against whom no criminal charges have been formally made or judicial order issued, may not indefinitely be kept in detention; that in the *"Universal Declaration of Human Rights"* approved by the General Assembly of the United Nations of which the Philippines is a member, the right to life and liberty and all other fundamental rights as applied to human beings were proclaimed; that the theory on which the court is given power to act is that the warrant of deportation, not having been able to be executed, is functus

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69 Reyes v. Bagatsing, G.R. No. 65366, November 9, 1983, 210 Phil. 457 (1983).

70 G.R. No. 4352, September 28, 1951, 90 Phil. 107 (1951).

71 G.R. No. 3802, October 26, 1951, 90 Phil. 256 (1951).

officio and the alien is being held without any authority of law (*U. S. vs. Nichols*, 47 Fed. Supp. 201); that the possibility that the petitioners might join or aid disloyal elements if turned out at large does not justify prolonged detention, the remedy in that case being to impose conditions in the order of release and exact bail in reasonable amount with sufficient sureties."

In fact, whatever delay the Philippines had incurred in ratifying human rights treatises and covenants is, more often than not, caused by the desire of those in power not to be bound by their terms for purposes which are not hard to discern. Thus, during the time of Marcos, the *International Covenant on Civil and Political Rights (ICPR)* despite being opened for signature as early as 19 December 1966 would only be ratified by the Philippines almost twenty years later, or on 23 October 1986, during the time of President Aquino. The same thing happened with the *First Protocol to the ICPR*, which was ratified only on 22 August 1989.[72] Clearly, Marcos would not have anything to do with both documents, specially the *First Protocol*, which allows *individual subject* who claims to be victims of a violation of a State Party of any of the rights in the ICPR to directly submit a written communication to the Human Rights Committee set up under the ICPR.[73] In short, any citizen of this country could have directly filed a complaint against Marcos for violation of the rights set up in the ICPR provided merely that his domestic remedies have been fully exhausted.[74] This further erodes, if not totally abandons, at least in cases of human rights violations, the general principle in international law that disputes in international courts may only be between States."[75]

IV
Conclusion: No Balancing Act in the Circus After All

Having presumably learned the lessons of history on how governments, despotic or otherwise, would invariably use "national security" for selfish ends at the expense of individual liberties, the end of our journey on the issue may have been clear-cut now in this world of global concerns for human rights. After all, the provisions of treaties and covenants on human rights are not political provisions. They are universal in application centered on the dignity of the human person, the guarantees that make man human. As the treaties make irrelevant creed, race, and religion, among others, so must political inclinations and contemporary predilections of state rulers. "Human rights are inalienable *under any condition*."[76]

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[72] U.P. Institute of Human Rights, Manual on International Human Rights, Treaties and Mechanisms 10 (2005).

[73] Articles 1 and 2, First Protocol to the ICPR, 16 December 1966.

[74] *Id.* Article 2.

[75] "Parties to International Disputes," available at http://www.icj-cij.org/icjwwwigeneralinformation/ibbook/Bbookchapter3.HTM citing as examples Ambatielos, Anglo-Iranian Oil Co., Nottebohm, Interhandel, Barcelona Traction, Light and Power Company, Limited, Elettronica Sicula S.p.A. (ELSI), (last visited January 4, 2006).

[76] P. C. Valera-Quisumbing, A Welcome Interface: International Law *vis-à-vis* Human Rights and Humanitarian Law, 48 Ateneo L.J. (2004).

But in that bigger arena of global politics, countries and states succumb to their own perceived "ruler," that is, to the more powerful among them.

On 11 September 2001, four commercial airlines were hijacked by terrorists and were crashed into the North and South towers of the World Trade Center, the third into the Pentagon, and the fourth in Shanksville, Pennsylvania. The tragedy jarred America to the core. The incident came to be painfully known as "9/11."[77] In the aftermath of this tragedy, or on 28 September 2001, the Security Council of the United Nations passed Resolution 1373. The Resolution imposes broad legal obligation on all 191 member-states of the United Nations and establishes a framework for the "launch of a global campaign of cooperative law enforcement measures to address the threat of international terrorism."[78] It endorses the Security Council's notion that "today's threats recognize no national boundaries, are connected, and *must be addressed* at the global and the regional *as well as national level*."[79]

The Philippines, while late in obeisance, legislated its version of an anti-terrorist law in Republic Act No. 9372 which was signed into law by President Arroyo on 6 March 2007. The law was euphemistically dubbed as *"Human Security Act of 2007."*

For so long the history of Philippine governance by the executive had shown, more often than not, its predilection in favor of "national security" as against human rights. May this law be the new vehicle for state suppression or merely the "emperor's new clothes" in the midst of an already awakened citizenry? Chief Justice Reynato S. Puno, in his commencement address for the graduating class of the University of the East on 17 April 2007, without saying so, may be commenting on this law when he said:

> "Terrorism is terrible enough but the mindless, *knee-jerk reaction* to extirpate the evil is more discomforting. The quickie solution is to unfurl the flag, sing the national anthem and issue the high pitched call to arms for the military and the police to use their weapons of destruction under the theme victory at all cost. To put constitutional cosmetics to the military-police muscular efforts, *lawmakers usually enact laws using security of the state to justify diminution of human rights* by allowing arrests without warrants; surveillance of suspects; interception and recording of communications; seizure or freezing of bank deposits, assets and records of suspects. They also redefine terrorism as a crime against humanity and the redefinition is broadly drawn to constrict and shrink further the zone of individual rights. If there is any lesson that we can derive from the history of human

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77 Wikipedia, http://en.wikipedia.org/wiki/September_11,_2001_attacks (last visited 1 May 2007).

78 M. Morarji, The Dual Imperative to Enhance National Security and Foster Human Rights: The United nations and the Adoption of Resolution 1373, The Fletcher School, (2005).

79 United Nations Secretary General, A More Secure World: Our Shared Responsibility (Report of the Secretary General's High Level Panel on Threats, Challenges, and Change), available at http://un.org/secureworld/, (last visited 2 May 2007).

> rights, it is none other than these rights cannot be obliterated by bombs but neither can they be preserved by bullets alone. Terrorism is a military-police problem but its ultimate solution lies beyond the guns of our armed forces."

While the law itself is already obvious as a Pavlovian reaction to "threats of terrorism," its attempt in its "declaration of policy" to provide reassuring tone to human rights falls flat by its seeming irreconcilable phrasing that "nothing in the act shall be interpreted to curtail" the powers of the executive while at the same time such power "shall not prejudice respect for human rights which shall be absolute and protected at all times."[80] This juxtaposition of both absolutes makes the provision meaningless, if not ludicrous.

Thus, it is hard to reconcile this "declaration of policy" with some provisions of the law which directly and patently diminish human rights already protected in existing statutes. This prompted Senator Aquilino Pimentel to say that the law "may unsettle the people because they allow law enforcement agents to place a terror suspect under surveillance, arrest and detain terror suspects without warrants, examine a terror suspect's bank deposits and financial papers, and seize, sequester and freeze bank deposits, financial papers and properties of all kinds or nature of the terror suspects."[81]

Indeed, there are safeguards in the law itself against the fears voiced by Senator Pimentel. But exercise of naked powers by the police is one thing, their observance of the safeguards is another. Have we, perhaps, resurrected the specters of the dreaded arrest, seizure, and freeze orders of the Martial Law years? Let us see.

1. Rebirth of "Administrative" Seizure and Arrest, Freeze and Sequestration Orders

A *non-judicial* body known as *Anti-Terrorism Council* has been authorized to issue arrest orders[82] and freeze orders,[83] against persons suspected of perceived terroristic activities. One wonders why in the same law, a "wiretapping order" expressly requires *judicial authorization* at the level of the Court of Appeals[84] where in such case the Anti-Terrorism Council was reduced merely to an applicant for such order,[85] but the more serious affront to individual liberty being directly made against person and property *does not* need prior judicial authorization?

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80 Rep. Act. No. 9372 (2007), sec. 2.

81 Senate Press Release, May 1, 2007, available at http://www.senate.gov.ph/press_release/2007/0501_pimentel1.asp (last visited 3 May 2007).

82 Rep. At No. 9372 (2007), sec. 18.

83 Rep. Act No. 9372 (2007), sec. 54 (4).

84 Rep. Act No. 9372 (2007), sec. 7.

85 Rep. Act No. 9372 (2007), sec. 8.

2. Detention Beyond Allowable Periods

The period of detention of terrorist suspects was prolonged to three days,[86] and it was not even made clear whether it means 72 hours. Is the day of arrest excluded and the last day included in the computation which is the statutorily-prescribed manner of counting periods denominated in days?[87] If it were the case, the detention may even exceed 72 hours. Worse, this 3-day period may even be further extended without the suspect being charged in court "in the event of "actual or imminent terrorist attack," by the expediency of a "written approval of the municipal, city, provincial or regional official of a Human Rights Commission" or of the court sitting nearest the place of arrest.[88] The written approval may even be secured within five (5) days aftermlawfirm@gmail.comr the date of detention.[89] Does this mean that the suspect after having been released after the lapse of the original 3-day period, may be recommitted to jail upon the release of such written approval secured beyond this original period? Moreover, does the fact of "actual or imminent terrorist attack" a political question solely reserved for the military or police to determine?

3. Right to Travel Severely Restricted: "Punishment" During Trial

The right to travel has been severely restricted even in cases when the "evidence of guilt is not strong" in that the person charged, upon application by the prosecutor, shall be limited in his travel "within the municipality or city where he resides or where the case is pending."[90] If the crime is alleged to have been committed outside the residence of the accused, and therefore, the case filed in such place of commission (venue in criminal cases being jurisdictional), where will the accused stay? In a hotel? This in effect amounts to unnecessary punishment even during the period of trial. A poor accused will have to sleep on the street while waiting for his day of vi in his dissenting opinion in *Ilagan v. Enrile*,[91] would intone His Holiness: "Even in exceptional situations that may at times arise, one can never justify any violation of the fundamental dignity of the human person or of the basic rights that safeguard this dignity. *Legitimate concern for the security of a nation, as demanded by the common good, could lead to the temptation of subjugating to the State the human being and his or her dignity and rights.* Any apparent conflict between the exigencies of security and of the citizens' basic rights *must be resolved according to the fundamental principle – upheld always by the*

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86 Rep. Act No. 9372 (2007), sec. 18.

87 Rules of Court, rule 22, sec. 1: "How to compute time.– In computing any period of time prescribed or allowed by these Rules, or by order of the court, or by any applicable statute, the day of the act or event from which the designated period of time begins to run is to be excluded and the date of performance included. If the last day of the period, as thus computed, falls on a Saturday, a Sunday, or a legal holiday in the place where the court sits, the time shall not run until the next working day."

88 Rep. Act No. 9372 (2007), sec. 19.

89 Rep. Act No. 9372 (2007), sec. 19.

90 Rep. Act No. 9372, (2007), sec. 26.

91 G.R. No. 70748, October 21, 1985, 139 SCRA 349 (1985), Italics ours.

Church – that social organization exists only for the service of man and for the protection of his dignity, and that it cannot claim to serve the common good when human rights are not safeguarded."

International Humanitarian Law as an Evolving Field of Law

Miriam Defensor Santiago[*]

Definition and Background

International humanitarian law is a new field of law that governs the use of force, specifically the protection of persons from the effects of armed conflicts. This new field was officially acknowledged by the International Court of Justice in 1996 when it ruled that the Law of the Hague dealing with the laws and customs of war, and the Law of Geneva dealing with the protection of civilians during armed conflict, "have become as closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law."[1] The Court added that "[t]he provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law."[2]

International humanitarian law developed from the middle of the nineteenth century, with the following milestones:

- 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Crimes in the Field, later revised in 1906.
- 1868 Declaration of St. Petersburg prohibiting the use of small or incendiary projectiles.
- 1899 and 1907 Hague Conventions codifying the laws of men.
- 1949 Four Geneva "Red Cross" Conventions.
- 1977 Two Additional Protocols to the Geneva Conventions.

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[*] Senator, Republic of the Philippines. Keynote speech delivered at the opening ceremonies of the 2007 Conference on International Humanitarian Law to Mark the 30th Anniversary of the 1977 Additional Protocols, Manila (Aug. 29, 2007).

[1] Advisory Opinion on the Legality of the Threat on Use of Nuclear Weapons, 1996 I.C.J. 256.

[2] *Id.*

The Four Geneva Conventions

The Four Geneva Conventions consist of the following:

1. The First Geneva Convention concerns the Wounded and Sick on Land.

2. The Second Geneva Convention concerns the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea.

3. The Third Geneva Convention is concerned with prisoners of war, and requires humane treatment in all circumstances.

4. The Fourth Geneva Convention is concerned with the protection of civilians in time of war.

The Two Additional Protocols

The Two Additional Protocols consist of the following:

1. Protocol 1 defines combatants as members of the armed forces of a party to an international armed conflict. Such armed forces consist of all organized armed units under an effective command structure, which enforces compliance with the rules of international law applicable in armed conflict. Combatants are obliged to distinguish themselves from the civilian population, while they are engaged in an attack or in a military operation preparatory to an attack.[3] Protocol 1 defines a civilian or any person, not a combatant, and provides that in cases of doubt, a person is to be considered a civilian.[4]

2. Protocol 2 also protects civilians, and establishes the International Fact-Finding Commission. Protocol 2 developed the common Article 3 of the Geneva Conventions. It applies by virtue of Article 1 to all non-international armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces, which have to be under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, and actually implement Protocol 2.

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[3] art. 43 and art. 44, 3.

[4] art. 50 1.

Two Cardinal Principles of Humanitarian Law

Duly noting the subject matter of both the Hague and the Geneva Conventions, the International Court of Justice in the same case summarized the cardinal principles of humanitarian law, as follows:[5]

- The first principle is aimed at the protection of the civilian population and civilian objects, and establishes the distinction between combatants and non-combatants. States must never make civilians the object of attack, and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.

- The second principle prohibits unnecessary suffering caused on combatants. Weapons that cause unnecessary harm to combatants, or uselessly aggravate their suffering, is prohibited. States do not have unlimited freedom of choice of means in the weapons they use.

The Court called the principle of civilian protection and the principle of prohibiting of unnecessary suffering as "intransgressible principles of international humanitarian law."[6] As such, these two principles are binding on all states, even including those states that have not ratified the Hague and Geneva Conventions. These two principles are firmly rooted in the "overriding consideration of humanity."[7]

Geneva Conventions Bind All States

The 1949 Geneva Conventions bind all states. But the 1977 Additional Protocols do not yet have the same status, except if the provisions merely codify existing international customary law. Otherwise, the Protocols bind only the state parties. Certain major military powers, such as the United States, are not party to the First Protocol. The Philippines in 1952 ratified all Four Geneva Conventions, and subsequently in 1986 ratified the 1977 Protocol 1. The Philippines in 1977 signed Protocol 1, but has not yet ratified it, and consequently is not a state party.

In the 1986 *Nicaragua* case,[8] the International Court of Justice affirmed the universally binding character of the four Geneva Conventions, which all contain common Article 3 concerning "general principles of humanitarian law." The Court took the view that "the Geneva Conventions are in some respects a development, and in other respect no more than an expression, of such principles:" The Court explained:

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5 Legality of the Threat on Use of Nuclear Weapons, 1996 I.C.J. at 226, 257.

6 *Id.*

7 *Id.* and at 262-3.

8 Nicaragua v. United States, 1986 I.C.J. 113-14, 218.

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, ICJ Reports 1949, p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute. . .

Prof. Brownlie of Oxford[9] notes that on its own accord, the International Court of Justice used the phrase "general principles of humanitarian law" six times.

Overlap with International Human Rights Law

Insofar as it incorporates the law of war, international humanitarian law may overlap with international human rights law. Both fields of international law are rapidly evolving, and both share a common foundation in the principle of respect for human dignity.[10] This area of overlap between the two fields of law has been formally acknowledged in various ways.

In 1970, the General Assembly passed a resolution which emphasized that fundamental human rights "continue to apply fully in situations of armed conflict."[11] In 1976, the European Commission on Human Rights ruled in one case that in belligerent operations a state is bound to respect not only the humanitarian law laid down in the Geneva Conventions, but also fundamental human rights.[12]

Subsequently, the Inter-American Commission on Human Rights declared that in situations of internal armed conflict, the two fields of international humanitarian law and international human rights law "must converge and reinforce each other." It noted that the Geneva Conventions common Article 3, and the Inter-American Convention on Human Rights Article 4, both protect the right to life, and prohibit arbitrary execution. When issues of the right to life arise in combat situations, the issues should not be resolved by applying human rights law alone. In addition, "the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance."[13]

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9 IAN BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 538 (2003 ed.).

10 *See* Furundzija case, 121 I.L.R. 213, 271.

11 GA Res. 2675 (25).

12 Cyprus v. Turkey (First and Second Applications), Report of the European Commission on Human Rights of 10 July 1976, 509-10.

13 Report No. 55/97, Case 11.137 and OEA/Ser. L/V/II,98, 153, 160-1.

The same Commission in another case similarly declared that there is "an integral linkage between the law of human rights and humanitarian law" because they have a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity." Accordingly, "there may be a substantial overlap in the application of these bodies of law."[14] Prof. Shaw of the University of Leicester describes this as "the overlap between internal armed conflict principles and those of human rights law in situations where the level of domestic violence has reached a degree of intensity and continuity."[15]

The same Commission in 2002 issued precautionary measures, in effect upholding the American Declaration of Human Rights with respect to the detention at Guantanamo Bay of persons captured by the United States in Afghanistan.[16] Both the law of war and human rights laws concurrently apply in cases concerning the treatment of prisoners, as well as the government of occupied territory. Both fields of law apply, for example, to the situation that ensued after Iraq's illegal invasion of Kuwait. Consequently, in 1990-91, Kuwait and its allies, known as "the coalition," resorted to force against Iraq. In international law, the coalition's resort to force was lawful, but the coalition remained bound by the Third Geneva Convention, particularly the obligation not to target civilians, and to treat prisoners of war pursuant to the requirements of that Convention.[17]

However, the two fields of international humanitarian law and international human rights law are distinguished from each other in the following ways:[18]

- The law of war is more specialized and more detailed.

- Most human rights treaties are limited in their application. For example, the European Convention on Human rights did not apply to the 1995 NATO bombing of Yugoslavia during the Kosovo campaign.[19]

- The law of war requires a degree of reciprocity which is not required in human rights law. A law of war treaty applies only among state parties, while a human rights treaty binds all state parties, regardless of what other states do.

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14 Coard v USA, Case No. 10.951/123 I.L.R. 156, 169.

15 MALCOLM SHAW, INTERNATIONAL LAW 1075 (2006 ed.).

16 41 I.L.M. 532. The US response is found in 41 I.L.M. 1015.

17 CHRISTOPHER GREENWOOD, THE LAW OF WAR (INTERNATIONAL HUMANITARIAN LAW) in M. EVANS, INTERNATIONAL LAW (2006 ed.).

18 *Id.* at 784.

19 Bankovic v. Belgium and others, 123 I.L.R. 94.

Armed Conflicts

International Armed Conflicts

International humanitarian law applies to all armed conflicts, whether international or internal. Thus ruled the International Tribunal on War Crimes in Former Yugoslavia, Appeals Chamber, in the 1995 *Ladic* case.[20] It gave certain definitions, as follows:

An ***armed conflict*** is a resort to armed force between states; or protracted armed violence between governmental authorities and organized armed groups; or between such groups within a state.[21] A more controversial definition is that an armed conflict is "any difference between two States and leading to the intervention of members of the armed forces."[22] This is not fully supported by state practice, particularly in cases of an isolated incident or exchange of fire.

An ***international armed conflict*** is one that takes place between two or more states. An internal armed conflict becomes an international armed conflict if:[23]

- Another state intervenes in that conflict through troops, or
- Some of the participants in the internal armed conflict act on behalf of that other State.

The Appeals Chamber went on to declare that an internal armed conflict becomes international, at the moment that a foreign state either directly intervenes within a civil conflict, or exercises "overall control" over a group that is fighting in that conflict. The "control" test requires that the state wields overall control over the group, by exercising two concurrent functions:

1. By equipping and financing the group, and
2. By coordinating or helping in the general planning of its military activity.

The same Appeals Chamber in another case[24] discussed the issue of the meaning of armed conflict where the fighting is sporadic, and does not extend to all of the territory of the state concerned. In an international armed conflict, the laws of war would apply in the whole territory of the warring states, until a general conclusion of peace. In an internal armed conflict, the laws of war apply to the whole territory

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[20] Prosecutor v. Tadic (Jurisdiction), Case No. IT-94-1-AR 72; 105 I.L.R. 453; and 38 I.L.M. 1518 (1999).

[21] *Id.* at 488.

[22] Commentary on the Geneva Conventions published by the International Committee of the Red Cross (ICRC).

[23] Judgment of 15 July 1999, 84.

[24] Kunarac case, Decision of 12 June 2002, Case No. IT – 96 – 23 and IT – 96 – 23/1, 57.

under the control of a party to conflict, until a peaceful settlement is achieved. In both cases, the law of war applies whether or not actual combat takes place in the territory. Thus, a violation of the laws on terms of war may occur, even no fighting is actually taking place.

Non-International Armed Conflict

Shaw argues that non-international armed conflicts could range from full-scale civil wars to relatively minor disturbances.[25] Fighting in the southern island of Mindanao in the Philippines between the armed forces of the Philippines and the Moro Islamic Liberation Front (MILF) is a non-international armed conflict. The Geneva Conventions under common Article 3 provides a sense of minimum guarantees for those not taking an active part in hostilities, including the sick and wounded. Under common Article 3, as developed by Protocol 2, the following acts are prohibited:

- Violence to life and person, in particular murder, cruel treatment, and torture.
- Hostage-taking
- Outrages upon human dignity, in particular humiliating and degrading treatment.
- Passing of sentences and carrying out of executions in the absence of due process.

Protocol 2 expands common Article 3, by providing in 15 substantive articles more detailed provisions on fundamental guarantees, treatment of the wounded and sick, and civilian protection. But while common Article 3 applies to any armed conflict occurring within a state, Protocol 2 applies only to its state parties. According to Prof. Greenwood of the London School of Economics, Protocol 2 "has a very restricted field of application, confined, in effect to civil wars in which both sides control tracts of territory . . . .In effect, therefore, there is a scale of internal conflicts and disturbances, with different bodies of law becoming applicable, the higher up the scale one moves."[26] This is the Greenwood scale:

1. Internal disturbances and acts of terrorism which do not amount to an armed conflict. An example was the fighting in Northern Ireland before the ceasefire. Another example is the sporadic clashes between the armed force of the Philippines and the communist New People's Army (NPA), which is tagged as a terrorist group. These internal disturbances are not subject to the laws of armed conflict. Instead,

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[25] *See* supra note 16, at 1072.

[26] *See* supra note 18, at 807-8.

in the Philippines, they are subject to the 2007 Human Security Act, an antiterror law. The state, but not the rebels, will be subject to the provisions of any human rights treaties to which the state is a party. For example, the Philippines is subject to provisions of such human rights treaties as the two International Covenants on Human Rights, and the Statutes of the International Red Cross and Red Crescent Movement, to which it is a state party.

2. Armed conflict, during which common Article 3 will apply to both government and rebel forces. The government will continue to be bound by any applicable human rights treaties.

3. An internal armed conflict, where rebels acquire sufficient control of territory to meet the requirements of Protocol 2. Both Protocol 2 and common Article 3 will apply to both sides in the conflict. The government will continue to be bound by applicable human rights treaties.

4. An international armed conflict, when another state intervenes on either side of the conflict. All the Four Geneva Conventions apply. Protocol 1 applies, if the states concerned are parties, when the fighting involves the intervening states.

There have been cases, where a conflict contained both international and internal elements.[27] For example, in the *Tadic* case,[28] the International Criminal Tribunal for the Former Yugoslavia held that the fighting in Bosnia-Herzegovina contained both elements:

1. It was an international conflict between Bosnia-Herzegovina and the Federal Republic of Yugoslavia.

2. It was a non-international conflict between the government of Bosnia-Herzegovina and the Bosnian Serb forces.

Another example was the Vietnam war:

1. It was an international conflict between the United States and North Vietnam.

2. It was a non-international conflict between South Vietnam and the Viet Cong.

Issues in Armed Conflicts

This section is based on Greenwood's identification and discussion of the following issues:

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[27] *Id.*

[28] Tadic, 105 I.L.R. at 486-45.

When Law of War Applies[29]

The law of war applies to any armed conflict between two or more states, whether or not the parties regard themselves as being in a state of war. The law of war also applies to UN military operations, where the Security Council authorizes action by a state on a group of states, as in the 1990-91 Kuwait conflict. But it is uncertain whether the law of war applies when a UN peacekeeping force becomes involved in the fighting, as in the 1992-95 Bosnian hostilities, notwithstanding a recent UN directive requiring UN peacekeeping forces to observe the basic principles of the law of war.[30]

State practice seems to indicate that the law of war does not apply to fighting between a state and a terrorist organization, or in military operations by the United States against the Al-Qaeda terrorist movement, following the terrorist attacks of 11 September 2001 in New York. There is no armed conflict, because Al Qaeda is not a state, but, Greenwood says, "is no more than an underground terrorist movement where recourse to violence is criminal."[31] However, under the UN Charter Article 51, the US was entitled to take military operations in self-defense. By contrast, the US fighting in Afghanistan was an armed conflict, and the laws of war applied, because Afghanistan is a state. Paradoxically, while the US argues that the laws of war apply in its military operations against Al-Qaeda, the US also argues that Al-Qaeda detainees are combatants, but are not entitled to the status of prisoners of war.

Distinction Between Combatants and Civilians[32]

Only lawful combatants are entitled to take part in hostilities, and, if captured, to be treated as prisoners of war (POWs). But combatants are legitimate targets. By contrast, civilians taking direct part in hostilities became unlawful combatants and are largely unprotected by the laws of armed conflict. Unlawful combatants cannot claim POW status. They can be tried and punished for their belligerent acts.

The 1907 Hague Regulations on Land Warfare Articles 1 and 2 and the 1949 Geneva POW Convention Article 4 laid down different standards for members of the regular armed forces on the one hand, and irregular combatants on the other hand. But in both cases, almost all irregulars fell outside the test determining who are lawful combatants.

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29 *See* supra note 28.

30 "Secretary-General's Bulletin on Observance by UN Forces of International Humanitarian Law," A. ROBERTS & R. GUELFF, DOCUMENTS ON THE LAW OF WAR 721 (2000 ed.).

31 *See* supra note 28.

32 *Id.* at 787-90.

Hence, Protocol 1 tried to assimilate regular and irregular forces. It no longer specifies the manner in which combatants must distinguish themselves from civilians, and has abandoned the requirement of a fixed, distinctive sign. The duty of a combatant to distinguish himself from civilians arises only during an attack, or a military operation preparatory to an attack.[33]

The controversial provision of Protocol 1 is found in the second sentence of Article 44 para (3), under which an armed combatant who cannot distinguish himself from a civilian retains his status as a combatant, provided that he carries his arms openly during each military engagement, and when he is visible to the adversary, while engaged in military deployment preceding the launching of an attack. This second sentence was one of the reasons why the United States has refused to ratify Protocol 1. The US argues that this second sentence seriously undermines civilian protection, by excessive accommodation of the guerilla.

Greenwood takes the view that the effects of the second sentence have been overstated, explaining:[34] "The basic rule remains that stated in the first sentence of Article 44 (3); the lower standard in the second sentence applies only in the exceptional case when a combatant *cannot* distinguish himself in the normal manner." States continue to be bound by the stricter rule under the Hague Regulation and the Geneva POW Convention. But only state parties are bound by Protocol 1. Thus, there are two different standards of what constitutes lawful combatancy.

Since neither the US nor Afghanistan are parties to the 1977 Protocols, the Afghanistan conflict was governed by the 1949 Geneva POW Convention. The US President determined that Al-Qaeda and Taliban fighters were combatants, but did not qualify as lawful combatants, and were not entitled to POW status. Hence, the US continues to detain such persons or unlawful combatants, provoking intense controversy.

Lawful Targets[35]

The question of who or what is a legitimate subject has been called the most important question in the law of war. The answer involves two actual principles:

- The ***principle of distinction*** between combatants and other military targets which are lawful targets; and civilian people and objects which are not lawful targets.

- The ***principle of proportionality*** which prohibits an attack on military objectives, if an attack is likely to cause civilian casualties or excessive damage, in relation to the concrete and direct military advantage which the attack is expected to produce. The principle of proportionality is part of international customary law.

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[33] art. 44, 3.

[34] *See* supra 33, at 789.

[35] *Id.* at 790-95.

Protocol 1 Article 51 para (2) expressly prohibits attacks designed to spread terror among the civilian populations. This prohibition applies to guerilla operations, such as the planting of a car bomb. It also applies to large-scale aerial bombardment.

Protocol 1 Article 52 para (2) provides this definition: Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use **make an effective contribution to military action** and where total or partial destruction, capture or neutralization, **in the circumstances ruling at the time**, offers a definite military advantage. (Emphasis added.)

When objects have "dual use" for both civilians and the military, it has to apply the test as laid down above. In the 1990-91 Kuwait conflict, the coalition treated Iraq's power stations as legitimate targets because they were making an effective contribution to Iraqi military action.

The principle of proportionality requires a commander to balance the likely civilian casualties and property damage, including collateral damage, against the concrete and direct military advantage to be gained from an attack. Protocol 1 Article 57 draws out of the two principles of distinction and proportionality, certain important duties of the commander. Perhaps the most important duty is for the commander to choose weapons and methods that will be most likely to avoid or reduce incidental civilian losses. Protocol 1 Article 58 further imposes the duty to protect civilians under his control from enemy attacks.

Weapons Limitations[36]

Greenwood has identified the general principles governing the choice of methods and means of warfare based on the Hague Regulations and Protocol 1, thus:

- ***The unnecessary suffering principle***, prohibiting methods or means causing unnecessary suffering or superfluous injury. This is the most important principle, because it authorizes ban on particular categories of weapons.[37]

- ***The discrimination principle***, prohibiting methods or means which cannot be directed against a specific military damage, thus likely to strike civilians. This principle was violated when in 1991 Iraq used Scud missiles against Saudi Arabia and Israel.

- ***The treachery or perfidy principle***, prohibiting certain treacherous methods of warfare. One example is the use of the Red Cross emblem to hide military operations. Another example is combatants feigning civilian status.

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[36] *Id.* at 795-801.

[37] *Id.* at 797-8.

In addition to these three general principles, Greenwood says that there is an emerging principle prohibiting method and means affecting the environment. In his view, "this principle exists, as yet, only in treaty law and is not part of customary international law."[38] Examples of treaty law are:

- 1977 Environmental Modification Treaty (ENMOD Treaty) banning "environmental modification techniques having widespread, long-lasting or severe effects on the means of destruction, damage, or injury."

- Protocol 1 Articles 35 para (3) and 55, prohibiting "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the national environment.

- 2003 Protocol on Explosive Remnants of War, to the Convention on Certain Conventional Weapons.

The most controversial issue in weaponry is the use of nuclear weapons. There is no treaty, law or customary law banning nuclear weapons. Existing treaties on nuclear weapons such as the Test Ban Treaty and the Nuclear Non-Proliferation Treaty, do not impose a ban, but merely impose restrictions on the possession or deployment of nuclear weapons. General Assembly resolutions condemning the use of nuclear weapons are not binding, and do not give rise to a rule of international customary law.

In its 1996 Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice ruled:

A threat or use of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

A threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons . . . .[39]

It follows from the above-mentioned requirements (quoted above) that the threat or use of nuclear weapons would generally be contrary to the rule of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

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[38] *Id.* at 795.

[39] 1995 I.C.J. 226, 105 (2)(C) and (D).

However, in view of the current state of international law, and of the element of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.[40]

It appears that the use of nuclear weapons is unlawful, except possibly in self-defense. In any case, the use of nuclear weapons is governed by the three principles of unnecessary suffering, discrimination, and treachery. Most importantly, it should comply with the test of proportionality.

War Victims[41]

International humanitarian law requires protection for three groups of war victims: POWs; civilians; and the wounded, sick, and shipwrecked.

The first group of victims, the POWs, are protected by the 1949 Geneva POW Convention. The general principle consists of the following features:

- A POW is neither a criminal nor a hostage.
- He or she is detained following capture, for the sole purpose of preventing him or her from rejoining the enemy's armed forces.
- He or she should not be kept in a military or civil prison, but in a POW camp.

POWs should not be ill-treated, murdered, tortured, abused, or exposed to insults or public curiosity. There are recent examples of POW ill-treatment. One example was the Kuwait conflict, when Iraq physically ill-treated captured Kuwaiti and coalition personnel, and compelled them to appear on TV. Another example was the 1991 and 2003 Iraq conflicts, when coalition states in their turn allowed TV to show footage of identifiable Iraq POWs. Another example was the Yugoslavia conflict, when POWs were forced to perform dangerous tasks, such as collecting bodies and equipment under fire.

The second group of victims are the civilians, who are protected by the Fourth Geneva Convention. The standard for treatment of civilians is broadly the same as that for POWs. One recent example of a violation was the Yugoslav conflict, when ethnic groups were detained wholesale. Treatment of civilians is governed not only by the Fourth Convention, but also by international customary law governing occupied territory. This law of belligerent occupation contains the following features:[42]

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40 *Id.* at 105 (2) (E).

41 *See* supra note 39, at 801-6.

42 *Id.* at 805-6.

● The law of belligerent occupation applies when territory is in fact seized by the armed forces of one state during a conflict with another, even where the invading state asserts that it has a better claim to the territory. In 1967, Jordan and Egypt seized the West Bank and Gaza Strip. Hence, the law of belligerent occupation prevailed. Israel protested, on the ground that Jordan and Egypt had no valid claim to these territories before 1967. States universally rejected Israel's position on that issue. The law of belligerent occupation also applied during 1982 Falkland Islands conflict, when Argentina occupied the Islands for ten weeks. But apparently, the law of belligerent occupation did not apply in 1974, when Turkey installed a military presence in northern Cyprus.

● The Fourth Convention and the rules on belligerent occupation apply, even if the occupying state tries to annex or change the status of occupied territory. One example of such continuing application of the rules was Kuwait, even though Iraq tried to annex it. Another example was East Jerusalem and the Golan Heights, even after Israel annexed them. Another example is the Gaza Strip, from where Israel withdrew in 2005, but continues to exercise control over its borders, ports, and air space.

● Art. 43 of the Hague Regulations requires the occupying power, "unless absolutely prevented," to respect the laws and customs of the territory. Thus, it prohibits the occupying power to make a wholesale change in existing laws, unless such laws are flagrantly contrary to international law. One example was the Nazi laws contrary to international law, which were later changed wholesale by the allies at the start of 1945.

● The Hague Regulations are now international customary law, with respect to treatment of property in occupied territory. However, these rules are complicated and are often violated.

Today, all states are UN members. Hence, the Security Council has mandatory power under the UN Charter Chapter 7 to bind all states under a new rule, even if it may exceed the law of belligerent occupation. One example was the 2003 Security Council directive to occupying states to take certain actions in Iraq.

Humanitarian Law Enforcement

Although there is no international police force and there is no network of courts with compulsory jurisdiction, international humanitarian law can be enforced by several methods:

● ***The method of appointing a Protecting Power*** to protect the nationals of one party to the conflict under the control of the other state. But both states must consent to the appointment. One example was the Second World War, when Sweden

and Switzerland performed this role. Since consent is essential, this method has been virtually unused since 1945.

● ***The method under Protocol 1 of calling on the International Fact-Finding Commission*** to inquire into grave breaches of the Geneva Conventions and Protocol 1, and thereafter to use its good offices to achieve the "restoration of an attitude of respect" for these instruments. The Commission can publish its findings, but its jurisdiction is limited, and it has no power to impose any kind of penalty.

● ***The method of placing war crimes under universal jurisdiction.*** It is not a defense to claim that the defendant acted under superior orders, nor that the defendant acted out of military necessity. Those on the winning side are hardly charged in war crime trials, but they are subject to the jurisdiction of their own state for crimes under its own criminal law or military law.

In the 1990s, the Security Council established separate international tribunals with jurisdiction to try war crimes in former Yugoslavia, Rwanda, and Sierra Leone. This growing trend toward international criminal proceedings continued with the 1998 Rome Statute, which established the International Criminal Court, with jurisdiction over war crimes and grave breaches of the Geneva Convention. The Philippines signed in 2000 the Rome Statute, but has not ratified it, because the Office of the President refuses to transmit it to the Senate for ratification.

● ***The method of requiring parties to the conflict to accept an offer by the International Committee of the Red Cross (ICRC)***, or another competent humanitarian organization, to assume the humanitarian functions of the protecting power. This method depends on the ability of ICRC to persuade a state to accept its offer.

● ***The method under the 1907 Fourth Hague Convention Article 3 of holding a state liable for compensation*** to other states and to individuals who have suffered loss as a result of the violation of international humanitarian law by the forces of that state. In 1991, the Security Council used this method by confirming that Iraq was liable to compensate victims of its violations of international law arising out of the invasion of Kuwait. The Council established a Compensation Commission with power to make awards, which were paid out of a fund financed by a levy on Iraqi oil sales.

This method was also used by Ethiopia and Eritria after their conflict in 1998-2002. They agreed to create a Commission which determined, by binding arbitration, claims for violation of international humanitarian law. Accordingly, the Commission issued awards for ill-treatment of POWs and civilians.

● ***The method of adopting UN resolutions*** to secure compliance with international humanitarian law. This method was used during the Iran-Iraq war and the Yugoslavia conflict.

- ***The method of subjecting states engaged in armed conflict to scrutiny by, and pressure from, third parties.*** This is a parallel method to the method under the Geneva Conventions and Protocol 1 of monitoring compliance with the law through certain formal mechanisms.

# # #

Red Cross Guidelines

In 1978, the ICRC published a guide to the legal rules in September-October 1978 *International Review of the Red Cross* 247. In 1989, ICRC also published a statement on non-international armed conflicts in September-October 1989 *International Review of the Red Cross* 404.

ARMM:
An Electoral Basket Case

Nasser A. Marohomsalic[*]

Every election in the country, especially in the Autonomous Region in Muslim Mindanao (ARMM),[1] is eventful – a tourist attraction if you wish – and to borrow the words of PCID Lead Convenor Amina Rasul in her recent column in Manila Times, "full of wonders that never cease to amaze."[2]

Travesty of Democracy

Foreign observers from Southeast Asian countries who witnessed the May 14, 2007 election in Muslim Mindanao could have mistaken it for a fiesta what with people crowding polling places and food stalls everywhere. But the extravaganza of vote-buying, vote-stealing, violence and other election offenses belied the festive atmosphere. Prominent among these offenses are violations of the rules of orderly conduct of the electoral process by field officers of the Commission on Elections (COMELEC) itself, and deputized institutions especially the military and the police.

Mr. Mossarat Qadeem, a Pakistani from the Asian Network for Free Elections (ANFREL), was threatened with death by a partisan in Kalawi-Bacolod, Lanao del Sur, who took offense at the former's audacity in questioning the latter's escorting of voters inside polling places.[3] Ms. Marini Binti Muhammad Daud, another election observer from Acheh, Indonesia, was mistaken for a M'ranao in Ramain-Ditsaan town also in Lanao del Sur and was offered money in exchange for votes by a partisan leader.[4] Indeed, vote-buying is a fixture in Moro politics. In Lanao del Sur, it reached P7,000.00 pesos per voter in the mayoralty contest in one town.

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[*] The author is a Member of the Executive Committee of the Legal Network for Truthful Elections (LENTE), a Co-Convenor and Fellow of the Philippine Council for Islam and Democracy (PCID), a Presidential Assistant on Human Rights of the Integrated Bar of the Philippines (IBP), the Chairman of the Muslim Legal Assistance Foundation (MUSLAF), a founding Member of the Counsels for the Defense of Liberties (CODAL), a former Commissioner of the Human Rights Commission, a former Commissioner of the Regional Consultative Commission for Muslim Mindanao (RCCMM), and author of "Aristocrats of the Malay Race: A History of the Bangsa Moro Muslims in the Philippines" and "Towards Peace, Autonomy and Human Rights."

[1] The Autonomous Region in Muslim Mindanao is composed of Lanao del Sur, Maguindanao, Shariff Kabungsuan, Basilan, Tawi-Tawi and Sulu.

[2] Amina Rasul, *Durian*, MANILA TIMES, Jul. 1, 2007.

[3] Interview with Salic Ibrahim, Citizens Care and PPCRV Chair for Lanao del Sur, who served as host and guide to Musharat at that time. We monitored the election in Lanao del Sur.

[4] Interview with Sinab Ibrahim, host and guide to Marini at that time. We monitored the election in Lanao del Sur.

In Maguindanao, no less than its Provincial Election Supervisor confirmed on television that minors were allowed to vote – justifying this anomaly with the notion that the age of maturity in Islam is lower than the age requirement for voters in the country. On television, youngsters were seen voting in Lanao del Sur too, two of whom pegged their age at 17 when asked by Ambassador Henrietta de Villa, Chairperson of the Parish Pastoral Council for Responsible Voting (PPCRV).

A sizeable number of residents of Iligan City and Lanao del Norte voted in Lanao del Sur. The PPCRV Chair discovered their presence at the polling places in Madalum during her surprise sortie to the town on the day of its special election, June 20, 2007. Upon her approach, they recoiled, dispersed and kept distance.

Last July 17, 2007, Atty. Franklin Quijano, former Mayor of Iligan City, confirmed reports that voters from his city and Lanao del Norte were brought to Lanao del Sur and were given substantial amounts during the 2004 and 2007 elections for their participation as flying voters.[5]

Even elements of the military and the police in Lanao del Sur providing perimeter security to counting and canvassing centers got a part of the action. "Entrance fees" were collected from poll watchers at the gates which ranged from 100 to 200 pesos per watcher. In Sulu, an independent candidate for Congressman observed a contingent of soldiers assigned at Zamboanga City going around counting and canvassing centers in Jolo and checking on the votes of pro-administration candidates.[6]

The statistics for election-related deaths in 2007 is another sad commentary on the state of our electoral democracy. As of May 14, 2007, the Philippine National Police (PNP) reported to the media 114 deaths and 132 wounded in 191 election-related incidents. Of the 114 deaths, 59 were identified to be candidates, 55 were supporters.[7] A coordinator of the PPCRV in one town in Lanao del Sur was mauled black and blue by partisans inside the canvassing center.[8]

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5 Interview with Atty. Franklin Quijano, Greenbelt, Makati City, (Jul. 17, 2007).

6 Interview with Cocoy Tulawi, Robinson Place, Ermita, Manila, (Jul. 05, 2007). Tulawi ran for the 1st District of Sulu under a local party named Mushawara and allied himself with Nur Misuari who ran for governor of the province under Kabalikat ng Mamamayang Pilipino (KAMPI), the political party of President Gloria Macapagal-Arroyo. They lost.

7 Prof. Nestor T. Castro, *The Cultural Context of Election Violence in the Philippines*, Speech delivered in a conference entitled, "Putting a Stop to Election Violence: A Symposium," sponsored by the National Economic Development Authority (NEDA), Hanns Seidel Foundation and the Commission on Human Rights (CHR), Asian Institute of Management, Makati City, (Jul. 13, 2007).

8 Nursaide Dipatuan was mauled on 21 May 2007 inside the Malabang canvassing room at the Lanao National College of Arts and Trades in Marawi City by political partisans of local candidates after questioning certain irregularities in the canvassing process. Alarmed at the armed men who pursued him to the Lanao Hospital where he was brought after the incident, his relatives whisked him away in the nick of time. Four days later, the author located his hideout, paid him a visit and we talked.

Indeed, political violence in ARMM is one chief reason why the election was postponed in 13 towns in Lanao del Sur, one town in Maguindanao and several precincts all over the region. And like always, partisans and protagonists entangled in election-related violence would become enemies and settle the score in family feuds which could last for generations.

Politics of Dynasty and Dictatorship

This electoral experience is not new. Way back in the 1950s, the Supreme Court noted in *Sarangani vs. COMELEC* that even the dead, the birds and the bees voted in Lanao.[9] In the national and local elections in 1965, the High Court finds that the results in certain municipalities in Mindanao including Lanao del Sur were manipulated and all the votes given to all the senatorial candidates of the party-in-power, the Liberal Party, and nothing to the opposition Nacionalista Party.[10] Every election was marred with violence and all sorts of manipulation.

In 1972 President Marcos declared Martial Law and suspended election. Beginning 1978 he gradually opened up the electoral process. All the while the dictator cultivated among traditional Moro leaders a political clique to secure his grip to power from the fringes. In 1973 when government began reeling from the Moro insurgency, he co-opted senior rebel commanders in the field and mass leaders of the Moro National Liberation Front, appointing them to the local structure of power, as well as to offices in the national government.[11] He created the provisions of Tawi-Tawi and Basilan in 1973 and one Autonomous Government each for Central Mindanao and Western Mindanao in 1977 to accommodate the more prominent among the leadership of the revolutionary organization who sided with the dictatorship.[12]

This new clique joined the traditional leaders in their kind of dynastic politics, unheard of since Sultanic times for all its attendant aberrations. In the Report on the May 2004 Philippine Elections, the National Democratic Institute for International Affairs observed that dynastic and family influences on the political system continue to be a critical impediment to democratic developments in the country.[13] Many of them maintained a stable of ward leaders and a private militia. And with the sufferance of the powers that be, they leeched onto the coffers of government including their portions of the Internal Revenue Allotments to maintain their leadership and insure their political dominance.

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9 Saranggani v. COMELEC, G.R. No. 135927, 334 SCRA 379, Jun. 26, 2000.

10 Lagumbay v. COMELEC, 16 SCRA 176 (1966).

11 NASSER A. MAROHOMSALIC, ARISTOCRATS OF THE MALAY RACE: A HISTORY OF THE BANGSA MORO MUSLIMS IN THE PHILIPPINES, 266-275 (2001).

12 *Id.*

13 As stated.

With skeletons in their closets, they became leased to the national government, the powers that be wagging the sword of Damocles on them with threats of investigation and conviction for graft and corruption. So come election time, they would come under the banner of their political party and do its bidding, including rigging the election in favor of their candidates for national positions and blanking out the political Opposition. This kind of political combination deters upstarts from cracking through to widen the democratic space. The daring among them would run as Independent – Administration candidate or come under the wing of a political bigwig in national politics.

During the Ramos presidency (1992-1998), some religious in Lanao del Sur, who ran under their provincial party and the party-in-power, Lakas National Union of Christian Democrats–United Muslim Democrats of the Philippines (LAKAS-NUCD-UMDP) now Christian-Muslim Democratic Party (CMD),[14] succeeded and pulled through winning the governorship and vice-governorship of the province and several seats in the provincial board. The governor went on to win two reelections completing three successive terms, or a total of nine years.

In the 2007 elections, however, only one candidate for national position in Muslim Mindanao, a couple for mayor, one for vice-governor and ten for provincial board ran under the banner of the political Opposition. They all lost.

Myth of Command Votes

In Maguindanao, many candidates for local executive positions are close kin of the governor of the province and they all ran unopposed and under the banner of the party-in-power. They all won together with the other candidates in the political ticket. No senatorial candidate from the political Opposition got into the winning circle of twelve. But Administration candidates and propagandists justify the 12-0 outcome for senators by claiming that there is a dearth of Opposition candidates and poll-watchers during the counting and canvassing at the local level. This is reinforced by an equally *non-sequitor* argument: their local political leadership magically swayed the votes with their political scepters.

Political hogwash this theory of command vote is. The 12-0 scenario in the 2007 electoral contest has long been debunked by the Supreme Court as a case of "statistical improbability" in *Lagumbay vs. COMELEC.*[15]

If anything, this claim reeks of our kind of farcical election, our rotten political experience from which we never grew sick.

During the Marcos regime, the political Opposition in Muslim Mindanao was blanked out in the election for the 1978 Interim National Parliament and every

14 In 2004, Lakas NUCD-UMDP was renamed, Christian-Muslim Democrats (CMD).

15 *See supra* note 12, at 175-80.

election thereafter. In the elections for the Autonomous Government of Muslim Mindanao, only candidates and allies of the party-in-power, the *Kilusang Bagong Lipunan* or the Party of the New Society, were elected to office. In one regional election, one prominent candidate of the political Opposition for Regional Assemblyman was not credited even with his vote and that of his wife in their precinct in Marawi City.[16] In local politics, generally speaking, the same situation obtained, candidates of the powers that be giving a zero vote to their opponents in local elections even in their own supposed bailiwicks.[17]

After the ouster of President Marcos in the EDSA People Power Revolution in 1986, the electoral plaque, so to speak, did not go with him; its sores burrowed deep into the body politic.

In the first post-Marcos election in the ARMM on February 17, 1990, the political Opposition was thrashed resoundingly and, as in the past, denounced its result, assailing it before the Supreme Court as manufactured and statistically improbable.[18]

In Languyan, Tawi-Tawi, 100% or 99% of registered voters were cast for the Administration candidate for Regional Governor and Regional Vice-Governor while their rivals from the Opposition camp got zero. In Maguindanao, the number of votes cast in certain precincts in six (6) towns was either unusually high or exceeded the number of registered voters. A barangay, whose population evacuated to safer places to avoid the cross-fire in the shooting war between elements of the Moro Islamic Liberation Front and the Moro National Liberation Front and where no election was held, registered a very high percentage of votes. In nine (9) towns of Sulu, the Administration candidate for Regional Governor and Regional Vice-Governor garnered exactly the same number of votes in each of 197 precincts while the Opposition candidates for the same position each received zero.[19]

The Supreme Court dismissed the case on a technicality, however, the mode of relief being unavailing under the law. But Justice Gutierrez penned a Separate Statement denouncing "the glaring anomalies in the conduct of the regional election for the Autonomous Government of Muslim Mindanao . . . committed in such a crude and flaunting manner as to insult the intelligence." He went on to indict the poor administration of election laws by government. Thus:

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[16] Under PDP-Laban, an opposition party during the Marcos dictatorship, Atty. Saide Pangarungan ran for assemblyman for the 1st District of Lanao del Sur and was given "zero" in the precinct in Marawi City where he voted together with his wife and family. After the EDSA I People Power in 1986, he was appointed governor of Lanao del Sur and went on to win two successive gubernatorial elections.

[17] The Sangkis, a branch of the Ampatuans, used to control the local government of Ampatuan and gave a zero vote to their opponents in local elections. (In M.A.J. Tamano, "What the Muslims Ask: Simple Justice and Plain Sincerity." This is a privileged speech by Sen. Tamano in the Philippine Senate on 07 Feb. 1972). A new town is curved out of Ampatuan named Datu Abdullah Sangki. Practically every local political leadership in Muslim Mindanao is a dynasty.

[18] Dimaporo v. COMELEC, 186 SCRA 769 (1990).

[19] *Id.* at 789.

> Implied in the allegations of massive fraud is that government officials either participated in or were indifferent to the cheating. Neither the COMELEC nor this Court can do much if certain officials who should guard the polls with zeal, take advantage of the situation or condone the perpetration of anomalies.[20]

In the COMELEC, majority of election cases originated in ARMM, and most landmark decisions on the election law by the Supreme Court relate to these cases.

Electoral Sphinx

As in the past, indeed, there is every indication that the 2007 election in Maguindanao is rigged, particularly in connection with its results for the senatorial race, blanking out the Genuine Opposition (GO) from the winning circle of 12 and giving individually five (5) of its candidates a "0" vote.[21]

After the lapse of more than a month from the May 14, 2007 election, the duplicate copies of the municipal certificates of canvass (MCOCs) from Maguindanao, which are earmarked for posting on the wall outside the canvassing premises, resurfaced from nowhere and re-canvassed last June 27, 2007 at Sharif Aguak, the capital town of the province. It is pertinent to note that despite threats from the Commission on Elections, its field officers failed to produce the same during the national canvassing for senators until two (2) weeks after the proclamation of the 11 winning senators. Obviously, indeed, the tally of the votes for senator in Maguindanao is manufactured.

Other factors go for the falsity of the tally for senator in Maguindanao.

Sultan Jamalul Kiram of Team Unity (TU) topped the results in Lanao del Sur and Tawi-Tawi, while he landed 2nd in Basilan, Sulu and Sharif Kabungsuan. But in Maguindanao, wonder of all wonders, the Muslim candidate placed 10th with 86,905, a gulf away from his teammate Defensor, who is at 8th spot with 168,905 votes, and an ocean away from the rest of the ticket led by Zubiri at 195,823.

Something of a miracle and worthy of an entry to Ripley's Believe It or Not is Luis "Chavit" Singson's standing in ARMM. Singson, a former local executive from northern Luzon is the 2nd placer in Maguindanao at 194,242 votes, but among tail-enders in the rest of the region –- 16th placer in Tawi-Tawi, 21st in Sharif Kabungsuan, 20th in Sulu, 18th in Lanao del Sur and 23rd in Basilan.

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[20] *Id.*

[21] Genuine Opposition candidates who got "zero" in the Maguindanao tally—Aquino, Cayetano, Lacson, Osmeña and Roco.

Below is a table showing the margin between Team Unity senatorial candidates in the provincial certificates of canvass of Maguindanao:

Team Unity Ticket		Votes
1.	**Zubiri**	**195,823**
2.	Singson	194,242
3.	Angara	193,990
4.	Pichay	193,979
5.	Arroyo	193,012
6.	Recto	190,654
7.	Sotto	184,538
8.	Defensor	168,905
9.	Montano	86,305
10.	**Kiram**	**86,122**
11.	Magsaysay	85,822
12.	Oreta	83,076

(Source: Provincial Certificates of Canvass of Votes for Maguindanao as of 05 July 2007)

The blanking out of the senatorial ticket of GO happened in some areas in the region that is too obvious to escape attention. In Lanao del Sur, Pikong town posted a 12-0 win for Team Unity. In Sulu, Luuk went 12-0 too for Team Unity. Many barangays posted the same result.

Overall, the results of the election for senators in Muslim Mindanao gave out a mixed line-up for the winning 12 senatorial candidates in favor of Team Unity over the Genuine Opposition, thus: Lanao del Sur, 7-5; Basilan, 8-4; Tawi-Tawi, 7-5; Sulu, 8-4; Sharif Kabungsuan, 8-4.

This pattern strays from the national trend that favors the Genuine Opposition with seven seats, and Team Unity which garnered two. Independent candidates grabbed the two other seats. The 12th seat is still being contested by Pimentel of GO despite Zubiri's proclamation last July 14, 2007.

Early Tally

But I must mention the fact that the tally of the earliest batch of 46 election returns from Marawi City and Malabang in the possession of Namfrel-Lanao del Sur reflects the national trend of 8-2-2 and the topmost place won by Kiram of Team Unity therein is understandable, he being a Muslim.

Below is the Namfrel's tally of the said election returns from Malabang and Marawi City:

NAMFREL – LANAO DEL SUR PARTIAL UNOFFICIAL COUNT
As of May 17, 2007, 11:30 AM

Municipality Barangay Precinct #	PARTIAL ERs FROM MARAWI & MALABANG
46	Election Return #
8175	Total Registered Voters
6793	Total Actually Voted
2356	**Kiram, Jamalul (1-TU)**
1786	**Legarda, Loren (2-GO)**
1700	**Escudero, Chiz (3-GO)**
1352	**Pangilinan, Kiko (4-Ind)**
1298	**Trillanes, Antonio (5-GO)**
1240	**Cayetano, Alan Peter (6-GO)**
1214	**Aquino, Noynoy (7-GO)**
1168	**Angara, Edgardo (8-TU)**
1099	**Lacson, Ping (9-GO)**
1042	**Pimentel, Koko (10-GO)**
1030	**Honasan, Gringo (11-Ind)**
1019	**Villar, Manuel (12-GO)**
839	Pichay, Prospero
820	Montano, Cesar
796	Zubiri, Juan Miguel
783	Recto, Ralph
766	Defensor, Mike
744	Roco, Sonia
712	Arroyo, Joker
468	Sotto, Tito
425	Osmena, John
296	Magsaysay, Vic
254	Coseteng, Nikki
247	Oreta, Tessie
231	Singson, Chavit
149	Gomez, Richard
106	Estella, Antonio
93	Enciso, Ruben
84	Sison, Adrian
80	Cayetano, Joselito
73	Paredes, Zosimo
69	Lozano, Oliver
56	Opilla, Ed
49	Chaez, Melchor
46	Wood, Victor
41	Bautista, Martin
12	Cantal, Felix

However, as the days went by complaints of vote-padding and other forms of fraud poured in and the trend was disrupted until things shaped up in favor of Team Unity.

Lanao Special Election

The result of the special election on June 20, 2007 for 13 towns in Lanao del Sur is a telltale sign that vote-padding for senators or some form of manipulation to influence the result of the election for senators happened in Lanao del Sur. (N.B.: No data for the 13th town, Sultan Domalondong).

Below is a table showing the standing of the top 12 senators in the overall tally of the votes in Lanao del Sur and their individual votes and standing in the 12 towns where special election was held:

Top 12 Senators (Overall tally)	Registered Voters													
	11,884	10,966	9,174	9,049	8,564	8,472	7,581	7,393	7,042	6,182	5,711	5,670	3,983	
	Bayang	Masiu	Lumba Bayabao	Binidayan	Butig	Marogong	Kapatagan	Lumbatan	Madalum	Pualas	Lumbayanague	Kapai	Sultan Domalongdong	TOTAL/ STANDING
1. Kiram (TU) (158,047)	2,420	3,496	2,058	1,569	1,471	1,857	3,630	2,684	2,132	1,409	778	698	NO DATA	24,202 (1)
2. Legarda (GO) (131,309)	1,998	2,154	1,649	1,013	728	867	1,288	1,742	713	1,072	878	493		14,595 (6)
3. Pimentel (GO) (115,899)	2,811	1,810	2,837	884	865	5036	624	1,829	823	792	910	180		14,868 (5)
4. Zubiri (TU) (109,389)	2,824	1,867	866	576	386	978	650	1,050	3,735	372	930	832		15,066 (4)
5. Angara (TU) (105,900)	924	1,972	692	401	330	398	555	351	597	470	281	363		7,334 (13)
6. Recto (TU) (105,632)	535	1,341	928	490	335	431	493	592	794	344	956	255		7,494 (12)
7. Pichay (TU) (100,922)	1,992	1,339	507	668	352	310	575	316	704	361	238	171		7,533 (11)
8. Cayetano (GO) (94,053)	2,078	2,117	1,136	514	1,069	455	1,432	1,084	550	1,098	1,003	877		13,413 (7)
9. Escudero (GO) (90,985)	2,727	2,243	1,676	1,075	774	558	979	1,728	1,110	1,157	668	442		15,137 (3)
10. Arroyo (TU) (87,000)	2,044	2,179	1,399	312	424	322	726	522	2,610	461	380	263		11,642 (8)
11. Defensor (TU) (72,684)	627	1,151	434	376	407	337	386	41	391	1 72	1,188	143		5,653 (14)
12. Pangilinan (Ind) (68,052)	1,663	1,367	1,282	808	432	453	687	1,028	528	688	502	259		9,697 (10)
2 Senators making it to magic 12 in special election														
13. Trillanes (GO) (67,421)	3,372	1,190	1,696	574	1,549	367	1,201	2,560	1,178	1,955	676	384		17,422 (2)
14. Aquino (GO) (65,552)	2,093	1,475	1,105	578	375	310	600	951	779	603	780	273		10,722 (9)

(Source: Provincial Certificate of Canvass of Votes Involving 10,200 precincts out of 10,289 and Statement of Votes for 40 towns including Marawi City. Documents provided by COMELEC to the author on 05 July 2007)

In the special election the placement of the 12 winning candidates for senator is different from their standing in the overall tally of the result of the election in Lanao del Sur. There, Trillanes garnered 17,422 votes making it to the 2nd place while Aquino made 10,722 votes for the 9th place. Thus:

No. of Votes	Candidates for Senators	Rank/Party
24,202	Kiram	1 (TU)
17,422	Trillanes	2 (GO)
15,137	Escudero	3 (GO)
15,066	Zubiri	4 (TU)
14,868	Pimentel	5 (GO)
14,595	Legarda	6 (GO)
13,413	Cayetano	7 (GO)
11,692	Arroyo	8 (TU)
10,722	Aquino	9 (GO)
9,697	Pangilinan	10 (Ind)
7,533	Pichay	11 (TU)
7,494	Recto	12 (TU)
7,334	Angara	13 (TU)
5,653	Defensor	14 (TU)

The special election went for six (6) GO candidates and five (5) for TU candidates. Aquino made it to the number nine (9) which excites curiosity considering that he was nowhere in the circle of twelve (12) winning candidates for senator in the other towns which had regular elections.

The disparate results between the special elections and the regular elections in Lanao del Sur could only be explained by the fact that the special election was relatively orderly and clean, while the regular election was greatly tainted with fraud and other forms of manipulation including the padding of votes.

For the special election, a Special Municipal BOC was formed for each town headed by a lawyer and two (2) members who came from other regions. The local COMELEC and the board of canvassers were only given support roles, and they were considerably reined in. The Citizens Arms were allowed to monitor the electoral process upon personal and formal intervention of COMELEC Commissioner Rene Sarmiento whose field officers were earlier reported to the hostile to the poll-watchers of the Parish Pastoral Council for Responsible Voting (PPCRV) and its legal arm, the Legal Network for Truthful Elections (LENTE). The media too was conspicuously present and they gave the election full coverage. Security was heavy with army troops.

NAMFREL Report

In the Memorandum-Report of Namfrel – Lanao del Sur, its Chair claimed that the 2007 election in Lanao del Sur is "dirty . . . characterized by massive vote-buying and other election irregularities such as dagdag-bawas... prominently done in the votes cast for the provincial board members."[22]

The worst case of padding votes for candidates of Board Member happened in Maguing, 1st District – Lanao del Sur. About 11,845 people cast their votes in the town, which means that a total vote of 59,225 may be counted for and distributed through the 41 candidates for the electoral post in said District, the figure being the sum total for any five (5) winning candidates for Board Member. But the total tally of votes in Maguing for the position reached 71,988 votes, which means that there was an excess vote of 12,763. To date, the board of canvassers of the town has not submitted to National COMELEC the election returns, the base document that will belie the figures that are obviously manufactured.[23]

Questionable Voters Turnout

One other factor going against the integrity of the electoral process in Muslim Mindanao — especially in the result for the senators — is the turnout of voters in the region, which is way above the national average of more than 60%. A political scientist and professor of the University of the Philippines, Miriam Ferrer, notes:

> The extraordinary high turnout in Maguindanao and other ARMM provinces this year is consistent with the voting pattern reported on the discredited 2004 election. In 2004, about 87% of registered voters in Maguindanao allegedly trekked to the polls. Basilan averaged an even higher 89%. In Lanao del Sur, 26 of 40 municipalities averaged more than 80%. Of the 26, 16 registered more than 90%.[24]

Dagdag-Bawas Technology

The shaving of the votes from candidates and adding them on to others was done in retail in the remote past. In the mid-term election of 1995, however, it became massive and glaring, especially in the senatorial contest. Senator Aquilino "Nene" Pimentel protested the loudest among those cheated. He filed cases against some perpetrators, two of whom composing the Pasig City board of canvassers were found guilty of misconduct and fined P10,000.00 each.[25]

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[22] Memorandum addressed to Mr. Edward Go, the National Chairman of NAMFREL, from Hadji Abdullah "Lacs" Dalidig, Provincial Chairman of NAMFREL- Lanao del Sur, (Jun. 25, 2007).

[23] *See* Sharief v. Aisah D. Munder et al., SPC Case No. 07-297. This is a petition to annul proclamation filed with COMELEC on 11 July 2007. Documents are attached therein showing COMELEC's refusal to furnish certificates of canvass and election returns for Lanao del Sur.

[24] *See* Prof. Miriam Ferrer, *Eyes See*, ABS-CBN Interactive.

[25] Pimentel v. Llorente, 399 SCRA 154 (2000).

In the 2004 and 2007 elections, the practice was simplified, operators sometime unmindful of rationalizing the figures and adding votes to candidates, without shaving off the votes of other candidates. In many instances they saw no need for it, with the turnout of voters for senators low. So now the scheme mutated into *dagdag-dagdag-dagdag pa,* with boards of canvassers (BOCs) filling up the certificates of canvass (COCs) with votes for senators without regard to the figures in the election returns.

In the 2007 election in Lanao del Sur, the *dagdag* scheme was done at the canvassing stage with BOCs violating some COMELEC rules and guidelines, especially Section 26 of COMELEC Resolution No. 7859, dated 17 April 2007, thus:

> 6) The Chairman (of the PBOCs, CBOCs and MBOCs) shall first read the votes of each candidate for senator and Party-List as they appear in the election returns/certificate of canvass. The two other members shall simultaneously record the votes of said candidates in the respective copies of the statement of votes by precinct/municipality/ city as the chairman reads them (Parenthesis supplied);
>
> 7) After reading of votes of the candidates for senator and Party-List, the board shall proceed to read the votes of candidates for members of the House of Representatives and for local positions.

The violation consists in the BOC's preparing the COC first for local posts and thereafter declaring the winners. Watchers, who are mostly interested in the results of the local polls would then disperse, and the BOC would bring with them the COC for national post and fill it up in hotels in Iligan City and some secret places, selling the votes to highest bidders.

The BOC would deny the 4th copy of the COC to Namfrel representatives, reasoning out that they have not as yet completed the canvassing. Indeed, almost one-and-half months after the election of May 14, 2007 or by June 28, 2007, the Namfrel in Lanao del Sur had only the COCs for five (5) towns. Many BOCs also kept Namfrel's copy of the election returns. BEIs refused to sign or issue certificates of votes to poll-watchers from the Citizens Arms.[26] These actuations of COMELEC personnel frustrated the efforts of independent poll-watchers to safeguard the integrity of the electoral process.

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[26] Local teachers and recruits served in the BEIs. They violated COMELEC rules, filling up first the tally sheet with the votes for candidates and then copying them into the election returns. Section 44 of COMELEC Resolution No. 5843, dated 27 March 2007 mandates the poll clerk and the third member of the BEIs to record simultaneously in the election returns and in the tally board, respectively, its vote as it is read.

In the ballot, the portion for senators appeared first, followed by the party-list, next the congressman, and then the candidates for local positions from the governor down. This violation relates more to form than substance. But BEIs are provided the opportunity to make dagdag-bawas on candidates for national positions or frustrate Citizens Arms from their canvass watch or duty, as it happened in Lanao del Sur, Namfrel's representatives being refused their 6th copy of the election returns on the excuse that they have not as yet entered the votes for senators on the election returns.

To date, one cannot go to the Statistics and Records Department of National COMELEC and secure copies of the election returns on its authority. Strangely, the office refers any request thereof to the COMELEC En Banc for approval. But I know of no one who has gotten approval of his request and given a copy of the documents by the Central Office. A student-researcher of the University of Santo Tomas and an intern at PCID, Anna Agustin, who went there to request COCs for the towns of ARMM, was prevented by a soldier named Antonio Aragon from entering the office, making the excuse that the documents are "hot" documents.

In Maguindanao, the technology for *dagdag* operation is more efficient. In the rendition of one witness – a BEI member who wished to remain anonymous until the right time for fear of his life – no COMELEC officer received election returns and ballot boxes from them and so they deposited them at the municipal building of their town. A BEI chair, who requested that all concerned keep his identity a secret for security reasons, recounted in his affidavit how elections in his precincts in one town in Maguindanao was manipulated. He said that he and his fellow members were waylaid and then led into a secluded place where armed men waited and wrote down the names of the 12 senatorial candidates from Team Unity and some candidates for local posts. Four (4) election inspectors, who appeared in the visual media in silhouettes, revealed that more than 100 election inspectors were forcibly taken and detained for three (3) nights and two (2) days and were made to fill up election paraphernalia with votes for TU candidates. One whistleblower, a school supervisor, was gunned down. Two others are reportedly missing.

In Sulu, an Independent Congressional candidate of the 1st District of the province claimed that he was cheated and his watchers in some areas terrorized, adding that the worse could happen as it did to Opposition candidates for senator who had no local candidates and watchers.[27] In Jolo, the capital town of the province, a LENTE lawyer saw BEIs filling up ballots already bearing thumbmarks.[28]

Padded List of Voters

One last subject is the bloated lists of registered voters in the six (6) provinces of Muslim Mindanao.

From 155,210 registered voters in Basilan in 2004, the figure jumped to 181,374 in 2007, a 16.86% increase. Lanao del Sur had 276,980 registered voters in 2004 and the number leapfrogged to 395,488, an increase of 72.79 percent. A 9.65 % jump in voting population was noted in Maguindanao with 289,029 registered voters in 2004 and 305,373 in 2007. In Sulu, from 209,777 registered voters in 2004, the number rose to 250,327, a 19.33% increase. Tawi-Tawi had 120,635 registered in 2004 and 140,208 in 2007, a 16.22% increase. In Sharif Kabungsuan the increase came at 31.98%, with 150,228 registered voters in 2004 and 198,277 in 2007.

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[27] *See supra* note 6.

[28] Interview with Atty. Raissa Janjurie, the author's fellow volunteer in Lente, who was assigned in Sulu.

The table below shows the margin between the number of registered voters in 2007 in every province of ARMM and the projected increase of the registered voters therein from 2005 through 2007 according to the 2.36 percent of the annual growth of population in ARMM:

Six Provinces of ARMM in 2007	Registered Voters	Projected Increase at 2.36%			Difference (May be considered ghost votes)	Registered Voters in 2004
		2005	2006	2007		
Basilan	152,210	155,802	159,479	163,243	18,131	181,374
Lanao del Sur	276,980	283,517	290,208	297,057	98,431	395,488
Maguindanao	289,029	295,850	302,832	309,979	-4606	305,373
Tawi-Tawi	120,635	123,482	126,396	129,379	10,829	140,208
Sulu	209,777	214,728	219,796	224,983	25,344	250,327
Shariff Kabungsuan	150,228	153,773	157,402	161,117	37,160	198,277

This increase is simply inconsistent with the annual population growth rate in the region of 2.36 percent. Moreover, this increase in the number of registered voters in 2007 is statistically improbable considering the continuing out-migration of the people from the region owing to the precarious condition of peace and order and the dire economic situation therein. While there are no statistics for the rate of out-migration, the *diaspora* is evident in the social landscape of most towns, with rice fields and farmlands overgrown with weeds and cogon grass, and huddles and rows of houses padlocked and used as shelters from the sun and rain for domestic beasts.

Interestingly, there are towns in the six provinces that posted astronomical increase in registered voters in 2007.

Four (4) towns in Lanao del Sur increased their number of registered voters in 2007 at more than 100% from their 2004 figures. The table below illustrates the disparate figures and the percentages of increase:

Four (4) towns in Lanao del Sur	Registered voters in 2004	Registered voters in 2007	Increase (%)
1. Sultan Domalondong	1,465	3,983	171.88%
2. Binidayan	3,652	9,049	147.78%
3. Buadiposo-Buntong	4,300	9,477	120.40%
4. Madalum	3,432	7,042	105.19%

Twelve (12) towns in the province registered an incredible increase in the number of their registered voters at over 50%, seven (7) towns at more them 40%, five towns at over 30% and five (5) towns at above 20%.

Residents of Iligan City and Lanao del Norte padded the lists of voters in Lanao del Sur. In Kapai, a mountain town with an MNLF base in its jungle fastness, they numbered 357 spread over its three (3) barangays.[29]

The increase in Maguindanao is moderate, with the town of South Upi and Paglas registering an abnormal increment of 72.70% and 43.05%, respectively.

Five (5) towns in Shariff Kabungsuan made a remarkable increase in five towns, namely: Sultan Kudarat, 54.83%; Sultan Mastura, 35.85%; Datu Odin Sinsuat, 25.41%; Buldon, 24.32%; and Parang, 20.95%.

Sulu has eight (8) towns bearing an increase of more than 20% in 2007 over their figures in 2004. The table below shows the facts:

Eight (8) Sulu towns	Registered voters in 2004	Registered voters in 2007	Increase (%)
1. Luuk	17,179	23,355	35.95%
2. Kalingalan Kaluang	8,293	10,762	29,77%
3. Pandami	6,785	8,364	23.27%
4. Panglima Estino	4,700	5,765	22.66%
5. Patikul	18,180	22,343	22.90%
6. Maimbung	10,539	12,896	22.36%
7. Old Panamao	9,380	11,435	21.91%
8. Talipao	11,416	13,725	20.23%

Ironically, Basilan province registered a 20.95% in only one town, Maluso. In Tipo-Tipo and Tuburan, a dramatic decrease is registered at 54.94% and 69.27%, respectively. The precarious peace and order condition in these towns may account, among other reasons, for the decline of their voting populations from 19,772 in 2004 to 8,900 in 2007 and 15,079 in 2004 to 4,634 in 2007, respectively.

Tawi-Tawi, a comparatively peaceful province in Muslim Mindanao, posted a 20% increase or more in three (3) towns, namely: Turtle Islands, 33.08%; Cagayan de Tawi-Tawi, 23.98%; and South Ubian, 20.41%.

[29] The list is with the author, given by somebody in the know who wished to remain anonymous for security reasons.

A report on the 2007 elections by the Citizens' Caucus for Effective Governance (CCEG), dated July 2007[30] put out details on the extent of the padded lists of registered voters in the region, as follows:

1) Seventy-three of 102 ARMM towns posted 10 to 177% growth in number of voters from 2004 to 2007 although the annual population growth rate in the region is only 2.36 percent.

2) Three-hundred thousand multiple registrants in ARMM were discovered.

3) In some towns in Lanao del Sur, the number of registered voters more than doubled.

Recommendations

In conclusion, it may be asked: What do we do then to clean up the electoral process and serve the function of "election as one of the important and fundamental requisites of popular government?"[31]

The following proposals have been endorsed, namely:

1) Holding or advancing the election date for Muslim Mindanao to afford the COMELEC and its deputies, the media, the civic-minded citizenry and poll-watchers all their strengths and resources needed to safeguard the integrity of the electoral process.

   However, this proposal may be constitutionally objectionable. Section 5, Article XVIII of the Constitution enjoins synchronized National and Local Elections. In Osmeña vs COMELEC, G.R. No. 100318, July 30, 1991, the Supreme Court struck down as unconstitutional Republic Act No. 7056, which law provided for separate elections for national and local elective positions. As an administrative agency, COMELEC is limited to conducting and administering elections, not setting the date thereof which is a legislative power. It may postpone the election to some other date in some locality when circumstances make it difficult for COMELEC to hold a credible, peaceful and clean election thereat, in which case COMELEC has to declare a failure of election therein.

2) Automation of election from the registration of voters to the counting, canvassing and transmittal of votes.

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30 As stated.

31 U.S. v. Cueto, 38 Phil. 935.

3) Replacement of all local BOCs with officials from other regions.

4) Revamp COMELEC and the institution of a values education program for its officialdom.

5) Dismantling of political dynasties and their private armies.

6) Nationwide civic education program on the right of suffrage and responsible voting.

7) List of voters should be cleansed of double-registrants and ghost names.

8) Political parties should be allocated funds to level the playing field.

9) COMELEC should have the political will to enforce rules on spending and campaigning and penalize violators with disqualification, among others. It should also throw the book on its erring personnel and election offenders.

10) Deputization of the Marines for security.

Other proposals articulated are subsumed in the enumeration, except one – that is, praying to the Almighty to send down to the Filipino people and the Bangsa Moro one of the prophets to lead and deliver us from electoral evil-doers.

We realize indeed that reforming our electoral system will take a Sisyphus-like effort. But as Muslims we are not daunted. The Almighty teaches us the means to surmount any problem.

The Flunker: The Bar Examinations and the Miseducation of the Filipino Lawyer

Florin T. Hilbay[*]

When we came, they were like a priesthood
that had lost their faith and kept their jobs.
They stood in tedious embarrassment
before cold altars. But we turned away
from those altars, and found the mind's
opportunity in the heart's revenge.

- Roberto Mangabeira Unger

In the lobby of the U.P. College of Law is an inscription of the law school's mission statement, taken from a speech delivered by United States Supreme Court Justice Oliver Wendell Holmes, Jr. where he says: "The business of a law school is not sufficiently described when you merely say that it is to teach law and make lawyers; it is to teach law in the grand manner, and to make great lawyers."[1] I take it that the Supreme Court and law schools in any country would consider it a decent, if possibly a bit presumptuous, statement of the general goal of legal education. Of course, the terms "great" and "grand" are what is commonly referred to as open-textured words, susceptible to a multitude of meanings and pliant to the demands of the interpreter. Nonetheless, many would agree that they connote characteristics worth embracing as institutional objectives. Indeed, it could well be the very vagueness of such terms that qualify them for, more or less, universal acclaim. At the same time, it is precisely such quality that makes any description of greatness and grandeur an ineluctably normative enterprise.

My task in this Essay is to present a set of normative arguments favoring an institutional arrangement for law schools that focuses on two specific proposals for

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[*] Assistant Professor, University of the Philippines, College of Law. A.B., Ll.B., Ll.M (Yale Law School). Ranked 1st in the 1999 Bar Examinations.

[1] Oliver Wendell Holmes, *The Use Of Law Schools* (Speech delivered before the Harvard Law School Association at Cambridge, Mass., 5 November 1886).

reforming the bar examinations in this country: first, the abolition of the bar topnotcher tradition, and, second, the substantial reduction of the number of bar examination subjects. These are proposals that require no major changes in the way the Supreme Court conducts the bar examinations (and would even reduce the expense in taking and supervising them) but which, as I argue below, will transform the conditions (and therefore the quality) of teaching and learning in law schools towards the conception of law teaching and lawyering that could possibly comply with the Holmesian ideal. They are necessary, though non-sufficient, conditions. These proposals constitute a pair, their effects supplementing each other. The more general aim is to show that radical results need not always be accompanied by massive changes.

The Spectacle

The bar examinations are a rite of passage to the business monopoly that is the legal profession. Every September, the public is treated to a spectacle of thousands of law graduates from all over the country trooping to a test center to try their skills—and luck—at the licensure examination conducted by the Supreme Court. It has become a unique, national cultural experience for both spectator and gladiator. For four Sundays of that month, from 8 a.m. to 5 p.m., prospective lawyers take written examinations in Political Law, Labor Law, Civil Law, Taxation, Commercial Law, Criminal Law, Remedial Law, and Legal Ethics.[2] Six months later, the Supreme Court announces the list of successful examinees that ranges between fifteen and forty percent of all test-takers. The tradition continues for the next few days when the bar topnotchers get interviewed and asked about their plans for the future and how they could solve the problems of the nation. Meanwhile, it is parties galore for everyone who passed, while those unfortunate not to make the grade fade into sadness and think through the possibility of taking another set of exams the next September.

I would like to subject this tradition—the bar examinations, the institutional practices that surround it, and the myth system it has engendered—to a discourse of consequences. It should be a matter of special interest that this set of exams is viewed as some sort of neutral space for testing the competence of law students preparatory to their "practice of law," whatever that may mean.[3] It is not. The trope that the bar examinations function as a filtering mechanism that weeds out those competent to practice from those who are not, and no more than that, suffers from severe under-determination. While the bar examinations, especially considering the low passing rates at the national level, naturally have the effect of reducing the number of people qualified to enter the legal profession, they also have collateral effects on many other aspects of law and lawyering, from the kind of law schools that are able to thrive in the cut-throat competition over tuition money to the character of legal reasoning that lawyers employ in their trade. Furthermore, the saliency of

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2 Rules Of Court, Rule 138, sec. 9.

3 *See* Cayetano v. Monsod, G.R. No.100113, September 3, 1991, 201 S.C.R.A. 210 (1991).

the bar examinations in law schools essentially define what it means to practice law and be a lawyer to the extent that they condition the law students, the law faculty, and the society at large to follow a basket of expectations that are not only misdescriptive of the very rhetoric employed by the profession to describe its social tasks but are also ill-adapted for the politics of transformation that progressive problem solving requires.

The Miseducation Of The Bar

The authority of the Supreme Court to regulate entry (and exit) to the legal profession rests on innocuous-sounding procedural control over "the admission to the practice of law."[4] No applicant shall be admitted to the bar examinations unless she has satisfactorily completed the following courses in a law school or university duly recognized by the government: civil law, commercial law, remedial law, criminal law, public and private international law, political law, labor and social legislation, medical jurisprudence, taxation and legal ethics.[5] Any person heretofore duly admitted as a member of the bar, or hereafter admitted as such in accordance with the provisions of this rule, and who is in good and regular standing, is entitled to practice law.[6] This procedural control over the bar examinations, though superficially operating as a quality control mechanism, effectively dictates the occupation of law teachers and students in relation to what to teach, how to teach, and how to study law. I am not making a doctrinal argument that this authority intrudes into the academic freedom of law schools; instead, I am putting stress on this authority as the dominant constructor of the Filipino legal consciousness.

First. The number of bar examination subjects is simply staggering. This is worsened by the fact that, in reality, each bar examination subject is a conglomeration of related courses. Political law is not simply the first year, first semester course described in the law school curriculum; it is actually political law, constitutional law, administrative law, public officers & election law, municipal corporations law, and international law. Civil law covers all areas of the Spanish Civil Code—persons and family relations, property, succession, obligations & contracts, special contracts—and in some cases, even special commercial laws. Remedial law covers civil and criminal procedure, evidence, and special proceedings.

This is a shotgun approach to legal knowledge, requiring as a measure of legal competence that the law student study almost all the traditional areas of law for purposes of the bar, with the hope that they will become useful to all lawyers in whatever enterprise of law they engage in. While a broad perspective of law is, of course, desirable, the fact that this policing of legal knowledge is done through the bar examinations means that the students' grasp of the constellation of legal materials

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4 Const., Art.VIII, sec. 5, par.5.

5 Rules Of Court, Rule 138, sec. 5.

6 Rules Of Court, Rule 138, Sec. 1.

will inevitably be superficial, limited to the memorization of trite canons. This bar-oriented approach to legal learning inhibits the study of the political consequences of legal materials; and ultimately, what students learn is knowledge in parcels, making them unaware of how what they imbibe connects to larger patterns in the movements of ideas.

The number of bar examination subjects required by the Supreme Court has a direct impact on the flexibility of all law schools in matters of curriculum design and on the kinds of law teachers demanded by the system. Because law schools are left with no choice but to comply, their curriculum is reduced to the very same subjects required to pass the licensure examinations, with a sprinkling here and there of some elective courses to qualify for a minimal standard of scholarliness. There is an obvious correlation between what teachers and law students can teach and learn—including how teachers teach and students learn—and the number of bar subjects required by the Supreme Court. Every bar subject is a mandatory subject, even if only because law schools, both public and private, cannot afford not to teach such subjects that might be asked in the bar examinations, lest they end up bearing the brunt of complaints from law students, parents, and relatives for not teaching such courses and depriving them of the opportunity to pass the bar examinations.[7]

The result is that law schools end up tying both the student and the law teacher to the constraints and demands of these examinations. Legal education becomes studying in order to pass the bar, and law schools, "bar-type." To give an example, the first year curriculum in the University of the Philippines tracks almost exactly the requirements of the bar examinations: for the first semester—political law, persons & family relations, legal research, legal method, and criminal law; for the second semester—constitutional law, obligations & contracts, criminal law, legal theory, and legal ethics. Except for legal method (or statutory and constitutional interpretation) and legal theory, which are considered minor subjects (for purposes of the bar),[8] all these subjects are bar examination courses. The standing policy in the U.P. College of Law, an institution that claims to have a progressive tradition, is to prohibit first year law students from taking elective courses. The story is basically the same in the sophomore year.

The sheer number of bar examination subjects means that, for the most part, the four years of legal education will be devoted to preparations for the bar examinations, the first three years being the initial encounter with the bar subjects, and the last year being spent on the bar review itself. Later on, I will discuss the other pernicious effect of this problem—the quality of teaching and learning in law schools. At present, the point I would like to make is simply that the kind of course offerings law schools provide is affected by the bar examinations because these

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7 Of course, private law schools have little incentive to complain. Most of them measure their tuition fee on a *per unit* basis.

8 As anyone who has studied abroad will confirm, these two subjects are probably the most important and deeply interesting of the courses offered in law schools.

subjects crowd out other possible course offerings, especially those unrelated to the bar, such as: how law specifically operates in the provinces and cities where the law schools are situated, distributive justice, reproductive rights, political action and law, comparative legal studies, postcolonial legal theory, the impact of organized religion and other forms of god-belief on Philippine society, etc. The requirements of the bar examinations are a direct command for law schools to become bar-oriented, preventing them from using law as a means of problematizing the larger questions law students and law teachers face in a very complex legal environment operating in a society conditioned by massive contingencies. One should realize that every unit allotted for a bar subject is time away from the study of another subject, one which, though not necessarily relevant for the bar examinations, might actually better prepare the law student for the kind of lawyering present society demands of her and which she might, *ceteris paribus,* actually choose. The present rule mandating the study of so many bar examination subjects effectively transforms intelligent young Filipinos into zombies walking along the corridors of law schools memorizing voluminous texts in order to pass bar examination subjects. It means that, for the most part, these people will spend five years of their lives just preparing for a test of minimum skills.

Second. The crowding out by bar examination subjects of other possible course offerings explains to a large extent the continuing atheoretical and un-empirical nature of legal education in the Philippines. I am referring here to the elective courses that usually comprise the non-bar review subjects that could be taken up in the second, third, and fourth year of law school. One can glance at the curriculum of any random law school inside and outside Metro Manila and immediately notice the striking identity of these curricula—all of them are tailored after the bar examinations—and the dearth of alternative courses that could supplement the highly dogmatic teaching in the core subjects.

The lack of focus on elective subjects, where "law and –courses" may be taught and learned, is evidence of the heavy reliance of the law schools on the bar examinations as the full measure of academic competence of students and professors. This is in stark contrast to the kind of legal education in many other law schools outside the country, where the study of law is dedicated to the teaching of a host of elective and/or seminar courses, with the core subjects as introductory materials that allow students a working knowledge of mainstream legalese and policy issues. In Yale, for example, only the first semester, first year courses are required courses. After that semester, all other courses, including some subjects covered by the bar examinations, are offered as electives. In fact, bar examinations are purely personal undertakings of law students because many American law schools do not even care whether their graduates take the bar examinations or simply assume that they are more than prepared for the requirements of the bar examinations after having gone through a much more intellectually challenging law school experience. Here at home, the highlight of the first semester is the so-called bar operations, where lots of time, money, and parochial pride of the different law school communities are spent on ensuring their law students do well in the bar examinations.

The presence of these elective courses is crucial to providing both teachers and students a deeper understanding of fundamental legal issues and processes insofar as they allow opportunities for an out-of-the-box approach to the study of law, a taste of the avant-garde, and a chance to be politically relevant. Law in the second half of the twentieth century has become inter-disciplinary and empirical, relying on many different areas of knowledge as basis for viewing legal relations and providing legal solutions. The old scholars known for specializing in the traditional categories of law—constitution, procedure, torts, contracts, etc.—are now being replaced by legal scholars who simultaneously study the same subjects from the perspective of history, economics, sociology, psychology, literature, anthropology, etc. Modern legal studies have therefore turned away from the dry formalisms of doctrine or the mindless study of rules and towards inter-disciplinarity, where law becomes indebted to the insights of the other sciences. This trend past formalist legal studies has allowed legal education to keep abreast and take advantage of advances in other fields of knowledge, providing the study of law a constant stream of fresh perspectives.

Legal education in the Philippines, on the other hand, has retained the vestiges of its Spanish colonial heritage—doctrinal, memory-based, hierarchical. This is evident in the outlines of law teachers and the kinds of books and articles, if any, that they publish. While three centuries of colonial conditioning may have something to do with this, a large part of the responsibility can be attributed to the failure to reform the bar examinations to conform with the demands of modern legal education. So long as the bar examinations remain a brooding omnipresence in the law schools, law teaching will continue to be tailored towards making law students simply passing the bar. Those who teach the craft will limit themselves to cases and codals, divorcing law from the task of social criticism and transformative politics; they will continue to demand the memorization of doctrine and trite canons, with recitation cards and the "clean table approach" as their tools of enforcement; they will impose hierarchy by continually perverting the method of Socrates—relishing the emptiness of such titles of worship like "sir," "madam," or "the professor"—and promoting the failed projects of the old system while paying lip service to the rule of law. So long as legal education remains hostage to the bar examinations, the old scholars will remain collators of received knowledge, updating their old files with new cases and codals, and having little incentive to create new understandings and challenge existing settlements. And the young ones will follow in their footsteps.

Third. The structure of the bar examinations assumes an overwhelming bias in favor of a specific kind of competence—the jack of all trade, master of none, doctrinal lawyer. What is hidden in, and thus an assumption of, the bar examination system is the answer to the central question: what kind of skill is being tested and therefore incentivized? Viewing the publicity generated by this annual event, one is tempted to think that the bar examinations are set apart from other national licensure exams (like that for driving) or that it is qualitatively different from, say, the national medical exams. But they really are not. The bar examinations are essentially exercises in memory retrieval even if they are essay-type and requiring, superficially, some

amount of reasoning. They are also about good and fast handwriting, intelligent test-taking, and massive doses of fortuity.

The bar examinations are a test of minimum skills—a mix of doctrinal manipulation and memory work—and what they examine is whether a law graduate is able to hurdle a threshold of competence (for which no objective test is possible) which, when surpassed, enables the new lawyer to use and develop her tools as a starting professional. But it doesn't say anything more about the test-taker, or at least, nothing much. This is because the bar examinations are nothing more than a national quiz bee on statutes and decided cases.

This bias in favor of legal omniscience goes against the grain of specialization. Law is such a diverse field that it is impossible to expect everyone to be well versed even in just some of the different major areas. Compelling law students to study a wide array of the categories of law prevents them from picking and choosing those areas of law that really interest them. Thus, instead of law students being able to design their future professional lives in accordance with the kind of vision they have for themselves and use they want to make of whatever legal skills they have acquired, they are homogenized into bar junkies for at least five years of their lives, the pride of their learning being their ability to rattle off chunks upon chunks of statutory provisions and doctrines off the top of their heads. Homogenized legal education means that law schools will churn out thousands of students with just passable knowledge of pre-selected categories of law, and with little capacity to engage in critical argumentation or advocacy. The unbelievable amount of memory work required to study bar examination subjects means that the dominant legal structure is burned into the consciousness of law students, immersing them in the system and providing them little opportunities to question its assumptions.

The bar examinations ensure that legal education will be training for the mainstream and its products the unwitting tools of present social arrangements, having minds full of rules and eyes shrouded by doctrine. Legal education today is training for soldiery; it is the systematic disempowerment of otherwise intelligent human beings for the task of social transformation and committed political action. It is a tool that disables law students for policymaking, condemning them to commodification and transforming their purpose from agents of justice to merchants of legal service.

There are a lot of areas of law that could interest different law students and, hopefully, teachers as well—copyleft, corruption and law, constitutional reform, identity politics, cyberlaw, statutory reform, socialism, technology and law, evolution and law, barangay justice, environmental law, indigenous law, culture and law, etc.—and allow them to develop political commitments and a concrete sense of justice, values that are very difficult to instill if law schools are forced into teaching mostly bar subjects. In some law schools outside the country, for example, students are allowed, every term, to propose law-related subjects through credited "reading groups"

supervised by law professors the students themselves have selected. These sessions, along with elective courses, are actually forums where students and faculty of similar interest can build lasting communities that could form the basis of more organized and sustained advocacies. These, in addition to the elective courses, provide both students and teachers avenues to tinker with different specialized fields and develop the scholarly outlook essential to the development of a normative perspective of law.

The bar examinations are also one of the reasons why law schools have not developed into centers for promoting local justice. The "national" character of the bar examinations and the amount of everyday attention they require also mean that the productive juices of law teachers and students will be difficult to channel towards engaging more domestic concerns like local crime management, certain problems with local ordinances, local politics, environmental management, zoning regulations, local housing problems, etc. The bar-oriented structure of law schools guarantee that the high priests of the legal system will remain encamped in the law libraries, spending years of their lives in a state of social detachment, insensitive to the outrage of the moment.

Fourth. It is easy to consider the Supreme Court's practice of announcing bar topnotchers as a harmless tradition, with special note on the fact that topnotchers, in general, seem to have had more impact—good and bad—than others in their professional as well as public lives. But even if doing very well in the bar examinations signal strong potential for success, however defined, I wonder what benefit it would do to the public if it knew such statistics other than to satisfy its craving for another bit of fact; for this fact comes at a steep price for legal education. The topnotcher tradition is responsible for the pervasive public misconception that bar examination performance is a, if not the, polestar of legal excellence. Indeed, many lawyers and law students believe that the measure of a law school's academic strength is in its ability to land bar topnotchers along with a high passing average for all others who do not make it to the magic ten.

I am highlighting an important relationship between the bar examinations (as well as other entry-level examinations) and this fixation with "going beyond passing the bar." This fixation is worth interrogating not simply for its novelty but also, more importantly, because of its ability to re-define the purpose of the bar examinations. The argument to be made is that there is a conceptual tension in having a qualifying test that honors topnotchers. This tension is intense considering that lawyering is such a diverse field and the opportunities for applying as well as discovering legal know-how is almost infinite. The bar examinations only serve to qualify the new lawyer to do anything law-related, from practicing the many areas of law to teaching, judging, administering. This makes it all the more surprising why an entry-level examination for such a diverse field as law is in the business of creating a public hierarchy among all those who passed. This matter has nothing to do with some demand for egalitarianism; it has everything to do with relieving the tension

between a test of minimum skills and the bar topnotcher tradition. The result of this tension is a bar examinations scheme that suffers from an identity crisis—it does not know what it's really for. On the one hand, a licensure exam is one that allows equal entry for the qualified; the other, it is a test of some vague potential. The highlighting of this identity crisis in the bar examinations provides a powerful insight into the incentive mechanisms that drive the modern day law school.

The bar topnotcher is a powerful symbol, serving as a proxy for academic achievement and an indicium of professional success. It is a symbol that creeps into the law school, entering the classroom and inhabiting the minds of teachers and students. It is the annual dream of law school deans and alumni to produce this law student *sui generis*—so much so that they even give monetary rewards and bar review allowances for potentials and achievers. The products are law schools that are not only compelled to teach bar examination subjects but likewise motivated towards teaching in a way that will create future bar topnotchers.

The unfortunate consequence is that the teacher's outline will be exhaustive, covering all cases and statutes required by the bar examinations; classroom interaction will be about *re*-citations, the regurgitation of decided cases and the chanting of memorized information; the prized student possessions will be the case digests, the codals, and, of course, the ubiquitous highlighters; and the greatest skill of both teacher and student: the power to abuse logic. The students and teachers, instead of looking at their society and how law is able to affect everyday lives or how certain institutions have captured the power to create legal meaning, direct their eyes on the SCRA, searching for doctrinal consistency or distinction, looking for meaning in commas and conjunctives. The students will not read the newspapers and will find no time for science, philosophy or art, knowing fully well that their daily existence depends solely on surviving their teachers' attacks, those psychological harms that could only be parried by mouthing doctrine. This is nothing less than training for passivity in the face of atrocity. Legal learning as training for doctrine means that technicians of the legal system, the so-called practitioners, will thrive in law schools, teaching their craft—the ability to grease the system—as the consummate legal skill, and the masters of our excuse for a legal academy, the bar reviewers.

The Re-Creation of Law Schools

Now for the practical side. I have stated earlier that legal reform need not be expensive; does it require a lot of administrative creativity. In fact, the proposals that I offer here are discounting measures, requiring only open-mindedness and the political will to improve an otherwise perverse situation. They also do not come at a price, at least for the Supreme Court, and can even be viewed as cost-reduction methods.

The Supreme Court should reduce the number of bar examination subjects by one-half, leaving political law, remedial law, civil law, and ethics as the only bar

subjects. It could further lessen the load of bar examinees by limiting the scope of these bar examination subjects. For example, political law may be limited to the first year courses in constitutional law. Civil law could further be reduced to persons & family relations and obligations & contracts. Remedial law may be limited to the basics of civil and criminal procedure.

In addition, the Supreme Court should do away with the practice of announcing bar topnotchers. All the Court needs to do is to publish, without distinction, the names of those who passed the bar exams. It may, for purposes of informing every bar examinee of how she fared in the different subjects, send a list of the subjects where she passed, without informing her of the actual scores she obtained. If the Court does not look for bar topnochers, no one will be found. A "pass or fail" system is sufficient enough for purposes of communicating to the public who may practice and who may not.

It should be pointed out that the reduction of the bar examination subjects does not necessarily result in an easier bar examination or a higher national passing average. Indeed, if the Court is truly determined to measure competence through the bar examinations, it could easily make the reduced bar examinations more intellectually challenging, if not politically relevant, and there is an infinite number of ways to do this. Even then, however, that the number of bar examination subjects will have been reduced will not diminish the improvement that can be made possible through the greater autonomy of law schools to design a distinctive curriculum and a license for law teachers to move away from the traditional law subjects.

These minor re-calibrations are bound to alter the ecology of the law school. It will lead to a diversification of the curriculum of the different law schools, because then they would be able to offer different subjects depending on the kinds of academic and political interests of every law school administration. It would be a chance for these institutions to drop the "bar review center" paradigm and develop more socially relevant institutional identities. Law schools will then be known not simply for their ability to produce bar junkies but, more importantly, for the kind of law that they teach.

We can also expect, as a consequence of these changes, a radical transformation in the way law is taught and thought about, a shift in the mode of production of legal know-how. The present law teacher, stuck with the bar examinations, has his eyes fixed on doctrines and areas of law that constitute fertile ground for bar examination questions. Take away the demands of the bar examinations and he will be left without a foundation, and possibly stunned by the immensity of the creative space he now has. He will be nudged into reorganizing his syllabus, sheepishly inserting materials he heretofore considered esoteric, unnatural, and probably even radical. His recitation cards will now become an embarrassment, a typewriter in the age of computers. He might even rethink the need for recitations; after all, what is the point in relying on natural memory in the era of flash disks and laptop computers?

The needed skills of the new regime will be creativity and the ability to access needed information. Law will then be about conversations, and no longer re-citations. Such an altered mode of information exchange between students and faculty has a strong potential for reducing illegitimate hierarchies, the traditional source of injustice in law schools.

The enhanced freedom in law schools means they will be able to design their curriculum along inter-disciplinary lines, that they can now hire even non-lawyers to teach courses that heavily affect the operation of law or provide important insights on its development. There will probably be a greater demand for lawyers teaching law to engage in scholarly studies and concentrate on research, paving the way for the emergence of a legal academy conversant in the language of the social and physical sciences, maybe even driven to creativity by a "publish or perish" culture. It will open the possibility for a legal academy composed of human beings fixated with the life of the mind and how such form of life spills over to others in the larger community.

The students, freed from the task of memorizing, can now immerse themselves in the social projects of the law schools, giving them the chance to theorize the relevance of what they are studying to both the practical, immediate concerns of their community and the larger task of nation-building. They can now start delving deeper into their special interests whether it is any of the various kinds of practice, academic work, adjudication, or public governance. They can now participate in a world of law that is grounded, engaging, intellectually fulfilling, and socially relevant. And hopefully, apart from just learning the techniques of law, they will likewise develop a sense of justice.

Intellectual Property Rights Enforcement Issues for the Judiciary*

*Reynaldo B. Daway***

I. Brief Introduction and Overview on the Topics

This paper deals with six (6) issues on Intellectual Property or IP rights enforcement for judges and public prosecutors. These topics are: 1) Handling IP Cases: Is there a need for specialization by the courts?; 2) Collection Societies, Copyright Licensing and Royalty Disputes: Should governments become involved?; 3) Search and Seizure Motions and Orders; 4) Some approaches for deterrence: Judicial Perspective on Appropriate Criminal Sentencing; 5) Handling IP Cases: Case studies/discussions; and 6) Survey of Recent Significant Decisions on IP Related Issues.

Because the topics are broad in scope and given time and space constraints, an exhaustive treatment of the topics is not possible. Hence, this paper will focus principally on the criminal aspect of IPR enforcement, including the civil aspect thereof only when necessary, from the point of view of a judge. This paper will deal in particular with trademark counterfeiting and copyright piracy since many jurisdictions do not have criminal statutes on patents.[1]

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* Paper presented on six topics in Sessions 3, 4, 6, 8, 9 and 13 during the ASEAN-USPTO Seminar on Intellectual Property Rights Enforcement for the Judiciary and Public Prosecutors, which was held on 6 - 8 June 2007 at the Grand Hyatt Erawan Hotel, Bangkok, THAILAND. The author made his verbal presentation thereon.

** Presiding Judge, Regional Trial Court (RTC), Branch 90, Quezon City. Judge Daway is a C.P.A. - Lawyer, an RTC Judge since 1988, and a Special IP Court Judge for Quezon City from 1995 up to the present time. He obtained his B.S.C. degree, major in accounting and auditing, *magna cum laude*, from the San Beda College, Manila, in 1972. He obtained his law degree from the University of the Philippines, in 1977. He finished a management course at the Yale University, New Haven, Connecticut, U.S.A., in 1980. He is a member of the Sub-Committee on Special Rules for Special Commercial Courts that include IP courts, created by the Philippine Supreme Court. He attended, *as participant and/or speaker,* various IP seminars, conferences and/or short courses that were held in Australia, Europe, North America, South America and in other parts of Asia. He also authored the following papers: *Training of Judges in the Philippines,* PHIL. JUDGES ASSOCIATION JOURNAL, Jan. - June 2003 issue; *In a Nutshell, Enforcement of Intellectual Property Rights Particularly in Cases Filed in the Philippine Courts*, http://www.ecap-project.org/fileadmin/ecapII/pdf/en/activities/regional/20051201*ip/Judge Reynaldo and Mr Jose presentation.pdf,* among others.

1 This information was given during the Philippine Intellectual Property Crimes Seminar organized by the United States Department of Justice which was held on 25 - 27 April 2001 at the Holiday Inn, Manila. In the Philippines, there is no criminal action for infringement of patents, but there is a criminal action for repetition of infringement of a patent that is punishable under Section 84 of Republic Act No. 8293 (1997) otherwise known as the Intellectual Property Code of the Philippines.

To facilitate discussion and to place the topics in a clearer perspective, allow me to present a brief definition of the terms "intellectual property," "intellectual property rights," "copyrights and trademarks," "trademark counterfeiting," "copyright piracy," and the like.

The term "**intellectual property**" or **IP** refers to products and information that derive most of their value from the creative and intellectual ideas that led to their creation. They are often intangible in nature, but usually contained in a tangible and fixed medium - paper, CD, computer chip, and the like. "**Intellectual Property Rights**" or **IPR** are rights bestowed on owners of ideas, inventions and creative expressions so that they will have the same legal status as tangible property. The rights are given to IPR owners to exclude others from access to or use of their property. "**Trademark**" is a distinctive logo, mark, sign, symbol, emblem, word or phrase which a manufacturer or merchant affixes to the goods or services he produces so that they may be identified and distinguished from products and services sold by others. "**Trademark counterfeiting**" occurs when an infringer not only reproduces and distributes infringing merchandise, but also duplicates the genuine packaging of the product. "**Copyright**" is a right granted by statute to the author or originator of certain literary or artistic productions, whereby as a result of which he is vested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them. "**Copyright piracy**" is the unauthorized reproduction of an existing work or distribution of an infringing copy, with the original packaging or graphics of the genuine product not being duplicated. "**Infringer**" is a person who infringes on the rights of a right holder by stealing, selling and/or distributing the right holder's property without permission from the right holder. "**Right holder**" is a person or entity who has an exclusive right to a piece of intellectual property. "**Specialized IP court**" is a permanently organized body with independent judicial powers defined by law, consisting of one or more judges who sit to adjudicate disputes and administer justice in the IP field."[2]

The elements of trademark counterfeiting[3] are: 1) the defendant acted intentionally; 2) the defendant trafficked (or attempted to traffic) in goods or services; 3) the defendant used a "counterfeit mark" on or in connection with such goods or services; 4) the defendant knew that the mark was counterfeit; 5) the mark was identical, or substantially indistinguishable from a mark in use and registered for those goods or services; and 6) the use of the mark is likely to cause mistake, or to deceive.

The exclusive rights of a copyright holder involve reproduction, distribution, public display, public performance and derivative works. Criminal law on copyright piracy is primarily concerned with reproduction and distribution.[4]

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[2] Lecture notes distributed by the U.S. Department of Justice, Office of Overseas Prosecutorial Department, Assistance and Training in 2001.

[3] The U.S., for instance, punishes trademark counterfeiting (18 U.S.Code Section 2320).

[4] *See* supra note 2

II. Handling IP Cases: is there a Need for Specialization by the Courts?

Brief Background

During the ASEAN regional seminar held in 1995 for judges and other IP participants[5] the need for specialization by courts was highlighted with the then-recent designation at the time by the Philippine Supreme Court of IP Courts[6] in various parts of the Philippines specializing in the expeditious disposition of cases involving IPR in the country. The specialized IP courts in France and Germany and the bill then pending before the Thai Parliament for the establishment of a specialized IP court in that country were discussed.[7]

Shortly after, in 1996, Thailand established its specialized IP court, the Central Intellectual Property and International Trade Court (CIPITC), which has its own rules of procedure.[8] Singapore subsequently developed a specialized tribunal that exclusively hears IP cases.[9] Indonesia, Malaysia and other ASEAN countries are likewise exploring and contemplating the potentials of establishing their own specialized IP courts.[10]

During the International Conference on Judicial Capacity Regarding Intellectual Property - Enforcement and Dispute Settlement, held in Washington, D.C., U.S.A. on 12 – 13 September 2002 for judges and other participants,[11] the need for the establishment of specialized IP courts was extensively discussed. The Philippines maintained the position that the establishment of specialized IP courts has benefited the country.

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5 The ASEAN Regional Symposium on Enforcement of Industrial Property Rights held on 23 - 25 October 1995 at the New World Hotel in Makati.

6 Philippine Supreme Court (S.C.) Administrative Order No. 113 - 95 dated 2 October 1995 as amended by S.C. Administrative Order No. 104 - 96 dated 21 October 1996. After a survey was conducted in 2002, the handling of IP cases is now given to Special Commercial Court judges who also hear other types of commercial cases.

7 Rapporteur's Report for 23 October 1995, ASEAN Regional Symposium on Enforcement of Industrial Property Rights held on 23 - 25 October 1995.

8 Thailand's Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539(1996) and Rules for Intellectual Property and International Trade Cases B.E. 2540 (1997).

9 Singapore's Copyright Tribunal.

10 This information was given during the Philippine delegation's Study Visit to the CIPITC and the Thai Supreme Court and EU-ASEAN Symposium on IP Enforcement by Specialized Courts held on 28 November – 2 December 2005 in Bangkok, Thailand.

11 The author presented a paper on the training of specialized IP court judges in the Philippines and made a verbal presentation thereon on 12 September 2002 at the George Washington University, Washington, D.C.

Benefits of Having Specialized IP Courts; Questions to be Addressed

The benefits of having specialized IP courts are:

A. Expertise

- *Specialist Judges may produce more reasoned and practical decisions owing to their experience in IP issues.* The fact that the specialist judge is familiar with the particular area of law tends to enable the court, at an early stage, through case management at a directions hearing, to ensure that only the core issues are pursued and, if necessary, that discovery is tailored to the particular case. The judge may, in the more informal atmosphere of this particular process, express some preliminary views about the overall merits of the case, and this may point the way to a settlement or a reduction in the number of matters at issue.

- *Consistency of legal doctrine in the IP field.* This comprehensive understanding of and familiarity with the surrounding case material can be expected to provide greater consistency in the decision-making process and should bring with it the advantage to the litigants of a more predictable outcome of the proceedings. Consistency in decision-making is of extreme importance. Inconsistency in decision-making leads to a lack of confidence in the system and court authority will diminish.

- IP courts are more able to keep up with new IP issues and laws.

- Specific training in IP issues is more attainable as expertise and resources are concentrated within the judiciary.

- *Creation of a corpus of specialist advocates.* The creation of a specialist court, provided that it has a sufficient volume of work, can be expected to be accompanied by the development of a body of specialist advocates. They will either be in existence at the time when the court is created or they can be expected to evolve to meet the needs of the court.

B. Effectiveness

- *Quicker and more effective decision-making process.* The time that otherwise would be lost in dealing with aspects of the case in order to educate the judge will be saved, thereby shortening hearings and reducing costs for litigants, courts and administrative staff. Specialization theoretically reduces delay because judges become familiar with the case patterns and the legal issues raised by the cases before them. Judges who hear the same types of cases

regularly come to recognize fact patterns and issues more quickly and accurately than those who encounter cases only occasionally. As a result, they can control the lawyers more easily, see possibilities for settlement, and write better decisions. Their increased opportunity to see trends may also put them in a better position than judges who see a mix of cases to develop the law to suit evolving conditions.

- Better understanding of IP issues by judges.

- *Establishment of rules and procedures that are by nature unique to IP issues*, i. e. appointing associate judges or assessors to assist and provide technical knowledge.

- *Reduced risk of judicial errors*, which contributes to the effectiveness of the administration of justice.

- *Reduced caseload.* Specialist courts reduce the caseload of overburdened generalist courts. If a rash of cases in a specialist field emerges at a particular time, or if, there is new legislation in the particular field requiring thorough interpretation by the court, then the specialist court will relieve the general court of this burden and thereby ensure that the stream of litigation is not impeded.

C. Efficiency

- IP courts are more likely to manage the challenges of complex IP cases more efficiently and more precisely.

- *Appeals may be made directly to the highest court*, bypassing the court of appeal.

- More cost-effective due to efficiency and faster adjudication of cases.

- *As many IP rights have acquired a multinational aspect, judicial cognizance of judicial findings in other jurisdictions may be recognized and relied on* by specialized IP courts while generally not permitted in general courts.

- *Court proceedings may be shortened as exhibits and experts may be unnecessary.*

It should be noted that there are also likely to be benefits to the jurisdictions that create specialized IP courts as well as to their litigants. For example, an increase in foreign direct investment may be realized by countries that created specialized IP courts. Additionally, litigation costs for plaintiffs and defendants may decrease as exhibits and experts needed to establish facts in general courts may be unnecessary.[12]

[12] International Bar Association's Intellectual Property and Entertainment Committee's International Survey of Specialized Intellectual Property Courts and Tribunals, London (2005).

There are, however, certain matters to be considered by a country before deciding to establish its own specialized IP courts. Studies show that current deficiencies can be remedied and that a thriving and properly functioning specialized IP court starts with substantial reform of the whole legal and procedural system in a given court system. These questions or issues are:

- Do problems in the particular area disclose a genuine need for a specialized court? How have the problems been dealt with before the courts?
- Does the current court system fail to provide an effective enforcement mechanism for IP rights holders? If so, what are the concerns with the current system?
- Has there been any important legislation that has prompted or will prompt an increase in the number of cases being litigated in this area over a period of time?
- Are the general courts experiencing a backlog in regard to this particular area of law?
- Is the volume or potential volume of work in this area sufficient to justify the creation of a specialized court?
- How will the centralization of a specialized court affect the practicalities of litigation?
- How will the creation of a specialized court in this area affect the quality of justice in general courts?[13]

Need For Specialized IP Courts

As global trade increases, the importance of protecting IP rights has received heightened recognition. IP is a valuable asset, but protection is not sufficient without adequate and effective enforcement. Thus, the major problem faced by IP rights holders is in the realm of effectively and efficiently enforcing their rights against commercial-scale infringement. IP rights holders are concerned with speedy and cost-effective mechanisms for enforcement, timeliness of decisions, predictability of adjudication as well as unification and consistency of IP legal doctrines, and precision in decision-making. While the WIPO treaties[14] and the TRIPS Agreement do not require creation of IP specialized courts, many countries have now created them as the most appropriate way to implement their obligations under international IP agreements. A survey conducted by the International Bar Association shows that: 1) four countries have specialized courts that hear IP cases exclusively (Thailand's CIPITC is included in this classification, together with specialized courts in Turkey, the United Kingdom, Korea, and recently, Japan);[15] 2) eight countries have specialized tribunals that hear IP cases exclusively, and the Philippines and Singapore are included in this classification; 3) 29 countries have general jurisdiction courts with IP specialized divisions or specialist judges; 4) six countries have commercial courts/divisions that hear IP cases, and Indonesia is included in this classification;

[13] *Id.*

[14] WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty.

5) 13 countries have appellate courts that hear IP cases exclusively together with other types of appeals; and 6) 11 countries have explored or announced their intention to establish IP specialized courts, and Malaysia and Vietnam are included in this classification. There thus appears to be a clear global trend towards the creation or establishment of specialized IP courts. Countries realize that their economies will benefit in the form of increases in foreign direct investment, among other advantages, with the establishment of specialized IP courts. They likewise hope that their courts will, consequently, become more efficient in the administration of justice.[16]

III. Collection Societies, Copyright Licensing and Royalty Disputes: Should Governments Become Involved?

Overview

It all usually originates with a person composing a song. The composer subsequently approaches a lawyer who draws up the necessary contracts. A publishing agreement can be executed with a publisher. Licensing agreements which may include the mechanical reproduction license, synchronization license, print license, and grand rights (dramatic performances) license may also be executed. A deed of assignment over the performance right and the other rights over the musical work may be executed with a society of composers, artists and/or writers. The bottom line for the licensor is that he or she assigns less of his or her rights for the most money and for the licensee, the most rights for the longest term for the least cost.[17]

The Philippine experience

In the Philippines, local composers, authors and publishers oftentimes designate a society[18] of artists, writers, composers and/or publishers to enforce their copyright or economic rights and moral rights.[19] Under reciprocal representation agreements, the society also represents foreign societies[20] and the members thereof to institute and prosecute actions and to retain and recover damages for infringement

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15 This information was given in the lecture notes distributed during the Western Hemisphere and Asia Pacific Conference on Optical Media Piracy held on 21 – 25 August, 2006 at the Novotel Hotel in Santiago, Chile.

16 This information was given in the lecture notes distributed during the seminar on "Copyright in the Knowledge Economy: Challenges, Emerging Issues and Future Prospects" held on 13 - 14 September 2006 in Makati City, Philippines.

17 This information was given in the lecture notes distributed during the Advanced Course on Intellectual Property Law for Commercial Court judges held on 14-17 November 2006 in Makati City, Philippines.

18 FILSCAP or Filipino Society of Composers, Authors and Publishers, Inc., a domestic non-profit corporation representing the public performance, mechanical reproduction, synchronization and publishing rights of its members.

19 Rep. Act No. 8293 (1997), section 183.

20 ASCAP or American Society of Composers, Authors and Publishers, BMI or Broadcast Music, Inc., of the U.S., and the like.

of copyright committed in the Philippines. The society then monitors the activities of persons or companies that make unauthorized use of copyrighted works being administered by the society. Once it is determined that there is such use, the society, in representation of the copyright owners, demand the payment of license fees/royalties from the infringer. The license fees/royalties demanded by the society are computed based on guidelines on the type of activity, the area, audiences, and the like. Once the infringer agrees to pay the license fees/royalties demanded by the society, the amount of license fees/royalties ultimately benefit the copyright owners. A problem of enforcement arises if the infringer does not pay the license fees/royalties. Enforcement by the society or the IP copyright owner[21] primarily involves a civil case for injunction and damages. In addition, Philippine law allows the filing of a criminal case for infringement of copyright.[22] The Philippine government, through its enforcement agencies, is duty-bound to become involved in such IP disputes once the society or copyright owner decides to pursue either the civil route or the criminal route or both routes simultaneously.

IV. Search and Seizure Motions and Orders

Search and seizure refer to the examination of a person's house or other buildings or premises or of his person with a view to the discovery of illicit property or some evidence of guilt to be used in the prosecution of a criminal action for which such person is charged and to the act performed by an officer of the law under a writ in taking possession of property in consequence of a violation of public law.[23] In the event of counterfeiting or piracy, the IP right holder may wish to have recourse to search warrants or search and seizure orders. If recourse to search warrants is chosen, the assistance of an investigation agency[24] is sought by which surveillance may be necessary to be conducted. Once the results of the investigation turn out to be positive, the investigating agents prepare a sworn statement or affidavit stating the facts and circumstances which establish that probable cause exists that a crime has been committed at a prescribed location and that evidence of criminal activity is located at the location, and the merchandise to be seized that must be set forth in detail. The affidavit or sworn statement is attached to an application for search warrant. The application for search warrant is then presented to a judge or a magistrate who either grants or denies the application after asking searching questions of the applicant[25] and his witnesses. If the application is granted and the search warrant is signed by the judge or magistrate, the agents generally have up to ten

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21 In one case, Alphonse Mouzon, a foreign composer, was granted injunction and awarded damages in Civil Case No. Q-99-36527 by the RTC of Quezon City, Branch 90. The decision was affirmed on appeal and became final and executory on 15 March 2006 as against the local infringer.

22 Rep. Act No. 8293 (1997), sections 216 and 217.

23 Black's Law Dictionary, Third Edition.

24 In the U.S., the FBI's assistance may be sought; in the Philippines, the NBI (National Bureau of Investigation).

25 Generally, the investigating agent or police officer.

days to execute the search warrant. In the event of recourse to civil search and seizure motions,[26] the writ sought may be for the issuance of an **Anton Piller Order** or *"Saisie contrefacon,"*[27] or the like.[28]

The Philippine experience

Under Philippine law, a search warrant may be issued for the search and seizure of personal property: a) subject of the offense; b) stolen or embezzled and other proceeds, or fruits of the offense; c) used or intended to be used as the means of committing an offense.

The requisites for issuing a search warrant are that it shall not issue except upon probable cause in connection with one specific offense to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized which may be anywhere in the Philippines.

If the judge is satisfied of the existence of facts upon which the application is based or that there is probable cause to believe that they exist, he shall issue the search warrant.[29]

In one case,[30] probable cause was held to mean "such reasons, supported by facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper. Thus, probable cause for a search warrant requires such facts and circumstances that would lead a reasonably prudent man to believe that an offense has been committed and the objects sought in connection with an offense are in the place to be searched."

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[26] This is the IP right holder's usual recourse in the event the judges or magistrates generally do not grant applications for search warrants in a particular territorial jurisdiction.

[27] The Anton Piller Order (APO) became popular because of the first reported case of *Anton Piller KG vs. Manufacturing Processes Limited* [1976] Ch 55, handled by the English judge, Lord Denning, M.R. The essential pre-conditions for the issuance of an APO are: (1) the plaintiff must have an extremely strong *prima facie* case; (2) the potential or actual damage must be serious for the plaintiff; (3) the plaintiff must have clear evidence that the defendant has in his possession incriminating documents or things and that there is a real risk that the defendant will destroy them if given time to do so; (4) the inspection of defendant's premises will do no real harm to the defendant or his case, and there must be proportionality between the perceived threat to the plaintiff and the remedy granted.

"Saisie contrefacon" is a form of seizure which is a means of proof against an alleged infringer of IPR under French law. In response to an application, the President of a District Court in France, may make the order authorizing the seizure.

[28] Lecture notes distributed during the seminar-workshop for judges held on 26 - 30 June 2000 at the EPO International Academy, Strasbourg, FRANCE.

[29] Revised Rules on Criminal Procedure, Rule 126, Section 6.

[30] Microsoft Corp. v. Maxicorp Inc., G.R. No. 140946, September 13, 2004, 438 SCRA 225 (2004).

Civil Search and Seizure Motion and Order

No less than the **Philippine Constitution**[31] protects intellectual property in this wise: "(T)he State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property xxx." The Constitution likewise empowers the Philippine Supreme Court to promulgate rules and procedure in all courts.[32] It also protects the right of the people against unreasonable searches and seizures.[33]

Moreover, the Philippines has bound itself to the Agreement establishing the World Trade Organization or WTO. A significant part of the **WTO Agreement** is the Trade-Related Aspects of Intellectual Property Rights or TRIPS Agreement. Article 50 of the TRIPS Agreement provides:

> "1. The judicial authorities shall have the authority to order prompt and effective provisional measures:
>
> (a) to prevent an infringement of any intellectual property rights from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods immediately after customs clearance;
>
> (b) to preserve relevant evidence in regard to alleged infringement.
>
> 2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is demonstrable risk of evidence being destroyed."

Article 41 of the TRIPS Agreement mandates members to adopt expeditious enforcement procedures to prevent infringement of intellectual property rights.

On 6 June 1997, the Philippine Congress enacted **Republic Act No. 8293** or the **IP Code**. In relation to Article 50 of the TRIPS Agreement, Section 156.2 of the IP Code provides that in actions involving infringement of a registered trademark, the court may impound during the pendency of the action, sales invoices and other documents evidencing sales. In addition, Section 216.2 of the IP Code states that in cases of copyright infringement, the court shall also have power to order the seizure and impounding of an article, which may serve as evidence in court proceedings.

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[31] Article XIV, section 13.

[32] Article VIII, section 5, paragraph 5.

[33] Article III, section 2.

These substantive laws (IP Code and the TRIPS Agreement) cannot be effectively enforced without the corresponding rules of procedure to be observed in the courts. The previous rules of procedure were insufficient to effectuate these new laws and there was an urgent need to supplement them in light of the seeming impunity with which IPR were violated.

The Philippine Supreme Court Committee[34] on Revision of the Rules of Court studied various models enforcing the TRIPS Agreement particularly those obtaining in the United Kingdom, France, Germany, Italy, Netherlands, United Stated and Japan. In light of the Philippine Constitution and the peculiar needs of the country, the Committee recommended to the Supreme Court the adoption of the English rule known all over the world as the **Anton Piller Order**.

> "The best-known enhancement of procedure in the interest of intellectual property owners has been the development by the court of the Anton Piller order for the preservation of evidence and the disclosure of information by the party subject of it. This is now known as a 'search order.' The order is sought by proceedings held in closed session of which the defendant has no notice, the whole object being to spring a surprise.
>
> The order will require the defendant to admit the claimant ¾ and, all-importantly, the claimant's solicitor - in order: (i) to inspect the defendant's premises and seize, copy or photograph materials demonstrating the alleged infringement, (ii) to print out infringing computer programs or data, and to deliver up infringing goods and keep infringing stock or incriminating papers; and (iii) in many cases, to require answers to questions concerning sources of supply or the subsequent destination of illicit material. To obtain this relief, the claimant must satisfy the court of three things: (i) that there is an extremely strong *prima facie* case of infringement; (ii) that the damages is likely to be very serious; and (iii) that the defendant possesses incriminating articles or documents which otherwise may well be destroyed or removed before any application *inter partes* can be made.
>
> The procedure has been used regularly against evident pirates of copyright material (notably on records, videos and computer games) and counterfeiters of trademarks. It can be effective particularly against small-scale distributors, operating often enough at markets, sports grounds and other fly-by-night venues."[35]

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[34] The Committee was headed by Supreme Court Senior Associate Justice, now Chief Justice Reynato S. Puno. The author was one of the resource persons during one of the Committee's deliberations on the Rule.

[35] Letter of the Committee on its recommendation for the adoption of the Rule by the Supreme Court.

The Supreme Court subsequently approved the same on 22 January 2002 and it became known as the Rule on Search and Seizure in Civil Actions for Infringements of Intellectual Property Rights.[36]

In the Rule, **the Supreme Court adopted a modified version of the Anton Piller Order**. The heart of the Rule is found in Section 2 thereof –

> "Section 2. The writ of search and seizure. – Where any delay is likely to cause irreparable harm to the intellectual property right holder where there is demonstrable risk of evidence being destroyed, the intellectual property right holder or his duly authorized representative in a pending civil action for infringement or who intends to commence such an action may apply *ex-parte* for the issuance of a writ of search and seizure directing the alleged infringing defendant or expected adverse party to admit into his premises the persons named in the order and to allow the search, inspection, copying, photographing, audio and audiovisual recording or seizure of any document and article specified in the order."

It cannot be gainsaid that an *ex-parte* order allowing search and seizure under the Rule is a harsh remedy. For the Rule is an exception to the rule against unreasonable searches and seizures. The Rule thus provides for measures to prevent its abuse. These are:

1. The standard of probable cause is adopted to align it with the constitutional provision that likewise provides the same standard of probable cause on search and seizure.

2. The filing of the application/motion is to be made with the Regional Trial Courts designated to try violations of intellectual property rights. These specialized courts have developed expertise on the matter.

3. The application/motion has to be verified. It must be supported by affidavits of witnesses who personally know the facts and by authenticated or certified documents.

4. The applicant/movant and his or her witnesses must be personally examined by the judge in the form of searching questions and answers in writing and under oath and affirmation.

5. The enforcement of the writ shall be supervised by an independent commissioner[37] to be appointed by the court.

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[36] This became effective on 15 February 2002 following its publication in two newspapers of general circulation.

[37] In one case, a retired Supreme Court associate justice was appointed as independent commissioner.

6. The writ shall issue only upon the filing of a bond by the applicant/movant. The bond "will pay all the costs which may be adjudged to the defendant or expected adverse party and all damages which the latter may sustain by reason of the issuance of the writ."

7. The writ shall be served only on weekdays and from 8:00 A.M. to 5:00 P.M. unless the court directs that the writ be served on any day and at any time for compelling reasons stated in the application/motion and duly approved by the court.

8. The writ has to be served on the defendant or expected adverse party and in case of his absence, on his agent or representative or the person in charge of the premises or residing or working therein who is of sufficient age and discretion.

9. The manner of search and seizure is scrupulously spelled out, especially the duties of the sheriff. The articles seized are to be deposited in a bonded or government warehouse to preserve their integrity.

10. The procedure for the return or discharge of the writ is given in detail. The defendant or expected adverse party or the party whose property has been searched, inspected, copied or seized may immediately ask for its discharge on specific grounds.

11. The sheriff has the duty to make a verified return within three (3) days from its enforcement. If no return is made by the sheriff, the court, within five days after issuance, shall ascertain whether the writ was properly enforced.

12. The procedure is provided for the defendant or expected adverse party to claim for damages in case the writ is discharged or where it is found after trial that there has been no infringement or threat of infringement of the intellectual property right of the applicant/movant.

13. Separate docket and logbooks are required for applications/motions for writ of search and seizure.

Instances where search and seizure orders were effectively implemented

In one civil case for infringement of trademark, a Philippine court[38] issued a Search and Seizure Order.[39] The corresponding Writ of Search and Seizure was issued resulting in the seizure of a truckload of alleged counterfeit products.

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[38] Quezon City RTC, Branch 90.

[39] Search and Seizure Order No. 4165 (04). A sample Search and Seizure Order and a sample Writ of Search and Seizure with the name of the defendant corporation changed to XYZ CORPORATION for this academic presentation are attached as Annex A and Annex B of this paper.

At this juncture, it is well to quote the importance of the Anton Piller Order, which was cited in an ASEAN seminar[40] in this wise-

> "The Anton Piller Order has been described as one of the law's nuclear weapons. It is particularly effective. It is the order made *ex parte*, whereby the Court orders the defendant to disclose documents and information relating to alleged wrongful activities. -It is an order that requires a defendant to permit the plaintiff and his representatives access to his premises for the purpose of looking for documents and items.
>
> One of the most interesting cases, where it has been used, has been where a large-scale manufacturing operation was set in Taiwan under the name Levi's Strauss, Taiwan. The documentation and other materials used in connection with that business were such good copies of genuine Levi's Strauss documents and materials that once the products had left Taiwan, it was difficult, even for legitimate traders, to know that the goods were counterfeit. The operation was a very large scale one. The goods were shipped by the container load and found their way in large quantities into the European markets. The operation was eventually cracked because the investigations had shown that payments were made through a small trading company in Hong Kong. The first Anton Piller Order was against the proprietor of that trading company. He was only a small trader but he managed the letters of credit both into and out of Hong Kong. An Anton Piller raid having been conducted on his premises, it was found out that his instructions came from a firm of accountants operating in Hong Kong, with offices throughout the world. An Anton Piller Order was obtained against the firm of accountants. That proved to be like a gold mine since it revealed the whole operation, that was quickly brought to a halt."

V. Some Approaches for Deterrence: Judicial Perspective on Appropriate Criminal Sentencing

Legal Basis

The TRIPS Agreement[41] provides for the mandatory imposition of imprisonment and/or monetary fines by member-states upon offenders for willful trademark counterfeiting or copyright piracy on a commercial scale sufficient to

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[40] WIPO ASEAN Sub-Regional Colloquium for Judges and Prosecutors held on 27 - 29 October 1999 with Mr. Justice J.A. Rogers, Court of Appeal, of the High Court in Hong Kong making the presentation.

[41] This Agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization or the WTO Agreement, which was concluded on 15 April 1994, and entered into force on 1 January 1995. The TRIPS Agreement binds all Members of the WTO (see Article 11.2 of the WTO Agreement).

provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity. Such imposition of the penalties of imprisonment and/or fines may be imposed upon offenders of other cases of infringement of IPR where they are committed willfully and on a commercial scale. Thus -

> "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale." [42]

Willful Trademark Counterfeiting or Copyright Piracy, on a Commercial Scale

The elements of willful trademark counterfeiting on a commercial scale are: 1) the defendant acted *intentionally*; 2) the defendant trafficked (or attempted to traffic) in goods or services; 3) the defendant used a "counterfeit mark" on or in connection with such goods or services; 4) the defendant knew that the mark was counterfeit; the mark was identical, or substantially indistinguishable from a mark in use and registered *for those goods or services*;[43] and 5) the counterfeiting is on a commercial scale. This must be a case of trademark counterfeiting, not misuse. Copyright piracy on a commercial scale, as stated earlier, is primarily concerned with reproduction and distribution on a commercial or large scale. What makes this criminal is the intent of the offender which must have the element of willfulness like theft, the motivation which is one of commercial advantage or private financial gain, and the scale which must be one of commercial or large scale reproduction or distribution.[44]

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[42] TRIPS Agreement, Article 61; underlining supplied.

[43] *See* supra note 4.

[44] *Id.*

Other Factors that may be considered in imposing appropriate criminal sentencing

When there is willful trademark counterfeiting or copyright piracy on a commercial scale, and the same is punishable by the imposition of a range of penalty of imprisonment and/or fines in their minimum up to their maximum range, it is submitted that the penalty must be imposed in its maximum range.

In the event that there is willful trademark counterfeiting or copyright piracy, but not on a commercial or large scale, it is respectfully submitted that the judge must consider other factors in sentencing the offender with the appropriate penalty in the presence of a range of penalty of imprisonment and/or fines in their minimum up to their maximum. These factors may include: the involvement or non-involvement of organized crime; the presence or absence of public health and safety concerns; the commercial nature of the violation; the amount of loss and harm; and the violation of the previous judgment.

In the United States of America, the U.S. Congress directed the Sentencing Commission in 1997 to ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property would be sufficiently stringent to deter such a crime and to adequately reflect consideration of the rental value and quantity of the items with respect to which the crime against the intellectual property was committed. As a consequence, the Sentencing Commission issued in 2000, an amended guideline that provides for stiffer penalties by increasing the base offense levels by two levels (from 6 to 8), by specifically providing for the use of the retail value of the infringed (legitimate) item, instead of the retail value of the infringed-upon (counterfeit or pirated) item.[45]

Application in the Philippines

In the Philippines, trademark counterfeiting,[46] on the one hand, is punishable with imprisonment from two (2) years to five (5) years and a fine ranging from Fifty thousand pesos (Php 50,000.00) to Two hundred thousand pesos (Php 200,000.00).[47] It is respectfully submitted that the judge must consider sentencing an offender to suffer imprisonment and to pay a fine in their maximum or near the maximum provided by law in case there is counterfeiting on a commercial or large scale.

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[45] This information was given during the conference with Superior Court judges on 2 - 3 July 2003 at the Southwest Justice Center in Murrieta, California, U.S.A.

[46] The mark had to be a registered mark.

[47] Rep. Act No. 8293 (1997), sections 155 and 170. As of the writing of this article, one U.S. dollar is equal to approx. 46 Phil. pesos.

On the other hand, the first-time offender of copyright piracy or infringement shall be punished with imprisonment of one (1) year to three (3) years plus a fine ranging from Fifty thousand pesos (Php 50,000.00) to One hundred fifty thousand pesos (Php 150,000.00). A second-time offender shall be punished with imprisonment of three (3) years and one (1) day to six (6) years plus a fine ranging from One hundred fifty thousand pesos (Php 150,000.00) to Five hundred thousand pesos (Php 500,000.00). A third and subsequent offender shall be punished with imprisonment of six (6) years and one (1) day to nine (9) years plus a fine ranging from Five hundred thousand pesos (Php 500,000.00) to One million five hundred thousand pesos (Php 1,500,000.00).[48] In determining the number of years of imprisonment and the amount of fine, the judge shall "consider the value of the infringing materials that the defendant has produced or manufactured and the damage that the copyright owner has suffered by reason of the infringement."[49]

VI. Handling IP Cases: Case Studies/Discussions

Overview

Applying the principles discussed in the topics presented earlier, a case study on each and every topic will now be presented together with suggested point/s to consider on how to resolve or decide the given case.

CASE 1 – Deterrence and Specialized IP Courts

Country A had set up specialized IP courts to hear and decide civil and criminal cases involving any violation of the IP laws of the country. The Constitution and laws of country A do not expressly provide for the creation of such courts. The country, however, is a member of the WTO. Citizen B was charged in a criminal case before the specialized IP court having territorial jurisdiction over the place where the alleged IP offense was committed. B now challenges the authority of the specialized IP court to try and hear his case on the ground that country A is not empowered to create such specialized IP courts. As the judge, will you sustain such challenge? Discuss.

Points to consider

1. The Constitution and the pertinent laws of country A.

2. The application of the pertinent provision of paragraph 1 of Article 41 of the TRIPS Agreement which reads, "(M)embers shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered

[48] Rep. Act No. 8293 (1997), section 217.1.

[49] Rep. Act No. 8293 (1997), section 217.2.

by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. xxx " as against the pertinent portion of paragraph 5 of the same Article which provides, "(I)t is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. xxx "

CASE 2 – Collection Societies and Criminal Sentencing

The copyright law of country X provides for recourse by the IP right holder against the alleged infringer. C, the composer of several songs, had assigned his copyright or economic rights over the songs to D, a society of composers and writers, with authority to institute and prosecute actions and to recover damages on account of infringement. D was able to monitor E as having infringed the copyright or economic rights assigned by C to D. D commences a criminal case for infringement against E. E sets up the defense that the criminal case is unwarranted as the case only concerns a simple civil case for payment of license fees/royalties.

As the judge, should such defense be sustained? Discuss.

Observation

1. Does the copyright law of country Z also provide for criminal recourse against the alleged infringer?

Suppose the answer to the question is in the affirmative and assuming that the infringement is on a large or commercial scale, would you, as judge, consider imposing both imprisonment and payment of fines upon the infringer, assuming further that the imposable penalties could be imprisonment and/or fine? Discuss.

Point to consider

1. The applicability of Article 61 of the TRIPS Agreement[50] to the case at bar.

CASE 3 – Search and Seizure Motions

Hamburger X, Inc. filed a search and seizure motion against Hamburger Z, Inc. on the ground that the latter spread the rumor that the hamburgers sold by the

[50] Article 61. "Members shall provide for criminal procedure and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale."

former are unsafe for human consumption. In its submission, Hamburger X, Inc. prays for the issuance of a search and seizure order based on its claim that the evidence against Hamburger Z, Inc. being the source of such rumor are stored in the company computers and in the company files located at the company's principal office. If you were the judge, will you issue the search and seizure order. Discuss.

Observation

1. Does the case involve any violation of the IP laws of the country, particularly an infringement of any IP rights?

Point to consider

1. The applicability of Article 50 of the TRIPS Agreement.[51]

VII. Survey of Recent Significant Decisions on IP-Related Issues

Decision resolving questions of jurisdiction as to what court should take cognizance over IP cases

After the approval of the Philippine IP Code on 6 June 1997, and its effectivity on 1 January 1998, there were many jurisdictional disputes on whether the first level courts, Metropolitan Trial Courts[52] or the second level courts, Regional Trial Courts,[53] have jurisdiction over cases involving violations of IPR in the country. Faced with these jurisdictional issues, the Supreme Court, in the leading case of *Samson vs. Daway*,[54] upheld the jurisdiction of Regional Trial Courts[55] as IP courts to hear and decide IP cases.[56]

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51 "Article 50. 1. The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged infringement.

Article 50.2 The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

x x x.
x x x.
x x x."

52 Metropolitan Trial Courts, the Municipal Trial Courts and the Municipal Circuit Trial Courts.

53 These courts have been designated as special IP courts for certain defined territorial areas all over the country.

54 *Samson v. Daway*, G.R. Nos. 160054-55, July 21, 2004, 434 S.C.R.A. 612 (2004).

55 Adm. Matter No. 02-1-11-SC dated 19 February 2002 designated certain Branches of the Regional Trial Courts as IP courts.

56 This is in addition to their jurisdiction to hear and decide certain Securities and Exchange Commission cases. This ruling, in effect, clarified the jurisdiction of Regional Trial Courts, as IP courts, over cases involving violations of IPR, whether criminal or civil.

Infringement of registered trademark

In the case of *McDonald's Corporation vs. L.C. Big Mak Burger, Inc.*,[57] petitioner was a U.S. Corporation that registered the "Big Mac" mark for its "double decker hamburger sandwich" with the U.S. Trademark Registry on 16 October 1979. Based on this "Home Registration," McDonald's applied for the registration of the same mark. Pending approval of its application, McDonald's introduced its "Big Mac" hamburger sandwiches in the Philippine market in September 1991. On 18 July 1995, the "Big Mac" mark was registered in the Philippines based on its Home Registration in the U.S. Like its other marks, McDonald's displays the "Big Mac" mark in items and paraphernalia in its restaurants.

Respondent L.C. Big Mak Burger, Inc. is a domestic corporation which operates fast-food outlets and snack vans. Respondent includes hamburger sandwiches in its menu using a "Big Mak" mark.

Resolving the issue on whether or not there was trademark infringement when the same issue was eventually brought before it, the Philippine Supreme Court held that the registration by petitioner of the "Big Mac" mark is a *prima facie* evidence of the validity of petitioner's exclusive right to use the mark on the goods specified in the certificate. Thus, the elements of trademark infringement relative to: 1) the validity of petitioner's mark; 2) petitioner's ownership of the mark, that is "Big Mac" in its entirety as distinctive, had been met. On the third element, the use of the mark or its colorable imitation by the infringer (respondent) results in "likelihood of confusion."

Expounding on this element of "likelihood of confusion," the Supreme Court held that there was confusion of goods and confusion of business too. There was confusion of goods because respondent used the "Big Mak" mark on the same goods, *i.e.,* hamburger sandwiches, upon which petitioner's "Big Mac" mark was used. And there was confusion of business because respondent admitted that it is in the same fast-food business as petitioner.

The Supreme Court further declared that "respondent's use of the 'Big Mak' mark on non-hamburger food products cannot excuse their infringement of petitioner's registered mark, otherwise registered marks will lose their protection under the law." The Court also said that "it recognized that the registered trademark owner enjoys protection in product and market areas that are the normal expansion of (its) business."

In determining "likelihood of confusion," the Supreme Court cited jurisprudence that developed the dominancy test and the holistic test.

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[57] G.R. No. 143993, August 18, 2004, 437 S.C.R.A. 10 (2004).

The dominancy test focuses on the similarity of the prevalent features of the competing trademarks that might cause confusion. In contrast, the holistic test requires the entirety of the marks as applied to the products, including the labels and packaging, in determining confusing similarity.

In applying the 0test, instead of the holistic test. The Supreme Court explained it had relied on the dominancy test in many cases and rejected the holistic test. Under the dominancy test, the Supreme Court gives greater weight to the similarity of the appearance of the product arising from the adoption of the dominant features of the registered mark, disregarding minor differences. The courts will consider more the aural and virtual impressions created by the marks in the public mind, giving little weight to factors like prices, quality, sales outlets and market segments.

The Supreme Court then ruled:

> "The test of dominancy is now explicitly incorporated into law in Section 155.1 of the Intellectual Property Code which defines infringement as the 'colorable imitation of a registered mark xxx or a **dominant feature** thereof.'
>
> Applying the dominancy test, the Court finds that repondents' use of the 'Big Mak' mark results in likelihood of confusion. First, 'Big Mak' sounds exactly the same as 'Big Mac.' Second, the first word in 'Big Mak' is exactly the same as the first word in 'Big Mac.' Third, the first two letters in 'Mak' are the same as the first two letters in 'Big Mac.' Fourth, the last letter in 'Mak' while a 'k' sounds the same as 'c' when the word 'Mak' is pronounced. Fifth, in Filipino, the letter 'k' replaces 'c' in spelling, thus 'Caloocan' is spelled 'Kalookan.'"
>
> The Supreme Court, then, went on to conclude as follows:
>
> "***Clearly, respondents have adopted in 'Big Mak' not only the dominant but also almost all the features of 'Big Mac.'*** Applied to the same food product of hamburgers, the two marks will likely result in confusion in the public mind.
>
> xxx
>
> Petitioner's failure to present proof of actual confusion does not negate their claim of trademark infringement. xxx Section 22 requires the less stringent standard of 'likelihood of confusion' only. While proof of actual confusion is the best evidence of infringement, its absence is inconsequential."

On the issue of whether there was unfair competition, the Supreme Court

said that "the essential *elements of* an action for unfair competition are (1) confusing similarity in the general appearance of the goods, and (2) intent to deceive the public and defraud a competitor. The confusing similarity may or may not result from the similarity in the marks, but may result from other external factors in the packaging or presentation of the goods. The intent to deceive and defraud may be inferred from the similarity of the appearance of the goods as offered for sale to the public. Actual fraudulent intent need not be shown."

The Supreme Court clarified that:

> "Unfair competition is broader than trademark infringement and includes passing off goods with or without trademark infringement. Trademark infringement is a form of unfair competition. Trademark infringement constitutes unfair competition when there is not merely likelihood of confusion, but also actual or probable deception on the public because of the general appearance of the goods. There can be trademark infringement without unfair competition as when the infringer discloses on the labels containing the mark that he manufactures the goods, thus preventing the public from being deceived that the goods originate from the trademark owner."

In finding respondents guilty of unfair competition, the Supreme Court held that the dissimilarities in the packaging are minor compared to the stark similarities in the words that give respondent's "Big Mak" hamburgers the general appearance of petitioner's "Big Mac" hamburgers. This is based on Section 29 (a) of the then-applicable trademark law (Republic Act No. 166) which provided that the (respondent) gives "his goods the general appearance of goods of another manufacturer." Moreover, the Supreme Court held that there is no notice that the "Big Mak" hamburgers are products of "L.C. Big Mak Burger, Inc." This clearly shows respondent's intent to deceive the public. Had respondent placed a notice on its plastic wrappers and bags, it could validly claim that it did not intend to deceive the public.

No infringement of registered trademarks because of absence of evidence of actual use by trademark owners

In the case of *Philip Morris, Inc., Benson and Hedges (Canada), Inc. and Fabrique de Tabac Reunies, S.A., vs. Fortune Tobacco Corporation,*[58] petitioners were foreign corporations who are the registered owners of the trademarks, **MARK VII**, **MARK TEN** and **LARK**, for cigarettes with registration dates sometime in 1964 and 1973, while respondent is a domestic corporation that manufactures and sells cigarettes using

[58] G.R. No. 158589, June 27, 2006, 493 S.C.R.A. 333 (2006).

the trademark, **MARK**. On 18 August 1982, petitioners sued respondent for trademark infringement. After trial, the Regional Trial Court ruled that respondent did not commit trademark infringement.

When the issue of trademark infringement was brought before it, the Philippine Supreme Court affirmed that there was indeed no trademark infringement. The Supreme Court ruled that, despite the Philippines' adherence to international agreements/conventions like the Paris Convention and the TRIPS Agreement and regardless of the fact that the Philippines adhered to the TRIPS Agreement only on 16 December 1994 well after this case was filed, petitioners failed to present evidence of actual commercial use of the marks/emblems in local commerce and trade to entitle them to protection of their trademarks in the country. The Supreme Court further ruled that petitioners likewise failed to present evidence to support their claim that their marks are well-known marks to entitle them to protection even without actual use in the country in accordance with Article 6 bis of the Paris Convention, and that there was an unlikelihood of confusion because the "products involved are addicting cigarettes purchased mainly by those who are already predisposed to a certain brand."

The Supreme Court placed in its decision the rationale of its ruling, thus: "True, the Philippines' adherence to the Paris Convention effectively obligates the country to honor and enforce its provisions as regards the protection of industrial property of foreign nationals in the country. However, any protection accorded has to be made subject to the limitations of Philippine laws. Hence, xxx foreign nationals must still observe and comply with the conditions imposed by Philippine law on its nationals. Considering that R.A. No. 166, as amended, xxx mandates **actual use** of the marks and/or emblems in local commerce and trade before they may be registered and ownership thereof acquired, the petitioners cannot, therefore, dispense with the element of actual use. Their being nationals of member-countries of the Paris Union does not alter the situation."

Search Warrant partially nullified

In *Microsoft Corporation vs. Maxicorp. Inc.*,[59] the issue brought before the Philippine Supreme Court was whether or not a partially defective search warrant should be nullified. The disputed paragraph, in the Search Warrant read:

> "(c) Sundry items such as labels, boxes, prints, packages, wrappers, receptacles, advertisements and other paraphernalia bearing the copyrights and/or trademarks owned by MICROSOFT CORPORATION."

[59] *Supra* Note 30.

In ruling on the issue, the Supreme Court held, in this wise, that the search warrant could still be validly upheld but the partially defective portion thereof had to be nullified:—

> "Still, no provision of law exists which requires that a warrant, partially defective in specifying some items sought to be seized yet particular with respect to the other items, should be nullified as a whole. A partially defective warrant remains valid as to the items specifically described in the warrant. A search warrant is severable, the items not sufficiently described may be cut off without destroying the whole warrant. The exclusionary rule found in Section 3(2) of Article III of the Constitution renders inadmissible in any proceeding all evidence obtained through unreasonable searches and seizure. Thus, all items seized under paragraph (c) of the search warrants, not falling under paragraphs a, b, d, e or f, should be returned to Maxicorp, Inc."

Trademark Dilution and Bad Faith Use of a Trademark and Copyright Infringement and Piracy

In *Levi Strauss & Co. vs. Clinton Apparelle, Inc.,*[60] the Supreme Court held that:

> "(T)**rademark dilution** is the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of: (1) competition between the owner of the famous mark and other parties; or (2) likelihood of confusion, mistake or deception.
>
> xxx
>
> Based on the foregoing, to be eligible for protection from dilution, there has to be a finding that: (1) the trademark sought to be protected is famous and distinctive; (2) the use by respondent of [(competing trademark]) began after the petitioner's mark became famous; and (3) such subsequent use defames petitioners' mark. xxx"[61]

Moreover, the Supreme Court had this to say about the **bad faith use** of a trademark, to wit: "One who has imitated the trademark of another cannot bring an action for infringement, particularly against the true owner of the mark, because he would be coming to court with unclean hands. Priority is of no avail to the bad faith

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[60] G.R. No. 138900, September 20, 2005,470 S.C.R.A. 236 (2005), citing Toys "R" Us vs. Akkaoui, 40 U.S.P.Q. 2d [BNA] 1836 [N.D. Cal. 1996].

[61] *Id.* Underlined word in brackets supplied.

plaintiff. Good faith is required in order to ensure that a second user may not merely take advantage of the goodwill established by the true owner."[62]

In *NBI-Microsoft Corp. vs. Hwang*,[63] the Supreme Court held that "the gravamen of copyright infringement is not merely the unauthorized '"manufacturing"' of intellectual works but rather the unauthorized performance of any of the acts covered by Section 5 of the then-applicable P.D. No. 49 (the prior Copyright Law) with respect to the rights of an author. It further held that: "Hence, any person who performs any of the acts under Section 5 without obtaining the copyright owner's prior consent renders himself civilly and criminally liable for copyright infringement. xxx

Infringement of a copyright is a trespass on a private domain owned and occupied by the owner of a copyright, and, therefore, protected by law, and **infringement of copyright, or piracy**, which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the - copyright, of anything the sole right to do which is conferred by statute on the owner of the copyright.

Significantly, under Section 5-(A), a copyright owner is vested with the exclusive right to '"copy, distribute, multiply, [(and]) sell"' his intellectual works."

VIII. Conclusion

Effective IPR enforcement has been a contentious issue between ASEAN and the countries demanding strict and effective IPR enforcement. To avoid trade sanctions, the governments of Southeast Asian countries have taken steps to enact better IP laws and to establish the proper IP rights frameworks towards enforcing their IP laws against those that violate them. They know fully well that a satisfactory resolution of the issue could lead to more foreign investments and trade opportunities which are badly needed in the region. Additional investments and trade will surely result in economic prosperity for the people of Southeast Asia.

Seminars and workshops conducted throughout the region are all geared towards effective IP rights enforcement. Participants coming from the law enforcement agencies, the customs bureaus, the prosecution and the judiciary who have attended these seminars from time to time, have shown their sincere desire to be part of this region-wide undertaking. For after all, it would have served no useful purpose to enact laws which would and could not be implemented effectively.

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[62] Shangri-La International Hotel Management Ltd. v. Developers Group of Companies, Inc., G.R. No. 159938, March 31, 2006, 486 S.C.R.A. 405 (2006), citing Ubeda vs. Zialcita, G.R. No. 4392, February 17, 1909, 13 Phil. 11 (1909).

[63] G.R. No. 147043, June 21, 2005, 460 S.C.R.A. 428 (2005), citing Columbia Pictures, Inc. v. Court of Appeals, G.R. No. 110318, August 28, 1996, 329 Phil. 875 (1996), among others; underlined words and emphasis supplied.

It is, therefore, hoped that the various IP laws of ASEAN countries can be harmonized and that there will be uniformity of, and consistency in, efforts for effective IP rights enforcement in the entire region. The Philippines, cognizant of its role as a member of the community, has laid the groundwork to achieve this end.

ANNEX A

REPUBLIC OF THE PHILIPPINES
REGIONAL TRIAL COURT
NATIONAL CAPITAL JUDICIAL REGION
BRANCH 90, QUEZON CITY

HUFFY CORPORATION,
Plaintiff,

- versus -

SEARCH AND SEIZURE ORDER NO. 4165 (04)
For: Application for Search and Seizure Order

XYZ CORPORATION and/or OTHER PROPRIETORS AND/OR DIRECTORS, OFFICERS AND/OR EMPLOYEES OF THE CORPORATION and/or THE OCCUPANTS OF THE PREMISES LOCATED AT NO. 136 DOÑA JULIANA STREET, QUEZON CITY,
Defendants.
x————————————————————x

O R D E R

This refers to the verified application filed by the plaintiff Huffy Corporation, for the issuance of a search and seizure order against the alleged infringing defendants, the defendants XYZ Corporation and/or Other Proprietors and/or Directors of the Corporation and/or The Occupants of the Premises located at No. 136 Doña Juliana St, Quezon City, pursuant to the Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights which became effective on February 15, 2002. The plaintiff filed the verified application to protect its internationally renown or well-known "HUFFY SPORTS" and "HUFFY" trademarks.

This Court allowed the plaintiff to present its evidence ex parte in the chambers of the undersigned in the presence of this Court's Court Interpreter and stenographer/s and examined the witnesses presented by the plaintiff applicant in the form of searching questions and answers, in writing and under oath, in accordance

with Section 5 of the aforecited Rule. The plaintiff, thereafter, filed its Formal Offer of Evidence with this Court on September 20, 2004. The exhibits so offered in the plaintiff's Formal Offer of Evidence were admitted for the purpose/s for which they were respectively offered. Hence, this Order.

After carefully evaluating the evidences presented by the plaintiff-applicant in the form of testimonial, documentary and object evidences, this Court finds and so holds that the plaintiff was able to show plaintiff's entitlement to the issuance of a writ of search and seizure in accordance with the aforecited Rule, including but not limited to Sections 2, 3, 4, 6, 7 and 8 thereof.

Search and Seizure Order No. 4165 (04)
Page 2

IN VIEW OF THE FOREGOING, the plaintiff's aforecited application for the issuance of a search and seizure order is granted, and accordingly, and upon plaintiff's posting of a bond of Php 300,000.00 to be approved by this Court in accordance with Section 9 of the said Rule, let a writ of search and seizure be issued in favor of the plaintiff and against the alleged infringing defendants to be implemented by any Deputy Sheriff appointed to the Office of the Clerk of Court and Ex-Officio Sheriff of the Regional Trial Court of Quezon City, with the assistance of such police officers and/or agents of the National Bureau of Investigation, the number of which may be necessary to effect and maintain a peaceful and orderly implementation of this Order and the writ, in the presence of plaintiff's witnesses, Atty. A and Mr. B, and plaintiff's representatives and counsels, Atty. C, Atty. D and Atty. E, and defendants, or their representative/s or the person/s in charge or in control of the premises or residing or working therein or in the absence of the latter, two persons of sufficient age and discretion residing in the same locality or in the absence of the latter, two persons of sufficient age and discretion residing in the nearest locality in accordance with Section 13 of the aforecited Rule, under the supervision of retired Supreme Court Justice Jose C. Vitug who is hereby appointed by this Court as Independent Commissioner who shall perform the duties and functions as provided under the said Rule and who shall be entitled to receive reasonable compensation in the amount of Php 75,000.00 from the plaintiff which shall be charged as costs of suit. In the event retired Supreme Court Justice Jose C. Vitug is unavailable, retired Court of Appeals Justice F is hereby appointed by this Court as Independent Commissioner who shall perform the duties and functions thereof and who shall be paid reasonable compensation in the amount of Php 75,000.00 by the plaintiff to be charged as costs of suit. For this purpose, the plaintiff's counsel is ordered to inform this Court in writing forthwith of the written acceptance of this appointment by retired SC Justice Vitug or in the event of his unavailability, by retired CA Justice F, and to furnish this Court a copy of such written acceptance and the bond to be posted containing all conditions as required in the aforecited Rule so this Court can issue the corresponding writ. The plaintiff's counsel is

furthermore directed to file forthwith with this Court a certificate or certification from the Clerk of Court, Regional Trial Court, Quezon City showing that the prescribed filing fee had been paid for this application/case within twenty-four hours from receipt of this Order in accordance with Section 23 of the aforecited Rule.

The Process Server is ordered to serve a copy of this Order by personal service upon the plaintiff's counsel, Atty. C and Atty. D, and to submit his return forthwith with this Court.

SO ORDERED.
Quezon City, September 29, 2004.

(SGD.)
REYNALDO B. DAWAY
Presiding Judge

ANNEX B

REPUBLIC OF THE PHILIPPINES
REGIONAL TRIAL COURT
NATIONAL CAPITAL JUDICIAL REGION
BRANCH 90, QUEZON CITY

HUFFY CORPORATION,
Plaintiff,

- versus -

SEARCH AND SEIZURE ORDER NO. 4165 (04)

XYZ CORPORATION AND/OR OTHER PROPRIETORS AND/OR DIRECTORS, OFFICERS AND/OR EMPLOYEES OF THE CORPORATION AND/OR THE OCCUPANTS OF THE PREMISES LOCATED AT NO. 136 DOÑA JULIANA STREET, QUEZON CITY,

Defendants.

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WRIT OF SEARCH AND SEIZURE

TO THE DEFENDANTS XYZ CORPORATION AND/OR OTHER PROPRIETORS AND/OR DIRECTORS, OFFICERS AND/OR EMPLOYEES OF THE CORPORATION AND/OR THE OCCUPANTS OF THE PREMISES LOCATED AT NO. 136 DOÑA JULIANA STREET, QUEZON CITY, (hereinafter referred to as "DEFENDANTS")

TO THE DEPUTY SHERIFF OF THE REGIONAL TRIAL COURT OF QUEZON CITY WHO IS SERVING THIS

WRIT OF SEARCH AND SEIZURE (hereinafter referred to as the "SHERIFF")

TO RETIRED S.C. JUSTICE JOSE C. VITUG WHO IS SUPERVISING THE ENFORCEMENT OF THIS WRIT OF SEARCH AND SEIZURE (hereinafter referred to as the "INDEPENDENT COMMISSIONER")

GREETINGS:

This Writ of Search and Seizure is issued by this Court pursuant to the Rule on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights, this Court's Order dated September 29, 2004 and this Court's Order dated December 14, 2004, it appearing to the satisfaction of the undersigned, from the evidence presented by the plaintiff-applicant HuffyCorporation and personally evaluated by the undersigned that all the grounds stated in Section 6 of the aforecited Rule are present in this case including a finding by the undersigned that there is **probable cause** to believe that the plaintiff-applicant's right is being infringed or that such infringement is imminent and there is a prima facie case for relief against the defendants.

You (the DEFENDANTS) or any person of sufficient age and discretion residing or working or who appears to be in charge or in control of the premises located at No. 136 Doña Juliana Street, Quezon City are hereby ordered (a) to disclose to the Sheriff serving this Writ of Search and Seizure the location of the documents and articles subject of this Writ, and (b) to permit the following persons to enter into the premises for the purpose of searching, inspecting, copying or removing from the premises and transferring to the custody of the Sheriff and subject to the control of the court the documents and articles enumerated below:

(i) Witnesses:

Atty. A
Mr. B

(ii) Representatives/Counsel of Applicant:

Atty. C
Atty. D

(iii) The Independent Commissioner duly appointed by this Court to supervise the enforcement of this writ; and

(iv) The Sheriff enforcing this Writ of Search and Seizure and such Police Officers and/or agents of the National Bureau of Investigation and/or such other peace officers, the number of which shall be necessary to effect and maintain a peaceful and orderly implementation of this Writ.

You (the SHERIFF) are hereby ordered or commanded (a) to serve and enforce this Writ of Search and Seizure within a period not more than ten (10) days from the date of issuance of this Writ of Search and Seizure, only on weekdays from 8 A.M. to 5 P.M.; (b) to conduct a search on the above-described premises of XYZ CORPORATION at No. 136 Doña Juliana Street, Quezon City; and (c) to seize therefrom, to be dealt with as the law directs, the following properties, articles and objects, which are used and/or intended to be used in violation of Sections 168, 165.2, and 169 of the Intellectual Property Code in the possession and/or control of XYZ CORPORATION and/or the other Proprietors, and/or directors, officers, employees of the Corporation and/or occupants and are kept and/or concealed at the above given address, to wit:

(i) Basketballs, baseballs, baseball gloves, softballs, softball gloves, baseball and softball bats, boxing gloves, boxing head guards, boxing foul protectors, punching balls, bags and pads, tae kwon do arm and shin protectors, drum sticks, supporters, color balls, knives-tools, and all other sporting goods/ products bearing copies and/or colorable imitations of the HUFFY Trademark/Trade Name, either on the goods themselves or in their packaging;

(ii) Sundry items such as boxes, patches, labels and hang tags bearing the HUFFY and HUFFY SPORTS Trademarks and Trade Name, and materials for printing the same and/or copies and/or colorable imitations of the HUFFY and HUFFY SPORTS Trademarks and Trade Name;

(iii) Any other finished or unfinished products and accessories which would likely induce the public to believe that the goods offered are those being manufactured by Huffy Corporation;

(iv) Any and all posters, leaflets, flyers, brochures, catalogues, and other advertising and/or promotional/marketing materials, and other paraphernalia bearing the HUFFY Trademarks and Trade Name which are used to advertise or otherwise promote the sale of the above-mentioned sporting goods;

(v) Invoices, ledgers, journals, official receipts, delivery receipts, purchase orders, and all other books of account and documents pertaining to the production, distribution and/or sale of the aforesaid products.

You are furthermore ordered to execute this Writ of Search and Seizure and to make a verified return to this Court within three (3) days from its enforcement. You are likewise ordered to appear before this Court on January 12, 2005 (Wednesday) at 9:30 A.M. so this Court shall hear you on your verified return.

You (the Independent Commissioner) are hereby ordered to supervise the enforcement of this Writ of Search and Seizure and to perform your duties as such Independent Commissioner in accordance with the Rule on Search and Seizure In Civil Actions for Infringement of Intellectual Property Rights including but not limited to the duties as provided under Sections 7, 12, 13, 14 and 17 thereof. You are likewise ordered to appear before this Court on January 12, 2005 (Wednesday) at 9:30 A.M., the date and time when this Court shall hear the Sheriff on his verified return.

Let a hearing on the result of this Writ of Search and Seizure be set also on January 12, 2005 (Wednesday) at 9:30 A.M. before this Court.

WITNESS THE HAND AND SEAL OF THIS COURT, this 14th day of December, 2004 in Quezon City.

(SGD.)
REYNALDO B. DAWAY
Presiding Judge

Ethical Aspects of China Walls

*Victor P. Lazatin**
*Teodoro D. Regala, Sr.***
*Diane A. Desierto****

A "China Wall" or "screen" is a fictional device used to prevent the disqualification of an entire firm simply because one member of the firm previously represented a client who is now an adversary of a client currently represented by the firm. A China Wall is typically implemented by restricting a member's access to files, informing attorneys working on the case of the barrier, and excluding the disqualified member from fees generated by the representation.[1]

History and Development of China Walls

China walls, or the concept of internally "screening information" in firms, originated from United States commercial banks whose trust departments traded publicly issued securities. The banks feared that mere possession by the trust department of the bank of material "insider" information about the issuer of the security could be imputed to the bank as a whole, rendering them vulnerable to charges of violation of US SEC rules. Thus, US commercial banks developed a "China Wall" to insulate information which came to the possession of the commercial department of the bank from any person in the trust department, who had the investment responsibility for publicly traded securities. The "China Wall", so-called, was a set of bank rules and procedures designed to restrict the flow of information from the bank's regular business unit to its trust department.[2]

Disciplinary Rule 5-105(D) of the American Bar Association's (ABA) Code of Professional Responsibility states that if a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, associate, or any other lawyer affiliated with him or his firm may accept or continue such employment. In the United States, it has been acknowledged that this rule has caused serious conflict of interest problems for large law firms that represent

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* President, Philippine Bar Association; Senior Partner, Angara Abello Concepcion Regala and Cruz Law Offices (ACCRALAW).

** Name Partner, Angara Abello Concepcion Regala and Cruz Law Offices (ACCRALAW).

*** Professorial Lecturer, University of the Philippines College of Law; Law Reform Specialist, Institute of International Legal Studies, University of the Philippines.

1 F. Wozniak, "Disqualification of member of law firm as requiring disqualification of entire firm – state cases", 6 A.L.R. 5th 242 (1992), at § 2.

2 T. Regala, "The Creation of China Walls Within Law Firms to Avoid Conflicts of Interests".

numerous clients. Thus, the ABA Ethics Committee has taken the position that disqualification of a firm may not be necessary if the disqualified lawyer has been **properly screened from participation** in the disputed case and there is no appearance of significant impropriety affecting the interests of government.[3] US courts, however, have taken varying positions on the sufficiency of China walls.

The sufficiency of a "China wall" or internal screening procedure in law firms has not yet been resolved by the Philippine Supreme Court. This paper explores the use of a "China wall" within the parameters of the conflict of interest rules in the Philippine legal profession, and examines its viability as a tool to resolve various conflict of interest problems affecting Philippine law firms.

Philippine conflict of interest rules

Canons 15, 17, and 21 of the Code of Professional Responsibility encapsulate the duties and obligations of members of the bar to their clients, particularly in avoiding conflicts of interest:

> **"Canon 15 – A lawyer shall observe candor, fairness, and loyalty in all his dealings and transactions with his clients.**
>
> Rule 15.01 – A lawyer, in conferring with a prospective client, shall **ascertain as soon as practicable whether the matter would involve a conflict with another client or his own interest**, and if so, shall forthwith **inform** the prospective client.
>
> Rule 15.02. – A lawyer shall be bound by the rule on **privilege communication** in respect of matters disclosed to him by a prospective client.
>
> Rule 15.03. – A lawyer shall not represent conflicting interests except **by written consent of all concerned, given after a full disclosure of the facts**.
>
> xxx xxx xxx
>
> **Canon 17 – A lawyer owes fidelity to the cause of his client and he shall be mindful of the trust and confidence reposed in him.**
>
> xxx xxx xxx
>
> **Canon 21 – A lawyer shall preserve the confidences and secrets of his client even after the attorney-client relation is terminated.**

[3] K. Brown, "Sufficiency of Screening Measures (Chinese Wall) Designed to Prevent Disqualification of Law Firm, Member of Which is Disqualified for Conflict of Interest", 68 A.L.R. Fed. 687 (originally published in 1984).

Rule 21.01. – A lawyer shall not reveal the confidences or secrets of his client except:

a) **When authorized by the client after acquainting him of the consequences of the disclosure;**

b) When required by law;

c) When necessary to collect his fees or to defend himself, his employees, or associates or by judicial action.

Rule 21.02 – A lawyer shall not, to the disadvantage of his client, use information acquired in the course of employment, nor shall he use the same to his own advantage or that of a third person, **unless the client with full knowledge of the circumstances consents thereto.**

Rule 21.03 – A lawyer shall not, without the written consent of his client, give information from his files to an outside agency seeking such information for auditing, statistical, bookkeeping, accounting, data processing or any similar purpose.

Rule 21.04 – **A lawyer may disclose the affairs of a client of the firm to partners or associates thereof unless prohibited by the client.**

Rule 21.05 – A lawyer shall adopt such measures as may be required to **prevent those whose services are utilized by him from disclosing or using confidences or secrets of the client**.

xxx xxx xxx

Rule 21.07 – A lawyer shall not reveal that he has been consulted about a particular case **except to avoid possible conflict of interest.**"[4]

The foregoing rules detail the two (2) primary duties of a lawyer towards his client – (1) the **duty of loyalty or fidelity to his client's cause**, and (2) the **duty of preserving confidentiality of all information and communications relating to his client.**

In the June 2006 case of *Lim Jr. vs. Villarosa,*[5] the Supreme Court elaborated on these two (2) primary duties of a lawyer to his client in a situation involving conflict of interest:

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[4] Code of Professional Responsibility, Canons 15, 17, and 21. Emphasis and underscoring supplied.

[5] Adm. Case. No. 5303, June 15, 2006, 490 SCRA 494 (2006). Emphasis and underscoring supplied.

"Canon 15 of the Code of Professional Responsibility (CPR) highlights the need for candor, fairness and loyalty in all the dealings of lawyers with their clients. Rule 15.03 of the CPR aptly provides:

Rule 15.03 – A lawyer shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts.

It is only upon strict compliance with the condition of full disclosure of facts that a lawyer may appear against his client; otherwise, his representation of conflicting interests is reprehensible. **Conflict of interest may be determined in this manner:**

> There is representation of conflicting interests if the acceptance of the new retainer **will require the attorney to do anything which will injuriously affect his first client in any matter in which he represents him and also whether he will be called upon in his new relation, to use against his first client any knowledge acquired through their connection**.

The rule on conflict of interests covers not only cases in which confidential communications have been confided but also those in which no confidence has been bestowed or will be used.

> Another test of the inconsistency of interests is **whether the acceptance of a new relation will prevent an attorney from the full discharge of his duty of undivided fidelity and loyalty to his client or invite suspicion of unfaithfulness or double-dealing in the performance thereof, and also whether he will be called upon in his new relation to use against his first client any knowledge acquire in the previous employment**. The first part of the rule refers to cases in which the opposing parties are present clients either in the same action or in a totally unrelated case; the second part pertains to those in which the adverse party against whom the attorney appears is his former client in a matter which is related, directly or indirectly, to the present controversy.

The rule prohibits a lawyer from representing new clients whose interests oppose those of a former client in any manner, whether they are parties in the same action or in totally unrelated cases. The cases here directly or indirectly involved the parties' connection to PRC, even if neither PRC nor Lumot A. Jalandoni was specifically named as party-litigant in some of the cases mentioned.

> An attorney owes to his client **undivided allegiance**. After being retained and receiving the confidences of the client, he cannot, **without the free and intelligent consent of his client**, act both for his client and for one whose interest is adverse to, or conflicting with that of his client in the same general matter. . . . **The prohibition stands even if the adverse interest is very slight**; neither is it material that the intention and motive of the attorney may have been honest.
>
> The representation by a lawyer of conflicting interests, **in the absence of the written consent of all parties concerned after a full disclosure of the facts**, constitutes professional misconduct which subjects the lawyer to disciplinary action."

Considering that the relation between the lawyer and the client is "highly fiduciary, requiring utmost good faith, loyalty, and fidelity",[6] the lawyer's twin primary duties of **loyalty** and **preservation of confidentiality** must be strictly observed.

TYPES OF CONFLICT OF INTEREST PROBLEMS

Conflict of interest problems will ultimately fall under any of two (2) categories: (1) **Concurrent or Multiple Representation;**[7] and (2) **Sequential or Successive Representation.**[8]

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[6] Almendarez Jr. v. Langit, A.C. No. 7057, July 25, 2006, 496 SCRA 402 (2006); *See* Yao v. Aurelio, A.C. No. 7023, March 30, 2006:

> "Notwithstanding the veracity of his allegations, respondent's act of filing multiple suits on similar causes of action in different venues constitutes forum-shopping, as correctly found by the investigating commissioner. This highlights his motives rather than his cause of action. Respondent took advantage of his being a lawyer in order to get back at the complainant. **In doing so, he has inevitably utilized information he has obtained from his dealings with complainant and complainant's companies for his own end.**
>
> Lawyers must conduct themselves, especially in their dealings with their clients and the public at large, with honesty and integrity in a manner beyond reproach. **Lawyers cannot be allowed to exploit their profession for the purpose of exacting vengeance or as a tool for instigating hostility against any person — most especially against a client or former client.** As we stated in Marcelo v. Javier, Sr.:
>
> > A lawyer shall at all times uphold the integrity and dignity of the legal profession. The trust and confidence necessarily reposed by clients require in the attorney a high standard and appreciation of his duty to his clients, his profession, the courts and the public. The bar should maintain a high standard of legal proficiency as well as of honesty and fair dealing. Generally speaking, a lawyer can do honor to the legal profession by faithfully performing his duties to society, to the bar, to the courts and to his clients. To this end, nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession." (Emphasis supplied.)

[7] R. Kane, "Attorney & Client", 7A C.J.S. Attorney & Client § 169 (General rules as to dual representation (May 2006).

[8] A. Melley, Am. Jr. 2d Attorneys at Law § 198 (Where Conflict of Interest Arises from Former Employment of Attorney in Firm) (May 2006); A. Melley, 7 Am. Jur. 2d Attorneys at Law § 201 (Representation of interest adverse to that of former client – Relationship between current and former representation; presumption as to Confidential Information).

In any of these types of conflict of interest, both the Code of the Professional Responsibility and the settled jurisprudence of the Supreme Court require that there should be: (1) written consent of all parties concerned; and (2) such consent given after full disclosure of the facts to all parties concerned.[9] The consent of all parties must be "informed". Necessarily, the lawyer must explain to the parties the nature and extent of the conflict and the parties must be made to understand all the possible adverse effects of the representation.[10]

Concurrent or multiple representation generally occurs when a lawyer represents clients whose objectives are adverse to each other, no matter how slight or remote such adverse interest may be. Our Supreme Court has established the following tests to ascertain if concurrent or multiple representation amounts to a conflict of interest: [11]

(1) Whether a lawyer is duty-bound to fight for an issue or claim in behalf of one client and, at the same time, to oppose that claim for the other client;

(2) Whether the acceptance of a new relation would prevent the full discharge of the lawyer's duty of undivided fidelity or loyalty to the client;

(3) Whether the acceptance of a new relation would invite suspicion of unfaithfulness or double-dealing in the performance of the lawyer's duty of undivided fidelity and loyalty; and

(4) Whether, in the acceptance of a new relation, the lawyer would be called upon to use against a client confidential information acquired through their connection.

The foregoing tests can be applied to ascertain the existence of concurrent or multiple representation in any of the following settings:

Clients in the SAME transaction

A law firm may encounter the problem of conflict of interest where various departments or practice areas of the firm are engaged by various clients for the same transaction.[12] This can occur between retainer and non-retainer clients of the

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9 *See* Code of Professional Responsibility, Rules 15.03, 21.02, 21.03, and 21.04; Northwestern University Inc. v. Arquillo, Adm. Case No. 6632, August 2, 2005, 465 SCRA 513 (2005); Nakpil v. Valdes, Adm. Case No. 2040, March 4, 1998, 350 Phil. 412 (1998).

10 Perez v. Dela Torre, Adm. Case No. 6160, March 30, 2006, 485 SCRA 547 (2006).

11 Quiambao v. Bamba, Adm. Case No. 6708, August 25, 2005, 468 SCRA 1 (2005).

12 Nakpil v. Valdes, *supra* at note 13, where the same lawyer represented the interests of an estate and its creditors.

firm who may have direct or competing interests in the same transaction. It can likewise occur where a new client is accepted by the firm for a particular or non-retainer matter, despite the firm already handling existing litigation as between said new client and other clients of the firm.[13] Likewise, a law firm may find itself representing each of the parties in a commercial purchase/sale transaction, where various departments or practice areas of the firm may be engaged from different ends of the spectrum (the buyer, the entity comprising the subject matter of the transaction, and the seller).

Clients engaged in the same business

Likewise, where a law firm represents various competitors that are engaged in the same business or are members of the same industry, the law firm may find itself engaged in concurrent or multiple representation, particularly where strategic business information is disclosed to the firm for the resolution of a legal query or question referred by a client whose competitors are also clients of the firm.

Transferring Lawyers

A "presumption of shared confidences" arises where a law firm employs a lawyer who had **previously represented a client in a matter substantially related** to a matter in which the firm is representing another client.[14] Under this presumption, the lawyer who left his former employment and becomes employed by another firm representing the opposing party is assumed to take with him or her any confidences gained in the former relationship and shares those confidences with the new firm.

In the United States, a very strict standard of proof has been applied to rebut this presumption, since any doubt as to the existence of asserted conflict of interest must be resolved in favor of disqualification of the new firm, "in order to dispel any appearance of impropriety". US courts hold evidentiary hearings and issue findings of fact on three (3) issues:

1) If there is substantial relationship between the matter at issue and matter of former firm's prior representation;

2) If so, whether the presumption of shared confidences within the former firm is rebutted by evidence that the lawyer had no personal contact with or knowledge of the related matter; and

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[13] Image Technical Service Inc. v. Eastman Kodak Co., 136 F.3d 1354 (9th Cir. 1998). Tiania v. Ocampo, Adm. Case Nos. 2285 and 2302, August 12, 1991, 200 S.C.R.A. 472 (1991).

[14] Nelson v. Green Builders Inc., 823 F. Supp. 1439, 1993 U.S. Dist. LEXIS 8344 (E.D. Wis. 1993).

3) If the lawyer did have personal contact or knowledge, whether the firm erected adequate and timely screens to rebut the presumption of shared confidences so as to avoid imputed disqualification.[15]

It may be noted, however, that several US courts have not extended the transferring lawyer's disqualification to his new employer/law firm, due to the difference between personal and **imputed** knowledge, the latter being a less compelling reason for extending disqualification to the firm.[16]

Related Lawyers/Special Concerns

Large law firms will necessarily carry a broad social and filial network from its members or employees. Spillover of client information may inadvertently occur, particularly where there are close friendships or relations between a lawyer and his client. In this regard, it is well to be mindful of Rule 21.06 of the Code of Professional Responsibility, which provides – "a lawyer shall avoid indiscreet conversation about a client's affairs even with members of his family."

Clients bidding for the same project

It is possible (if not already actually occurring) that large law firms with highly developed and/or specialized practice areas will find themselves solicited for representation by various bidders for the same commercial or government project.

'Positional conflict'

A law firm may also find itself in 'positional' conflict due to a member's position outside the firm. When a lawyer served on the governing board of a party adverse to the firm's client,[17] some US courts have extended the lawyer's disqualification to the entire law firm. Conversely, however, disqualification was not extended to the entire law firm where one of its lawyers helped establish an adverse corporate party.[18]

Gamilla vs. Mariño Jr.[19] illustrates a positional conflict. In *Gamilla,* the Philippine Supreme Court held that a lawyer acted in conflict of interest when he chose to act as the concurrent lawyer who forged a compromise agreement between management and union, while he was one of the sixteen (16) union officers and directors seeking compensation from the University of Santo Tomas for their illegal dismissal.

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15 Kala v. Aluminum Smelting and Refining Co., Inc., 81 Ohio St. 3d 1, 688 N.E. 2d 258 (1998); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (1992).

16 Lopez v. Precision Papers Inc., 99 App Div 2d 507, 470 NYS2d 678 (1984, 2d Dept); Enstar Petroleum Co. v. Mancias, 773 SW2d 662 (1989, Tex App San Antonio); J.K. Morris, 776 SW2d 271 (1989, Tex App Dallas); Goldberg v. Warner/Chappell Music, Inc. 23 Cal. Rptr. 3d 116 (Cal. App. 2d Dist. 2005); Nimkoff v. Nimkoff, 18 A.D. 3d 344, 797 N.Y.S. 2d 3 (App. Div. 1st Dep't 2005).

17 American Dredging Co. v. Philadelphia, 480 Pa 177 (1978), 389 A2d 568 (1978); William H. Raley Co. v. Superior Court, 149 Cal App 3d 1042, 197 Cal Rptr 232 (1983, 4th Dist).

18 First Small Business Invest. Co. v. Intercapital Corp. of Oregon, 108 Wash 2d 324, 738 P2d 263 (1987).

19 Adm. Case No. 4763, March 20, 2003, 447 Phil. 419 (2003).

Sequential or successive representation, on the other hand, involves representation by a law firm of a present client who may have an interest adverse to a prior or former client of the firm.[20] In the United States, it has been held that in order for disqualification of the law firm to be ordered, it must be shown that a "**substantial relationship**" exists between the former and present representations. If the two engagements are substantially related, it is assumed that during the former representation the lawyer might have acquired information related to the subject matter of the subsequent representation. Thus, if the former client can establish a substantial relationship, US courts have conclusively presumed that the lawyer possesses confidential information adverse to the former client **where it appears by virtue of the nature of the former representation that confidential information material to the current dispute would "normally" have been imparted to the lawyer.**[21]

However, US courts have also denied disqualification where there is "no evidence" that the law firm acquired "confidential information" during the prior representation **that would be "of value"** in the current representation.[22]

Utilization of Chinese Walls and Defenses To a Law Firm's Disqualification

The foregoing conflict of interests problems may be prevented and/or addressed through the use of "Chinese walls", especially by large institutional law firms with various departments or practice areas. This method of "screening" has been permitted in the United States where:

(1) Confidential information communicated to a prohibited lawyer is unlikely to be significant;

(2) Screening measures will eliminate participation in the representation by the screened lawyer; and

(3) Notice of the screening is given to the affected clients.[23]

The effectivity of the "Chinese wall" or procedure for screening a lawyer disqualified to handle a representation from the rest of the law firm is a matter of judicial appreciation. US courts have tended to determine the effectivity of the "Chinese wall" (thus denying disqualification to the entire law firm) based on the

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[20] Vda. De Alisbo v. Jalandoon, Sr., Adm. Case No. 1311, July 18, 1991, 199 SCRA 321 (1991).

[21] H.F. Ahmanson & Co. v. Salomon Brothers Inc. (2nd Dist) 229 Cal App 3d 1445, 280 Cal Rptr 614 (1991), 91 CDOS 3398, 91 Daily Journal DAR 5573.

[22] Cossette v. Country Style Donuts Inc. (CA5 Fla) 647 F2d 526 (1978); Wong v. Fong, 60 Hawaii 601, 593 P2d 386 (1981); De La Vergne v. De La Vergne (La App 1st Cir) 361 So 2d 1234 (1978).

[23] S. S. Fortney and J. Hanna. "Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest", 33 St. Mary's L.J. 669, at 701-702 (2002).

individual circumstances of the case. Disqualification of the entire law firm was denied, however, where the law firm was able to raise the following defenses showing the effectivity of its "Chinese wall" or screening procedure:

(1) A lawyer acting as "of counsel" to the firm had represented parties in matters that had a substantial overlap or relation to the litigation being handled by the law firm, where "the firm consisted of over 80 attorneys; the attorney's connection with the firm was only of counsel; the firm had represented the party for over five years before the of counsel's association, and disqualification would create a severe economic hardship on the party;[24]

(2) Where there is a procedure to screen the disqualified lawyer, showing how it would deny him any benefit from the firm's representation of the party, and that the representation has progressed so far that unreasonable prejudice would result from change of counsel;[25]

(3) The disqualified lawyer could not touch any case file or discuss the disputed matter with anyone at the firm. Disqualification would create delay that would be highly prejudicial to all parties;[26]

(4) A **court-ordered and supervised** embargo on any communications between the disqualified lawyer and the personnel of his new firm regarding any matter related to the litigation;[27]

(5) The law firm had a policy of screening each case which the firm accepted for potential conflict. If a substantial conflict existed, the firm would decline representation, but if the previous exposure of one of its attorneys was tangential, the case would be accepted and that attorney would be insulated from further contact with the matter;[28]

(6) The disqualified attorney was excluded from participation in the case, had no access to relevant files, and did not derive any remuneration from funds obtained by the firm prosecuting the case. No one at the firm was permitted to discuss the matter in his presence or allow him to view any documents relating to this litigation;[29] and

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[24] Jenson v. Touche Ross & Co, 335 NW2d 720 (1983, Minn).

[25] *See* implication in Ussury v. St. Joseph Hospital, 43 Ohio App 3d 48, 539, NE2d 700 (1988, Cuyahoga Co).

[26] Kassis v. Teacher's Ins. And Annuity Ass'n, 243 A.D. 2d 191, 678 N.Y.S.2d 32 (1st Dept 1998).

[27] NFC Inc. v. General Nutrition Inc., 562 F. Supp. 332 (1983 DC Mass), 1983-1 CCH Trade Cases.

[28] Kadish v. Commodity Futures Trading Com., 553 F. Supp. 660 (1982 ND Ill).

[29] Armstrong v. McAlpin, 625 F2d 433 (1980 CA2 NY), CCH Fed Secur L. Rep. 97542, 51 ALR Fed 646.

7) The partner conducting the relevant litigation, upon learning of the conflict, immediately instructed both the professional and clerical staff of the firm that the associate could not have access to any of the files, documents, or records of the case under any circumstances. He also instructed the professional staff that the associate was neither to advise nor to consult with any attorney or any person with respect to any aspect of the proceedings. The law firm then removed all files, documents, and records pertaining to the case to a suite to which the associate was denied access, and subsequently removed the files to the LA branch of the firm.[30]

Generally, US courts appreciated the prior existence of a **screening or "China wall" policy and procedural rules** in the law firm; its vigilance in detecting potential conflicts; its immediate implementation of the China wall upon apprehension of the conflict; and the firm's ongoing monitoring of the China wall. US courts have taken the following factors in favor of the law firm as defenses against extending the disqualification of a lawyer to his law firm:

(1) The larger the size of the firm, the better it can rebut the "presumption of shared confidences" and disavow any imputed knowledge from the disqualified lawyer.

(2) Where the number of screened or disqualified lawyers is minimal in proportion to the firm size, evidence may be appreciated to show that such lawyers can be effectively "isolated" in relation to the subject matter of the disqualification.

(3) Where the "China wall" is set up immediately, long before or immediately after the occurrence of the potential conflict, there is a greater probability that the courts will appreciate the law firm's vigilance and control procedures.

(4) The "China wall" is designed in such a manner that there is no discussion between the disqualified lawyer and the rest of the firm on the subject matter of the conflict of interest; there is very limited circulation of, and access to, the relevant documents as to the rest of the firm; there are strong sanctions against the "breach" of the "wall" or violation of the screening policy; the disqualified lawyer does not receive any compensation or remuneration from the subject matter of the conflict of interest; and the physical and geographic organization of the firm is such that the objectives of the "China wall" can be approximated, if not fully achieved.[31]

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[30] Sierra Vista Hospital Inc. v. United States, 226 Ct Cl 223, 639 F2d 749 (1981).

[31] Miller v. Chicaco & North W. Transp. Co., 938 F Supp 503 (1996, ND Ill); Healy v. Axelrod Constr. Co. Defined Pension Plan & Trust (1994, ND Ill) 155 FRD 615; Bauunternehmung v. United States, 8 Cl Ct 793 (1985), 33 CCF 74028.

Noting the foregoing practices accepted by US courts, it is recommended that Philippine law firms (especially large and institutional law firms with various practice areas) adopt the following procedures to erect their own "China walls" to prevent and address conflicts of interest problems:

For Concurrent/Multiple Representation cases

1. There should be a different team of lawyers for each client/matter represented or handled.

2. Strictly **no discussion** between the teams on the matter subject of representation.

3. Routing of communications should be strictly monitored and devised so that only the team of lawyers assigned has custody and access to its files. Filing should be done separately.

4. Clerical staff, including paralegals and stenographers, should be separately assigned to each team, with no "crossing over".

5. Teams should be **physically segregated**.

6. Lawyers assigned to each team cannot be "crossed-over" with other lawyers for other teams, **even in different referrals**.

7. There should be **restricted access to topics being researched** (library access to resources, electronic searches, etc.).

8. All work of each team is strictly confidential as Attorney Work Product.

9. Billing letters, daily service records, and statements of account should be **segregated** for each team, with no opportunity whatsoever for each team to inspect or examine the other's records.

For Sequential/Successive Representation cases

Measures similar to the foregoing should likewise be adopted. However, the law firm should take into consideration distinctions between a litigation setting (and the particular needs of the client in this case) and a non-litigation setting.

'Cracks in the China Wall': Areas of Concern *for the Law Firm*

There are two (2) possible areas of concern in a law firm's undue reliance on a "China Wall". First, from a legal perspective, while a "China Wall" may prove effective in upholding the lawyer's duty to preserve the confidences and communications of his client, it may not necessarily be sufficient to approximate the high standards set

by the Supreme Court on the lawyer's primary duty of loyalty to his client. Second, from a law practice perspective, a rigidly enforced "China Wall" may dampen the overall effectiveness of the firm as an institutional organization which draws expertise from lawyers specializing in practice areas. These areas of concern, if left unaddressed, could collectively undermine the stated merits of a "China Wall".

ON THE LEGALITY OF A "CHINA WALL". Canon 17 of the Code of Professional Responsibility (CPR) strictly enjoins a lawyer to observe "fidelity to the cause of his client" and to be "mindful of the trust and confidence reposed in him". A "China Wall", by its very nature, contemplates an irreconcilable division of the law firm's loyalty to its clients, and thus clearly appears to circumvent Canon 17 of the CPR.

In the 2005 case of *Solatan vs. Inocentes et al.*,[32] the Supreme Court stressed that a lawyer's duty of fidelity to his clients should be "undivided", or "serve their needs without interference or impairment from any conflicting interest", such that "an attorney giving legal advice to a party with an interest conflicting with that of his client resulting in detriment to the latter may be held guilty of disloyalty". The Supreme Court emphasized that "all partners and practitioners who hold supervisory capacities are legally responsible to exert **ordinary diligence in apprising themselves of the comings and goings of the cases handled by the persons over which they are exercising supervisory authority and in exerting necessary efforts to foreclose the occurrence of violations of the Code of Professional Responsibility by persons under their charge**."

With the creation of a "China Wall", in a law firm, however, it will be difficult for law partners and practitioners to discharge the foregoing duties of "apprising themselves" of cases being handled by the firm, and "exerting necessary efforts" to foreclose the occurrence of violations of the CPR. Without the necessary information being made available to the law partnership and the persons holding supervisory authority over associates, the law firm partnership as a whole shall not have the means available to prevent or forestall practices in violation of the CPR. Ironically, the "China Wall" can itself become the instrument to deter the fullest implementation of the CPR in a law firm.

Moreover, the Supreme Court itself has laid stringent standards for determining a lawyer's observance of his "duty of fidelity" to his client. Mere suspicion of double-dealing or unfaithfulness invited by multiple or successive representation has been declared sufficient by the Supreme Court to declare that the lawyer's "duty of fidelity" to his client is breached.[33] As such, a "China Wall" may not be sufficient by itself to dispel any "suspicion" of double-dealing or infidelity by the law firm to the cause of its clients. A law firm may still be deemed to be acting in violation of its "duty of fidelity" under the CPR.

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[32] Adm. Case No. 6504, August 9, 2005, 466 SCRA 1 (2005).

[33] Frias v. Bautista-Lozada, Adm. Case No. 6656, December 13, 2005, 477 SCRA 393 (2005); Pormento v. Pontevedra, Adm. Case No. 5128, March 31, 2005, 454 SCRA 167 (2005).

Finally, while there is some widespread acceptance of "China Walls" in the United States, there is also a parallel thread of US jurisprudence holding that "China Wall" screening procedures are ineffective, causing the disqualification of the entire law firm. This is inevitable from the judicial trend to evaluate the effectivity of "China Wall" screening procedures "based on the circumstances of the case". Some of the factors which some US courts have considered as bearing upon the ineffectivity of "China Wall" screening procedures are:

(1) The law firm made no attempt to screen the disqualified lawyer from the litigation, until it was ordered by the court to use a "China Wall";[34]

(2) A "China Wall" could only be utilized where the disqualified lawyer could clearly and effectively show that he had no knowledge of the confidences and secrets of the former client;[35]

(3) A lawyer who was intimately involved with the particular litigation, and who had obtained confidential information pertinent to that litigation, and later terminated the relationship and became associated with the firm that represented an adverse party in the same litigation, gives the law firm an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation;[36]

(4) The "China Wall" was insufficient as it merely focused on the use of case management software to restrict the disqualified lawyer's access to documents;[37] and

(5) The "appearance of impropriety" was created by a lawyer who left his firm and joined a law firm after filing a continuance to file appellate brief for his client only two weeks before joining the new firm. No screening methods could affect perception that the lawyer had abandoned his client and joined the new firm representing his adversary while the case was pending.[38]

These are just some of the factors that US courts have considered in denying the effectivity of the "China Wall" and ordering the disqualification of law firms. A law firm relying on the "China Wall" should therefore observe caution, and be prepared to raise its defenses against disqualification, particularly on the alleged "breach" of the duty to observe fidelity to the client.

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34 Klein v. Superior Court, 198 Cal App 3d 894, 244 Cal Rptr 226 (1988, 6th Dist).

35 Weglarz v. Bruck, 128 Ill App 3d 1, 83 Ill Dec 266, 470 NE2d 21 (1984, 1st Dist).

36 State ex rel. Freezer Services Inc. v. Mullen, 235 Neb 981, 458 NW2d 245 (1990).

37 Doe ex rel. Doe v. Perry Community School Dist., 650 N.W. 2d 594 (Iowa 2002).

38 Kala v. Aluminum Smelting & Refining Co., Inc., 81 Ohio Street, 3d 1, 688 N.E. 2d 258 (1998).

The Code of Professional Responsibility itself provides the mechanism to avoid the breach of the lawyer's duty of fidelity to its client. Whether it is concurrent, multiple, successive, or subsequent representation at stake, it is still imperative that the law firm obtain the **written consent of all parties concerned**, after it has made **full disclosure of the nature, extent, and effects of the representation**. It is only after this "informed" consent has been obtained by a law firm that a "China Wall" gains significance: 1) it governs the conduct of the lawyers of the firm in an admitted situation of conflict of interest and prevents prejudice to the clients or parties who have bestowed consent during the course of the case or transaction; and (2) it provides ongoing reassurance to the consenting clients that the law firm is prudently taking measures to ensure that the adverse consequences of the representation are avoided. After all, parties have their right to their choice of counsel. If parties insist on exercising this right and are willing to absorb all the foreseeable consequences of consenting to the conflict, the "China Wall" may indeed prove useful to maintaining the beneficial relationship between the client and the law firm.

On the effect of a "China Wall" on a law firm's competence and competitiveness. Large and "institutional" law firms are distinct in the legal profession by providing the widest possible scope of legal services to their clients. A single legal query may span issues on taxation, commercial law, litigation, and labor, among others. An "open" environment law firm encourages a swifter, more updated, and broader approach to providing legal solutions. This more-adaptable and responsive structure has proven to be at pace with the needs of corporate clients, in particular, who are accustomed to the globalized nature of business and industry.

With the creation of a "China Wall", however, the expanding nature and approaches of law firm practice would be forced to reach a standstill. By its very nature, a "China Wall" prohibits interaction, consultation, and discussion between lawyers of the firm due to the existence of the conflict. Even research topics and library resources might have to be parceled out and divided, and access to emails and opinions restricted. This restriction dampens the "competitive edge" offered by the institutional law firm. An institutional law firm draws upon the collective human resources of the firm to provide the best possible legal options and services for its client. How will this be done when a "China Wall" is put into place? Will a blind query or consultation referred by one lawyer of a team to another lawyer (in another practice area) in another team be construed as violation of the "China Wall"? If that is the case, how is the client supposed to be assured that it is getting the best possible legal services when the human and material resources of the institutional law firm have been deliberately segregated and divided to service the client's competitors or adversaries?

Guidelines for a Law Firm's Ethical *Infrastructure*

To address the foregoing areas of concern for law firms relying on China walls, international practice has evolved several "guidelines" for the development of the law firm's ethical infrastructure. These guidelines recognize that a law firm's susceptibility to conflict of interest problems concomitantly increases as the firm's practice areas, fields of specialization, and cross-border transactions expand. The complexity of matters brought to the law firm requires more stringent guidelines to prevent and/or address such conflicts of interest. Apart from the "China wall", these guidelines include, among others:[39]

(1) Conflicts check, both through software and "people-ware"

(2) New matter memoranda outlining new representations

(3) Weekly or daily conferences

(4) An analysis process which evaluates all potential or actual conflicts; the consequences of proceeding in light of the existence of a conflict; possible steps to address conflicts; and the effectiveness of steps to avoid the consequences of conflicts

(5) Strong disciplinary rules requiring disclosure of the existence of potential conflicts;

(6) Firm policies and procedures requiring documentation of all representation;

(7) Engagement letters or contracts setting for the services to be provided and the manner of financing the remuneration/compensation for the service;

(8) Educating the lawyers on promoting "conflict-sensitive" practice and ethics training;

(9) Clear provisions for termination of the engagement; and

(10) Assigning lawyers and/or support staff to conduct conflicts check while the referral is ongoing, and developing a "firewall" preventing the opening of files or billing before a conflicts review is done.

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[39] *Id.* at note 23.

Recommendations and Conclusion

A "China wall" is not entitled to encompass all solutions to a law firm's conflict of interest problems. For the most part, while a "China wall" addresses the lawyer's duty of preserving confidentiality to a significant and satisfactory degree, Philippine jurisprudence has laid emphasis on the lawyer's **primary duty of loyalty** to the cause of his client. To date, "China walls" remain untested within the parameters of the Code of Professional Responsibility. However, considering that lawyers can represent parties with conflicting interests for as long as **all parties concerned give their "informed" consent, after full and effective disclosure has been made to them of the nature, extent, and consequences of the representation**, a case may still be argued for the viability of "China walls" as a tool that gives life to this very same exception to the prohibition against conflict of interests.

Survey of 2006 Supreme Court Decisions in Human Relations, Torts and Damages

Carmelo V. Sison[*]

Part One
TORTS

A. In General

Tort may be defined as a civil wrong consisting of a violation of a right or conversely a breach of duty for which the law grants a remedy in damages or other relief. This right is created by law in favor of a person called a creditor to compel another called a debtor to observe a duty or a prestation either to render what is due to him or to refrain from causing him injury.

For a person to be given relief by a court, he should allege and prove (1) he has a right, created or recognized by law (statute or judicial decision) and a correlative obligation on the part of the defendant to respect or not to violate the right; (2) an act or omission of the defendant which violates such right, the violation being called a wrong, an injury, or harm; (3) the defendant's act or omission is the proximate cause of the violation; and (4) damages or the pecuniary value of the loss that results because of the violation of the plaintiff's right.

The right of the plaintiff is a legally protected interest, recognized by law, expressly or impliedly. The violation of the right or the non-observance of duty is known as a wrong, injury or harm, because some legal interest of the plaintiff in his person, property or relations is impaired or extinguished. The acts constituting the violation are the acts that the law defines as the acts of execution resulting in the impairment or extinction of the plaintiff's right. A cause of action will prosper if the facts alleged are established by competent evidence and these conform to the elements of the cause of action, in which case the court is duty bound to grant relief.

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* Professor of Law, University of the Philippines. The author would like to thank the following research assistants: Ms. Frances Lynette V. Sayson (U.P. Law 2009 D), Ms. Leah B. Tinaza (U.P. Law 2008 B) and Ms. Karla Regina D. Valera (U.P. Law 2009 D).

B. Civil liability

1. Civil liability arising from a criminal act

Both the Civil Code and the Rules of Court provide instances when an independent civil action may be instituted regardless of whether the civil action is based on an obligation arising from the act or omission complained of as a felony. Section 1 of Rule 111 of the Rules of Court states that when a criminal action is instituted, the civil action for the recovery of civil liability arising from the offense charged shall be deemed instituted with the criminal action unless the offended party waives the civil action, reserves the right to institute it separately or institutes the civil action prior to the criminal action.

As discussed by the Court in *L.G. Foods Corporation vs. Pagapong-Agraviador*,[1] victims of negligence or their heirs have a choice between an action to enforce the civil liability arising from culpa criminal under Article 100 of the Revised Penal Code, and an action for quasi-delict (culpa aquiliana) under Articles 2176 to 2194 of the Civil Code.

Article 1161 of the Civil Code provides that civil obligation arising from criminal offenses shall be governed by penal laws subject to the provision of Article 2177 and of the pertinent provisions of Chapter 2, Preliminary Title on Human Relation, and of Title XVIII of this Book, regulating damages. Plainly, Article 2177 provides for the alternative remedies the plaintiff may choose from in case the obligation has the possibility of arising indirectly from the delict/crime or directly from quasi-delict/tort. The choice is with the plaintiff who makes known his cause of action in his initiatory pleading or complaint, and not with the defendant who cannot ask for the dismissal of the plaintiff's cause of action or lack of it based on the defendant's perception that the plaintiff should have opted to file a claim under Article 103 of the Revised Penal Code.

2. Civil liability in cases of acquittal

Settled in jurisprudence is the principle that a court may acquit an accused on reasonable doubt and still order payment of civil damages in the same case.

In *Yadao vs. People*,[2] the trial court found petitioner Artemio Yadao guilty of assaulting and mauling one Deogracias Gundran causing his untimely death. The Supreme Court, however, overturned his conviction of homicide stating that:

> Though it was established that petitioner Yadao slapped the victim, and as a result of which the latter fell down and struck his head on the

[1] G.R. No. 158995, September 26, 2006, 503 SCRA 170 (2006).

[2] G.R. No. 150917, September 27, 2006, 503 SCRA 496 (2006).

> edge of a table, the prosecution nonetheless failed to show the nexus between the injury sustained by the victim and his death. It failed to discharge the burden to show beyond a reasonable doubt that the death of the victim resulted from the use of violent and criminal means by petitioner Yadao.

The fact that the victim herein was wounded is not conclusive that death resulted therefrom. To make an offender liable for the death of the victim, it must be proven that the death is the natural consequence of the physical injuries inflicted. If the physical injury is not the proximate cause of death of the victim, then the offender cannot be held liable for such death.

Despite said acquittal, his liability for damages was not considered extinguished since the judgment of acquittal is not based on a pronouncement that the facts from which civil claims might arise did not exist. Accordingly, the Court awarded P50,000.00 as civil damages to the heirs of the victim.

C. The Tortfeasor

Employer

The Court, in *L.G. Foods Corporation vs. Pagapong-Agraviador*,[3] stated that under Article 2180 of the Civil Code, the liability of the employer is direct or immediate. It is not conditioned upon prior recourse against the negligent employee and a prior showing of insolvency of such employee.

In said case, the Vallejera spouses alleged in their complaint that the petitioners are civilly liable for the negligence/imprudence of their driver since they failed to exercise the necessary diligence required of a good father of the family in the selection and supervision of their employees, which diligence, if exercised, could have prevented the vehicular accident that resulted to the death of their seven-year old son. The lower courts found the spouses' cause of action as one based on negligence under Article 2180 of the Civil Code and ruled in their favor. The petitioners appealed to the Supreme Court arguing that the spouses' cause of action is founded in the civil case for damages under Article 103 of the Revised Penal Code and not in Article 2180.

Upholding the lower court, the Supreme Court ruled that the spouses were able to sufficiently allege that the death of the their minor son was caused by the negligent act of the petitioners' driver; and that the petitioners themselves were civilly liable for the negligence of their driver for failing "to exercise the necessary diligence required of a good father of the family in the selection and supervision of [their] employee, the driver, which diligence, if exercised, would have prevented said

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[3] *Supra* note 1.

accident." It noted that had the respondent spouses elected to sue the petitioners based on Article 103 of the Revised Penal Code, they would have alleged that the guilt of the driver had been proven beyond reasonable doubt; that such accused driver is insolvent; that it is the subsidiary liability of the defendant petitioners as employers to pay for the damage done by their employee (driver) based on the principle that every person criminally liable is also civilly liable. Since there was no conviction in the criminal case against the driver, precisely because death intervened prior to the termination of the criminal proceedings, the spouses' recourse was, therefore, to sue the petitioners for their direct and primary liability based on quasi-delict. Furthermore, it took note that the petitioners, in their Answer with Compulsory Counter-Claim, repeatedly made mention of Article 2180 of the Civil Code and anchored their defense on their allegation that "they had exercised due diligence in the selection and supervision of [their] employees." The Court viewed this defense as an admission that indeed the petitioners acknowledged the private respondents' cause of action as one for quasi-delict under Article 2180 of the Civil Code.

Joint Tortfeasors

The Supreme Court discussed, in *Construction Development Corporation vs. Estrella,*[4] citing the case of *Worcester vs. Ocampo*,[5] that "as a general rule, joint tort feasors are all the persons who command, instigate, promote, encourage, advise, countenance, cooperate in, aid or abet the commission of a tort, or who approve of it after it is done, if done for their benefit. They are each liable as principals, to the same extent and in the same manner as if they had performed the wrongful act themselves. . . .Joint tort feasors are jointly and severally liable for the tort which they commit. The persons injured may sue all of them or any number less than all. Each is liable for the whole damages caused by all, and all together are jointly liable for the whole damage. It is no defense for one sued alone, that the others who participated in the wrongful act are not joined with him as defendants; nor is it any excuse for him that his participation in the tort was insignificant as compared to that of the others. . . .Joint tort feasors are not liable pro rata. The damages can not be apportioned among them, except among themselves. They cannot insist upon an apportionment, for the purpose of each paying an aliquot part. They are jointly and severally liable for the whole amount. . . .A payment in full for the damage done, by one of the joint tort feasors, of course satisfies any claim which might exist against the others. There can be but satisfaction. The release of one of the joint tort feasors by agreement generally operates to discharge all."

In said case, respondents Rebecca Estrella and her granddaughter Rachel were passengers of a BLTB bus which was rammed from behind by a tractor-truck of CDCP. They filed a complaint for damages against CDCP, BLTB, and their respective

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[4] G.R. 147791, September 8, 2006, 501 SCRA 228 (2006).

[5] G.R. No. 5932, February 27, 1912, 22 Phil. 42 (1912).

drivers, Payunan and Datinguinoo. It was alleged in the complaint that (a) Payunan and Datinguinoo were negligent and did not obey traffic laws; (b) BLTB and CDCP did not exercise due diligence of a good father of a family in the selection and supervision of their employees; and (c) BLTB allowed its bud to operate knowing that it lacked proper maintenance thus exposing the passengers to grave danger.

The lower courts held that BLTB, as a common carrier, was bound to observe extraordinary diligence in the vigilance over the safety of its passengers. It must carry the passengers safely as far as human care and foresight provide, using the utmost diligence of very cautious persons, with due regard for all the circumstances. Thus, where a passenger dies or is injured, the carrier is presumed to have been at fault or has acted negligently. BLTB's inability to carry respondents to their destination gave rise to an action for breach of contract of carriage while its failure to rebut the presumption of negligence made it liable to respondents for the breach.

Regarding CDCP, the lower courts found that the tractor-truck it owned bumped the BLTB bus from behind. Evidence showed that CDCP's driver was reckless and driving very fast at the time of the incident. The gross negligence of its driver raised the presumption that CDCP was negligent either in the selection or in the supervision of its employees which it failed to rebut thus making it and its driver liable to respondents.

The Supreme Court, in upholding the above findings and finding CDCP, BLTB and their respective drivers liable, ruled that the owner of a vehicle which collided with a common carrier is solidarily liable to the injured passenger of the same. It held, thus:[6]

> **Nor should it make any difference that the liability of petitioner [bus owner] springs from contract while that of respondents [owner and driver of other vehicle] arises from *quasi-delict*.** As early as 1913, we already ruled in *Gutierrez vs. Gutierrez*, 56 Phil. 177, that in case of injury to a passenger due to the negligence of the driver of the bus on which he was riding and of the driver of another vehicle, the drivers as well as the owners of the two vehicles are jointly and severally liable for damages. x x x

D. Proximate Cause

Proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. Proximate cause is determined by the facts of each case upon mixed considerations of logic, common sense, policy and precedent. Proximate cause is one of the requisites to institute a valid cause of action.

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[6] *Supra* note 4 at 239.

Calimutan vs. People[7] gives a clear illustration of the concept of proximate cause. In this case, a stone, as big as a fist, was thrown by Calimutan at the victim Cantre during an altercation. The stone hit Cantre at the left side of his back. After said incident Cantre started complaining of pain in the left side of his back which was hit by the stone and stomachache. By nighttime, he was sweating profusely and his entire body felt numb. Early the next morning, Cantre died.

Right after his death, Cantre was examined Dr. Ulanday, the Municipal Health Officer of Masbate. Dr. Ulanday stated that the cause of death of Cantre was food poisoning. Unsatisfied with the findings of Dr. Ulanday, Cantre's family requested another examination of the body by the NBI. The autopsy, conducted by Dr. Mendez, stated that the cause of death of Cantre was a traumatic injury to the abdomen. The trial court found Calimutan guilty of the crime of homicide. The appellate court sustained the conviction of homicide and gave credence to the autopsy report of Dr. Mendez over Dr. Ulanday.

The Supreme Court found that the prosecution was able to establish that the proximate cause of the death of the victim Cantre was the stone thrown at him by petitioner Calimutan. The witnesses presented testified that before the encounter with Calimutan, Cantre seemed physically fine. After being hit at the back by the stone, however, Cantre had continuously complained of backache and subsequently, his physical condition rapidly deteriorated, until finally, he died. Other than being stoned by petitioner Calimutan, there was no other instance when the victim Cantre may have been hit by another blunt instrument which could have caused the laceration of his spleen. Giving credence to the testimony of the examining physician that the sheer impact of the stone thrown by petitioner Calimutan at the back of the victim Cantre could rupture or lacerate the spleen – an organ described as vulnerable, superficial, and fragile – even without causing any other external physical injury, the Court was morally persuaded that the victim Cantre died from a lacerated spleen, an injury sustained after being hit by a stone thrown at him by petitioner Calimutan.

The Court, however, found that Calimutan did not throw the stone with the specific intent of killing or harming the victim Cantre. The former's intention was to drive away the attacker. His act was committed with inexcusable lack of precaution although he may have been impelled by a lawful objective when he threw the stone at the victim. He miscalculated his own strength perhaps unaware that he could throw a stone with such force as to seriously injure, or worse, kill someone. Despite such finding, the Supreme Court still concluded that Calimutan was civilly liable for the death of Cantre. The Court found Calimutan guilty beyond reasonable doubt of reckless imprudence resulting in homicide.

In *Equitable PCI Bank vs. Ong,*[8] respondent Ong filed action for damages against

[7] G.R. No. 152133, February 9, 2006, 482 SCRA 44 (2006).

[8] G.R. No. 156207, September 15, 2006, 502 SCRA 119 (2006).

the petitioner PCI Bank for unjustly refusing to pay the amount of the Manager's check drawn from her account. Said checks were issued from the proceeds of another check earlier issued by one Sarande to Ong as payment for a transaction. Upon inquiry, the bank cleared the checks issued by Sarande. The Court found that the proximate cause of the loss is attributable to PCI Bank. It ruled that, the proximate cause of the loss is the act of PCI Bank in having cleared the check of Sarande and its failure to exercise that degree of diligence required of it under the law which resulted in the loss to Ong.

E. Evidence

Res Ipsa Loquitor

In *Capili vs. Cardaòa*,[9] the cause of action of the respondents was based on the failure of the petitioner to see to the maintenance of the school grounds and safety of the children within the school and its premises.

Respondent spouses Cardaña brought a suit for damages against petitioner Capili, the principal of San Roque Elementary School alleging that while their daughter Jasmin was walking along the fence of the school, a branch of a caimito tree located within the school premises fell on her, causing her instantaneous death. The spouses claimed that even as early as two months before the incident, a certain Lerios reported on the possible danger the tree posed to passersby. They averred that petitioner's gross negligence and lack of foresight caused the death of their daughter. The trial court dismissed the complaint for failure of the respondents to establish negligence on the part of the petitioner. On appeal, the Court of Appeals reversed the trial court's decision. Before the Supreme Court, the primary issue resolved was whether the principal was negligent and liable for the death of Jasmin.

The Court, in finding for the respondent spouses ruled that the probability that the branches of a dead and rotting tree could fall and harm someone was clearly a danger that is foreseeable. As the school principal, petitioner was tasked to see to the maintenance of the school grounds and safety of the children within the school and its premises. That she was unaware of the rotten state of a tree whose falling branch had caused the death of a child speaks ill of her discharge of the responsibility of her position.

The fact, that respondents' daughter, Jasmin, died as a result of the dead and rotting tree within the school's premises shows that the tree was indeed an obvious danger to anyone passing by and calls for application of the principle of res ipsa loquitur. The doctrine of res ipsa loquitur applies where: (1) the accident was of such character as to warrant an inference that it would not have happened except for the defendant's negligence; (2) the accident must have been caused by an agency or

[9] G.R. No. 157906, November 2, 2006, 506 SCRA 569 (2006).

instrumentality within the exclusive management or control of the person charged with the negligence complained of; and (3) the accident must not have been due to any voluntary action or contribution on the part of the person injured.

The effect of the doctrine of *res ipsa loquitur* is to warrant a presumption or inference that the mere falling of the branch of the dead and rotting tree which caused the death of respondents' daughter was a result of petitioner's negligence, being in charge of the school.

As the school principal, petitioner was tasked to see to the maintenance of the school grounds and safety of the children within the school and its premises. That she was unaware of the rotten state of the tree calls for an explanation on her part as to why she failed to be vigilant. Capili explained that she was unaware of the state of the rotting tree and she could not see the immediate danger posed by the tree by its mere sighting even as she and the other teachers conducted ground inspections. She also claimed that had she been aware, she exercised her duty by assigning the disposition of the tree to another teacher. The Supreme Court however, found Capili's explanation wanting. As school principal, petitioner is expected to oversee the safety of the school's premises. The fact that she failed to see the immediate danger posed by the dead and rotting tree shows she failed to exercise the responsibility demanded by her position. Moreover, even if petitioner had assigned disposal of the tree to another teacher, she exercises supervision over her assignee. It has been more than a month since Capili gave instructions to her assistant yet she failed to check if the danger had been removed. Her defense of negligence cannot be accepted.

F. Principles of Tort

1. Abuse of Right

Our Civil Code incorporates not only principles of equity but moral precepts as well. Such precepts are designed to indicate certain norms that spring from the foundation of good conscience and which are meant to serve as guides for human conduct.

One of the moral precepts enshrined in our civil law is the *Abuse of Rights* Principle. The principle is enunciated in the proverbial words of Article 19 of the Civil Code: Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith. This provision of law sets certain standards which must be observed in the exercise of one's rights and in the performance of one's duties. It is an affirmation of the fact that our rights are not absolute. The rights granted to us do not give us unbridled license to exercise such rights abusively, and at the expense of the rights of others. Our civil law, in Article 21 of the Civil Code, provides a legal remedy

when this important provision of law is violated.

In *Manila Doctors Hospital vs. Chua*,[10] Ty filed a tort action alleging that the hospital pressured her to pay the hospital bills of her mother (Chua) and sister by employing unethical, unpleasant and unlawful methods which allegedly worsened the condition of her mother, particularly, by (i) cutting off the telephone line in her room and removing the air-conditioning unit, television set, and refrigerator, (ii) refusing to render medical attendance and to change the hospital gown and bed sheets, and (iii) barring the private nurses or midwives from assisting the patient. The petitioner hospital was held by the Court to have not abused its right in taking measures to reduce the mounting unpaid hospital bills incurred by the respondent during the confinement of her mother for hypertension. In ruling for the petitioner, the Court found that evidence in the record firmly established that the hospital staff took proactive steps to inform the relatives of Chua of the removal of facilities prior thereto, and to carry out the necessary precautionary measures to ensure that her health and well-being would not be adversely affected.

The Court also noted that, "while the operation of private pay hospitals and medical clinics is impressed with public interest and imbued with a heavy social responsibility it is also a business, and, as a business, it has a right to institute all measures of efficiency commensurate to the ends for which it is designed, especially to ensure its economic viability and survival. In the institution of cost-cutting measures, the hospital has a right to reduce the facilities and services that are deemed to be non-essential, such that their reduction or removal would not be detrimental to the medical condition of the patient....Though human experience would show that the deactivation of the air-conditioner may cause a temperature differential that may trigger some physical discomfort, or that the removal of entertainment facilities such as the television set, or the disconnection of communication devices such as the telephone, may cause some exasperation on the part of the one who benefits from these, nevertheless, all things considered, and given the degree of diligence the petitioner duly exerted, not every suppression of the things that one has grown accustomed to enjoy amounts to an actionable wrong, nor does every physical or emotional discomfort amount to the kind of anguish that warrants the award of moral damages under the general principles of tort. The underlying basis for the award of tort damages is the premise that an individual was injured in contemplation of law. Thus, there must first be the breach of some duty and the imposition of liability for that breach before damages may be awarded; it is not sufficient to state that there should be tort liability merely because the plaintiff suffered some pain and suffering."

In *Sison vs. Court of Appeals,*[11] the Supreme Court held that petitioner, who was then in charge of the regional office of the Social Security System in Cebu, abused his discretionary authority when it unreasonably delayed the payment of claims filed

[10] G.R. No. 150355, July 31, 2006, 497 SCRA 230 (2006).

[11] G.R. No. 124086, June 26, 2006, 492 SCRA 497 (2006).

with it by the respondent owner of hospitals, and is thus, liable for damages. Petitioner delayed payment of respondent's Medicare claims because there were irregularities concerning it which required further investigation. Respondent's action is based on delay, anchoring her claim on Medicare Circular No. 258 s. 1998 which entitles her to payment within 90 days unless a case is filed against her. No such case has been filed.

Although the Court agreed with the petitioner that his office has the discretionary authority to withhold payment of fraudulent claims, it noted that such authority was tempered by the application of the mandate of Medicare laws and regulations. Thus, contrary to petitioner's assertions, the exercise of his discretionary authority to approve and deny claims was not absolute. Petitioner's exercise of authority was defined by the limits provided by Circular No. 258, which states that only a patently wrongful claim can be denied. For doubtful claims, petitioner only has two options: (1) file a case within 90 days and suspend payment or (2) pay within 90 days and subject the claim to pre-audit. Payment of the claim does not prejudice petitioner from filing a case at a later time. Moreover, the exercise of petitioner's discretionary authority cannot be indefinitely held in abeyance. As in the present case, government's inaction puts the financial standing of participating hospitals in a precarious position. Indeed, instead of placing a premium on participation in the government's Medicare program, petitioner effectively punished an accredited provider by refusing to provide payment for services already rendered.

2. Unjust Enrichment

The doctrine of unjust enrichment was defined in *Equitable PCI Bank vs. Ong*[12] as a transfer of value without just cause or consideration. It is based on the equitable postulate that it is unjust for a person to retain benefit without paying for it. In said case, respondent Ong, instead of encashing the check issued to her by Sarande (drawn against PCI Bank account), requested petitioner bank to convert the proceeds thereof into a manager's check. After the former deposited the converted check in his bank account he received a check return-slip informing her that PCI Bank had stopped the payment of the said check on the ground of irregular issuance. This prompted Ong to file a collection suit with damages against the bank.

The Court, in resolving the case, noted that the check of Sarande had been cleared by the PCI Bank for which reason the former issued the Manager's check to Ong. A check which has been cleared and credited to the account of the creditor shall be equivalent to a delivery to the creditor of cash in an amount equal to the amount credited to his account. Having cleared the check earlier, PCI Bank, therefore, became liable to Ong and it cannot allege want or failure of consideration between it and Sarande. Under settled jurisprudence, Ong is a stranger as regards the transaction

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[12] *Supra* note 8.

between PCI Bank and Sarande.

The Court, on the other hand ruled that there was no unjust enrichment in *Car Cool Philippines, Inc. vs. Ushio Realty and Development Corporation.*[13] In said ejectment case, USHIO purchased the property in question from Spouses Lopez. USHIO alleged that the former owners Spouses Lopez entered into a verbal month-to-month lease agreement with CAR COOL. Upon failure of CAR COOL to exercise its option to buy the property, Lopez terminated the verbal lease agreement and gave CAR COOL orders to vacate the property. CAR COOL, on the other hand, alleged that USHIO was aware of the lease agreement between CAR COOL and the former owner, and that the latter had agreed to renew the lease for another two years. It claimed that it paid Lopez in advance covering one year rental plus an additional security deposit. Upon the receipt of the advance rentals and security deposit, Lopez allegedly promised to execute a written contract of lease for two years.

The Metropolitan Trial Court and Court of Appeals both rendered a decision in favor of USHIO ordering CAR COOL to surrender possession of the premises and to pay USHIO a reasonable compensation as rent, from the date of the latter's purchase of the property and every month thereafter until the premises is finally vacated. CAR COOL questioned the propriety of awarding damages by way of rentals and asserted that to award such would constitute unjust enrichment at its expense.

The Supreme Court held that since the payment by CAR COOL as rentals were given to the former owner Lopez and not to USHIO, as the latter was not privy to the transaction, the payment of damages in the form of rentals for the property does not constitute unjust enrichment. It never benefited financially from the alleged transaction. Moreover, the checks that USHIO admitted to have received were never encashed and in fact, it offered to return the same to CAR COOL but the latter refused.

There is unjust enrichment when a person unjustly retains a benefit to the loss of another, or when a person retains money or property of another against the fundamental principles of justice, equity and good conscience. Article 22 of the Civil Code provides that every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him. The principle of unjust enrichment under Article 22 requires two conditions: (1) that a person is benefited without a valid basis or justification, and (2) that such benefit is derived at another's expense or damage.

There is no unjust enrichment when the person who will benefit has a valid claim to such benefit. USHIO Realty had a legal right to receive some amount as reasonable compensation for CAR COOL's occupation of the property by virtue of

[13] G.R. No. 138088, January 23, 2006, 479 SCRA 404 (2006).

[14] G.R. No. 104828, January 16, 1997, 334 Phil. 217 (1997).

Section 17 of Rule 70 of the Rules of Civil Procedure on ejectment. The Court citing the case of *Benitez vs. Court of Appeals*[14] held that damages recoverable in ejectment cases under Section 8, Rule 70 of the Revised Rules of Court arise from the loss of the use and occupation of the property, and not the damages which private respondents may have suffered but which have no direct relation to their loss of material possession. Damages in the context of Section 8, Rule 70 is limited to "rent" or "fair market value" for the use and occupation of the property.

3. *Damnum Absque Injuria*

In *Citibank vs. Sabeniano*,[15] the respondent claimed to have substantial deposits and money market placements with the petitioners, the proceeds of which were supposedly deposited automatically and directly to respondent's accounts with petitioner Citibank. Respondent further alleged that petitioners refused to return her deposits and the proceeds of her money market placements despite her repeated demands, thus, compelling respondent to file a civil case against petitioners for "Accounting, Sum of Money and Damages."

The petitioners admitted that respondent had deposits and money market placements with them, but claimed that she also had several loans from them. They alleged that when the respondent failed to pay her loans despite repeated demands by petitioner Citibank, the latter exercised its right to off-set or compensate respondent's outstanding loans with her deposits and money market placements, pursuant to the Declaration of Pledge and the Deeds of Assignment executed by respondent in its favor. Petitioner Citibank supposedly informed respondent Sabeniano of the foregoing compensation through 2 letters. Thus, petitioners prayed for the dismissal of the Complaint and for the award of actual, moral, and exemplary damages, and attorney's fees.

The Supreme Court partially granted the action of respondent Sabeniano but as to Citibank's counterclaim, it found no sufficient basis to award damages to them. It noted that respondent was compelled to institute the civil case in the exercise of her rights and in the protection of her interests. Any injury resulting from the exercise of one's rights is *damnum absque injuria.*

G. Negligence

1. Concept

Negligence is conduct which falls below the standard established by law for the protection of others against an unreasonable risk or harm. Negligence as a source of obligation is embodied in quasi-delict which is defined in Article 2176 of the Civil

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[15] G.R. No. 156132, October 16, 2006, 504 SCRA 378 (2006).

Code.

In *Capili vs. Cardaòa*,[16] the Court held that a negligent act is an inadvertent act; it may be merely carelessly done from a lack of ordinary prudence and may be one which creates a situation involving an unreasonable risk to another because of the expectable action of the other, a third person, an animal, or a force of nature. A negligent act is one from which an ordinary prudent person in the actor's position, in the same or similar circumstances, would foresee such an appreciable risk of harm to others as to cause him not to do the act or to do it in a more careful manner. In every tort case filed under Article 2176 of the Civil Code, plaintiff has to prove by a preponderance of evidence: (1) the damages suffered by the plaintiff; (2) the fault or negligence of the defendant or some other person for whose act he must respond; and (3) the connection of cause and effect between the fault or negligence and the damages incurred.

In *Philippine National Railways vs. Brunty*,[17] the respondents' cause of action was based on the failure of the petitioner Philippine National Railways (PNR) to provide the necessary equipment in railroad crossing.

Rhonda Brunty, the daughter of the respondent, Ethel Brunty and an American citizen, came to the Philippines for a visit. Before leaving the country, she, together with her Filipino host, Garcia, traveled to Baguio City on board a car driven by Mercelita. When the car was already approaching the railroad crossing in Tarlac, Mercelita, driving at approximately 70 km/hr drove past a vehicle, unaware of the railroad track up ahead and that they were about to collide with a train. Mercelita was instantly killed when the car smashed into the train while the two other passengers suffered serious physical injuries. Rhonda died on the way to the hospital.

Ethel Brunty, together with Garcia, brought an action against PNR to indemnify the former for the death of her daughter Rhonda. The case was filed after the demand letter she sent to the PNR demanding payment of actual, compensatory and moral damages was ignored by the latter. In her complaint, Ethel alleged that the deaths of Rhonda were the direct and proximate result of the gross and reckless negligence of PNR in not providing the necessary equipment at the railroad crossing. They mentioned that there was no flagbar or red light signal to warn motorists who were about to cross the railroad track. They also pointed out that PNR failed to supervise its employees in the performance of their respective tasks and duties, more particularly the pilot and operator of the train.

PNR, on the other hand, claimed that it exercised the diligence of a good father of a family not only in the selection but also in the supervision of its employees. It stressed that it had the right of way on the railroad crossing in question, and that it has no legal duty to put up a bar or red light signal in any such crossing. It insisted

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[16] *Supra* note 9.

[17] G.R. No. 169891, November 2, 2006, 506 SCRA 685 (2006).

that there were adequate, visible, and clear warning signs strategically posted on the sides of the road before the railroad crossing. It countered that the immediate and proximate cause of the accident was the negligence of Mercelita, the person driving the car where Rhonda was a passenger, and that he had the last clear chance to avoid the accident. The driver disregarded the warning signs, the whistle blasts of the oncoming train and the flashlight signals to stop given by the guard. As counterclaim, it prayed that it be awarded actual and compensatory damages, and litigation expenses. The trial court rendered judgment in favor of the plaintiffs and against PNR adjudging them to indemnify the former.

The Supreme Court, in resolving the matter as to whose negligence resulted in the unfortunate collision, defined the concept negligence as "not doing something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do." Citing *Corliss vs. Manila Railroad Company*,[18] the Court also stated that negligence is the want of the care required by the circumstances. It is a relative or comparative, not an absolute, term and its application depends upon the situation of the parties and the degree of care and vigilance which the circumstances reasonably require. In determining whether or not there is negligence on the part of the parties in a given situation, jurisprudence has laid down the following test: Did defendant, in doing the alleged negligent act, use that reasonable care and caution which an ordinarily prudent person would have used in the same situation? If not, the person is guilty of negligence. The law, in effect, adopts the standard supposed to be supplied by the imaginary conduct of the discreet *pater familias* of the Roman law.

The Supreme Court emphasized, that petitioner was found negligent because of its failure to provide the necessary safety device to ensure the safety of motorists in crossing the railroad track. As such, it is liable for damages for violating the provisions of Article 2176 of the New Civil Code, viz:

> Whoever, by act or omission, causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a *quasi-delict* and is governed by the provisions of this Chapter.

The Court held that in order to sustain a claim based on *quasi-delict*, the following requisites must concur: (1) damage to plaintiff; (2) negligence, by act or omission, of which defendant, or some person for whose acts he must respond was guilty; and (3) connection of cause and effect between such negligence and damage. It affirmed the conclusion of the Court of Appeals that 1) there was damage or injury as a result of the collision, 2) there was negligence on the part of PNR and 3) the alleged safety

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[18] G.R. No. 21291, March 28, 1969, 137 Phil. 101, 108 (1969).

measures installed by the PNR at the railroad crossing is not only inadequate but does not satisfy well-settled safety standards in transportation. This was deduced from the evidence presented by the PNR itself such as the photographs which showed the absence of the flagbars or safety railroad bars, the inadequacy of the installed warning signals and lack of proper lighting within the area. Thus, even if there was a flagman stationed at the site as claimed by PNR (petitioner), the Court observed that it would still be impossible to know or see that there is a railroad crossing/ tracks ahead, or that there is an approaching train from the Moncada side of the road since one's view would be blocked by a cockpit arena. Moreover, as held by the Court of Appeals in the case, a vehicle coming from the Moncada side would have difficulty in knowing that there is an approaching train because of the slight curve, more so, at an unholy hour as 2:00 a.m. Thus, it is imperative on the part of the PNR to provide adequate safety equipment in the area.

2. Test of negligence: standard of care to be employed

Banks/ Credit Card Companies

In *Equitable PCI Bank vs. Ong*,[19] the Court observed that the banking system has become an indispensable institution in the modern world and plays a vital role in the economic life of every civilized society. Whether as mere passive entities for the safe-keeping and saving of money or as active instruments of business and commerce, banks have attained an ubiquitous presence among the people, who have come to regard them with respect and even gratitude and most of all, confidence. For this reason, banks should guard against injury attributable to negligence or bad faith on its part. Without a doubt, it has been repeatedly emphasized that since the banking business is impressed with public interest, of paramount importance thereto is the trust and confidence of the public in general. Consequently, the highest degree of diligence is expected, and high standards of integrity and performance are even required of it.

3. Defenses

Doctrine of Last Clear Chance

In the case of *Philippine National Railways vs. Brunty*,[20] the Supreme Court held that the doctrine of last clear chance does not apply. The doctrine of last clear chance states that where both parties are negligent but the negligent act of one is appreciably later than that of the other, or where it is impossible to determine whose fault or negligence caused the loss, the one who had the last clear opportunity to avoid the loss but failed to do so, is chargeable with the loss. The antecedent negligence of plaintiff does not preclude him from recovering damages caused by the supervening

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[19] *Supra* note 8.

[20] *Supra* note 17.

negligence of defendant, who had the last fair chance to prevent the impending harm by the exercise of due diligence. Since the negligence of the petitioner PNR was the proximate cause of the injury, the abovementioned doctrine cannot be applied in this case.

Contributory negligence

Contributory negligence was defined in *Philippine National Railways vs. Brunty*,[21] as conduct on the part of the injured party, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. To hold a person as having contributed to his injuries, it must be shown that he performed an act that brought about his injuries in disregard of warning or signs of an impending danger to health and body. To prove contributory negligence, it is still necessary to establish a causal link, although not proximate, between the negligence of the party and the succeeding injury. In a legal sense, negligence is contributory only when it contributes proximately to the injury, and not simply a condition for its occurrence.

In the said case, the Supreme Court upheld the trial courts findings that there was indeed negligence on the part of the driver Mercelita. It observed that despite the fact that there was a slight curve before approaching the tracks; the place was not properly illuminated; one's view was blocked by a cockpit arena; and Mercelita was not familiar with the road, he was then driving the Mercedes Benz at a speed of 70 km/hr and, in fact, had overtaken a vehicle a few yards before reaching the railroad track. However, the Court here ruled that while Mercelita's acts contributed to the collision, they nevertheless do not negate the petitioner's liability. Pursuant to Article 2179 of the Civil Code, the only effect such contributory negligence could have is to mitigate liability.

The above definition of contributory negligence was reiterated in *Estacion vs. Bernardo*.[22] The Court pronounced that its underlying precept is that a plaintiff who is partly responsible for his own injury should not be entitled to recover damages in full but must bear the consequences of his own negligence. The defendant must thus be held liable only for the damages actually caused by his negligence.

In this case, respondent Noe boarded a Ford Fiera passenger jeepney driven by respondent Quinquillera, owned by respondent Bandoquillo, and was seated on the extension seat placed at the center of the Fiera. When an old woman boarded, respondent Noe offered his seat. Since the Fiera was already full, respondent Noe hung or stood on the left rear carrier of the vehicle. When the Fierra stopped by the right shoulder of the road to pick up passengers, an Isuzu cargo truck, owned by

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[21] *Supra* note 17.

[22] G.R. No. 144723, February 27, 2006, 483 SCRA 222 (2006).

petitioner Estacion and driven by Gerosano, which was traveling in the same direction, hit its rear end portion where respondent Noe was standing. Due to the tremendous force, the cargo truck smashed respondent Noe against the Fiera crushing his legs and feet which made him fall to the ground. A passing vehicle brought him to the hospital where his lower left leg was amputated.

Respondent Noe, through his guardian *ad litem* Arlie Bernardo, filed with the RTC of Dumaguete City a complaint for damages arising from *quasi delict* against petitioner as the registered owner of the cargo truck and his driver Gerosano. He alleged that the proximate cause of his injuries and suffering was the reckless imprudence of Gerosano and petitioner's negligence in the selection of a reckless driver and for operating a vehicle that was not roadworthy.

The trial court rendered its judgment in favor of Noe and ordered the defendants Gerosano and Estacion, to pay jointly or solidarily, the following: ₱129,584.20 for actual damages in the form of medical and hospitalization expenses, ₱50,000.00 for moral damages, consisting of mental anguish, moral shock, serious anxiety and wounded feelings, ₱10,000.00 for attorney's fees and ₱5,000.00 for litigation expenses.

The Supreme Court partially granted the appeal of Estacion. Applying the test that "to hold a person as having contributed to his injuries, it must be shown that he performed an act that brought about his injuries in disregard of warning or signs of an impending danger to health and body," it found that the act of Noe in standing on the left rear carrier portion of the Fiera showed his lack of ordinary care and foresight, making him liable for contributory negligence.

Accordingly, the Court allocated the damages on a 20-80 ratio which was earlier applied in the case of *Phoenix Construction, Inc., vs. Intermediate Appellate Court.*[23] Taking into account the contributing negligence of respondent Noe, it ruled that the demands of substantial justice are satisfied by distributing the damages on a 20-80 ratio excluding attorney's fees and litigation expenses. Consequently, 20% was ordered to be deducted from the actual and moral damages awarded by the trial court in favor of respondent Noe, that is: 20% of ₱129,584.20 for actual damages is ₱25,916.84 and 20% of ₱50,000.00 for moral damages is ₱10,000.00. Thus, after deducting the same, the award for actual damages was ₱103,667.36 and ₱40,000.00 for moral damages or 80% of the damages so awarded.

In *Romulo v. Layug,*[24] the Romulo spouses alleged in their complaint for Cancellation of Title and Annulment of the Deed of Sale with damages that they were duped by the Layug spouses into signing blank documents to secure a loan obtained by them from the latter. The blank documents turned out to be Deeds of Absolute Sale, which the respondents used to cause the transfer in their name of a

[23] G.R. No. L-65295, March 10, 1987, 148 SCRA 370 (1987).

[24] G.R. No. 151217, September 8, 2006, 501 SCRA 262 (2006).

land owned by the petitioners.

The award of moral and exemplary damages granted by the lower court was reduced by the Supreme Court to one-half of the amounts on the finding that the petitioners were not completely without fault. It ruled that had Romulo spouses exercised ordinary diligence in their affairs, they could have avoided executing documents in blank. Respondents' wrongful act, although the proximate cause of the injury suffered by petitioners, was mitigated by petitioners' own contributory negligence.

Force Majeure

In *Radio Communications of the Philippines, Inc. (RCPI) vs. Verchez,* et. al,[25] RCPI invoked *force majeure*, specifically, the alleged radio noise and interferences which adversely affected the transmission and/or reception of the telegraphic message, to justify its failure to deliver the telegram on time.

The Court, in rejecting this defense held that for *force majeure* to prosper, it is necessary that one has committed no negligence or misconduct that may have occasioned the loss. An act of God cannot be invoked to protect a person who has failed to take steps to forestall the possible adverse consequences of such a loss. One's negligence may have concurred with an act of God in producing damage and injury to another; nonetheless, showing that the immediate or proximate cause of the damage or injury was a fortuitous event would not exempt one from liability. When the effect is found to be partly the result of a person's participation, whether by active intervention, neglect or failure to act the whole occurrence is humanized and removed from the rules applicable to acts of God.

The Court further held that, assuming *arguendo* that fortuitous circumstances prevented RCPI from delivering the telegram at the soonest possible time, it should have at least informed the sender of the non-transmission and the non-delivery so that she could have taken steps to remedy the situation. But it did not. There lies the fault or negligence.

Diligence of a Good Father of a Family

According to Art. 2180 of the Civil Code, the obligation imposed under Article 2176 which is demandable for the acts or omissions of those whom one is responsible for (*i.e.*, employers for the acts and omission of employees and household helpers acting within the scope of their assigned tasks) ceases when the persons therein mentioned prove that they observed all the *diligence of a good father of a family* to

[25] G.R. No. 164349, January 31, 2006, 481 SCRA 384 (2006).

prevent damage.

In *Estacion vs. Bernardo,*[26] citing *Yambao vs. Zuniga,*[27] the "diligence of a good father of the family" as to employers was taken to mean as diligence in the selection and supervision of employees. Thus, when an employee, while performing his duties, causes damage to persons or property due to his own negligence, there arises the *juris tantum* presumption that the employer is negligent, either in the selection of the employee or in the supervision over him after the selection. For the employer to avoid the solidary liability for a tort committed by his employee, an employer must rebut the presumption by presenting adequate and convincing proof that in the selection and supervision of his employee, he or she exercises the care and diligence of a good father of a family.

In said case, petitioner Estacion was sued by respondent Noe for the injuries he suffered from being hit by a vehicle owned by her and driven by her driver Venturina. The Court ruled that Estacion's allegation that before she hired Venturina she required him to submit his driver's license and clearances is worthless, in view of her failure to offer in evidence certified true copies of said license and clearances. It also held that, assuming arguendo, that Venturina did submit his license and clearances when he applied with petitioner in January 1992, the latter still fails the test of due diligence in the selection of her bus driver. Case law teaches that for an employer to have exercised the diligence of a good father of a family, he should not be satisfied with the applicant's mere possession of a professional driver's license; he must also carefully examine the applicant for employment as to his qualifications, his experience and record of service. Petitioner failed to present convincing proof that she went to this extent of verifying Venturina's qualifications, safety record, and driving history. The presumption juris tantum that there was negligence in the selection of her bus driver, thus, remains unrebutted.

Nor did the Court find that the petitioner was able to show that she exercised due supervision over Venturina after his selection. As observed, the petitioner did not present any proof that she drafted and implemented training programs and guidelines on road safety for her employees. In fact, the record was bare of any showing that petitioner required Venturina to attend periodic seminars on road safety and traffic efficiency. Hence, petitioner was not allowed to claim exemption from any liability arising from the recklessness or negligence of Venturina.

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[26] *Supra* note 17.

[27] G.R. No. 146173, December 11, 2003, 418 SCRA 266 (2003).

Part Two
DAMAGES

I. General Considerations

Concept of Damages

Damages, strictly speaking, are the pecuniary value of the loss suffered as a consequence of the legal injury inflicted. Parenthetically, it might be mentioned that damages are awarded not only as a consequence of tort but also because of the other sources of obligation. The Supreme Court held in *Ong vs. Court of Appeals*[28] that the fundamental principle of the law on damages is that one injured by a breach of contract or by a wrongful or negligent act or omission shall have a fair and just compensation, commensurate with the loss sustained as a consequence of the defendant's acts. An award of damages should be justified by invoking a provision of the Civil Code authorizing the award and not by referring to the definition of the damages by the Civil Code.

In *Pascual vs. Beltran*,[29] private respondent Raymundo was charged before the DOTC, Region II, Tuguegarao City, with Conduct Grossly Prejudicial to the Best Interest of the Service/Gross Insubordination/Violation of Reasonable Office Rules and Regulations, Gross Discourtesy in the Course of Official Functions and Gross Dishonesty Through Falsification of Official Document by petitioner Pascual as Regional Director of the Telecommunications Office, Region II, Tuguegarao, Cagayan. This was in connection with certain acts she had committed, such as her signing of official communications/correspondences without being issued the delegated authority to sign on behalf of the head of office, her alleged shouting and discourteous remarks against management, and her unauthorized absences during office hours. The DOTC Assistant Secretary exonerated Raymundo of the charges.

Raymundo, assisted by her husband, then filed an action for damages arising from Malicious Administrative Suit against petitioner Pascual in the Regional Trial Court, primarily on the basis of the administrative complaint filed by the latter against the former. During the trial, Pascual was represented by the Office of the Solicitor General (OSG). Raymundo filed a motion to disqualify the OSG from representing petitioner since no right or interest of the government is involved, that petitioner is sued in his private capacity, and that petitioner had retired from the government since July 1995.

The trial court judge, issued an order granting the motion to disqualify stating that Pascual is being sued for acts which he committed in his official capacity but it is also true that the cause of action is for torts, for which he may be held personally

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[28] G.R. No. 117103, January 21, 1999, 361 Phil. 338 (1999).

[29] G.R. No. 129318, October 27, 2006, 505 SCRA 545 (2006).

answerable. Since it is suit for damages, the interest of the Government is in no way involved so that further appearance by the Solicitor General in his defense is unjustified.

The Supreme Court, affirming the lower court, held that the OSG has no authority to represent Pascual in a civil suit for damages. The law allows a public official to be represented by the Solicitor General in all civil, criminal and special proceedings, when such proceedings arise from the former's acts in his official capacity. However, in said case, petitioner was actually sued in his personal capacity inasmuch as his principal, the State, can never be the author of any wrongful act. The complaint filed by Raymundo with the RTC merely identified petitioner as Director of the Telecommunications Office, but did not categorically state that he was being sued in his official capacity. What is determinative of the nature of the cause of action are the allegations in the complaint. In addition, the complaint filed by Raymundo contained an allegation that she sued Pascual for having personal motives in filing the administrative case against her. In fact, it can also be observed in the same Complaint that the reliefs sought by Raymundo are directed against Pascual personally and not his office. Raymundo is claiming liability directly from Pascual.

Moreover, the court ruled that an action for recovery of damages for the commission of an injury to a person is a personal action. A personal action is one brought for the recovery of personal property, for the enforcement of some contract of recovery of damages for its breach, or for the recovery of damages for the commission of an injury to the person or property. More so, any liability the petitioner may be held to account for on the occasion of such civil suit is for his own account and the state is not liable for the same. Thus, the OSG has no authority to represent him in such civil suit for damages.

Discretion in Fixing Damages

In *Republic Planters Bank vs. Montinola*,[30] the cause of action was the unilateral suspension of the credit line of the Montinola brothers by the bank. Ricardo Montinola, Jr. and Ramon Monfort are sugarcane planters who have obtained a crop loan credit line with Republic Planters Bank (RPB). When the two sought to withdraw P30,000.00 chargeable against the crop loan credit line, RPB refused to release the amount because Montinola and Monfort filed a civil case against the bank arising from a malversation committed by a bank employee which directly affected the deposit accounts of plaintiffs-appellees and the case was instituted to recover from appellant Bank the sum of money taken by the bank employee. Thereupon, they immediately made a formal written demand upon RPB for the release of the balance of their crop loan, which the bank still adamantly refused. This prompted the two to file a joint complaint for breach of contract and damages against RPB with the trial court praying for P1,000,000 as actual damages, P1,000,000 as moral damages, P500,000 as exemplary damages and P250,000 as attorney's fees.

[30] G.R. No. 134728, February 23, 2006, 483 SCRA 173 (2003).

The trial court rendered judgment for the plaintiffs Montinola, Jr. and Monfort granting the damages in the amounts prayed for with the modification that they be given P350,000 as attorney's fees. The Court of Appeals affirmed the trial court with the modification. The appellate court opined that the only reason the plaintiffs' credit line was suspended was solely due to the case they filed against the bank. The bank had maliciously and in bad faith unilaterally suspended the credit line of the plaintiffs. The Court of Appeals, however, found no sufficient evidence to support the amounts awarded by the trial court and reduced the actual damages to P500,000, moral and exemplary damages to P500,000 and attorney's fees to P200.00.

As to the authority of the appellate court to reduce the damages awarded, the Supreme Court cited Article 2216 of the Civil Code which provides:

No proof of pecuniary loss is necessary in order that moral, nominal, temperate, liquidated or exemplary damages, may be adjudicated. The assessment of such damages, except liquidated ones, is left to the discretion of the court, according to the circumstances of each case.

The Supreme Court held that the Court of Appeals correctly exercised its discretion by reducing the amounts involved. It agreed with the appellate court's reduction of the damages awarded to the plaintiff. As to the actual damages, the Court cited Article 2219 of the Civil Code and emphasized that the reduced amount of actual damages awarded by the Court of Appeals complied with the abovementioned provision. The amount was adequate compensation for the pecuniary loss which Montinola, Jr. and Monfort could have possibly suffered under the circumstances established by the evidence proffered. Anything over and above such amount would definitely result in their unjust enrichment at the expense of RPB.

II. Kinds of Damages

A. Actual or Compensatory Damages

1. Concept

Actual damages are adequate compensation only for pecuniary loss actually suffered by the plaintiff as he has duly proved (Article 2199). The components of actual damages are: (a) value of loss and unrealized profit (Article 2200); (b) loss of earning capacity for personal injury suffered (Article 2205); (c) injury to plaintiff's business standing or commercial credit (ibid); (d) attorney's fees (Article 2208); and interest (Article 2209).

Citing *PNOC Shipping and Transport Corporation vs. Court of Appeals*,[31] the Court in *MALT Corp. vs. Court of Appeals*[32] stated that actual or compensatory damages are those awarded in satisfaction of, or in recompense for, loss or injury sustained. They proceed from a sense of natural justice and are designed to repair the wrong that has been done, to compensate for the injury inflicted and not to impose a penalty. In actions based on torts or quasi-delicts, actual damages include all the natural and probable consequences of the act or omission complained of. There are two kinds of actual or compensatory damages: one is the loss of what a person already possesses (*daño emergente*), and the other is the failure to receive as a benefit that which would have pertained to him (*lucro cesante*).

In *Ferrer vs. People*,[33] petitioner Tommy Ferrer and his brother Ramon Ferrer were found guilty beyond reasonable doubt of Attempted Homicide for stabbing brothers Roque Ferrer and Ricardo Ferrer. The trial court also awarded to Roque Ferrer the sum of 1,809.45 representing medical expenses, P11,979.60 representing unrealized earnings, P5,000 as expenses of litigation and P10,000.00 as moral damages. To Ricardo Ferrer, it awarded P2,000.00 as hospitalization and medical expenses, P10,000 as unrealized earnings, P5,000 as expenses in attending the hearings and P8,000 as moral damages. The appellate court affirmed the lower court's decision.

The Supreme Court found that the lower court erred in awarding P10,000 each in favor of the victims as unrealized earnings. It held that compensation for lost income is in the nature of damages and requires due proof of the amount of the damage suffered. It observed that aside from the self-serving testimony of Ricardo, the prosecution failed to present any other proof to substantiate their claim of lost earnings.

The award of P2,000.00 in favor of Ricardo representing hospitalization and medical expenses was also held to be improper for lack of proof to substantiate the same. Ricardo failed to present receipts of payment when he claimed the amount of P2,000.00 as his expenses for hospitalization. On the other hand, Roque was able to present receipts to prove his medical expenses.

2. Must be alleged and proved with certainty

In *Diño vs. Jardines*,[34] petitioner Diño alleged that respondent Jardines executed in her favor a Deed of Sale with Pacto de Retro over a parcel of land with improvements. It was agreed that the period for redemption would expire in six months and upon expiry, neither Jardines nor any of her representatives redeemed

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[31] G.R. No. 107518, October 8, 1998, 358 Phil. 38 (1998).

[32] G.R. No. 15240, March 31, 2006, 486 SCRA 284 (2006).

[33] G.R. No. 143487, February 22, 2006, 483 SCRA 31 (2006).

[34] G.R. No. 145871, January 31, 2006, 481 SCRA 226 (2006).

or repurchased the property consolidating ownership in favor of Diño. Jardines, on the other hand alleged that the Deed of Sale with Pacto de Retro did not embody the real intention of the parties since the transaction actually entered into by the parties was one of simple loan and the Deed of Sale with Pacto de Retro was executed just as a security for the loan.

In a recovery suit between the parties, Regional Trial Court rendered judgment in favor of the petitioner declaring the contract as a pacto de retro sale and ordering Jardines to pay Diño actual damages as follows: P3,000.00 representing expenses in going to and from Jardines' place to collect the redemption money, P1,000.00 times the number of times Diño came to Baguio to attend the hearing of the case, and P10,000 attorney's fees. The Court of Appeals reversed the judgment and held that the true nature of the contract was actually an equitable mortgage. It also deleted the damages awarded to Diño.

The Supreme Court held that the Court of Appeals correctly deleted the actual damages awarded to petitioner since there is no sufficient evidence to prove that she is entitled to the same. Petitioner's only evidence to prove her claim for actual damages was her testimony that she spent such amounts. Citing *People vs. Sara*,[35] the Court held that a witness' testimony cannot be "considered as competent proof and cannot replace the probative value of official receipts to justify the award of actual damages, for jurisprudence instructs that the same must be duly substantiated by receipts." There being no official receipts whatsoever to support petitioner's claim for actual or compensatory damages, said claim was denied.

In *G.Q. Garments vs. Miranda*,[36] petitioner G.Q. Garments instituted an action for damages and recovery of possession of the property against Angel and Florenda Miranda as alternative defendants based on an executed contract of lease between Angel and G.Q. In the complaint, it was alleged that Florenda, accompanied by several armed men who identified themselves as policemen, forcibly evicted petitioner from the premises leased to him by the former's father-in-law, Angel. During the encounter, Florenda and her men took some equipment, machinery and other properties belonging to petitioner, thereby causing loss and damage to said properties in the amount of P2 million.

The Supreme Court held that the petitioner's claim for actual damages was not properly substantiated by evidence. It found that there is no question that, indeed, petitioner sustained damages because its equipment, machineries, and other valuables were taken, and its building was destroyed by respondent Florenda Miranda and her cohorts. However, the only evidence adduced by the petitioner to prove the value of said property is the testimony of one Kho. No other proof was adduced to establish the value or price of the equipment, machineries and valuables taken by respondent Florenda Miranda, as well as the damage to petitioner's building. The

[35] G.R. No. 140618, December 10, 2003, 417 SCRA 431 (2006).

[36] G.R. No. 161722, July 20, 2006, 495 SCRA 471 (2006).

bare claim of Kho that the petitioner sustained actual damages in the amount of P10,000,000.00 is utterly insufficient on which to anchor a judgment for actual damages in the amount of P10,000,000.00; it is speculative and merely a surmise.

The Court further declared that actual damages are not presumed. The claimant must prove the actual amount of loss with a reasonable degree of certainty premised upon competent proof and on the best evidence obtainable. He must point out specific facts that could afford a basis for measuring whatever compensatory or actual damages are borne. Actual damages cannot be anchored on mere surmises, speculations or conjectures. The claimants are not, however, mandated to prove damages in any specific or certain amount in order to recover damages for a substantial amount. When the existence of a loss is established, absolute certainty as to its amount is not required. The amount of the damages should be determined with reasonable certainty. The law does not require that the amount fixed be absolute or beyond conjectural possibilities. The ascertainment of the amount of damages should be by the plainest, easiest and most accurate measure which will do justice in the premises. As where goods are destroyed by the wrongful acts of the defendant, the plaintiff is entitled to their value at the time of the destruction that is normally the sum of money which he would have to pay in the market for identical or essentially similar good plus, in a proper case, damages for the loss of the use during the period before replacement.

In *MALTC Corp. vs. Court of Appeals,*[37] a passenger bus driven by Suelto and owned by MALTC rammed into the terrace of the commercial apartment owned by Valdellon located along Kamuning Road. In the criminal complaint for reckless imprudence resulting in damage to property against Suelto and the separate civil complaint against Suelto and the bus company for damages which were tried jointly, the trial court found Suelto guilty of reckless imprudence resulting in damage to property, and ordered MALTC and Suelto to pay, jointly and severally, P100,000.00 to Valdellon, by way of actual and compensatory damages.

The Supreme Court agreed with the contention of the petitioners that the prosecution failed to adduce evidence to prove that respondent Valdellon suffered damages in the amount of P100,000.00. The only pieces of evidence adduced by respondents to prove actual damages were the summary computation of damage made by Engr. Jesus R. Regal, Jr. amounting to P171,088.46 and the receipt issued by the BB Construction and Steel Fabricator to private respondent for P35,000.00 representing cost for carpentry works, masonry, welding, and electrical works. Respondents failed to present Regal to testify on his estimation. It further reiterated the rule that actual damages are not presumed. The claimant must prove the actual amount of loss with a reasonable degree of certainty premised upon competent proof and on the best evidence obtainable. Specific facts that could afford a basis for measuring whatever compensatory or actual damages are borne must be pointed out. Actual damages cannot be anchored on mere surmises, speculations or conjectures.

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[37] *Supra* note 32.

3. Interest

In *Construction Development vs. Estrella*,[38] the Court held that when an obligation, regardless of its source, *i.e.*, law, contracts, quasi-contracts, delicts or quasi-delicts is breached, the contravenor can be held liable for payment of interest in the concept of actual and compensatory damages. Citing *Eastern Shipping Lines, Inc. vs. CA,*[39] said award is subject to the following rules, to wit –

> 1. When the obligation is breached, and it consists in the payment of a sum of money, *i.e.*, a loan or forbearance of money, the interest due should be that which may have been stipulated in writing. Furthermore, the interest due shall itself earn legal interest from the time it is judicially demanded. In the absence of stipulation, the rate of interest shall be 12% per annum to be computed from default, *i.e.*, from judicial or extrajudicial demand under and subject to the provisions of Article 1169 of the Civil Code.
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> 2. When an obligation, not constituting a loan or forbearance of money, is breached, an interest on the amount of damages awarded may be imposed at the discretion of the court at the rate of 6% per annum. No interest, however, shall be adjudged on unliquidated claims or damages except when or until the demand can be established with reasonable certainty. Accordingly, where the demand is established with reasonable certainty, the interest shall begin to run from the time the claim is made judicially or extrajudicially (Art. 1169, Civil Code) but when such certainty cannot be so reasonably established at the time the demand is made, the interest shall begin to run only from the date the judgment of the court is made (at which time the quantification of damages may be deemed to have been reasonably ascertained). The actual base for the computation of legal interest shall, in any case, be on the amount finally adjudged.
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> 3. When the judgment of the court awarding a sum of money becomes final and executory, the rate of legal interest, whether the case falls under paragraph 1 or paragraph 2, above, shall be 12% per annum from such finality until its satisfaction, this interim period being deemed to be by then an equivalent to a forbearance of credit.

In *Diño vs. Jardines*,[40] the appellate court was upheld in ordering Jasmines to pay legal interest. While it is true that the parties came to an agreement that the interest would be at 9% (according to Diño) and 10% (according to Jasmines), the Court found such interest rate to be clearly excessive, iniquitous, unconscionable and exorbitant. It is shown by jurisprudence that iniquitous and unconscionable

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[38] *Supra* note 4.

[39] G.R. No. 97412, July 12, 1994, 234 SCRA 78 (1994).

[40] *Supra* note 33.

stipulations on interest rates, penalties and attorney's fees are contrary to morals. In this case, the rate of interest is void and the Court of Appeals correctly reduced the exorbitant rate to legal interest.

4. Attorney's fees

Citing *Traders Royal Bank Employees Union-Independent vs. NLRC,*[41] the Court in *Construction Development vs. Estrella*,[42] discussed that there are two commonly accepted concepts of attorney's fees, the so-called ordinary and extraordinary. In its ordinary concept, an attorney's fee is the reasonable compensation paid to a lawyer by his client for the legal services he has rendered to the latter. The basis of this compensation is the fact of his employment by and his agreement with the client.

In its extraordinary concept, an attorney's fee is an indemnity for damages ordered by the court to be paid by the losing party in a litigation. The basis of this is any of the cases provided by law where such award can be made, such as those authorized in Article 2208, Civil Code, and is payable not to the lawyer but to the client, unless they have agreed that the award shall pertain to the lawyer as additional compensation or as part thereof.

In said case, the Supreme Court further held that an award of attorney's fees and other expenses of litigation may be recovered as actual or compensatory damages when exemplary damages are awarded and in any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered. It confirmed the lower court's P10,000.00 award of attorney's fees after finding that the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiffs' valid, just and demandable claim for reimbursement for the bills they incurred after suffering physical injuries occasioned in an accident caused by the former's employee.

The propriety of awarding attorney's fees was also discussed in *Villanueva vs. Spouses Salvador.*[43] The respondents' cause of action in this case was based on petitioner's act of selling the two sets of jewelry pledged as security for the loans without notice to the respondents.

The respondent spouses Alejo and Virginia Salvador secured a loan of P7,650.00 from petitioner Ever Pawnshop owned and managed by co-petitioner Enrico Villanueva. Shortly after, the Salvadors took out a second loan of P5,400.00. In the two transactions, the spouses pledged jewelry items. Pawnshop tickets were issued indicating the last day to redeem the jewelries pawned. The separate redemption periods came and went but the Salvador spouses failed to redeem the pawned pieces of jewelry. Their son paid the pawnshop P7,000.00 to be applied against the first

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41 G.R. No. 120592, March 14, 1997, 336 Phil. 705 (1997).

42 *Supra* note 4.

43 G.R. No. 139436, January 25, 2006, 480 SCRA 39 (2006).

loan of P7,650.00. The ticket for the first loan was replaced. As for the second loan, Ever Pawnshop agreed to the extension of the maturity date provided the Salvadors pay 20% of their second loan obligation at a date set 3 weeks before the maturity date. The failure to pay the amount would result to the auction of the items. A new ticket for the second loan was not issued.

Ever Pawnshop issued a notice announcing a public auction sale of all unredeemed pledges. This notice appeared in the Classified Ads Section of a newspaper on the same day of the auction. After the lapse of the maturity date for the second loan, the Salvador spouses requested to renew the second loan by tendering the 20% of the amount due only to be informed that the pledged jewelry had already been auctioned. The spouses then made several attempts to recover the jewelry by tendering payment on the amount due on both loans but Ever Pawnshop refused to accept the tender. The spouses filed a complaint for damages against the pawnshop and Villanueva. Villanueva then signified his willingness to accept payment but the spouses Salvador turned down this belated offer.

The trial court rendered judgment in favor of the spouses and ordered Villanueva to pay the former P20,000.00 as moral damages, P5,400.00 as value of the jewelry sold under the second loan and P5,000.00 as attorney's fees.

The Supreme Court deleted the award of attorney's fees. The Court observed that the petitioners made an attempt to obviate litigation by offering to accept tender of payment and return the jewelry. This offer, however belated, could have saved much expense on the part of both parties, as well as the precious time of the court itself. Because the respondent chose to turn down this offer and pursue judicial recourse, the Court found it unfair to award them attorney's fees at petitioners' expense.

Explaining further, the Court also stated that as a matter of sound practice, an award of attorney's fee has always been regarded as the exception rather than the rule. Counsel's fees are, to be sure, not awarded every time a party prevails in a suit because of the policy that no premium should be placed on the right to litigate. Attorney's fees, as part of damages, are assessed only in the instances specified in Article 2208 of the Civil Code. In short, the factual, legal or equitable justification for the award must be set forth in the text of the decision. The matter of attorney's fees cannot be touched only in the fallo of the decision, else the award should be thrown out for being speculative and conjectural.

In *Ferrer vs. People*[44] there was an award of P5,000 given by the lower court pertaining to the "expenses of litigation" and "expenses in attending the hearings" in favor of the stabbing victims Roque and Ricardo. The Supreme Court held this award to be without basis. As specified in Article 2208 of the Civil Code, attorney's

[44] *Supra* note 33.

fees and expenses of litigation, other than judicial costs, may be recovered in cases where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered. Considering that the grant of attorney's fees and litigation expenses under this provision of law is in the concept of actual and compensatory damages, the court deemed it necessary to make findings of fact and law and give good reasons in granting such an award.

The award of attorney's fees was sustained in *Asian International Manpower Services vs. Court of Appeals.*[45] In said case, private respondent Aniceta Lacerna was hired by a Hong Kong based recruitment agency through AIMS. She signed an employment contract to work as a domestic helper of Low See Ting, who later cancelled the contract. Nevertheless, Lacerna was advised by AIMS to proceed to Hong Kong on the assurance that she will be provided with an employment abroad. Upon reaching Hong Kong, she was passed on from one employer to another until her work permit was denied and she was forced to return to the Philippines. Because of AIMS refusal to return her placement fee, Lacerna filed an illegal dismissal case against it.

In resolving the claim, the Court held that in actions for recovery of wages or where an employee was forced to litigate and thus incurred expenses to protect his rights and interests, a maximum of ten percent (10%) of the total monetary award by way of attorney's fees is justified under Article 111 of the Labor Code, Section 8, Rule VIII, Book III of its Implementing Rules, and paragraph 7, Article 2208 of the Civil Code. There need not be any showing that the employer acted maliciously or in bad faith when it withheld the wages. There need only be a showing that the lawful wages were not paid accordingly and that the employee was forced to file a case, as in the instant case.

B. Temperate

1. Concept

Article 2224 of the Civil Code provides that temperate or moderate damages may be recovered when the Court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty. Temperate damages are more than nominal but less than compensatory damages.

In *Philippine National Railways vs. Brunty,*[46] the Supreme Court deleted the award of P1,000,000 as actual damages by the Court of Appeals to heirs of Rhonda Brunty. It found that there was no evidence shown by respondents of the actual amount thereof. Actual or compensatory damages are those awarded in order to compensate a party for an injury or loss he suffered. They arise out of a sense of natural justice, aimed at repairing the wrong done. To be recoverable, they must be duly proved

[45] G.R. No. 169652, October 9, 2006, 504 SCRA 103 (2006).

[46] *Supra* note 17.

with a reasonable degree of certainty. The award of actual damages cannot be sustained. However, as the heirs of Rhonda Brunty undeniably incurred expenses for the wake and burial of the latter, the Supreme Court deemed it proper to award temperate damages in the amount of P25,000.00 pursuant to prevailing jurisprudence. This is in lieu of actual damages as it would be unfair for the victim's heirs to get nothing, despite the death of their kin, for the reason alone that they cannot produce receipts.

In *People vs. Beltran*,[47] Normita, the widow of the victim claimed that she spent a total amount of P61,080 for the burial and funeral expenses. However, the receipts on record showed that only an amount of P18,420.82 was spent therein. Normita's claim of expenses for the food, drinks, flowers, chairs and tables during the funeral and burial of Norman, as well as the traditional days prayer thereafter, were not supported by any receipts. These expenses are merely written, listed, and signed by Normita in one sheet of yellow paper, and submitted as evidence in the trial court. Thus, the Court held, that as general rule, Normita would only be entitled to an amount of P18,420.82 since actual damages may be awarded only if there are receipts to support the same. However, it declared that when actual damages proven by receipts during the trial amount to less than P25,000.00, such as in the said case, the award of temperate damages for P25,000.00 is justified in lieu of actual damages for a lesser amount. The Court ratiocinated therein that it was anomalous and unfair that the heirs of the victim who tried but succeeded in proving actual damages to less P25,000.00 only would be in a worse situation than those who might have presented no receipts at all but would be entitled to P25,000.00 temperate damages. Thus, instead of P18,420.82, an amount of P25,000.00 as temperate damages should be awarded to the heirs of Norman.

Similarly, in the case of *Palaganas vs. People*,[48] the Court ruled that since there was no documentary evidence to substantiate actual damages for loss of earning capacity, it cannot be awarded to the heirs of Melton Ferrer, who was shot to death by petitioner Rujjeric Palaganas. Nevertheless, since loss was actually established in the case, temperate damages in the amount of P25,000.00 was awarded to said heirs.

C. Liquidated

1. Concept

Article 2226 of the Civil Code provides that liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof. Article 2227 of the Civil Code further provides that liquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable.

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[47] G.R. No. 168051, September 27, 2006, 503 SCRA 715 (2006).

[48] G.R. No. 165483, September 12, 2006, 501 SCRA 533 (2006).

D. Moral

1. Concept

Moral damages, though incapable of pecuniary estimation, are designed to compensate and alleviate in some way the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury unjustly caused a person.

Moral damages are awarded to enable the injured party to obtain means, diversions or amusements that will serve to alleviate the moral suffering a person has undergone, by reason of the defendant's culpable action. Its award is aimed at restoration, as much as possible, of the spiritual status quo ante, and thus, it must be proportionate to the suffering inflicted. Since each case must be governed by its own peculiar circumstances, there is no hard and fast rule in determining the proper amount.

In *Villanueva vs. Court of Appeals*,[49] petitioner Orlando Villanueva and private respondent Lilia Canalita-Villanueva married in 1988. Four years later, Orlando filed a petition for annulment of his marriage alleging that threats of violence and duress forced him into marrying Lilia, who was already pregnant with another child since he alleged that he never cohabited with her. He later learned that the child died during delivery. Lilia, on the other hand, alleged that the petitioner freely and voluntarily married her. Lilia filed a counterclaim and prayed for the payment of moral damages and exemplary damages, attorney's fees and costs. The trial court rendered judgment dismissing Orlando's case and ordering him to pay Lilia, among others, moral damages in the amount of P100,000. The Court of Appeals affirmed the trial court's decision but reduced the award to P50,000.00.

The Supreme Court deemed it proper to award attorney's fees but deleted the award of moral damages. It found that nothing in the records or in the appealed decision that would support an award of moral damages. It noted that the Court of Appeals merely said, in justifying the award, that it is not difficult to imagine the suffering of the Lilia Villanueva from the portrayal of her by the Orlando Villanueva as the perpetrator of fraudulent schemes to "trap an unwilling mate." The Supreme Court ruled that such finding is only a supposition as it has no reference to any testimony of private respondent detailing her alleged physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury as would entitle her to moral damages.

In *Ferrer vs. People*,[50] the Court ruled that the P8,000 given as moral damages in favor of Ricardo was unsupported and should be deleted. There was no testimony given by Ricardo alleging emotional distress, physical suffering or mental anguish

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[49] G.R. No. 132955, October 27, 2006, 505 SCRA 564 (2006).

[50] *Supra* note 33.

suffered resulting from the crime. It stated that while no proof of pecuniary loss is necessary for moral damages to be awarded, it is essential that the claimant should satisfactorily provide factual basis for the moral injury. The award of moral damages to Roque, on the other hand, was upheld since he testified that he suffered pain even at the time that he was being discharged.

In *Coastal Pacific Trading, Inc. vs. Southern Rolling Mills Co., Inc.*,[51] a group of creditor banks (Consortium) took over management and control of more than 90% of VISCO when the latter's unpaid loan was converted into equity. In fraud of other creditors, the Consortium took advantage of the position of its members by creating complex schemes to place VISCO's properties away from the hands of other creditors. First, the Consortium put the name of the FEBTC account of VISCO under its name such that when petitioner sued on breach of contract, no garnishment can be made on VISCO's account with FEBTC as there was no such account. Second, it assigned to itself the properties of VISCO which were released by a mortgage to the DBP, wherein such property could have been available to other creditors of VISCO as well. The Consortium was held to have defrauded the other creditors by securing and disposing the company's assets in such a way that only the creditors who are members of the Consortium would benefit to the prejudice of other creditors entitled as well to the same assets.

The Supreme Court held in this case that as a rule, a corporation is not entitled to moral damages because, not being a natural person, it cannot experience physical suffering or sentiments like wounded feelings, serious anxiety, mental anguish and moral shock. The only exception to this rule is when the corporation has a good reputation that is debased, resulting in its humiliation in the business realm. In said case, moral damages was not awarded, as the records did not show any evidence that the name or reputation of petitioner has been sullied as a result of the Consortium's fraudulent acts.

2. Requisites

According to *Equitable PCI Bank vs. Ong,*[52] the requisites for an award of moral damages are as follows: firstly, evidence of besmirched reputation or physical, mental or psychological suffering sustained by the claimant; secondly, a culpable act or omission factually established; thirdly, proof that the wrongful act or omission of the defendant is the proximate cause of the damages sustained by the claimant; and fourthly, that the case is predicated on any of the instances expressed or envisioned by Article 2219 and Article 2220 of the Civil Code.

The Supreme Court found all these elements present in the said case. In the first place, by refusing to make good the manager's check it has issued, Ong suffered

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[51] G.R. No. 118692, July 28, 2006, 497 SCRA 11 (2006).

[52] *Supra* note 8.

embarrassment and humiliation arising from the dishonor of the said check. Secondly, the culpable act of PCI Bank in having cleared the check of Serande and issuing the manager's check to Ong is undeniable. Thirdly, the proximate cause of the loss is attributable to PCI Bank. Proximate cause is defined as that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. In this case, the proximate cause of the loss is the act of PCI Bank in having cleared the check of Sarande and its failure to exercise that degree of diligence required of it under the law which resulted in the loss to Ong.

In *Sison vs. Court of Appeals*,[53] the regional office of the Social Security Service in Cebu, then being managed by petitioner Sison, received several Medicare claims from respondent Tan, who was the proprietor of a hospital in Valencia, Bohol and the administrator of another hospital in Guindulman, Bohol. The claims were supposedly for the medical care services by said medical facilities to persons who represented themselves as SSS members or as dependents of SSS members. Because of the delay in the payment of the claims, respondent filed an action for mandamus and damages. In his defense, petitioner alleged that the delay was due to the investigation conducted on the respondent's claims, as some appeared to be fraudulent.

Although the Supreme Court agreed with the respondent that the petitioner abused its authority in indefinitely holding in abeyance the payment of the former's claims, it still affirmed the CA's deletion of the trial court's award of moral damages as there was no finding of bad faith on the latter's part.

3. Moral damages in quasi-delicts

In accordance with Article 2219 of the Civil Code, and as ruled in *Construction Development Corporation vs. Estrella*,[54] moral damages may be recovered in quasi-delicts causing physical injuries.

In said case, respondents Fletcher and Estrella were passengers in a BLT bus which collided with a delivery truck owned by the petitioner. The trial court's award of moral damages in the amount of P80,000.00 was reduced by the Supreme Court since prevailing jurisprudence fixed the same at P50,000.00. It held that while moral damages are not intended to enrich the plaintiff at the expense of the defendant, the award should nonetheless be commensurate to the suffering inflicted.

In *Philippine National Railways vs. Brunty*,[55] the Court sustained the award of moral damages in favor of the heirs of Rhonda Brunty. The relatives of the victim who incurred physical injuries in a quasi-delict are not proscribed from recovering

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[53] *Supra* note 11.

[54] *Supra* note 4.

[55] *Supra* note 17.

moral damages in meritorious cases. Moral damages are not punitive in nature, but are designed to compensate and alleviate in some way the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury unjustly caused a person. Although incapable of pecuniary computation, moral damages must nevertheless be somehow proportional to and in approximation of the suffering inflicted. In the case, the moral suffering of the heirs of Rhonda Brunty was sufficiently established by Ethel Brunty in her deposition. The Supreme Court awarded P500,000 as moral damages.

In *Radio Communications of the Philippines, Inc. (RCPI) vs. Verchez,*[56] Verchez and his daughters Grace and Zenaida and their respective spouses, filed a complaint against RCPI before the RTC of Sorsogon for damages. In their complaint, they alleged that the delay in delivering the telegram contributed to the early demise of the late Editha Verchez to their damage and prejudice, for which they prayed for the award of moral and exemplary damages and attorney's fees.

In said case, Grace sent a telegram to her sister Zenaida, who was residing in Quezon City, through the Sorsogon Branch of the RCPI, advising her of their mother Editha's illness and requesting for financial assistance. As there was no response from Zenaida three days after RCPI was engaged to send the telegram to the former, Grace sent a letter, this time thru JRS Delivery Service, reprimanding her for not sending any financial aid. Immediately after she received Grace's letter, Zenaida, along with her husband, left for Sorsogon. On her arrival at Sorsogon, she disclaimed having received any telegram.

The telegram was finally delivered to Zenaida 25 days later. On inquiry from RCPI why it took that long to deliver it, the manager of RCPI, replied that the delivery was not immediately effected due to the occurrence of circumstances which were beyond its control and foresight. Among others, during the transmission process, the radio link connecting the points of communication involved encountered radio noise and interferences such that subject telegram did not initially registered in the receiving teleprinter machine.

The trial court found that the obligation of the defendant to deliver the telegram to the addressee is of an urgent nature and that its essence is the early delivery of the telegram to the concerned person. It held that due to the negligence of its employees, the defendant failed to discharge its obligation on time making it liable for damages under Article 2176. RCPI was ordered to pay the Verchez's P100,000.00 as moral damages.

The Supreme Court, sustained the lower court's award for moral damages but made a distinction as to RCPI's contractual obligation to Grace and tort-based liability to the other respondents.

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[56] *Supra* note 25.

As for RCPI's tort-based liability, the Court cited Article 2219 of the Civil Code, which provides that, "Moral damages may be recovered in the following and **analogous cases:** xxx (10) Acts and actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34, and 35." Article 26 of the Civil Code, in turn, provides:

> Every person shall respect the dignity, personality , privacy and **peace of mind** of his mind neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention, and other relief:
> xxxx
> (2) Meddling with or **disturbing** the private life or **family relations** of another.

The Court held that RCPI's negligence in not promptly performing its obligation undoubtedly disturbed the peace of mind not only of Grace but also her co-respondents. As observed, it disrupted the "filial tranquillity" among them as they blamed each other "for failing to respond swiftly to an emergency." The tortious acts and/or omissions complained of were therefore held to be analogous to acts mentioned under Article 26 of the Civil Code, which are among the instances of quasi-delict when courts may award moral damages under Article 2219 of the Civil Code.

4. Moral damages in labor cases

The rule that a dismissed employee is entitled to moral damages when the dismissal is attended by bad faith or fraud or constitutes an act oppressive to labor, or is done in a manner contrary to good morals, good customs or public policy was applied in *Quadra vs. Court of Appeals*.[57] In said case, petitioner Quadra was deliberately dismissed from the service by reason of his active involvement in the activities of the union groups of both the rank and file and the supervisory employees of PCSO, which unions he himself organized and headed. PCSO first charged petitioner before the Civil Service Commission for alleged neglect of duty and conduct prejudicial to the service because of his union activities. The Civil Service Commission recommended the dismissal of petitioner. PCSO immediately served on petitioner a letter of dismissal even before the latter could move for a reconsideration of the decision of the Civil Service Commission. Petitioner, together with the union, filed with the CIR a complaint for unfair labor practice against respondent PCSO and its officers. CIR found PCSO guilty of unfair labor practice for having committed discrimination against the union and for having dismissed petitioner due to his union activities. It ordered the reinstatement. PCSO complied with the decision of the CIR. But while it reinstated petitioner to his former position and paid his backwages, it also filed with the Supreme Court a petition for review on certiorari assailing the decision of the CIR. During the pendency of the case filed by the PCSO with the

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[57] G.R. No. 147593, July 31, 2006, 497 SCRA 221 (2006).

Supreme Court, Quadra sues for damages in connection with the CIR finding of unfair labor practice. Moral and exemplary damages were awarded. The Court expressed that unfair labor practices violate the constitutional rights of workers and employees to self-organization, are inimical to the legitimate interests of both labor and management, including their right to bargain collectively and otherwise deal with each other in an atmosphere of freedom and mutual respect, and disrupt industrial peace and hinder the promotion of healthy and stable labor-management relations.

Although the Supreme Court in *Asian International Manpower Services vs. CA*[58] sustained the lower courts finding that petitioner Lacerna was illegally dismissed, it still deleted the award of moral damages in as much as she failed to prove that her employers were guilty of bad faith. It stated that while it is true that said employees were not able to justify Lacerna's dismissal, the same does not automatically amount to bad faith.

The Court ruled that moral damages cannot be based solely upon the premise that the employer dismissed the employee without cause or due process. The termination must be attended with bad faith, or fraud, or was oppressive to labor or done in a manner contrary to morals, good customs or public policy and that social humiliation, wounded feelings, or grave anxiety resulted therefrom.

Chaves vs. National Labor Relations Commission[59] was a case of illegal dismissal, an action based on law and also quasi-delict as it was alleged that the manner in which petitioner was treated and dismissed was wrongful. The Court also held that moral damages may only be recovered where the dismissal or suspension of the employee was attended by bad faith or fraud, or constituted an act oppressive to labor, or was done in a manner contrary to morals, good customs or public policy. In other words, the act must be a conscious and intentional design to do a wrongful act for a dishonest purpose or some moral obliquity.

In said case, petitioner Chaves was unceremoniously terminated as a teacher by St. Bridget School because of her alleged failure to renew her license in the Professional Regulations Commission. The Supreme Court found, however, that the real reason for Chaves' termination was because of her involvement in organizing an employees' union. It noted the contemptuous way that petitioner was treated by the school officials, Sr. Tarcila in particular, when she attempted to discuss her termination:

"The following day, petitioner went to the respondent school to meet with Sr. Mary Tarcila. However, when petitioner asked to speak with Sr. Tarcila, she was informed that Sr. Tarcila was out. Undaunted, petitioner and a Mr. Willy Lipayon proceeded to the Sister's house, talked with Sr. Clare, and presented copies of

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[58] *Supra* note 25.

[59] G.R. No. 166382, July 27, 2006, 493 SCRA 434 (2006).

documents as proof of her efforts to secure her PRC license. Sr. Clare informed petitioner that respondent Sr. Mary Tarcila would be back between 4:00 and 4:30 p.m.

At 6:15 p.m., petitioner was finally able to talk to respondent Sr. Mary Tarcila but only through the intercom system. The latter refused to see the petitioner and told her that the documents that the petitioner presented were meaningless. Sr. Tarcila asserted that what she required was a letter explaining what the petitioner had been doing regarding her application for a license. However, to the petitioner's recollection, and based on Sr. Tarcila's memorandum, no mention was made by the latter as to the type of document she required from the PRC.

On June 16, 2001, petitioner reported to the respondent school at 7:10 a.m. However, the guard at the school gate physically restrained the petitioner, in full view of her students, from entering the school premises. At that time, Sr. Mary Tarcila had given instructions to the guards not to allow the petitioner to enter the school premises due to her termination. Two of the petitioner's colleagues saw the petitioner at the school gate and offered to help. They proceeded to see respondent Sr. Tarcila to convince her to talk with petitioner. Their efforts were for naught as Sr. Tarcila informed them that petitioner would be considered absent for the day."

5. Moral damages in contractual obligations

The rule that moral damages are generally not recoverable in culpa contractual except when bad faith supervenes and is proven is illustrated in *Villanueva vs. Spouses Salvador* [*supra*]. The Supreme Court held that as it was the trial court's categorical finding that the case came about owing to petitioners' mistake in renewing the loan when the sale of the article to secure the loan had already been effected, the reliance of the Court of Appeals on Article 2220 of the Civil Code in affirming the award of moral damages was misplaced. Said article provides:

> "Willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith."
>
> From the above provision, the Court concluded that for moral damages to be assessed, the defendant's act must be vitiated by bad faith or that there is willful intent to injure. It further ruled that although there need not be a showing that the defendant acted in a wanton or malevolent manner, as this is a requirement for an award of exemplary damages, there must still be proof of fraudulent action or bad faith for a claim for moral damages to succeed.

> Bad faith does not simply connote bad judgment or negligence; it imports a dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of known duty through some motive or interest or ill-will that partakes of the nature of the fraud. And to the person claiming moral damages rests the onus of proving by convincing evidence the existence of bad faith, for good faith is presumed.

In *Bankard, Inc. vs. Feliciano*,[60] respondents Dr. Antonio Feliciano and his wife Marietta were holders of a PCIBank Mastercard issued and managed by petitioner Bankard, Inc. When they attempted to use their card to pay for their breakfast bill and some purchases made in an exclusive shop in Toronto, Canada it was dishonored for payment. Upon inquiry, they were advised by a bank employee that the dishonor was due to the non-payment of their last billing. Feliciano sues for damages based on breach of contract. Petitioner later on alleged that it suspended the privileges of respondent's credit card after it received the fraud alert from Indonesia. It also claimed that such suspension was done only after its fraud analyst, Mr. Lopez, tried to contact both the respondent and his wife at his clinic and at home.

The Court, in awarding P500,000.00 as moral damages to the spouses, observed that the petitioner's efforts at personally contacting respondent regarding the suspension of his credit card fell short of the degree of diligence required by the circumstances. Petitioner received the fraud alert on June 13, 1995. The following day, petitioner's fraud analyst tried to call up respondent at his clinic and at home, to no avail. Apart from this attempt, however, no further effort was exerted to personally inform respondent about the cancellation of his card. Petitioner had more than enough time within which to do so considering that it was not until four (4) days later that respondent left for Canada. But, petitioner's Mr. Lopez contented himself with just leaving a message with an unidentified woman in respondent's house for the latter to return his call. Before receiving the return call, the cards had been blocked on June 15, 1995. To be sure, a notice of card account blocking was sent to respondent. However, by the ordinary course of mail, the notice was not expected to reach respondent for several days yet. Despite the possibility that respondent or his wife may have occasion to use their credit cards, petitioner's fraud analyst made no further attempt to contact and warn them. Thus, respondent left for Canada on June 18, 1995 armed with his card but totally unaware that the card had been blocked three days previously, and that he was not to use the same.

Petitioner claimed that it suspended respondent's card to protect him from fraudulent transactions. However, while the Court found petitioner's motive as laudable, it found it lamentable that petitioner was not equally zealous in protecting respondent from potentially embarrassing and humiliating situations that may arise from the unsuspecting use of his suspended card. The Court stated that considering the widespread use of access devices in commercial and other transactions, petitioner

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[60] G.R. No. 141761, July 28, 2006, 497 SCRA 52 (2006).

and other issuers of credit cards should not only guard against fraudulent uses of credit cards but should also be protective of genuine uses thereof by the true cardholders. The duty was found to be much more demanding in this case for the evidence showed that respondent is a credit cardholder for more than ten (10) years in good standing, and has not been shown to have violated any of the provisions of his credit card agreement with petitioner. Considering the attendant circumstances, the petitioner was found to have been grossly negligent in suspending respondent's credit card.

In *Radio Communications of the Philippines, Inc. (RCPI) vs. Verchez,*[61] the Court held that petitioner RCPI's liability for damages was based on following grounds: firstly, evidence of besmirched reputation or physical, mental or psychological suffering sustained by the claimant; secondly, a culpable act or omission factually established; thirdly, proof that the wrongful act or omission of the defendant is the proximate cause of damages sustained by the claimant; and fourthly, that the case is predicated on any of the instances expressed or envisioned by Article 2219 and Article 2220 of the Civil Code.

Respecting the first ground, the Court quoted with approval the evidence of suffering by the respondents as appreciated by the lower court in this wise: "the failure of RCPI to deliver the telegram containing the message of appellees on time, disturbed their filial tranquillity. Family members blamed each other for failing to respond swiftly to an emergency that involved the life of the late Mrs. Verchez, who suffered from diabetes." It also found that the foregoing accounted for the second and third grounds.

On the fourth ground, Article 2220 of the Civil Code provides that willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. *The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith.* The Court observed that after RCPI's first attempt to deliver the telegram failed, it did not inform Grace of the non-delivery thereof and waited for 12 days before trying to deliver it again, knowing as it should know that time is of the essence in the delivery of telegrams. When its second long-delayed attempt to deliver the telegram again failed, it, again, waited for another 12 days before making a third attempt. Such nonchalance in performing its urgent obligation indicates gross negligence amounting to bad faith. The fourth requisite is thus also present.

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[61] *Supra* note 25.

E. Exemplary

1. Concept

Article 2229 of the Civil Code provides that exemplary or corrective damages are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages. The requirements of an award of exemplary damages are: (1) they are imposed by way of example in addition to compensatory damages, and only after the claimant's right to them has been established; (2) they cannot be recovered as a matter of right, their determination depends upon the amount of compensatory damages that may be awarded to the claimant; and (3) the act must be accompanied by bad faith or done in a wanton, fraudulent, oppressive or malevolent manner.

Based on a finding that petitioner bank was negligent in its clearing operations, the Court stated in *Equitable PCI Bank vs. Ong*,[62] that the banking system has become an indispensable institution in the modern world and plays a vital role in the economic life of every civilized society. For this reason, banks should guard against injury attributable to negligence or bad faith on its part. Without a doubt, it has been repeatedly emphasized that since the banking business is impressed with public interest, of paramount importance thereto is the trust and confidence of the public in general. Consequently, the highest degree of diligence is expected, and high standards of integrity and performance are even required of it. Having failed in this respect, the award of exemplary damages is warranted.

2. Requisites

a. Must be in addition to other damages

Exemplary damages, as held in *Construction Development vs. Estrella*,[63] may be awarded in addition to moral and compensatory damages. The Supreme Court stated that while exemplary damages cannot be recovered as a matter of right, they need not be proved, although plaintiff must show that he is entitled to moral, temperate or compensatory damages before the court may consider the question of whether or not exemplary damages should be awarded. Exemplary damages are imposed not to enrich one party or impoverish another but to serve as a deterrent against or as a negative incentive to curb socially deleterious actions.

In *Villanueva vs. CA*,[64] since private respondent was not entitled to moral damages, it follows that she is not entitled to exemplary damages as well. Article 2234 of the Civil Code provides that the amount of the exemplary damages need not be proved, the plaintiff must show that he is entitled to moral, temperate or

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[62] *Supra* note 8.

[63] *Supra* note 4.

[64] *Supra* note 49.

compensatory damages before the court may consider the question of whether or not exemplary damages should be awarded. Hence, exemplary damages is allowed only in addition to moral damages such that no exemplary damages can be awarded unless the claimant first establishes his clear right to moral damages. In the instant case, private respondent failed to satisfactorily establish her claim for moral damages, thus she is not likewise entitled to exemplary damages.

b. Act must be with gross negligence

Article 2231 of the Civil Code also states that in quasi-delicts, exemplary damages may be granted if the defendant acted with gross negligence. In *Construction Development vs. Estrella*,[63] the petitioner's driver was found driving recklessly at the time its truck rammed the BLTB bus. Petitioner, who has direct and primary liability for the negligent conduct of its subordinates, was also found negligent in the selection and supervision of its employees. Thus, the award of exemplary damages was held to be proper.

c. Aggravating Circumstances must be attendant

According to Article 2230, exemplary damages may be imposed as a part of the civil liability in criminal offenses when the crime was committed with one or more aggravating circumstances. Such damages are separate and distinct from fines and shall be paid to the offended party.

In *Palaganas vs. People*,[65] a shooting incident ensued which started with the song "My Way." The presence of the special aggravating circumstance of use of unlicensed firearm in a frustrated homicide case was found by the Supreme Court to be a valid basis for an award of exemplary damages. Based on prevailing jurisprudence, the amount of P25,000.00 was granted to each of the victims.

In *People vs. Tubongbanua*,[66] the accused was employed as a family driver of the victim, Atty. Evelyn Kho. The Court ruled that, the stabbing was committed inside the dwelling of the victim and with insult or in disregard of the respect due to the offended party on account of his rank, age or sex. It held that as an example and deterrent to future similar transgressions the award of P25,000.00 for exemplary damages was proper.

Due to the presence of the qualifying circumstances of minority and relationship in *People vs. Lavaquiz*,[67] the amount of P25,000.00 was awarded as exemplary damages to the rape victim of the accused Rogelio Lavaquiz, who was his 13 year old step-daughter.

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[65] *Supra* note 48.

[66] G.R. No. 171271, July 28, 2006, 500 SCRA 727 (2006).

[67] G.R. No. 166546, September 26, 2006, 503 SCRA 275 (2006).

d. Bad faith must be attendant

In *Asian International Manpower Services vs. CA*,[68] the Court ruled that exemplary damages are recoverable only when the dismissal of the employee was effected in a wanton, oppressive or malevolent manner and it cannot be based solely upon the premise that the employer dismissed the employee without cause or due process. To merit the award of these damages, additional facts showing bad faith are necessary but respondent Lacerna failed to plead and prove the same in this case.

III. Damages in cases of death

Arising from a crime

When death occurs due to a crime a civil indemnity ex delicto for the death of the victim is one of the damages that can be properly awarded. Thus, the award of P50,000.00 in *People vs. Beltran*[69] for civil indemnity ex delicto to Norman's heirs was upheld without need of proof other than the commission of murder that resulted in Norman's death.

In *People vs. Tubongbanua*,[70] the Court reiterated the rule that an award for civil indemnity is mandatory and is granted to the heirs of the victim without need of proof other than the commission of the crime. Based on recent jurisprudence, the award of civil indemnity ex delicto of P75,000.00 was awarded to the heirs of the victim Atty. Sua-Kho.

[68] *Supra* note 45.

[69] *Supra* note 47.

[70] *Supra* note 66.

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Integrated Bar of the Philippines
15 J. Vargas Avenue, Ortigas Center, Pasig City 1600
Telephone: (632) 631-3014/18 • Fax: (632) 634-4697
Website: www.ibp.org.ph • Email: journal@ibp.org.ph