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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.ph Email: ibp.publication@gmail.com

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Peculiarities in the Constitutional Treatment of International Law Norms

*Merlin M. Magallona**

Due to recent developments in contemporary international law there may have been created nuances in their interpretation under the Constitution. Even with respect to well-established concepts and methodologies there may have arisen the need to inquire as to whether their application in hierarchical order deserves consideration under both the Incorporation Clause and the Treaty Clause of the Constitution.

International Community as a Whole: *Erga Omnes* Obligations

We have in mind, for example, the separation emphasized by the International Court of Justice (ICJ) in the *Barcelona Traction* Case[1] that should be drawn between the obligation of a State toward the international community as a whole or obligation *erga omnes* and its obligation vis-à-vis another State or obligation *inter se*. The Court regards the former as the concern of all States because all States have legal interest in their protection. May obligation *erga omnes* make a difference in the transformation into Philippine law of "generally accepted principles of international law" under the Incorporation Clause?

Jus Cogens Norms

Pertinent to the Treaty Clause of the Constitution is the formulation of peremptory norm or *jus cogens* norm in the Vienna Convention on the Law of Treaties as a ground of invalidity and of termination of Treaties.[2] The Convention defines *jus cogens* norm as a "norm of general international law accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[3] The Philippines being a State Party to the Convention, it may be asked whether the application of *jus cogens* norms in domestic jurisdiction may affect the scope of the Supreme Court's power of judicial review on treaties. The Convention, however, has provisions dealing with the consequences of invalidity of a treaty in conflict with a peremptory norm of international law.[4] At any rate, *jus cogens* norms may recognize the distinction between two categories of general norms of international law, namely: "as part of the law of the land" under the Incorporation Clause, as well as their application on the Philippines as a State. The general prohibition against the threat or use of force

* Professorial Lecturer, U.P. College of Law; Professor, San Beda Graduate School of Law; Chair, Department of International and Human Rights Law, Philippine Judicial Academy, Supreme Court.

1 ICJ Reports, 1970, pp. 3, 32.

2 Articles 53 and 64, correspondingly.

3 Art. 53.

4 See Art. 71.

may have acquired that double status on the Philippines. As embodied in Article 2(4) of the United Nations Charter, it binds the Philippines as a Member of the United Nations, and it may have acquired supremacy under Article 103 of the Charter, as explained later. It should be noted that the International Court of Justice in *Nicaragua vs. United States* has affirmed the opinion of the International Law Commission that the general prohibition against the threat or use of force is of *jus cogens* character.

Supremacy Clause of the UN Charter

The United Nations Charter may be interpreted as structuring a hierarchy of obligations in international law in Article 103 when it provides that "In the event of a conflict between the obligations of the Members of the United Nations Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Under the Incorporation Clause, on the assumption that these conflicting obligations may be embodied in what may be considered as having the character of "generally accepted principles of international law" what difficulties may be encountered in the operation of the Incorporation Clause as the transformative method of both categories of obligations when they apply as part of the law of the land? Under the Treaty Clause, domestic jurisprudence has not yet internalized the interpretation of Article 103 of the UN Charter, although certainly it is binding on the Philippines by virtue of its long standing membership in the United Nations since its founding.

Treaty in Relation to the Statute

In *Ichong vs. Hernandez*,[5] the Supreme Court has the pronouncement that "the treaty is always subject to qualification or amendment by a subsequent law". If the intendment is to change the terms of the treaty by means of statutory enactment, the law will not affect in any way the rights and obligations of the Philippines with other States Parties. In this regard, it may be appropriate to strike the distinction between a treaty as international law in the relations between States Parties from a treaty as domestic law. Its status in the former is such that it takes precedence over the Constitution; a State Party is not permitted to invoke its internal law — including its Constitution — "as justification for its failure to perform a treaty,"[6] which may be the consequence of a legislative enactment intended to amend the text or change an obligation provided in the treaty. Among States Parties the treaty prevails over domestic statutory law. A judicial decision in national law may declare a treaty unconstitutional and thus void or inoperative, and thus a State Party would be unable to perform its obligations under the treaty. Hence, it may be confronted with a claim on the part of the other States Parties that it has committed an "internationally wrongful act" by reason of breach of obligation under international law, with a demand for reparation.

5 101 Phil. 1156 (1957).

6 See Vienna Convention on the Law of Treaties (1969), Art. 27.

On the other hand, in domestic law, the treaty is subject to constitutional limitations. In relation to statutory law, the treaty may be held by the domestic court as governed by the later-in-time principle (*lex posteriori derogat priori*), in case of irreconcilable conflict[7]. By judicial review, the treaty may be nullified as against the Constitution or statute.[8] Or the domestic law may be held to prevail over the treaty "inasmuch as the apparent clash is being decided by a municipal tribunal.[9]

Methods of Internalizing International Law Norms

In the relation of States, international custom is distinguished by its binding character on all States, whereas international convention or treaty law creates rights and duties only on the part of States Parties. These principal sources of law maintain their respective obligatory characteristics as they assume continuity into the Incorporation Clause with respect to "generally accepted principles of international law and into the Treaty Clause as to "treaties or international agreements." There should be no confusion in this line of continuity under the Constitution. It appears out of character, for example, for the whole Vienna Convention on Road Signs and Signals, of which the Philippines is a Party, to be described in a judicial decision as impressed with the character of "the generally accepted principles of international law as part of the law of the land",[10] and thus to be internalized under the Incorporation Clause. Instead, properly it pertains to the Treaty Clause which affirms a treaty as valid and effective if concurred as required.[11]

The judicial act of subsuming norms of international law under the Incorporation Clause or the Treaty Clause cannot be done arbitrarily lest it may cause confusion as regards the nature or status of customary norm or conventional rule.

In *Bayan Muna vs. Romulo*,[12] the interpretation of the status of the Incorporation Clause raises some fundamental questions as to the nature of norms of international law subsumed under it. In confusion, *Bayan Muna* holds:

> 'Petitioners' contention taken unaware of certain well-recognized international doctrines, practices, and jargon — is untenable. One of these is the doctrine of Incorporation, as expressed in Section 2, Article II of the Constitution wherein the Philippines adopts the generally accepted principles of international law and jurisprudence as part of the law of the land…. An exchange of notes fall "into

7 As applied by the Supreme Court in *Abbas vs. Commission on Elections* (179 SCRA 287-1989)

8 See *Gonzales vs. Hechanova*, 9 SCRA 230 (1963).

9 *Might Corporation vs. Gallo V. Winery*, GR> No. 154342, July 14, 2004.

10 See *Agustin vs. Edu*, 88 SCRA 198 (1979), based on the 1973 Constitution. For the Incorporation Clause of this Constitution, see Art. II, sec. 3.

11 See Constitution (1973), Art. VII Sec. 14(1).

12 641 SCRA 244 (2011).

> the category of inter-governmental agreements", which is an internationally accepted form of agreement.

In the foregoing formulation, the Incorporation Clause or its content becomes unrecognizable. In the first place, it appears that it is the principle of incorporation as a method of internalizing norms of international law into national law that is considered as one of the "well-recognized international doctrines, practices, and jargons". Secondly, an exchange of notes — which is considered a treaty under the Vienna Convention on the Law of Treaties[13] — appears as an example of "well-recognized international doctrines, practices, and jargon". How this is related to generally accepted principles embodied in the Incorporated Clause is shrouded with ambiguity. Or, in the alternative, it might be the intent to consider the exchange of notes as "category of inter-governmental agreement" as in itself a generally accepted principle of international law under the Incorporation Clause, which is an absurdity. In the result, the Incorporation Clause has lost its purpose and meaning in the normative regime of sources of international law in relation to national law.

Judicial Review of Treaties

By constitutional prescription, Philippine courts have authority to decide cases in which the "constitutionality or validity of any treaty, international or executive agreement" is in question. Final judgment on such questions are subject to final review by the Supreme Court.

If by the time the Supreme Court strikes down the treaty as unconstitutional, it has already entered into force, *pacta sunt servanda* acquires supremacy for the treaty to be performed by the parties in good faith.[14] The defense that the treaty is violative of the Constitution as declared by the highest tribune is unavailing, precluded by the application of Article 27 of the Vienna Convention on the Law of Treaties, which reads:[15]

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

This principle applies as well where the internal law relied upon consists of the provisions of the constitution. In the words of the Permanent Court of the International Justice (PCIJ) in the case of *Polish Nationals in Danzig:*[16]

> It should … be observed that . . . a State cannot adduce as against another State

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14 Vienna Convention on the Law of Treaties (1969), Art. 26.

15 Of which the Philippines is a State Party, having ratified it on 15 November 1972. It entered into

16 PCIJ, Ser. A/B, no 44, p. 24.

> its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

One exception is allowed by this rule: Article 46 of the Convention, namely, when the internal law invoked is of fundamental importance concerning "competence to conclude treaties as invalidating… consent". Serving as an example may be the case of a treaty having the benefit of the President having signed the instrument of ratification but deprived of concurrence by the Senate as required by Section 21, Article VII of the Constitution, for the treaty to be valid and effective.

Still in regard to treaties, deserving attention is the main premise of the *ponencia in Tañada vs. Angara*[17] to the effect that the conclusion of a treaty necessarily results in the diminution of state sovereignty. Apparently, this premise is uninformed of the formulation in the case of *Wimbledon* by the Permanent Court of International Justice (PCIJ) in which it has

> … decline[d] to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagement is an attribute of State sovereignty.[18]

The *Tañada* premise becomes more absurd in the context of domestic law in which a treaty is understood as in parity with statutory law. In which case the *ponencia* appears as advocating that a treaty regarded in that sense as domestic law by nature operates progressively to limit Philippine sovereignty. Does it imply that the continuing process of concluding treaties may spell the exhaustion or disappearance of sovereignty?

International Law Norms as Constitutional Provisions

In *U.S.A. vs. Guinto*,[19] the Supreme Court characterizes sovereign immunity as "one of the generally accepted principles of international law that we have adopted as part of the law of the land under Article II, section 2", which is the Incorporation Clause. At the same time, the Court is of the opinion that the same generally accepted principle of international law appears as a *provision of the Constitution* in Section 3, Article XVI which reads "The State may not be sued without its consent". Hence, under the Constitution sovereign immunity becomes part of Philippine law in Section 2, Article II as "part of the law of the land" in parity with statutory law. However, in Section 3, Article XVI it

17 272 SCRA 18 (1997).

18 PCIJ, Ser. A, no. 1, 1920, p. 25.

19 182 SCRA 644 (1990).

acquires supremacy by reason of its being a provision of the Constitution.

Is there any other "generally accepted principle of general international law" that likewise possesses the status of a constitutional provision? We may take note of Section 2, Article II of the Constitution which provides that "The Philippines renounces war as an instrument of national policy". This constitutional provision, which appears to be quite apart from the "generally accepted principles of international law" in the Incorporation Clause, is a replication of the core obligation of the General Treaty for the Renunciation of War which reads: "1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and *renounce it as an instrument of national policy* in their relations with one another".[20] It is a multilateral treaty of indefinite duration and has never been terminated. It is regarded as a landmark in international law in outlawing war of aggression, the norm quoted above having been recognized as customary norm. The United States which negotiated the treaty was one of the States Parties when it entered into force in 1929 and was one of the sixty-three parties when World War II broke out in 1939. There were sixty-four parties as of January 1984, including the United States and the Soviet Union.[21] It must have been by reason of the treaty's territorial clause that the Philippines became a party to the treaty as a "commonwealth" of the United States.

The renunciation-of-war provision of the Constitution, being limited in its coverage to war, must have been superseded or replaced by the comprehensive prohibition of general character of the Charter of the United Nations in Article 2(4) which provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".[22] It is the foundation principle of the United Nations expressed in its Preamble that "armed force shall not be used, save in the common interest", by authority of the United Nations[23] and except by reason of individual or collective self-defense if an armed attack occurs".[24] The Internation Court of Justice may reasonably be interpreted as affirming in *Nicaragua vs. United States*[25] that the general prohibition has been accepted as a norm of *jus cogens* character.

On this account, it gives rise to a situation where a norm of international law embodied in the Constitution as its provision is absorbed substantively by a "generally accepted principle of international law" which by virtue of the Incorporation Clause is merely

20 94 LNTS 57 (1928). Emphasis added.

21 See Robert L. Bledsoe and Boleslaw A. Bocsek, The International Law Dictionary, Sta. Barbara, California, Oxford, England, 1987, pp. 329-30.

22 Emphasis added.

23 United Nations, Art. VII secs. 41 and 42.

24 United Nations Charter, Art. 51.

25 ICJ Reports, 1986, at 90. See the report of the International Law Commission on this general prohibition as *jus cogens* norms. *ILC Yearbook*, vol. II, 1966, p. 248.

regarded as "part of the law of the land" to be applied in parity with statutory law. But, on the other hand, the renunciation-of-war principle may prevail in application over the general prohibition norm because of its supremacy as a provision of the Constitution.

Dual Character of General Norms of International Law

Even as the "generally accepted principles of international law" are intended to apply as domestic law by the mandate of the Constitution in the Incorporation Clause, still the same principles apply to the Philippines as a constituent person of the international community of States, or in the formulation of the Supreme Court in "consequence of its membership in the society of nations", the state is "automatically obligated to comply with these principles in relation with other States".[26] They are binding on the Philippines by reason of their status as general norms of international law. The duality of general norms of international law is such that, on one hand, they apply to subjects of Philippine law and, on the other hand, they apply as well to subjects of international law.

The duality principle finds another application n the relationship between the principal sources of law. In the case of *Nicaragua vs. United States,*[27] the ICJ clarifies that even if customary norms have been codified or embodied in treaties, this does not mean that they cease to apply as customary law, even with respect to States which are parties to those treaties. The ICJ concludes: "It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."

How norms of general international law are internalized into Philippine legal system may be affected by the duality of norms as thus explained, in that they may be properly subsumed under the Incorporation Clause as well as under the Treaty Clause, but depending on the identicalness of their content.

Conclusion

The concepts and methods of contemporary international law in this brief survey have to be studied in their inter-connected development as they emerge and form part of general practice in the international setting. The need for this orientation becomes all the more important by reason of the slow or occasional pace of practice in the internalization of general norms of international law into domestic law.

By every measure, the creative contribution of Philippine courts should be firmed up as they engage in decision-making in international law.

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26 U.S.A. vs. Guinto, 182, SCRA 644 (1990).

27 ICJ Reports, 1986, para. 179.

Negligence in Jurisprudence

Rommel J. Casis[*]

> *It cannot be stressed too much that the decisive considerations are too variable, too dependent in the last analysis upon a common sense estimate of the situation as it presented itself to the parties for us to be able to say that this or that element having been isolated, negligence is shown. The factors that enter the judgment are too many and diverse for us to imprison them in the formula sufficient of itself to yield the correct answer to the multi-faceted problems the question of negligence poses. Every case must be dependent on its facts. The circumstances indicative of lack of due care must be judged in the light of what could reasonably be expected of the parties. If the objective standard of prudence be met, thenbe stressed too much that*
>
> *Justice Fernando, Corliss v. Manila Railroad*[1]

I. Introduction

Negligence is an important concept in civil law cases. In actions based on quasi-delict, a finding of negligence is an absolute requirement, while in *culpa contractual,* negligence is one of the ways a contract may be breached.

As the vast number of cases discussing negligence show, it can be difficult to determine whether it exists under a given set of facts. Justice Fernando in the excerpt quoted above points to the variable "decisive considerations" as the culprit. He argues that the factors that enter the judgment are too many and diverse for them to be captured in a sufficient formula, at least one that would yield the correct answer to the multi-faceted problems that the question of negligence poses.

This difficulty caused by the diversity of negligence-based problems perhaps best explains the varied approaches that the Court takes in resolving the negligence issue.

In many cases, the Court states that the determination of negligence is a question of fact and it often chooses to simply adopt the finding of the lower courts. But in other cases, the Court makes the determination of negligence itself. This paper focuses its analysis on the latter.

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* Assistant Professor, College of Law, University of the Philippines Diliman; LL.M., Columbia Law School, Columbia University; LL.B College of Law, University of the Philippines; B.A. Political Science, College of Social Sciences and Philosophy, University of the Philippines.

1 Corliss v. Manila Railroad Co., G.R. No. L-21291, [March 28, 1969]

This paper is an attempt to make sense of the varied approaches of the Court in determining negligence.

Part II explains how negligence is defined under the Civil Code, how negligence is determined based on this definition and how the Court has employed this definition.

Part III discusses the various ways the Court has chosen to define negligence and how it determines negligence.

Part IV concludes by explaining the effects of the negligence-determining procedure chosen by the Court and why simply applying Article 1173 would be better than the varied approaches applied thus far by the Court.

The argument this paper posits is that because the current *ad hoc* procedure applied by the Court in determining negligence creates uncertainty, if not conflict in the jurisprudence, justice would be better served if the procedure outlined in Article 1173 is simply applied.

II. Negligence as the Code Sees It

The definition of negligence is found in Article 1173 of the Civil Code:

> Article 1173. The fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place. When negligence shows bad faith, the provisions of articles 1171 and 2201, paragraph 2, shall apply.
>
> If the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required.

Thus, under the Code, the fault or negligence of the obligor is the omission of that diligence required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place.[2]

Therefore, the determination of negligence merely requires two steps:
- identifying the diligence required;
- determining whether the actor performed the diligence required.

2 Article 1173.

The diligence required is in turn determined by the:

- the nature of the obligation; and
- circumstances of the persons, of the time and of the place.

The nature of the obligation takes into account whether the law or contract identifies the diligence required.

There are some cases where the Court appears to have applied Article 1173 to determine negligence.

In *Crisostomo v. CA,*[3] the Court identified the diligence required by the nature of the obligation. The Court said:

> The **nature of the contractual relation** between petitioner and respondent **is determinative of the degree of care required** in the performance of the latter's obligation under the contract. For reasons of public policy, a common carrier in a contract of carriage is bound by law to carry passengers as far as human care and foresight can provide using the utmost diligence of very cautious persons and with due regard for all the circumstances. As earlier stated, however, respondent is not a common carrier but a travel agency. It is thus not bound under the law to observe extraordinary diligence in the performance of its obligation, as petitioner claims.
>
> Since the contract between the parties is an ordinary one for services, **the standard of care required of respondent is that of a good father of a family under Article 1173** of the Civil Code. This connotes reasonable care consistent with that which an ordinarily prudent person would have observed when confronted with a similar situation. (emphasis supplied)

In this case, the Court was unable to reach the second step, which is to determine if the actor performed the diligence required, as the petitioner failed to provide evidence on the actor's alleged negligent acts.

In *Solidbank v. Sps. Tan,*[4] the Court held that the trial court did not commit any error as it anchored its conclusion that petitioner was negligent on Article 1173 of the Civil Code. It explained:

> In citing the different provisions of the Civil Code on common carriers,

3 Crisostomo v. Court of Appeals, G.R. No. 138334, [August 25, 2003].

4 Solidbank Corporation v. Spouses Tan, G.R. No. 167346, [April 2, 2007].

> the trial court merely made reference to the kind of diligence that petitioner should have performed under the circumstances. In other words, like a common carrier whose business is also imbued with public interest, petitioner should have exercised extraordinary diligence to negate its liability to respondents.

As the Court merely adopted the conclusion reached by the lower courts, the Court did not discuss whether the required degree of diligence was reached.

In *Canlas v. CA,*[5] the Court after quoting Article 1173 explained that:

> The degree of diligence required of banks is more than that of a good father of a family in keeping with their responsibility to exercise the necessary care and prudence in dealing even on a registered or titled property. The business of a bank is affected with public interest, holding in trust the money of the depositors, which bank deposits the bank should guard against loss due to negligence or bad faith, by reason of which the bank would be denied the protective mantle of the land registration law, accorded only to purchasers or mortgagees for value and in good faith.

The Court then went on to explain why the bank did not meet this standard of diligence. Interestingly, earlier in *Gempesaw v. CA,*[6] after quoting Article 1173, the Court stated that:

> We hold that banking business is so impressed with public interest where the trust and confidence of the public in general is of paramount importance such that the appropriate standard of diligence must be a high degree of diligence, if not the utmost diligence.

So these two cases appear to conflict as to the standard of diligence required of banks. But as will be seen later, this situation is not so bad because at least there was a standard of diligence applied.

In *Windvalley v. CA,*[7] the Court held that there being no contractual obligation, the respondent was obliged to give only the diligence required of a good father of a family in accordance with the provisions of Article 1173. It added that the diligence of a good father of a family requires only that diligence which an ordinary prudent man would exercise with regard to his own property, which the Court found to have been exercised.

5 Canlas v. Court of Appeals, G.R. No. 112160, [February 28, 2000].

6 Gempesaw v. Court of Appeals, G.R. No. 92244, [February 9, 1993]

7 Wildvalley Shipping Co., Ltd. v. Court of Appeals, G.R. No. 119602, [October 6, 2000].

In *Valenzuela v. CA,*[8] the Court held that the factual milieu of this case did not justify the application of the second paragraph of Article 1173 of the Civil Code, which prescribes the standard of diligence to be observed in the event the law or the contract is silent. In this case, it said that Article 362 of the Code of Commerce provides the standard of ordinary diligence for the carriage of goods by a carrier. The standard of diligence under this statutory provision may, however, be modified in a contract of private carriage, as the petitioner and respondent had done in their charter party.

Thus, there are cases where the Court does seem either to apply the procedure prescribed by the Code or to at least identify a standard of diligence. However, as will be demonstrated in the succeeding sections, there are a greater number of cases where it would not. Even in those cases where the definition under Article 1173 is quoted, it is not necessarily followed.[9]

III. Negligence is the Eyes of the Court

A. Definitions

The Court defines negligence in a variety of ways.

1. Failure and "Injury"

One of the most popular definitions used by the Court defines negligence as "the failure to observe that degree of care, precaution and vigilance that the circumstance justly demand, whereby that other person suffers injury."[10]

A similarly worded definition states that it is the "failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury."[11] In *Cusi v. PNR*,[12] this definition is attributed to Judge Cooley.[13]

8 Valenzuela Hardwood and Industrial Supply, Inc. v. Court of Appeals, G.R. No. 102316, [June 30, 1997].

9 Añonuevo v. Court of Appeals, G.R. No. 130003, [October 20, 2004]; Civil Aeronautics Administration v. Court of Appeals, G.R. No. 51806, [November 8, 1988].

10 Cagayan II Electric Cooperative, Inc. v. Rapanan, G.R. No. 199886, [December 3, 2014] citing Guillang v. Bedania, G.R. No. 162987, [May 21, 2009]; PNR Corp. v. Vizcara, G.R. No. 190022, [February 15, 2012]; Agusan del Norte Electric Cooperative, Inc. v. Balen, G.R. No. 173146, [November 25, 2009].; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005]; Smith Bell Dodwell Shipping Agency Corp. v. Borja, G.R. No. 143008, [June 10, 2002]; Fernando v. Court of Appeals, G.R. No. 92087, [May 8, 1992].

11 R Transport Corp. v. Yu, G.R. No. 174161, [February 18, 2015]; BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014]; PNR v. Court of Appeals, G.R. No. 157658, [October 15, 2007]; NPC v. Heirs of Casionan, G.R. No. 165969, [November 27, 2008]; Child Learning Center Inc. v. Tagario, G.R. No. 150920, [November 25, 2005]; Cusi v. PNR, G.R. No. L-29889, [May 31, 1979].

12 Cusi v. PNR, G.R. No. L-29889, [May 31, 1979].

13 Judge Cooley in his work on Torts (3d. ed.), sec. 1324|.

These definitions are similar to Article 1173 because they require a determination of the degree of care which the circumstance justly demand, although it does not provide for a default standard like Article 1173.

In addition, this definition is different from Article 1173 because it requires a finding of injury. The term "injury" in this definition does not refer to the term in its technical sense but to the ordinary sense or "damage." Applying the technical definition of "injury" in the definition will result in a conceptual problem. The determination of negligence is ordinarily a first step in determining liability. Once negligence is proven, a variety of defenses can come into play, which will negate liability despite the presence of negligence. So if any defense applies, the actor will not be liable despite his negligence. In other words, a finding of negligence is not necessarily a finding of liability. On the other hand, a finding of injury would necessarily mean that the person responsible for the injury is liable. For every injury, someone is liable, otherwise it will not be injury but only a case of *damnum absque injuria.*[14] So therefore, requiring injury in technical sense as an element for determining negligence would mean that a finding of negligence will automatically mean liability. No defense would be available. This is in conflict with the procedure provided by law.

In cases where this definition is stated, damage is ordinarily presumed[15] or is not an issue. Unfortunately, the Court also generally does not determine or identify the degree of care required.[16] One exception is *PNR v. Vizcara,*[17] where the Court mentioned that "petitioners fell short of the diligence expected of it, taking into consideration the nature of its business." At times, the Court would combine this definition with the *Picart* tests, which may be construed as its statement on the degree of diligence required.[18]

2. Reasonable Man

Another common definition used by the Court states that negligence is the "omission to do 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 do."[19]

14 See Custodio v. CA.

15 Guillang v. Bedania, G.R. No. 162987, [May 21, 2009].

16 Agusan del Norte Electric Cooperative, Inc. v. Balen, G.R. No. 173146, [November 25, 2009]; Guillang v. Bedania, G.R. No. 162987, [May 21, 2009]; Child Learning Center Inc. v. Tagario, G.R. No. 150920, [November 25, 2005]; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005]; Smith Bell Dodwell Shipping Agency Corp. v. Borja, G.R. No. 143008, [June 10, 2002]; (Fernando v. Court of Appeals, G.R. No. 92087, [May 8, 1992]; Cusi v. PNR, G.R. No. L-29889, [May 31, 1979].

17 Phil. National Railways Corp. v. Vizcara, G.R. No. 190022, [February 15, 2012].

18 BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014].

19 R Transport Corp. v. Yu, G.R. No. 174161, [February 18, 2015]; BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014]; Pereña v. Zarate, G.R. No. 157917, August 29, 2012; PNR Corp. v. Vizcara, G.R. No. 190022, [February 15, 2012]; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005]; Philippine

This definition can be traced back to *Layugan v. IAC,*[20] which apparently quotes it from "Black[s] Law Dictionary".[21]

This definition is similar to the first *Picart* test or the "ordinary prudent person test" discussed later in this paper. In essence, this definition provides for a standard of diligence, that of a reasonable man. This is similar to the "good father of a family" standard under Article 1173.

The problem with this definition is that it is not as flexible as Article 1173. This definition provides for only one standard, "the reasonable man," whereas Article 1173 provides for "good father of a family" as a default standard, but allows for a flexible standard depending on "the nature of the obligation" and "the circumstances of the persons, of the time and of the place." Considering that the cases where negligence would have to be determined can be quite diverse, a flexible standard is probably more useful. If, for instance, what is involved is a child, is the reasonable man standard proper? What if the case involved an expert in his field of expertise, shouldn't there be a higher standard?

In the cases that state this definition, as a general rule, the Court does not explain or identify what the reasonable man, "guided by those considerations which ordinarily regulate the conduct of human affairs, would do." The Court would simply narrate what the actor did or did not do.[22] The exception is *McKee v. IAC,*[23] where the Court said that no negligence could be imputed to one of the parties because:

> Any reasonable and ordinary prudent man would have tried to avoid running over the two boys by swerving the car away from where they were even if this would mean entering the opposite lane.

Of course, the Court may have been referring to the *Picart* test (which was also quoted in this case) and not the definition because it used the phrase "ordinary prudent man" and not "reasonable man."

Bank of Commerce v. Court of Appeals, G.R. No. 97626, 14 March 1997; Philippine National Railways v. Brunty, G.R. No. 169891, [November 2, 2006]; McKee v. Intermediate Appellate Court, G.R. No. 68102, July 16, 1992; Jarco Marketing Corp. v. Court of Appeals, G.R. No. 129792, [December 21, 1999]; Philippine Bank of Commerce v. Court of Appeals, G.R. No. 97626, [March 14, 1997]; Layugan v. Intermediate Appellate Court, G.R. No. 73998, [November 14, 1988]

20 Layugan v. Intermediate Appellate Court, G.R. No. 73998, [November 14, 1988].

21 "Black[s] Law Dictionary, Fifth Edition, 930."

22 R Transport Corp. v. Yu, G.R. No. 174161, [February 18, 2015]; Spouses Pereña v. Spouses Zarate, G.R. No. 157917, [August 29, 2012]; Philippine Bank of Commerce v. Court of Appeals, G.R. No. 97626, 14 March 1997; Jarco Marketing Corp. v. Court of Appeals, G.R. No. 129792, [December 21, 1999]; Philippine Bank of Commerce v. Court of Appeals, G.R. No. 97626, [March 14, 1997]

23 Mckee v. Intermediate Appellate Court, G.R. No. 68102, 68103, [July 16, 1992].

3. Undue Risk

Another definition states that negligence is a "conduct which naturally or reasonably creates undue risk or harm to others"[24] or a "conduct that creates undue risk or harm to another."[25]

A similar definition states that negligence is a "conduct that involves an unreasonably great risk of causing damage; or, more fully, a conduct that falls below the standard established by law for the protection of others against unreasonably great risk of harm."[26]

These definitions are similar in stating that negligence is a conduct that creates undue or unreasonable risk to another. Therefore, in establishing negligence under this definition, it is imperative that the risk created be established or identified.

The Court did this in *Smith Bell v. Borja*,[27] where it pointed out that although the petitioner knew that its vessel was carrying dangerous inflammable chemicals, its officers and crew failed to take all the necessary precautions to prevent an accident. Thus, it held that the petitioner was negligent.

But in other cases, it was simply an implied application at best.[28]

4. Want of care under the circumstances

In some cases, the Court simply defines negligence "want of the care required by the circumstances."[29] The definition was imported by the Court via *Corliss v. Manila Railroad*[30] into this jurisdiction from common law sources.

This definition can be considered as a simplified version of Article 1173. It would therefore be unnecessary if the Court simply applied Article 1173. The definition simply requires the Court to identify the care required by the circumstances and whether such care has been reached.

But in the cases that mention this definition, this procedure is also not followed and

24 Southeasthern College, Inc. v. Court of Appeals, G.R. No. 126389, [July 10, 1998].

25 Smith Bell Dodwell Shipping Agency Corp. v. Borja, G.R. No. 143008, [June 10, 2002]; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005].

26 Philam Insurance Co., Inc. v. Court of Appeals, G.R. No. 165413, [February 22, 2012].

27 Smith Bell Dodwell Shipping Agency Corp. v. Borja, G.R. No. 143008, [June 10, 2002].

28 Philam Insurance Co., Inc. v. Court of Appeals, G.R. No. 165413, [February 22, 2012]; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005].

29 Philam Insurance Co., Inc. v. Court of Appeals, G.R. No. 165413, [February 22, 2012]; Philippine National Railways v. Brunty, G.R. No. 169891, [November 2, 2006].

30 Corliss v. Manila Railroad Co., G.R. No. L-21291, [March 28, 1969].

is usually mentioned in conjunction with other definitions and/or tests of negligence.[31] Perhaps, its value is that it provides a definition for negligence that is easy to remember, but its value as a tool in determining negligence is negligible.

B. How the Court determines Negligence

Defining negligence is one thing but the process used to determine its existence is another thing altogether. A definition provides a description of a concept while the determination of whether such concept applies in a case may require specific tests. Ideally, the elements of a definition should provide the elements or requisites for determining whether the concept applies under the given set of facts. This is true in the case of Article 1173. But the Court has chosen to veer away from the simpler procedure.

1. Applying a standard or test

In many cases, the Court chose to determine negligence by applying certain tests. These tests, although similar, are often independent[32] of the definition of negligence provided in the case.

a. The Picart Tests

Perhaps the most popular test in determining negligence under Philippine jurisprudence is found in the case of *Picart v. Smith.*[33] But a closer analysis would reveal that *Picart* actually establishes not one but two tests to determine negligence.

i. Ordinary Prudent Person

The first and more popular test is the *test of the ordinary prudent person.* The Court said:

> The test by which to determine the existence of negligence in a particular case may be stated as follows: Did the 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, then he is guilty of negligence. The law here in effect adopts the standard supposed to be supplied by the imaginary conduct of the discreet *paterfamilias* of the Roman law. The existence of negligence in a given case is not determined by reference to the personal judgment of the actor in the situation before him. The law considers **what would**

31 Philam Insurance Co., Inc. v. Court of Appeals, G.R. No. 165413, [February 22, 2012]).

32 They are independent because the tests are usually what the Court uses to determine negligence and not the elements of the definition and there is usually no one-to-one correspondence between the tests and the definition provided.

33 Picart v. Smith, Jr., G.R. No. L-12219, [March 15, 1918].

> **be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence** and determines liability by that. (emphasis supplied)

This test essentially would require a determination of what an ordinary prudent person would do in the same situation and compare the conduct of the actor with that standard. Another way of putting it would be that the Court determines if the conduct of the actor were something an ordinary prudent person in the same situation would do.

The Court has referred to this test in many cases[34] and has applied them in a few.

In *McKee v. IAC,*[35] the Court applied the test in a case where a collision occurred due to a car invading the lane of a cargo truck because two boys suddenly darted unto the lane of the car. The Court said:

> Any reasonable and ordinary prudent man would have tried to avoid running over the two boys by swerving the car away from where they were even if this would mean entering the opposite lane. Avoiding such immediate peril would be the natural course to take particularly where the vehicle in the opposite lane would be several meters away and could very well slow down, move to the side of the road and give way to the oncoming car.

In *Delsan Transport v. C & A,*[36] a ship was damaged while trying to avoid a typhoon. The captain was held to be negligent because:

> When he ignored the weather report notwithstanding reasonable foresight of harm, Capt. Jusep showed an inexcusable lack of care and caution which an ordinary prudent person would have observed in the same situation.

In *Dangwa v. CA,*[37] the Court did not mention *Picart* but applied the test of the ordinary prudent person. It said:

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34 BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014]; PNR Corp. v. Vizcara, G.R. No. 190022, [February 15, 2012]; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005]; Delsan Transport Lines Inc. v. C & A Construction Inc., G.R. No. 156034, [October 1, 2003]; Crisostomo v. Court of Appeals, G.R. No. 138334, [August 25, 2003]; Jarco Marketing Corp. v. Court of Appeals, G.R. No. 129792, [December 21, 1999]; Philippine Bank of Commerce v. Court of Appeals, G.R. No. 97626, [March 14, 1997]; Layugan v. Intermediate Appellate Court, G.R. No. 73998, [November 14, 1988]. See also Agusan del Norte Electric Cooperative, Inc. v. Balen, G.R. No. 173146, [November 25, 2009]; Guillang v. Bedania, G.R. No. 162987, [May 21, 2009] where the Court referred to an "ordinary person" and not "ordinary prudent person."

35 Mckee v. Intermediate Appellate Court, G.R. No. 68102, 68103, [July 16, 1992]

36 Delsan Transport Lines Inc. v. C & A Construction Inc., G.R. No. 156034, [October 1, 2003].

37 Dangwa Transportation Co., Inc. v. Court of Appeals, G.R. No. 95582, [October 7, 1991].

> It is not negligence per se, or as a matter of law, for one to attempt to board a train or street car which is moving slowly. An ordinarily prudent person would have made the attempt to board the moving conveyance under the same or similar circumstances. The fact that passengers board and alight from a slowly moving vehicle is a matter of common experience and both the driver and conductor in this case could not have been unaware of such an ordinary practice.

In *Jarco Marketing v. CA*,[38] a child was killed when a counter in a store fell on her. The Court noted that the petitioner was informed of the danger of the unstable counter, yet did not initiate any concrete action to remedy the situation nor "ensure the safety of the storet the petitioner was informed of the danger of the unstable counter, yet did not initiate any concrete action to remedy the situation nor "ensure the safety of the store's employees and patrons as a reasonable and ordinary prudent man would have done" and therefore held it negligent.

In other cases, this test is simply mentioned but not applied by identifying what the ordinary prudent person would have done.[39]

ii. Foreseeability Test

The second test in *Picart* is a *foreseeability test.* The Court said:

> Could a prudent man, in the case under consideration, **foresee harm** as a result of the course actually pursued? If so, it was the duty of the actor to take precautions to guard against that harm. Reasonable foresight of harm, followed by the ignoring of the suggestion born of this prevision, is always necessary before negligence can be held to exist. Stated in these terms, the proper criterion for determining the existence of negligence in a given case is this: Conduct is said to be negligent when a prudent man in the position of the tortfeasor **would have foreseen** that an effect harmful to another was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences. (emphasis supplied)

While this test also refers to a "prudent man," it cannot be seen simply as a qualification to the ordinary prudent person test as the latter is meant to be broader in application. If this test were taken merely as an elaboration of the earlier discussed test, then the ordinary prudent test would be reduced to a foreseeability test.

38 Jarco Marketing Corp. v. Court of Appeals, G.R. No. 129792, [December 21, 1999].

39 BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014]; PNR Corp. v. Vizcara, G.R. No. 190022, [February 15, 2012]; Crisostomo v. Court of Appeals, G.R. No. 138334, [August 25, 2003]; Philippine Bank of Commerce v. Court of Appeals, G.R. No. 97626, [March 14, 1997] Layugan v. Intermediate Appellate Court, G.R. No. 73998, [November 14, 1988].

Under this test, the Court must determine if the actor could have foreseen harm and could have taken precautions but did not.

The Court has also referred to this test in several cases.[40]

In *PNCC v. CA,*[41] the Court ruled that the operator of the expressway was negligent when it removed warning devices (i.e. the lighted cans) and lane dividers on the highway "even as flattened sugarcanes lay scattered on the ground" and "[t]he highway was still wet from the juice and sap of the flattened sugarcanes" because it should have "foreseen that the wet condition of the highway would endanger motorists passing by at night or in the wee hours of the morning."[42]

But similar to the ordinary prudent person test, there is no direct application[43] of this test in other cases where it is mentioned.[44]

b. Foreseeability Test

The *Picart* tests include a foreseeability test. But there are cases where *Picart* is not referred to but the Court uses a foreseeability test to determine negligence.

In *Capili v. Spouses Cardaña,*[45] after defining a negligent act as one from which an ordinary prudent person would foresee such an appreciable risk of harm to others, the Court went on to hold that:

> The probability that the branches of a dead and rotting tree could fall and harm someone is clearly **a danger that is foreseeable**. As the school principal, petitioner was *tasked to see to the maintenance* of the school grounds and s*afety 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. (emphasis supplied)

Thus, the foreseeability of the danger was considered in holding the principal respon-

40 BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014]; Philam Insurance Co., Inc. v. Court of Appeals, G.R. No. 165413, [February 22, 2012]; PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005].

41 PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005]

42 PNCC v. Court of Appeals, G.R. No. 159270, [August 22, 2005]

43 By "application" we mean the explanation or demonstration of how the facts of the case fit into the specific elements of the test.

44 BJDC Construction v. Lanuzo, G.R. No. 161151, [March 24, 2014].

45 Capili v. Spouses Cardaña, G.R. No. 157906, [November 2, 2006].

sible for the falling branch. The Court coupled this with the *duty* of the principal regarding maintenance and safety. As discussed in the next section, the failure to comply with a duty is also used to determine the existence of negligence.

In *R Transport v. Yu*,[46] the Court held that foreseeability is the fundamental test of negligence. The Court appears to have applied it because in ruling that the actor was negligent, it took note of the fact that the injury occurred in the loading and unloading area of a commercial center. The Court found that "upon seeing that a bus [had] stopped beside his lane… [he should have stepped] on his brakes to slow down for the possibility that said bus was unloading its passengers" but he did not take such necessary precaution.

c. Failure to comply with duty

In *Fernando v. Court of Appeals*,[47] the city Government of Davao was found to be negligent[48] because it was "remiss in its duty to re-empty the septic tank annually."

In *PNB v. Quimpo*,[49] the Court ruled that the prime duty of a bank is to ascertain the genuineness of the signature of the drawer or the depositor on the check being encashed and that it is expected to use reasonable business prudence in accepting and encashing a check presented to it. In this case, the Court held that the petitioner was negligent in encashing said forged check without carefully examining the signature which shows marked variation from the genuine signature of private respondent.

In *Citytrust v. Cruz*,[50] the Court held that the petitioner banking institution had the direct obligation to closely supervise the employees handling its depositors' accounts, and should always be mindful of the fiduciary nature of its relationship with the depositors. Thus:

> Such relationship required it and its employees to record accurately every single transaction, and as promptly as possible, considering that the depositors' accounts should always reflect the amounts of money the depositors could dispose of as they saw fit, confident that, as a bank, it would deliver the amounts to whomever they directed. If it fell short of that obligation, it should bear the responsibility for the consequences to the depositors, who, like the respondent, suffered particular embarrassment and disturbed peace of mind from the negligence in the handling of the accounts.

46 R Transport Corp. v. Yu, G.R. No. 174161, [February 18, 2015] citing Philippine Hawk Corporation v. Vivian Tan Lee, 626 Phil. 483, 494 (2010), citing Achevara v. Ramos, 617 Phil. 72, 85 (2009).

47 Fernando v. Court of Appeals, G.R. No. 92087, [May 8, 1992]

48 Although it was not found liable.

49 PNB v. Quimpo, G.R. No. 53194, [March 14, 1988].

50 Citytrust Banking Corporation v. Cruz, G.R. No. 157049, [August 11, 2010].

In this case, the savings account was considered closed due to the oversight committed by one of the latter's tellers.

d. Violation of a law or rule

In *Añonuevo v. Court of Appeals*,[51] the Court ruled that the generally accepted view is that the violation of a statutory duty constitutes negligence, negligence as a matter of law, or negligence *per se*. In this case, what was involved was a municipal ordinance requiring the registration of bicycles and the installation of safety devices. But despite this, the Court did not consider the violation as the proximate cause of the injury nor did it even consider such violation as contributory negligence.

In *Ramos v. C.O.L. Realty*,[52] the Court ruled that the act of crossing Katipunan Avenue via Rajah Matanda constitutes negligence because it was prohibited by law. In this case, the Court found that barricades were precisely placed along the intersection of Katipunan Avenue and Rajah Matanda Street in order to prevent motorists from crossing Katipunan Avenue. Nonetheless, the driver crossed Katipunan Avenue through certain portions of the barricade that were broken, thus violating the MMDA rule.

In *Marinduque Iron Mines Agents, Inc. v. Workmen's Compensation*,[53] the Court held that a violation of a rule promulgated by a Commission or board *is not* negligence *per se* but may be an evidence of negligence.

In *Garcia v. Florido*,[54] the Court ruled that the violation of traffic rules is descriptive of the failure of said driver to observe for the protection of the interests of others, that degree of care, precaution and vigilance which the circumstances justly demand, which failure resulted in the injury of petitioners. It also said that excessive speed, in violation of traffic rules, is a clear indication of negligence.

In *Cipriano v. CA*,[55] the Court held that violation of a statutory duty is negligence *per se*. In this case, the petitioner owned an enterprise engaged in the business of rustproofing vehicles. The respondent protection of the interests owas in the premises of the petitioner when it burned down. The respondent alleged that the petitioner's failure to register his business with the Department of Trade and Industry under P.D. No. 1572 and to insure it, as required in the rules implementing the decree, constituted negligence. Regarding the statute, the Court explained:

51 Añonuevo v. Court of Appeals, G.R. No. 130003, [October 20, 2004]

52 Ramos v. C.O.L. Realty Corp., G.R. No. 184905, [August 28, 2009]

53 Marinduque Iron Mines Agents, Inc. v. Workmen's Compensation Commission, G.R. No. L-8110, [June 30, 1956]

54 Garcia v. Florido, G.R. No. L-35095, [August 31, 1973].

55 Cipriano v. Court of Appeals, G.R. No. 107968, [October 30, 1996].

> Thus, P.D. No. 1572, §1 requires service and repair enterprises for motor vehicles, like that of petitioner's, to register with the Department of Trade and Industry. As condition for such registration or accreditation, Ministry Order No. 32 requires covered enterprises to secure insurance coverage.

The Court further added that:

> There is thus a statutory duty imposed on petitioner and it is for his failure to comply with this duty that he was guilty of negligence rendering him liable for damages to private respondent. While the fire in this case may be considered a fortuitous event, this circumstance cannot exempt petitioner from liability for loss.

Thus, while the violation of the statute constituted negligence, it did not contribute to the occurrence, which is a fire.

In *F.F. Cruz v. CA*,[56] the Court found the petitioner guilty of negligence because it had failed to construct a firewall between its property and respondents' residence, which sufficiently complies with the pertinent city ordinances. It held that the failure to comply with an ordinance providing for safety regulations is considered as an act of negligence.

2. Applying an implied standard

In some cases, a standard is not explicitly provided, but the Court rules as if there is a standard applied that need not be mentioned.

a. Lack of foresight

In *FGU Insurance v. CA,*[57] a barge ran aground and was destroyed due to a typhoon. The Court explained that the captain of the tugboat should have had the foresight not to leave the barge alone, considering the pending storm. Thus, he and the other members of his crew were held to be negligent.

In *Umali v. Bacani*,[58] the employees of a power plant were found guilty of "a series of negligence" because they failed to exhibit "ordinary foresight" when they "did not take the necessary precaution to eliminate that source of danger.

56 F.F. Cruz v. Court of Appeals, G.R. No. 52732, [August 29, 1988].

57 FGU Insurance Corp. v. Court of Appeals, G.R. No. 137775, 140704, [March 31, 2005].

58 Umali v. Bacani, G.R. No. L-40570, [January 30, 1976]

These rulings however may be taken as using an implied foreseeability test.

b. Dangerous per se

In *Marinduque Iron Mines Agents, Inc. v. Workmen's Compensation,*[59] the Court held that mere riding on haulage truck or stealing a ride thereon is not negligence, ordinarily because transportation by truck is not dangerous *per se.* The ruling therefore implies that engaging in activities which are dangerous *per se* would constitute negligence.

c. Failure to comply with higher standard of diligence

In *PNB v. F.F. Cruz,*[60] the Court held that the bank failed to meet the high standard of diligence required by the circumstances to prevent the fraud. The Court explained:

> A higher degree of diligence is imposed on banks relative to the handling of their affairs than that of an ordinary business enterprise. Thus, the degree of responsibility, care and trustworthiness expected of their officials and employees is far greater than those of ordinary officers and employees in other enterprises.

In *PSBank v. Chowking*,[61] the Court held that the petitioner failed to prove that it has observed the due diligence required of banks under the law. The Court explained:

> It cannot be over emphasized that the banking business is impressed with public interest. Of paramount importance is the trust and confidence of the public in general in the banking industry. Consequently, the diligence required of banks is more than that of a Roman *pater familias* or a good father of a family. The highest degree of diligence is expected.

Thus, these cases refer to a high standard of diligence and a statement that the actions of the actor do not meet that high standard.

3. Apply a rule on presumptions of negligence

The law creates a presumption of negligence when certain conditions exist. There are many examples of this but this section only includes those types that the Court has actually employed to determine negligence.

a. Res ipsa loquitur

59 Marinduque Iron Mines Agents, Inc. v. Workmen's Compensation Commission, G.R. No. L-8110, [June 30, 1956

60 PNB vs. F.F. Cruz and Co., Inc., G.R. No. 173259, [July 25, 2011]

61 PSBank v. Chowking Food Corp., G.R. No. 177526, [July 4, 2008].

Res ipsa loquitur is a rule of necessity that applies where evidence is absent or not readily available.[62] The rule may be stated this way:

> Where the thing which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management used proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care.[63]

Thus, when the requisites of *res ipsa loquitur* are present, the person in control of the thing causing injury is presumed negligent.

Jurisprudence provides that the requisites for the application of the *res ipsa loquitur* rule are the following:[64]

- the accident was of a kind which does not ordinarily occur unless someone is negligent;
- the instrumentality or agency which caused the injury was under the exclusive control of the person charged with negligence; and
- the injury suffered must not have been due to any voluntary action or contribution on the part of the person injured.

In *Malayan Insurance Co., Inc. v. Alberto,*[65] the Court applied the doctrine in determining who among the drivers and owners of the vehicles involved in a collision is deemed negligent.

In *Josefa v. MERALCO,*[66] the Court applied the presumption in a case involving a truck hitting an electric post. It said:

> The present case satisfies all the elements of *res ipsa loquitur*. It is very unusual and extraordinary for the truck to hit an electricity post, an immovable and stationary object, unless Bautista, who had the exclusive management and control of the truck, acted with fault or negligence.

b. Simultaneous violations

62 Malayan Insurance Co., Inc. v. Alberto, G.R. No. 194320, [February 1, 2012]

63 See Casis, Rommel J. Analysis of Law and Jurisprudence on Torts and Quasi-Delicts 191 (2012)

64 Malayan Insurance Co., Inc. v. Alberto, G.R. No. 194320, [February 1, 2012]

65 Malayan Insurance Co., Inc. v. Alberto, G.R. No. 194320, [February 1, 2012].

66 Josefa v. MERALCO, G.R. No. 182705, [July 18, 2014].

Article 2185 provides:

> Article 2185. Unless there is proof to the contrary, it is presumed that a person driving a motor vehicle has been negligent if at the time of the mishap, he was violating any traffic regulation.

Under this provision, the presumption arises if the driver of the motor vehicle was violating a traffic regulation at the time of the mishap. There is some confusion on the nature of the traffic violation that would trigger the application of this rule due to some unfortunate language employed in the case of *Tison v. Spouse Pomasin.*[67] However, some clear legal reasoning can easily resolve the confusion.[68]

In *Mallari Sr. v. Court of Appeals*,[69] the Court applied the rule under Article 2185 to hold the driver of a passenger jeepney negligent.

In *Añonuevo v. CA*,[70] the Court ruled that the rule only applies to motorized vehicles and not to bicycles. Therefore, non-compliance of the bicycle rider with regulations involving bicycles will not trigger the application of the rule.

c. Common carriers

As a general rule, common carriers are presumed to have been at fault or to have acted negligently, if the goods are lost, destroyed or deteriorated, unless they prove that they observed extraordinary diligence.[71] The exception is if the loss, destruction, or deterioration of the goods is due to any of the following causes:[72]

- Flood, storm, earthquake, lightning, or other natural disaster or calamity;
- Act of the public enemy in war, whether international or civil;
- Act or omission of the shipper or owner of the goods;
- The character of the goods or defects in the packing or in the containers;
- Order or act of competent public authority.

In *De Guzman v. CA*,[73] the Court ruled that causes falling outside the foregoing list, even if they appear to constitute a species of *force majeure*, fall within the scope of the rule provision for presumption of fault or negligence. In this case, the Court held that

67 G.R. No. 173180, 24 August 2011.

68 See Casis 180-184.

69 Mallari Sr. v. Court of Appeals, G.R. No. 128607, [January 31, 2000]

70 Añonuevo v. Court of Appeals, G.R. No. 130003, [October 20, 2004].

71 Article 1735.

72 Article 1734.

73 De Guzman v. Court of Appeals, G.R. No. L-47822, [December 22, 1988].

hijacking of the carrier's truck does not fall within any of the five categories of exempting causes and therefore, the rule applies.

This presumption has been applied in several cases.[74]

In *FGU Insurance Corp. v. G.P. Sarmiento*,[75] the Court found that the respondent common carrier recognized the existence of a contract of carriage and admitted that the cargoes it has assumed to deliver have been lost or damaged while in its custody. Thus, it held that in such a situation, a default on or failure of compliance with, the obligation —in this case, the delivery of the goods in its custody to the place of destination — gives rise to a presumption of lack of care and a corresponding liability.

In *Edgar Cokaliong Shipping v. UCPB*,[76] the Court reiterated that a common carrier is presumed to have been negligent if it fails to prove that it exercised extraordinary vigilance over the goods it transported and said that ensuring the seaworthiness of the vessel is the first step in exercising the required vigilance. It applied the presumption as it found that the petitioner did not present sufficient evidence showing what measures or acts it had undertaken to ensure the seaworthiness of the vessel.

4. Applying no standard

In some cases, the Court simply rules why a party is negligent without providing a standard, implied or otherwise.

In *Laguna Tayabas Bus Co. v. Cornista*,[77] a bus company was held negligent because "the right side of said bus [was] not covered nor protected by any bar to safeguard passengers sitting at the extreme ends of the seats on the right side from falling therefrom."

In *Vergara v. CA*,[78] the Court held that the fact of negligence may be deduced from the surrounding circumstances. It said:

> According to the police report, "the cargo truck was travelling on the right side of the road going to Manila and then it crossed to the center line and went to the left side of the highway; it then bumped a tricycle; and then another bicycle; and then said cargo truck rammed the store

74 Edgar Cokaliong Shipping Lines v. UCPB General Insurance Company, G.R. No. 146018, [June 25, 2003]; FGU Insurance Corp. v. G.P. Sarmiento Trucking Corp., G.R. No. 141910, [August 6, 2002]; Bascos v. Court of Appeals, G.R. No. 101089, [April 7, 1993]; Benedicto v. Intermediate Appellate Court, G.R. No. 70876, [July 19, 1990]); Ganzon v. Court of Appeals, G.R. No. L-48757, [May 30, 1988].

75 FGU Insurance Corp. v. G.P. Sarmiento Trucking Corp., G.R. No. 141910, [August 6, 2002].

76 Edgar Cokaliong Shipping Lines v. UCPB General Insurance Company, G.R. No. 146018, [June 25, 2003].

77 Laguna Tayabas Bus Co. v. Cornista, G.R. No. L-22193 (Resolution), [May 29, 1964].

78 Vergara v. Court of Appeals, G.R. No. 77679 (Resolution), [September 30, 1987].

> warehouse of the plaintiff."
>
> According to the driver of the cargo truck, he applied the brakes but the latter did not work due to mechanical defect. Contrary to the claim of the petitioner, a mishap caused by defective brakes cannot be considered as fortuitous in character. Certainly, the defects were curable and the accident preventable.

In *Macalinao v. Ong,*[79] the Court used photographs of the area where the accident occurred and the vehicles involved to determine who was negligent. It said:

> While ending up at the opposite lane is not conclusive proof of fault in automobile collisions, the position of the two vehicles gives rise to the conclusion that it was the Isuzu truck which hit the private jeepney rather than the other way around. The smashed front of the Isuzu truck is pressed against the private jeepney's left front portion near the driver's side. The private jeepney is positioned diagonally in the right lane; its front at the rightmost corner of the road while its rear remained a few feet from the demarcation line. Based on the angle at which it stopped, the private jeepney obviously swerved to the right in an unsuccessful effort to avoid the Isuzu truck. This would support the statement of the police investigator that the Isuzu truck lost control and hit the left front portion of the private jeepney. It would also explain why the driver of the private jeepney died immediately after being brought to the hospital, since in such a scenario, the brunt of the collision logically bore down on him.

A closer analysis of what the Court is saying would lead one to conclude that what it is determining is *how* the accident happened and not necessarily whether there was negligence. Identifying which vehicle hit the other does not necessarily mean that the driver of that vehicle was negligent. What the Court is actually doing here is determining the proximate cause without first determining whether there was negligence in the first place.[80]

In *Cadiente v. Macas*,[81] the Court held that a driver had no business driving as recklessly as she did and that the respondent cannot be expected to have foreseen that the vehicle, erstwhile speeding along the cemented part of the highway, would suddenly swerve to the shoulder, then bump and run him over. While a lack of foreseeability was used in absolving the injured party, there was no discussion on why the driver was reckless or negligent apart from the fact that he suddenly went to the shoulder of the road. It must be noted

79 Macalinao v. Ong, G.R. No. 146635, [December 14, 2005].

80 However the subsequent invocation of res ipsa loquitur saves this case.

81 Cadiente v. Macas, G.R. No. 161946, [November 14, 2008].

that there are cases where a driver is not deemed negligent even though he invades another lane.[82] The mere act of going to the shoulder of the road is not necessarily an act of negligence under all circumstances.

In these cases, it is almost as if the Court is saying that when people engage in these types of activities, they are obviously negligent such that no explanation or standard is needed.

IV. Conclusion

Overall, there is a lack of uniformity in the way the Court defines and determines negligence. This does not have to be the case because there is a clear definition of negligence in Article 1173. This definition also provides for a procedure in determining negligence and provides sufficient flexibility to cover virtually every situation.

Because Article 1173 is largely ignored, an *ad hoc* process is employed in almost every case. Generally, the process involves, at best, quoting one or several of jurisprudential definitions of negligence discussed earlier and the *Picart* tests. After stating a combination of these definitions and tests, the Court would then proceed to identify the negligent party. There is rarely a clear discussion as to how and why the facts of the case fit the standards or elements of the definition or test stated.

So while definitions are stated, they are not actually used. Jurisprudential definitions have become decorations. Worse, it may be argued that the statement of jurisprudential definitions and tests is being used as a disguise, to create the illusion that the finding of negligence is based on some legal standard when it actually is not. This procedure gives the *ponencia* some semblance of a legal basis, but in reality, the ruling is quite arbitrary.

What makes the situation worse is that many of the definitions of negligence cited by the Court come from common law sources. While the adoption of common law doctrines may be acceptable when no civil law concept is available, the fact that there is a clear definition of negligence in Article 1173 makes the recourse to common law sources unjustifiable. Had the definition and procedure for determining negligence under the Civil Code been inadequate, perhaps there might be some basis for adopting common law definitions to fill in the gaps. But as it was mentioned earlier, many, if not all, of these definitions that come from common law sources are inferior to the clarity and flexibility offered by Article 1173.

Ambiguous rulings result from cases where the Court is not clear on the standards applied to determine negligence.

82 McKee v. IAC

In *Mallari Sr. v. CA,*[83] the Court held the jeepney driver negligent and responsible for a collision. It explained it in this way:

> In the instant case, by his own admission, petitioner Mallari Jr. already saw that the BULLETIN delivery van was coming from the opposite direction and failing to consider the speed thereof since it was still dark at 5:00 o'clock in the morning **mindlessly** occupied the left lane and overtook two (2) vehicles in front of it at a curve in the highway. Clearly, the proximate cause of the collision resulting in the death of Israel Reyes, a passenger of the jeepney, was the sole negligence of the driver of the passenger jeepney, petitioner Alfredo Mallari Jr., who recklessly operated and drove his jeepney in a lane where overtaking was not allowed by traffic rules. Under **Art. 2185** of the Civil Code, unless there is proof to the contrary, it is presumed that a person driving a motor vehicle has been negligent if at the time of the mishap he was violating a traffic regulation. As found by the appellate court, petitioners failed to present satisfactory evidence to overcome this legal presumption. (emphasis supplied)

The Court never stated a standard for determining negligence. It seemed at first that it may be applying the standard of the ordinary prudent person because it described the act of the driver as "mindless" and therefore not something an ordinary prudent person would do. Then it goes on to cite the presumption of negligence under Article 2185. But it is not clear if this was the basis for the determination of negligence because the Court never identified the violation that would give rise to the presumption.

The Court itself has pointed out that in cases involving a quasi-delict, the negligence or fault should be clearly established because it is the basis of the action.[84]

But in several cases, the Court simply skips the determination of negligence and jumps immediately into whether the negligence was merely contributory or the proximate cause or whether the doctrine of last clear chance applies.

Perhaps the current state of jurisprudence on negligence is not a result of lack of diligence on the part of our jurists but the sheer difficulty in providing a "formula" to determine negligence, as Justice Fernando posits.

While it is true that the factual background of cases requiring a determination of negligence can be quite diverse, there is an existing definition and procedure that can be applied. This can be found in Article 1173 of the Civil Code.

83 Mallari Sr. v. Court of Appeals, G.R. No. 128607, [January 31, 2000].

84 Calalas v. Court of Appeals, G.R. No. 122039, [May 31, 2000].

The first step would merely require a determination of the standard of diligence required. The Court would simply have to ask the following questions:

- What is the nature of the obligation? Is it a quasi-delict, *culpa contractual* or some other juridical relationship?
- What are the circumstances of the persons, time and place? Is the actor an adult, child, expert, a common carrier, a medical professional, etc.? Did the event happen in broad daylight or at night, or did the actor have sufficient time to react? Did the event happen in a public or isolated place?

If there were no specific considerations requiring the application of a specific standard of diligence, then the standard of a good father of a family or ordinary due diligence would be applied.

The second step would then require whether the standard of diligence was met. The questions the Court would have to ask would be:

- Based on the facts, what did the actor do or not do?
- Are these acts or omissions consistent with due diligence?

In both steps, it is only in the first question where the Court may have to rely on the finding of facts of the lower courts. In everything else, it would be a question of law. So it may not be correct to say that the finding of negligence is purely a question of fact, which the Court can no longer review absent any of the exceptions provided by jurisprudence.

The procedure outlined in Article 1173 is clear and sufficiently flexible to be applied in a broad range of cases requiring a determination of negligence. There is no reason why it should not be applied and to take recourse to inferior methods. The law provides for what should be done by the courts. To do otherwise would be nothing less than negligence in jurisprudence.

HIGHLIGHTS OF PHILIPPINE CONFLICT OF LAWS

*Ranhilio Callangan Aquino**

I. CONFLICT OF LAWS AND HUMAN MOBILITY

1. For a long time, Philippine case law in private international law was sparse. Authors on the subject and professors had to turn to foreign sources for authority. The conflicts cases we had in our reporters were vestiges of our colonial past, involving principally Americans who fell in love with the Philippines (and, not coincidentally, with Filipinas as well!), decided to stay on, and then lived lives and executed wills that occasion the mind-twisters that conflicts cases often are.

2. That there are a growing number of reported cases laying down doctrine in this area of law is beyond doubt. While many of the recent decisions continue to intone venerable (but regrettably, almost mechanical) incantations – *lex rei sitae, lex delicti commissi* – there are very encouraging signs of responsiveness to developments in the field in other jurisdictions. That we have more conflicts cases now than in the pasts is explained in large measure by the increasing mobility of the Filipino. He will be found everywhere. Sometimes to our credit, sometimes to our shame, it is rightly observed that manpower is one of our country's principal exports.

3. Filipino entrepreneurs have also reached other states, and trans-boundary contracts and transactions, as a result, have increased in frequency. The availability of even the most exotic products through such media the World Wide Web engenders interesting problems of jurisdiction. Banks and banking institutions are multinational, and it will not take much to understand that this development spawns its own share of conflicts cases.

4. Trans-boundary and transnational movement and transactions of themselves, however, would not explain the increasing prominence of private international law. One must also take heed of the gorwing aversion for the brand of 'legal chauvinism' that drove courts in the past to apply their own laws to all cases. And it is more than just the comity of *Hilton v. Guyot* that makes our courts today choose to apply foreign law. There is the general conviction that it does not seem right or fair to resolve cases as if foreign law did not exist. Our courts recognize values worth protecting in the principles that direct them to choose foreign law. And there too is the growing regard we have for the person's autonomy, and the demand this makes on us to respect her choices, including the law she elects to govern her transactions.

5. Caravaca and Gonzalez (*Introduccion al Derecho Internacional Privado,* 1997) very usefully point out that in effect what we deal we deal with in choice of law is the political decision of the legislator to refer a controversy or a legal dispute to foreign law. Since it is not applied in all cases there can be no universal justification

* Chair, Department of Jurisprudence and Legal Philosophy; Philippine Judicial Academy, Supreme Court of the Philippines; Dean, Graduate School of Law, San Beda College

for the application of foreign law. In the ultimate analysis then it depends on the policies and objectives of the legislature.

6. It is altogether reasonable then to characterize conflict of laws as "bilateral": first, in delimiting the scope of internal law – such as resolving procedural questions by the law of the forum – and second, providing for the application of foreign law. (Novelli, *Diritto Internazionale Privato e Processuale*, 1997) Even this way, however, it is apparent that private international law rests on a policy decision to delimit the application of internal or domestic law and to allow for the application of foreign law.

II. JURISDICTION

7. It is obvious that before the court can even turn to the choices it has in regard to the law to be applied it must determine whether or not it has jurisdiction and whether or not it will exercise this jurisdiction. The fact that a court has jurisdiction does not make it obligatory on the part of the court to exercise it as there may be sound judicial principles militating against such exercise.

8. Because a lot depends on whether the action is *in rem, quasi in rem* or *in personam*, it is useful to be clear about the distinction. *Jose v. Boyon,* G.R. 147369 (October 23, 2003) reiterates the familiar distinction: An action *in rem* is against the thing itself, rather than against the person of the defendant; an action *quasi in rem* names a defendant, but its object is to subject such a defendant's interest in the property to the obligation or loan burdening it. But even where the suit incidentally involves a piece of real estate, if ownership or title is not in issue, but rather the defendant's performance or non-performance of an obligation, the action is *in personam.*

9. *Villareal v. Court of Appeals,* G.R. 107314 (September 17, 1998) illustrates the usefulness of this distinction insofar as actions involving non-residents are concerned. Where an action is *in personam* there is no allowance for extra-territorial service of summons. The problem then is how does one obtain relief when a defendant deliberately stays out of reach by ensconcing himself in safety in some foreign jurisdiction? The answer of the law is by an action directed not at his person but at his property, such as an action for garnishment or attachment. In such actions, the jurisdiction of the court "is limited to the property within the country which the court may have ordered attached. In such a case, the property itself is 'the sole thing which is impleaded and is the responsible object which is the subject of the judicial power.'" When the defendant appears, the action *in personam* may proceed without the court's loss of jurisdiction over the *res* and the latter remaining liable.

10. It is interesting that American jurisprudence has treated the question of jurisdiction in conflict of laws as a question, ultimately, of due process. (cf. Rosenberg, Hay and Weintraub, *Conflict of Laws: Cases and Materials,* 10th Ed., 1996) Whether or not a court had jurisdiction is a question of whether or not the defendant is afforded due process. Insofar as jurisdiction *in personam* is concerned, the question ultimately is whether or not the defendant's right to due process is properly served when the court acquires jurisdiction over him, even if he is not "present" in the State. Another way of raising the issue is to ask what kind of "presence" is sufficient to confer jurisdiction on the court over a defendant.

10.1 The leading case on this point of course is *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct 154 (1945). It must of course be remembered that what this case settled was the notion of 'presence' insofar as corporations are concerned. In effect, *International Shoe* holds that there are sufficient contacts between the State and the defendant that confer jurisdiction when the defendant's activities in the State are regular, systematic and continuous.

10.2 In the Philippines, the concept of "minimum contacts" insofar as juridical entities are concerned is treated as the issue of "doing business". When it is established that a foreign juridical entity is "doing business" in this jurisdiction, then it is susceptible to suit and is potentially a defendant.

11. *MR Holdings v. Bajar*, G.R. 138104 (April 11, 2002) provides a useful summary of the present rule on jurisdiction over foreign corporations:

11.1. "If a foreign corporation does business in the Philippines without a license it cannot sue before Philippine courts." To this we must add: But it can be sued, precisely because it is doing business here.

11.2 "If a foreign corporation is not doing business in the Philippines, it needs no license to sue before Philippine courts on an isolated transaction or on a cause of action entirely independent of any business transaction", and again we must add: It cannot however be sued, although quite obviously, when it institutes suit, it opens itself to counterclaim.

11.3. "If a foreign corporation does business in the Philippines with the required license, it can sue before Philippine courts on any transaction" to which we add: and it can also be sued.

12. When a corporation does not do business in the Philippines it is its voluntary submission to the jurisdiction of the court by instituting a complaint that vests jurisdiction on the court. Unless it voluntarily submits, however, it cannot be a defendant since the minimum contact required for the acquisition of jurisdiction – doing business – is not present.

13. What constitutes "doing business"?

13.1. The *Foreign Investments Act of 1991* offers a core definition: "Any act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or of the purpose and object of the business organization".

13.2. Significantly, the same law excludes having representatives or distributors domiciled in the Philippines who transact business for their own account in their own name from the ambit of "doing business".

13.3. There is no general rule or governing principle that holds for the determination of whether or not a foreign juridical entity is doing business in the Philippines to enable our courts to acquire jurisdiction over it. When such a foreign corporation however participates in a bidding process, its mere participation manifests an intention to engage in business in the Philippines, and therefore participating in the bidding process is "doing business" in this jurisdiction. More directly put, when a foreign corporation performs acts for which it was created, regardless of volume, it is doing business. *European Resources and Technologies, Inc. v. Ingenieuburo Birkhahn*, G.R. 159586 (July 26, 2004)

13.4. *Bajar, supra*, holds that mere ownership of property in a State without accompanying active use in furtherance of the business of the entity does not measure up to "doing business".

13.5. *European Resources, supra*, also reiterates the doctrine of estoppel against a party who has benefited from a transaction with an unlicensed foreign corporation. When a Philippine citizen or entity contracts with a foreign juridical entity and benefits from it, such a citizen or domestic entity is estopped from questioning the capacity of a foreign corporation to institute an action in our courts where our citizen or corporation has reneged on its obligation or breached its contract.

13.6. *Agilent Technologies Singapore v. Integrated Silicon Technology,* G.R. 154618 (April 21, 2004) reiterates the two-fold test applied to determine whether a foreign juridical entity is "doing business" in this jurisdiction: first, the "substance test" that asks whether or not the corporation is engaged in that for which it was organized; second, the "continuity test" that asks whether or not the engagement anticipates, points to or looks at a continuity of dealings. It goes however one step further and rules that "by and large", to constitute 'doing business', the activity must be one for profit-making.

14. Serving summons. A review of the salient provisions of the *1997 Rules of Civil Procedure* is necessary:

14.1 When the defendant is a *private juridical entity*: Service is on its resident agent (which entity must name when it applies for a license to do business here), or the designated government official. (*Rule 14, Section 12*)

14.2. *Extraterritorial service of summons* is allowed on the following condi-

tions:

i. The defendant is not a resident of the Philippines;
ii. He is not found in the Philippines
iii. Only for actions *in rem* and *quasi in rem.*

When these conditions are fulfilled, service may be by:

i. Personal service
ii. By publication, with copy sent by registered mail to the last known address of the defendant
iii. Any other manner deemed sufficient by the court. (*Rule 14, Section 15*)

14.3. In *Licaros v. Licaros*, G.R. 150656 (April 29, 2003), the Court ruled on the efficacy of extraterritorial service of summons in a case for the declaration of the absolute nullity of marriage. The Court ruled that being an action on the status of a person is an action *in rem* and therefore extraterritorial service of summons is effective. Here the trial court had ordered publication in a newspaper of general circulation, once a week for three consecutive weeks and service on the petitioner through the Department of Foreign Affairs. The Supreme Court held that this was the means "deemed sufficient by the court", and was thus sufficient.

14.4. *Belen v. Chavez,* G.R. 175334 (March 26, 2008) dealt with what was originally an action for the enforcement of a foreign judgment in a complaint for breach of contract. Quite correctly, the Court held this to be an action *in personam.* In then proceeded to rule that when summons cannot be served because the defendant is temporarily abroad but is otherwise a resident of the Philippines, summons may, by leave of court, be effected out of the Philippines under Rule 14, Section 16 of the Rules of Court. But, the Court emphasizes, the defendant must be a resident of the Philippines.

15. That an action involves real property makes it a *real action* but **not necessarily** an action *in rem.* In *Gomez v. Court of Appeals,* G.R. 127692 (March 10, 2004), the Court seized the occasion to correct a mistake frequently made: confusing actions *in rem* with *real actions.* Where an action seeks the recovery of real property it is a real action, but not necessarily an action *in rem.* Where it seeks recovery of personal property, it is a personal action but not necessarily for that reason *in personam*. It is therefore possible for a real action to be *in personam.* "Real actions are those brought for the specific recovery of lands, tenements or hereditaments xxx Personal actions are those brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injuries xxx". (1 Am Jur 2d, *Actions,* § 38)

16. A rather prevalent misconception should be addressed that concerns actions *in rem*. It is mistakenly held by many that jurisdiction is acquired by publication.

While there is good reason to claim that publication may be a "jurisdictional requirement" that does not justify the erroneous assertion that jurisdiction 'is acquired by publication'.

16.1. Where a specific thing is the subject of a judgment the court must of course have jurisdiction over the thing or *res*. Such jurisdiction is the power of the court over the thing before it, without regard to the particular persons who may be interested therein. It is the presence of the *res* within the territorial dominion of the state that confers jurisdiction. (6 Cal Jur 3rd, Part I, *Courts*, § 84)

16.2 Thus acquiring jurisdiction over the person of the defendant is not necessary. What is crucial is rather acquiring jurisdiction over the *res*. When the *res* is the status of a person, e.g., marriage, then the person must be domiciled in the Philippines, and when the *res* is property, the property must be in the Philippines within the jurisdiction of the court. It is important that our Supreme Court has held that in actions *in rem* service of summons **does not** serve the purpose of vesting the court with jurisdiction but is rather meant to satisfy the requirements of due process or fair play so that the defendant be apprised of pending action against his property or property interest. *Valmonte v. Court of Appeals*, G.R. 108538 (January 22, 1996)

16.3 A decision *in rem* can be rendered by a state court only with reference to a *res* situated in the state, but can be rendered even though the owner is not a resident of the state and process is not personally served upon him in the state. Jurisdiction *in rem* is required where the decision sought is of a nature to directly affect real property. A court of one state has no jurisdiction to establish, to pass, or to quiet a title to real property situated in another state, or to make any other decision directly affecting real property located in another state, or the title to that real property. (20 Am Jur 2d, *Courts*, § 119)

16.4. It is then the presence of the *res* within the territorial dominion of the court that confers jurisdiction. True, publication may be required before the court exercises jurisdiction (or as a condition to the exercise thereof), in which case, it truly is a jurisdictional requirement, but that is not to say that jurisdiction is acquired through publication. One can publish in every known broadsheet and tabloid that exists, but if the *res* is not within reach, there is no jurisdiction.

17. Precisely because a court acquires jurisdiction over parties in different ways, depending on whether the action is *in rem* or *in personam*, then acquiring jurisdiction for *in rem* purposes does not mean acquiring jurisdiction also for *in personam* purposes. This is illustrated by *Banco de Brasil v. Court of Appeals*, G.R. 121576-78 (June 16, 2000). Originally the plaintiff sought to exclude the defendant bank from any interest over the ship, M/V Ace Star. The plaintiff, however, also claimed that

since the defendant was a nuisance defendant, he had caused the plaintiff irreparable damage for which the plaintiff claimed damages. Originally, therefore, the action was *in rem*, but the plaintiff sought a relief totally alien to the action. Any relief granted *in rem* or *quasi in rem* proceedings must be confined to the *res* and the court cannot lawfully render a personal judgment against the defendant. The court then could not lawfully render a judgment for damages, as the action was *in rem* and the court had not properly acquired jurisdiction over the defendant for *in personam* actions.

18. The court may indeed have jurisdiction but it will not follow that it will choose to exercise jurisdiction. *The Manila Hotel Corporation v. NLRC*, G.R. 12007 (October 31, 2000) indicates the circumstances that indicate the propriety of the exercise of jurisdiction over a case involving foreign elements, provided that the court can acquire jurisdiction over the parties.

    i. The Philippine court or agency is one to which the parties may convenient resort.

    ii. The Philippine court has or is likely to have the power to enforce its decisions.

    iii. The Philippine court has or is likely to have the power to enforce its decision.

19. One reason a Philippine court may refuse to exercise jurisdiction even when it has it is *forum non conveniens*. The judgment of the Supreme Court in *Philsec Investment v. Court of Appeals*, 274 SCRA 102 (1997) explains what this is:

    19.1 It is a ground for dismissal, or for refusal on the part of the Philippine court to exercise jurisdiction.

    Note: While *Rule 16* does not in fact mention "forum non conveniens" as a ground for dismissal it nevertheless is a ground for the court's refusal to exercise or assume jurisdiction addressed to the sound discretion of the court.

    19.2. But before invoking the doctrine, the court must make a factual determination as to its applicability, so that dismissal on the basis of an *ex parte* plea lone of inconvenient forum is not proper.

    19.3 The factual determination settles the following questions:

        a. Whether or not the Philippine court is one to which the parties may convenient resort.

        b. Whether or not the court is in a position to make an intelligent decision as to the law and the facts, in view of the evidence available and other relevant circumstances.

        c. Whether or not the Philippine court has or is likely to have

the power to enforce its decision.

Whether or not a court has jurisdiction is one question, and whether or not it will exercise this jurisdiction is another. A court that has jurisdiction may refuse to entertain a case on the ground of *forum non conveniens* when:

a. The court believes that the matter can be better tried and decided elsewhere, either because the main aspects of the case transpired in a foreign jurisdiction or the material witnesses have their residence there;

b. The court believes that the non-resident plaintiff sought the forum – engaged in forum-shopping – merely to gain a processual advantage or to convey or harass the defendant;

c. The court is unwilling to extend local judicial facilities to non-residents or aliens when the docket may already be overcrowded;

d. There is no guarantee that the court will be able to effectuate its own judgment;

e. It is difficult to ascertain foreign law.

Whether or not to dismiss is a matter that depends on the facts of each case and on the discretion of the judge. *Puyat v. Zabarte*, G.R. 141536 (February 26, 2001)

20. Another ground for dismissal is *litis pendentia* (or *lis alibi pendens*). A court will refuse to take cognizance over a case, even if it might have jurisdiction, when an identical or a similar case has been filed before a competent court in another jurisdiction. It must be remarked that "Forum Shopping" which is the evil that the required Certification in all initiatory pleadings is meant to obviate, was a private international law concept and it referred to the practice of opportunists who introduced identical actions before the courts of different jurisdictions "shopping around" for the most favorable judgment. The attitude of some eminent English jurists, who were more tolerant of the practice, is amusing: "This may be forum-shopping, but England is certainly a good palce to shop!"

Bank of America v. Court of Appeals, G.R. 120135 (March 31, 2003) examined whether or not *litis pendentia* was successfully pleaded in view of actions filed in England and Hongkong that, it was claimed, were identical to the actions filed in the Philippines. While the Court ruled that the movants had failed to establish all the elements of *litis pendentia* it in effect maintained that were all the elements present, *litis pendentia* would be an effective plea against suit in the Philippines. The requirements are well known: First, identity of parties; second, identity of

reliefs sought and rights asserted; third, judgment in one would constitute *res judicata* in the other.

III. PROOF OF FOREIGN LAW

21. There is, as a general rule, no judicial notice of foreign law. This is merely a consequence of the juridical fact that foreign law is not law within the jurisdiction of the forum. It is a fact that must be proved like any other fact is proved.

21.1. A different treatment is given "the law of nations" of which there is judicial notice because the law of nations – or customary international law – is truly law for the forum. Treaty law, insofar as it becomes law for us upon Senate concurrence, receives the same treatment as does statute law.

21.2. Because there is no judicial notice of foreign law, when alleged to apply, it must be proved by the party that alleges the applicability of foreign law. (*Bank of America v. American Realty Corporation,* G.R. 133876 (December 29, 1999]. In fact, *Yao Kee v. Sy-Gonzales*, 167 SCRA 736 (1988) would seem to forbid a court from taking judicial notice of foreign laws. This should not be too surprising because were a court to take judicial notice of what should be proved the contesting party would be denied the opportunity to challenge the proof purportedly establishing the contested fact.

21.3. Since administrative bodies and proceedings are not bound by all the rules of evidence, they may take judicial notice of foreign law. (*Dumez Company v. NLRC*, G.R. 74495, July 11, 1996)

Note:

There is incoherence in the present position of Philippine law – the same incoherence noted by Spanish jurists – in regard to conflict of laws. On the one hand, the Civil Code and other laws direct the application of foreign law. On the other hand, jurisprudence has made foreign law an issue of fact that must be resolved by introduction of proof. The result of course of this incoherence is that while the law directs the application of foreign law, it will in fact not be applied if the parties who claim the application of foreign law fail to prove it in accordance with the rules.

The basic reason for maintaining this inconsistency is expedience: it is undesirable to lay on Philippine courts the onerous burden of familiarizing themselves with foreign law. What is however clear is that the imperative of applying foreign law – laid down by Philippine law itself – can be negated by the lackadaisical attitude of parties in regard to proof of foreign law. It is also clear that a party who would otherwise be disadvantaged by the application of foreign law and who would stand to gain by the application of the so-called "processual presumption" merely has to desist from proving foreign law to enjoy the advantage of the pro-

cessual presumption. (cf. Caravaca-Gonzalez, 414-415)

22. Foreign law is properly proved by:

1.1 An official publication thereof.
Would a print-out of the official Web-page of a foreign legislature that contains the law alleged to be applicable constitute acceptable proof? It is submitted that under the *Rule on Electronic Evidence* (A.M. 01-7-01-SC), specifically under Rule 3, Section 1 thereof, the Web-based evidence is to be accorded the same treatment as is a writing or a document.

1.2 A copy attested by the officer having the legal custody thereof. If the record is not kept in the Philippine, the secretary of the Philippine embassy or legation, the consul-general, the consul, the vice-consul or the consular agent or any officer in the foreign service of the Philippines stationed in such jurisdiction must certify that the attesting officer does have legal custody of the original of such law. (*Rules 132, Section 24* and *25*) The certification accompanying the attestation of the officer having the legal custody of the record of foreign law can be issued by the secretary of the Philippine embassy or legation in the foreign jurisdiction, the Philippine consul-general, consul, vice-consul or consular agent stationed in such country, or by any other authorized officer in the Philippine foreign service assigned to the same jurisdiction. *Benedicto v. Court of Appeals*, G.R. 125359 (September 4, 2001)

1.3 A published treatise on the subject law provided that the court takes judicial notice of the competence of the writer, or evidence is introduced to establish the author's competence. (*Rule 130, Section 46*)

1.4 The testimony of an expert witness. (*Asiavest v. Court of Appeals*, G.R. 128803, September 25, 1998)

An old case, *Pardo v. Republic*, G.R. 2248 (January 23, 1950) has a salutary reminder: in those proceedings not governed by the Rules of Court, such as naturalization and land registration proceedings, the Rules outlined above on the proof of foreign law may not apply, and more liberal standards may allow the introduction of other means of proving foreign law. In fact, *Pardo* suggests the possibility that when the relevant foreign law has already been proved in a previous case, in a succeeding case or in following cases involving the same foreign law, the court may take judicial notice of such foreign law.

23. In *Manufacturers Hanover Trust v. Guerrero,* G.R. 136804 (February 19, 2003), the Supreme Court was asked whether the affidavit of a foreign attorney that purported to prove the laws of the attorney's jurisdiction. The Court rejected this proof however and pointed out the fact that the affidavit was *ex parte*, taken abroad and never testified to in the Philippines. Even if the affidavit did cite decisions of U.S. courts and copies of such decisions were attached to the affidavit, these together do not constitute the proof required by the Rules. Equally important is the Court's rejection of the contention that since the opposing party did not oppose the "proof" of foreign law thus introduced, it was in fact admitting the proof. The Court insists that it is the duty of the party relying on foreign law to prove it in accordance with the rules.

24. What should the court do if foreign law is not properly proved?

24.1. Technically, if the plaintiff's cause of action rests on foreign law and it is not proved, then there is no cause of action, and that is a defense that the adverse party may properly raise. It may be proper ground for Demurrer to Evidence. If a defense rests on foreign law that is not proved then the defense fails.

24.2. *Northwest Airlines v. Court of Appeals,* 241 SCRA 192 (1995) articulates the more common recourse when foreign law is not proved: then becomes operative the ***processual presumption***. It is usually put forward as: "In the absence of competent proof of foreign law, then such law is presumed to be identical with Philippine law" which is quite clearly an absurd presumption. Rather it seems more reasonable to explain the processual presumption as the recourse of a forum that is not properly apprised of the foreign law it is urged to apply to the law with which it is most familiar – and that of course is the law of the forum itself.

25. When foreign law is successfully proved the court applies foreign law:

25.1. As such foreign law has been construed in the jurisdiction where it applies;

25.2. As the courts of such jurisdiction have definitely interpreted such law.

It is in this case where the pronouncements of a foreign supreme court with the competence to lay down definitive interpretation of the law also bind a Philippine court.

26. Conflict rules have three essential components: the supposition of fact (*tatbestand*), the point of connection (or point of contact) and the juridical consequence. The *tatbestand* ("supposition of fact") is the category that is keyed to certain situations or social relations that the law considers significant (e.g., testate succession; sale of real property, etc.) It is because of the *tatbestand* that one conflict rule can be applied to a multiplicity of situations. The *point of connection* is that circumstance that links a particular set of facts to a State on the basis of which the Legislator prescribes the applicable law. Hence, "nationality", "domicile", "situs of the goods" are all points of connection. Finally, the *juridical consequence* is the application of the law, whether domestic or foreign. (Caravaca-Gonzalez, 305-311)

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Philippine Export and Foreign Loan Guarantee Corp. v. V.P. Eusebio Construction, G.R. 140047 (July 13, 2004) deals with the applicable law in resolving the intrinsic validity of contractual provisions. It thus adverts to what is no in conflicts theory as "points of contact" or "contact factors". In fact, the Court conflated "point of contact" with the "most significant relationship" test. It found that since the place of performance was Iraq, and one of the contracting parties was the Iraqi government – points of contact without doubt – then it was the laws of Iraq that were applicable.

a. A "point of contact" is that which establishes a connection between the case at hand and the laws of a foreign jurisdiction. "It is that circumstance that states a connection between the given case and a determinate jurisdiction which the legislator uses as basis for determining the applicable law in a situation of private international law." (Caravaca, Gonzalez, 299-300) Novelli, an Italian jurist, usefully points out the fact that a connecting factor is that which the legislator identifies to be determinative in orienting a case towards the applicability of foreign law. (Novelli, 30)

b. "Points of contact" are therefore prejudicial considerations in relation to choice of law. One chooses the applicable law on the basis of the connecting factor the legislator deems most significant, in cases where legislation is clear as to the applicable law, or which the court appreciates to be the properly applicable law.

c. Collier believes that the list of connecting factors is rather uncomplicated.

   c.1. Personal law, which can be either:

      i. The law of one's nationality: where the nationality theory is followed, as in the Philippines;
      ii. The law of one's domicile: where domicile is considered the more telling factor.

   c.2. The place of the transaction:

      i. The place of celebration
      ii. The place of the perfection of the contract

   c.3. The place of performance: such as the place of the performance of the contract.

   c.4. The situs

      i. The situs of the property

ii. The situs of the tort.

c.5. The place where the court sits.

d. Connecting factors indicate the applicability of foreign law on the following bases, as classified by Caravaca and Gonzalez:

i. Proximity: Points of connection indicate the applicability of the law that has the greatest connection with the case.
ii. General interest: The law that safeguards general or common interests is applied, e.g., the law of the affected State in a commercial transaction.
iii. Intention of the parties or autonomy
iv. Materiality: The law that safeguards a material or concrete value or a specific condition, e.g., the validity of marriage, is applied.
v. Sovereignty: The law is applied that bests safeguards the sovereignty of the State involved, such as the State within whose territory the property is found.

Connecting factor or points of contact in Philippine jurisprudence:

In the choice of law, the rules for choice involve first, a factual element and second, a connecting factor or a point of contact. It is by this that the applicable law is chosen. Test factors or points of contact could be:

a. The nationality of a person, his domicile, his residence, his place of sojourn or his origin;
b. The seal of a legal or juridical person, such as a corporation;
c. The *situs* of a thing, that is the place where a thing is, or is deemed to be situated.
d. The place where an act has been done, the *locus actus*, such as the place where a contract has been made, a marriage celebrated, a will signed or a tort committed.
e. The place where an act is intended to come into effect, e.g., the place of performance of contractual duties, or the place where a power of attorney is to be exercised;
f. The intention of the contracting parties as to the law that should govern the agreement, the *lex intentionis*
g. The place where judicial or administrative proceedings are instituted or done, *les fori*
h. The flag of a ship

Saudi Arabian Airlines v. Court of Appeals, G.R. 122191 (October 8, 1998)

27. *Oil and Natural Gas Commission v. Court of Appeals*, G.R. 114323 (July 23, 1998) reiterates an elementary rule in the conflict of laws: Procedure is always governed *lex fori*, or the internal law of the forum. This, however, means two things:

a. Notwithstanding the fact that a Philippine court applies foreign law, procedure will always be governed by Philippine law. Evidence considered admissible under the applicable foreign law will be ruled inadmissible if so excluded under our rules of evidence.

b. When the regularity of a procedure or process before a foreign court is raised as an issue before our court, the issue will be resolved by reference to the law of the foreign forum. Thus our Supreme Court refused to sustain an assault against a judgment of the Malaysian High Court that did not completely state the law and the facts on which it was based. Because Malaysian procedural law allowed the High Court to omit recital of every relevant fact or applicable law, the foreign judgment was unassailable in this regard. *Asiavest Merchant Bankers v. Court of Appeals,* G.R. 110263 (July 20, 2001)

27. ***Characterization.*** Is the validity of a donation between spouses during the subsistence of their marriage a problem of marriage law or of property law? The answer is easy if Philippine law were the only reference. Since provision governing this situation – holding such a donation in particular to be void – is found in the Family Code, then it is a matter of matrimonial law. But it is of course very well possible that other jurisdictions may treat it as a property problem, plain and simple, and this is a problem when foreign law is to be applied. We will then be faced with the initial problem of determining whether it is foreign "matrimonial" law or foreign "property law" that will apply.

The same thing may be said of "donations". Is a donation of matter of "contracts" or a matter of "property"? In common law systems, donations are a matter of property – and call for the application of the law on property. Under Philippine civil law, donations are a kind of a contract. And the problem asserts itself: If we have to apply foreign law in regard to a donation that is in issue before our courts, do we apply foreign property law, or foreign contract law? This is the classic problem of *characterization* in the conflict of laws. *Saudi Arabian Airlines v. Court of Appeals,* G.R. 122191 (October 8, 1998) referred to the problem of characterization in the following wise: "Before a choice can be made, it is necessary for us to determine under what category a certain set of facts or rules fall. This process is known as 'characterization', or the 'doctrine of qualification'. It is the 'process of deciding whether or not the facts relate to the kind of question specified in a conflicts rule.' The purpose of 'characterization' is to enable the forum to select the proper law." Although the Court went no further in this case then to observe that the court *a quo* had characterized the case as a tort case, we must examine the three solutions commonly proposed to the problem of characterization:

27.1. The *lex fori* solution: The forum characterizes according to its own law, and then applies the law – domestic or foreign – consequent upon its classification. While there is no doubt that this would be a straightforward solution, the difficulty under which

it labors is plain to see. When our courts characterize according to our laws and then apply foreign law as a consequence of their characterization, it may very well be the case that the foreign law is applied to case to which it was never meant to apply!

27.2. The *lex causae* solution: Classification or characterization will depend on the governing law. At first blush this seems to be a reasonable solution, because it applies State A's laws to cases that the legal system of A determines should be governed by such laws. But it also soon becomes evident that there is a vicious circle here. We characterize to be able to determine the governing law, but the proposal is that we characterize according to the governing law!

27.3. The *analytic jurisprudence and comparative law* solution: By far the most scholarly of proposals it is also the most difficult for it calls upon the court to determine the common patrimony of juridical concepts – for whatever differences there might be between legal systems, there are commonalities in legal categories. The point is to employ characterizations of a universal or quasi-universal character. This, of course, does not yet tell us that there are any such characterizations, or that they are sufficient to cope with the cases that come before the courts. It should suffice, however, to say that the Hague Conventions on Private International Law aim at precisely such an approach.

27.4. The *double characterization* solution: This thoughtful compromise attempts couples the *lex fori* and *lex causae* solutions. The forum initially determines into which category the case before it falls. This is the first characterization. So far, it is a characterization of and by the forum. If, for example, it determines that the matter has to do with the validity of testamentary provisions, then, under Philippine law, it must refer to the national law of the testator. Assuming the testator to be an American, the Philippine court then asks whether under American law, the matter would be one of intrinsic or formal validity, and then proceeds to use the applicable law.

Falconbridge, a Canadian jurist, is credited with having proposed a compromise for characterization that is best illustrated by an example:

A Filipina and her naturalized American (formerly Filipino) husband appear before the RTC of Manila asking for a declaration of the absolute nullity of their marriage. They were married while vacationing in Italy, not by any means an improbable scenario these days of ubiquitous Filipinos and the ease of travel.

If the petitioner alleges nullity on the basis that the husband was only 17 at the time marriage was contracted, the first question

that confronts the court is whether the issue is one of "capacity" or one relating to the "essential" or "formal" requisites of marriage.

i. There is no question what with regard to the Filipina, age is a matter of capacity and is determined by Philippine law. But this is not the issue. The issue is her husband, a naturalized American citizen.
ii. The *lex locus celebrationis* is therefore asked whether or not age is characterized as a matter of "formality", and what the provision of Italian law would be were it a matter of formality.
iii. Finally, the *lex nationalii* of the husband is referred to in order to determine capacity. It is possible that American law would make capacity a matter for the determination of his ante-nuptial domicile, and if he and his wife were domiciled in the Philippines, then capacity to marry would be a matter for Philippine law to determine. One would also have besides a *renvoi* case.

The general attitude of American courts to characterization is aptly summarized in the statement: "Generally, the forum performs the process of characterization in accordance with its own views, without giving consideration to the question whether the legal question thus characterized would be similarly characterized by the jurisdiction to which the forum thereby refers the question." 12 Cal Jur 3d (Rev), *Conflict of Laws*, § 33 In fact, even the determination as to whether an issue is a matter of procedure or of substance is left by American courts to the forum, the exception being tangible property that is characterized as either "immovable" or "movable" by the law of the situs. 16 Am Jur 2d, *Conflict of Laws*, § 3

27. **Renvoi.** The Civil Code provides that the validity of testamentary provisions is determined by reference to the national law of the testator. If an American from the State of California was domiciled in the Philippines before his death and here executed his will, we would perforce turn to the laws of California to determine the validity of the provisions of his will. But if the laws of California themselves were to provide that it is the law of testator's ante-mortem domicile that controls, then what we have is the classic **renvoi** problem that was the stuff of which horror stories were made for students of private international law.

27.1 There is "renvoi" because jurisdictions do not craft their laws principally with an eye to harmonizing them with the laws of other jurisdictions.

27.2. In private international law, the term "law" comprehends two types of rules:

i. There are "internal laws" or "internal rules" such as the

rule that one must be at least 18 to contract marriage validly;

ii. There re also "conflict rules" such as the rule that provides that a marriage celebrated abroad according to the laws of that foreign jurisdiction and there considered valid will also be valid in the Philippines.

It is clear that "renvoi" can arise only from conflict rules, and not from internal rules.

27.3. The following solutions have been proposed in juridical theory and applied by various jurisdictions:

a. The *internal rule* or *internal law* solution: Realizing that "renvoi" arises precisely because the clash of conflict rules, the "internal rule" solution eliminates the problem by ignoring the conflict rules of the foreign jurisdiction. Thus we would examine the validity of the will in issue in our example by referring to the laws on succession of the State of California, ignoring whatever conflict rules there might be, such as the rule on ante-mortem domicile. This is the solution of *rejection of renvoi*. The problem with this solution however that it results in applying the laws of California in a manner that the laws themselves do not contemplate or provide for. The doctrine of *renvoi* is generally repudiated by American authorities (cf., 12 Cal Jur 3d (Rev), *Conflict of Laws*, § 34). In fact, the doctrine of *renvoi* is presented as an "alternative" to the position taken by American courts: Where a question comes before a court which according to the law of the forum as to conflict of laws, is to be determined by the law of another jurisdiction, the question is determined by the law of such other jurisdiction applicable to the precise question; the law of such other jurisdiction as to conflict of laws is not taken into consideration. 16 Am Jur 2d, *Conflict of Laws*, § 4 The rejection of renvoi then is the policy decision not to read the conflict rules of another jurisdiction when a case is referred to the laws of such a jurisdiction.

b. The *single renvoi* or *acceptance of renvoi* solution: Under this solution, the Philippine court would apply Philippine succession law to determine the validity of the American testator's will provisions. We would thus be accepting the return of the issue to our laws. But does this not offend the Civil Code itself that provides that we apply American law? Our acceptance of renvoi is itself compliance with American law that directs the application of the laws of the testator's ante-mortem domicile. Decided cases in the Philippines, some going back to the

American era, hold this to be the solution this jurisdiction so far adopts. There is at least one case, *Aznar v. Garcia*, 7 SCRA 95 (1963) in which the Supreme Court ruled in favor of the acceptance of *renvoi.* Interestingly, the Supreme Court held that California law was parsed into the law applicable to domiciliaries of California and those residing out of the State. While Salonga takes issue with this distinction (cf. Salonga, *Private International Law,* 1995 Ed., 229) what in effect it does is demonstrate that by "law", our courts read not only internal rules but conflict rules as well.

c. The *foreign court* or *double renvoi* solution: The term does not suggest that it is the foreign court that decides. Rather, the Philippine court sits as a foreign court and as such asks itself how a foreign court – in this case the courts of California – would decide this case. It will also consider the question of whether or not the courts of California would apply conflict rules also or internal rules only. Put otherwise: sitting *as if* it were a California court, the Philippine court would resolve both the renvoi and the validity of testamentary provisions issues. There is no case in our reporters that evidences use of this solution.

IV. Marriage and its Incidents:

28. *Article 26* of the *Family Code* subjects marriages solemnized outside of the Philippines (except consular marriages governed by *Article 10*) to the "laws in force in the country where they are solemnized". This is an announcement of the rule of *les loci celebrationis*. In *Yao Kee v. Sy-Gonzales*, the Supreme Court laid down the two matters that must be proved when the validity of a marriage under foreign law is in issue:

i. The fact of the foreign marriage, by convincing evidence;
ii. The existence of the foreign law as a question of fact.

This is the rule applied whenever the marriage in a foreign jurisdiction of Filipinos, of a Filipino and a foreigner, or of foreigners is in issue. The article purports to cover "all marriages solemnized outside the Philippines."

29. The *Family Code* itself imposes three requirements of recognition:

i. That the marriage is in conformity with the laws of the jurisdiction where the marriage is celebrated;
ii. That it is considered valid in the same jurisdiction;
iii. That it is none of the prohibited unions, namely:
   a. Marriages of parties below 18 years of age;
   b. Bigamous or polygamous marriages;
   c. Marriages contracted through mistake of one contracting party as to the identity of the other;

d. Marriages void as a result of failure to record decrees of nullity;
e. Marriages between psychologically incapacitated persons;
f. Incestuous marriages;
g. Marriages prohibited by public policy.

29.1 It is clear that where or not one of the parties to a marriage contracted abroad suffers from disqualifying psychological incapacity, or mistakenly married one person whom she thought to be another can be established only in appropriate judicial proceedings assailing the validity of the marriage. It is not clear though whether or not any of the grounds enumerated above may be invoked by a government agency or office without need of a judicial decree. Could the Office of the Civil Registrar, for example, refuse recordation of a foreign marriage on the ground that it has records attesting to a subsisting bond between one of the parties and a third party?

29.2. Will the marriage of two aliens, both first cousins, valid under the laws of the *locus celebrationis* be valid in this jurisdiction? Salonga (*Private International Law,* 1995) is of the opinion that it will be, because he submits that the public policy rejecting marriages of first cousins is an internal rule applicable only to Filipino nationals. Coquia and Aguiling-Pangalangan (*Conflict of Laws,* 1995) venture the same opinion. "It is submitted that our prohibition against marriage of first cousins should be limited only to Filipino nationals." The problem however with this position is that it does not find textual support: "except those prohibited…" includes bigamous, polygamous, incestuous marriages and those contrary to public policy. If the respected authors concede that incestuous marriages are void, wherever celebrated, whichever law may be controlling, what textual justification is there for crafting an exception for the marriage of first cousins?

29.3. When a Filipino is one of the parties to a foreign marriage, *Article 15* and *Article 17, third paragraph* of the *Civil Code* should be read in conjunction with *Article 26* of the *Family Code*. This means that compliance with the requirements of foreign law notwithstanding the Filipino spouse must possess the capacity to marry according to Philippine law and must not labor under any of the prohibitions of prohibitive laws that have for their object public order, public policy and good customs.

30. *Van Dorn v. Romillo*, 139 SCRA 139 (1985) though no longer new is the progenitor of many important doctrines on the effect of foreign decrees of divorce. It therefore invites diligent attention:

Alice, a Filipina, was wed to an American, Richard. The facts as recited by the Court, suggest that it was Alice who sued for divorce. She obtained it from a Nevada court. Richard, arguing that the Nevada divorce decree could not have any

effect in this jurisdiction, sought to exercise his management rights over what he claimed to be conjugal property.

The Court, through Madame Justice Melencio Herrera, ruled that it was American law that defined the status of Richard Upton. By American law, he was a divorcee, and therefore by the same law, was no longer Alice's husband. As such he was no longer entitled to exercise a husband's rights over what he claimed to be conjugal property.

30.1. It appears that *Van Dorn* rests on two premises: first, that the national law of Richard is what governs his status; second, since he participated in the divorce proceedings and did not oppose them he is estopped from repudiating his representation before the Nevada court. The trouble with the first premise is that in several jurisdictions it is not national law that governs capacity but the law of one's domicile. The trouble with the second premise is that while Richard may be estopped from denying his participation in the divorce proceedings, it is a doubtful proposition that estoppel lies against state policy against divorce.

30.2. These misgivings having been expressed, it ought to be acknowledged that *Van Dorn* has set the key for the resolution of similar disputes in this jurisdiction. It remains unaffected by *Article 26* of the Family Code that came into force shortly after the *Van Dorn* case. That particular provision of the Family Code allows a Filipino spouse the freedom to re-marry but only when it is the foreign spouse who obtains a divorce enabling him or her to remarry. The *Van Dorn* doctrine does not have to do with the freedom to re-marry but with the status of the foreigner spouse and his legal right to administer conjugal property. Regardless then of who institutes the action for divorce, the foreign divorce decree may later the foreigner's status, depending on the national law of the foreigner.

30.3. In a new and masterful treatise on the Civil Code, the eminent Justice Jose Vitug raises an important query. "The law is not clear as to whether or not the second paragraph of Article 26 would also apply to a marriage contracted by Filipino spouses, on of whom during such marriage acquires alien citizenship and who thereafter validly obtains abroad a divorce capacitating him or her to remarry." (1 Vitug, *Civil Law Annotated,* 2003 Ed., 248) The response the very phraseology of the law suggests to me is that the second paragraph applies only to a couple one of whom was a Filipino, the other a foreigner **at the time the marriage was celebrated.** Furthermore, there is, to my mind a public policy reason against a contrary construal. It would provide a rather open backdoor to divorce, for it would be the most expedient thing for one of the spouses to apply for foreign citizenship and then suing for divorce.

30.4. There is a controversial "tradition" of Philippine law that invites attention. *Article 15* declares the "nationality theory" – making Philippine law applicable to citizens of the Republic wherever they may be, insofar as "family rights and duties", "status, condition and legal capacity" are concerned. Disturbingly, the Supreme Court has, in some cases, applied this same theory even to foreigners – determining their capacity and status by their national law. But the fact is that in the juridical world, there are far fewer jurisdictions that subscribe to the "nationality theory" and far more that adhere to the "domiciliary theory". Justice Vitug, to my mind, advances the most acceptable position: "Thus, a resident alien under the Philippine nationality rule should be governed by the law of his own country, but if under the latter law the domiciliary theory prevails, then the Laws of the Philippines where such an alien is a resident of apply." (1 Vitug 19) Of course, it is clear that this would be a *renvoi* situation – which only shows that *renvoi* is not dead matter in this jurisdiction! It should also be noted that *Article 15* of our Civil Code is very clearly meant for Filipinos and has been made to extend to foreigners only by some dubious form of analogizing!

30.5. Does a foreigner ex-spouse have the standing to commence prosecution for adultery or concubinage? This was the issue in *Pilapil v. Ibay-Somera*, 174 SCRA 643 (1989). Erich Geiling, a German, married Imelda Pilapil, a Filipina, in Germany. They settled in the Philippines therafter but relations turned awry. Erich sued in Germany for a divorce and a German court conceded the decree. Five months after the decree had issued, Rich caused the filing of two complaints for adultery against Imelda before the City Prosecutor of Manila. The Supreme Court, through Mr. Justice Florenz Regalado, held that only the offended spouse could complain of adultery against his wife. Because of the divorce, Erich, at the time he filed the complaints, was no longer Imelda's spouse. It was his status as defined by his national law, at the time of the filing of the complaint, that was crucial.

The holding in this case is to be distinguished from the Court's position in a later case, *Fujiki v. Marinay*, G.R. 196049 (June 26, 2013) where the Court held that the prior spouse of a person who subsequently enters into a bigamous marriage has the personality to institute an action for bigamy against the erring spouse. "There is no doubt that the prior spouse has as a personal and material interest in maintaining the integrity of the marriage he contracted and the property relations arising from it. There is also no doubt that he is interested in the cancellation of an entry of a bigamous marriage in the civil registry, which compromises the public record of his marriage." Clearly, if the subsequent marriage of his partner is bigamous, then it is the "former" or prior spouse who is the aggrieved spouse – who consequently has the personality to institute action.

30.6. *Quita v. Court of Appeals*, G.R. 124862 (December 22, 1998), aside from providing an example of arrant shamelessness, also triggers interesting legal debate precisely on this subject. Fe Quita was married to Arturo Padlan. Subsequently she obtained a divorce from him in the United States, remarried, divorced and then married a third time. Upon the death of Padlan, her erstwhile husband, she sought to inherit from him, arguing that the divorce she herself had obtained against him had no effect in this jurisdiction. The Supreme Court remanded the case to the lower court which it tasked to determine the citizenship of Quita at the time she obtained the divorce. If she was a foreigner at the time of the divorce (even only a naturalized one) by applying *Van Dorn* she was no longer Arturo's spouse, and therefore no longer eligible to inherit from him. But even if she was a Filipina at the time of the divorce, and only subsequently became a U.S. citizen, would not the application of *Van Dorn* allow us the conclusion that under her personal law, American law, she is no longer Arturo's wife and therefore cannot inherit from him?

31. *Divorce.*

Quita v. Court of Appeals is consequence of the doctrine laid down in *Van Dorn v. Romillo* that rests for its part on the nationality principle of Article 15 of the Civil Code. When divorce is obtained by the foreigner spouse, this may adversely affect the right of the Filipino spouse to succeed since the validity of the divorce obtained by the foreigner spouse is recognized. The proscription of divorce applies only to Filipino nationals.

a. When the foreigner makes clear in his will his intention to bequeath his property to a second wife after having obtained a divorce from his first wife, the courts will not frustrate his wishes. When the testator is a foreigner Article 16 of the Civil Code applies that directs the application of the national law of the decedent. *Llorente v. Court of Appeals*, G.r. 124371 (November 23, 2000)

b. *Recognition of Divorce; matters of proof*

Once more *Van Dorn* supplies the principle: Aliens may obtain divorces abroad which may be recognized in the Philippines provided they are valid according to their national law. The prerequisites then for the recognition of a divorce granted by a foreign court are first, proof of the divorce as a fact, second, its conformity to the foreign law allowing it.

As regards to proof of the due issuance of a decree of divorce,

when the decree is introduced in evidence and despite deficiencies the party against whom it is to be introduced does not object, the decree is admissible in evidence.

Even if divorce is duly proved, it does not follow that the grantee is free to re-marry, as it must also be established that the decree of divorce does not restrict remarriage and allows the beneficiary to re-marry. *Garcia v. Recio*, G.R. 138322 (October 2, 2001)

Corpus v. Sto. Tomas, G.R. 186571 (August 11, 2010) calls attention to a heretofore glossed-over matter. When a foreign decree of divorce is presented to the local civil registrar, as required by law, for the purpose of the issuance of a marriage license, the registrar is without authority to recognize such a decree, it being issued by a forum extraneous to our judicial system. But obtaining judicial recognition of the foreign decree of divorce does not necessitate the filing of a proceeding distinct, say, from a Rule 108 action that may be brought to correct or bring up to date an entry in the civil registry, provided of course that the proceedings take on an adversarial character.

32. Attention must be given *Art. 80* of the *Family Code*: It provides that absent stipulation on the part of the spouses, the property relations are governed by Philippine law. Clearly then, the spouses can stipulate in the marriage settlement that the law of a different jurisdiction shall contrary, provided that their choice of governing law does not run counter to the governing law as provided for by the Civil Code or other laws. (1 Vitug 292) While the extrinsic validity of contracts affecting property in other jurisdictions is excluded from the scope of the article, Tolentino teaches that even the intrinsic validity of contracts relating to property in other jurisdictions is outside the scope of marriage settlements and of *Article 80* in virtue of *Art. 16* of the *Civil Code*.

V. Wills and Succession

33. In *Quita v. Court of Appeals*, *supra* the Court taught that where a former Filipino – naturalized foreigner – seeks and obtains a decree of divorce, the result could very well be that owing to the efficacy of the decree of divorce as regards the Filipino-turned-foreigner, the Filipino spouse of the latter loses the right to inherit. In *Llorente v. Court of Appeals, supra* the Court ruled in favor of respecting the provisions of Llorente, a Filipino who acquired foreign nationality, to bequeath his property to his second wife and to his children by her to the exclusion of his first wife. Whatever may be the obligations of a husband towards his wife and children as provided for in the Family Code do not apply to Llorente, the Court ruled, because as a foreigner, he "is not covered by our laws on family rights and duties, status, condition and legal capacity." The Court ordered a remand to enable the trial court to receive evidence of foreign law and therefrom to determine the intrinsic validity of Llorente's testamentary provisions.

34. It is significant that wherever the property that is subject of succession may be, the principle involved is "universality" (in contrast to the theory of "scission") that subjects the designation of heirs, capacity to succeed, order of succession and amount of successional rights to only one law: the national law of the decedent. Universality in this regard avoids the inconvenience and difficulty of adjudging successional rights according to the *situs* of the property – especially when the situs may be in different jurisdictions. And when the formality of a will is subject to the national law of the testator, Italian jurists suggest that this be read to mean "nationality as of the time of the writing of the will, the modification or the revocation of the will". (Novelli: 87-88)

VI. *Torts and Quasi-Delicts*

35. The traditional rule was rather simple: *lex delicti commissi*, the law of the place where the tort was committed is the law that controls. Other jurisdictions thought had already introduced more sophistication by crafting the rule of "the most significant relationship". *Saudi Arabian Airlines v. Court of Appeals*, G.R. 122191 (October 8, 1999) penned by Mr. Justice Leonardo Quisumbing introduced this welcome development into Philippine jurisprudence.

35.1 Milagros, a Filipina, was hired by Saudia to work as a flight attendant for the airline that is based in Juddah. Once, while on a stop-over at Jakarta, two crew members, nationals of the Kingdom of Saudi Arabia, attempted to rape Milagros. She filed a complaint before local authorities, and the two assailants were detained. Through subterfuge and ruse, it was Milagros who was eventually charged before a Saudi court. The two assailants meanwhile were allowed to resume their service to Saudia. Milagros was transferred to Manila but then summoned by her superiors in Saudi Arabia to report to the legal officer who brought her before the court that rendered its verdict against her to her astonishment. Saudia however terminated her services and she returned to Manila. She brought suit against Saudia through its local office.

35.2 The point of contact with foreign law in this case is the fact that the offending employwer is a Saudi juridical persona and that many of the tortuous acts, such as the baseless charge before the Saudi court and the unjustified, unexplained termination, including the condonation of her assailants, took place in Saudi Arabia. The Court ruled that under the rule of *lex loci actus* the tortuous conduct can be said to have taken place in the Philippines because "it is in the Philippines where petitioner allegedly deceived the private respondent, a Filipina residing and working here." It is in this jurisdiction "where the over-all harm or the totality of the alleged injury to the person, reputation, social standing and human rights of the complainant had lodged."

35.3 In tort cases, a newly-evolved rule for the choice of law is "the State of the most significant relationship" rule, and in determin-

ing which State it is that has the most significant relationship to the case, the following factors are considered:

a) The place where the injury occurred
b) The place where the conduct causing the injury occurred
c) The domicile, residence, nationality, place of incorporation and place of business of the parties
d) The place where the relationship, if any, between the parties is centered.

In this case, since the plaintiff is a Filipina working with the defendant which, though a foreign corporation, is a resident of the Philippines and the relationship was centered here, in the sense that it was here that the was employed, then the Philippines is the state with the most significant relationship to the case.

35.4. *Section 145* of the *Restatement, Second, Conflict of Laws* enlightens us on the application of the rule. The rights and liabilities of the parties to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.

The points of contact with foreign law in a tort case may be:

a. The place where the injury occurred.
b. The place where the conduct causing the injury occurred.
c. The domicile, residence, nationality, place of incorporation and place of business of the parties.
d. The place where the relationship, if any, between the parties is centered.

35.5. Another approach to the problem of choice of law is by recourse to governmental interest. This is also known as the "comparative impairment test" because one determines the impairment of policy resulting from the non-application of the laws of a State and then compares the impairment to determine who stands to lose more. The jurisdiction that loses more is the jurisdiction that can be said to have the greater interest – or even the most significant relationship to the case. The approach can be outlined in the following manner:

i. Examine the laws of the states involved.
ii. Determine whether each state has an interest in having its law applied to the case.
iii. The court then applies the laws of the state whose interests would be more impaired if its policy were subordinated to the policy of the other state. (cf. 12 Cal Jur 3d [Rev], *Conflict of Laws*, § 30)

VII. Contracts

36. The basic persuasion in conflict of laws is that contracts are to be governed by that law that the parties agree will govern their contract. In other words, the binding law of a contract is subject to stipulation. There are two relevant codal provisions on contracts in conflict situations.

36.1. *Art. 17* directs that "the forms and solemnities of contracts xxx shall be governed by the laws of the country in which they are executed." Formal validity is therefore determined by reference to the laws of the place where the contract was executed.

36.2 *Art. 1306* allows the parties to bind themselves by stipulations, clauses, terms and conditions as they may deem convenient, provided that these are not contrary to law, morals, good customs, public order or public policy.

Would it then be legal for parties to a contract to stipulate that the form of their contract shall abide by a law other than that of the place where the contract is executed? I submit that the answer must be in the negative, since such a choice would violate the Civil Code that expressly directs application of the law of the place where the contract was executed.

37. Under Italian law that applies the most significant relationship test also to contracts, absent stipulation by the parties, the law of the state of the obligor who assumes the obligation of "characteristic performance" – that performance that is most characteristic of the contract – is the applicable law. Where the object of the contract is an immovable, the law of the situs of the immovable controls.

38. *Art. 10,5* of the Spanish Civil Code likewise leaves controlling law to stipulation, but requires that there be some connection between the law chosen by the parties and the contract itself. This, of course, can and should be read within our own system of law as well. The choice of the parties cannot be whimsical – for any such whimsical choice would be contrary to public policy – but must be based on some real relation the contract may have to the law of the state chosen.

39. *Cadalin v. POEA*, 238 SCRA 721 (1994) is one case on contracts in the area of choice of law, and it lays down the rule on several issues. The aggrieved overseas Filipino workers brought suit on a contract of employment that made applicable the laws of the host country, Bahrain. One of the first issues was on the applicable law defining the prescriptive period for the action. The Court reiterated the fundamental rule that foreign procedural law will not be applied by the forum.

39.1 However, it held that the law on prescription of actions was *sui generis* neither plaintly substantive nor procedural. The Court then pointed out that in regard to this issue there is a domestic "borrowing statute" that has the effect of treating a foreign statute of limitations as one of substantive law. *Section 48* of the

America-era *Civil Code of Procedure* has not been repealed by the Civil Code. It therefore continues to be in force. Under this borrowing statute, an action barred by the laws of the place where it accrued will not be enforced in the forum even though the local law has not run against it. Even if it ruled, however, that Bahrain's statute of limitations was the applicable law, the Court nevertheless held that Bahrain's law could not be enforced since a one-year statute of limitations against claims of workers violated a public policy of the forum-state: the protection of the welfare of laborers and workers.

39.2 The Court upheld the rule that "parties to a contract may select the law by which it is to be governed". It then commented that in such a case, the law selected would regulate the relations of the parties, including questions of their capacity to enter into the contract, the formalities to be observed by them, matters of performance, etc. This right will be upheld provided that the law so chosen bears some relationship to the parties or to their transaction.

40. *United Airlines v. Court of Appeals*, G.R. 124110 (April 20, 2001) teaches that the law of the place where a contract is made or entered into governs with respect to validity, nature, obligation and interpretation. The judgment is important for laying down the rule that this precept applies even if the place where the contract is made may be different from the place where it is performed. Thus if an airline ticket is issued in the Philippines, of which passengers are either residents or nationals, the laws of the Philippines will govern the contract, even if the flight takes place elsewhere.

40.1 Is it then the law of the place where the contract is perfected, or the law chosen by the parties to govern their contract that controls? It seems to be rather clear that the rule directing application of the law of the place where a contract is made or entered into governs only when the parties have not stipulated a different law, or when the law they choose to govern their contract cannot, on some legal ground, be applied.

41. Whether or not the obligor delayed in performance under a service contract pertains to the essential or intrinsic validity of a contract and this is controlled by the *lex contractus* or the law voluntarily agreed upon by the parties. The choice of the contracting law is either express or implied and, if the latter, is inferred from such factors as substantial connection with the transaction, or the nationality or domicile of the parties. The position of Philippine law is to allow the parties to choose the law that controls their contract provided that such a choice is not contrary to law, morals or public policy and that the chosen law must bear a substantive relationship to the transaction.

41.1. When parties do not choose the controlling law, the law of the State with the most significant relationship to the transaction

and the parties is the applicable law. In respect to time, place, and manner of performance as well as valid excuses for non-performance, the Court characterizes as "useful" the proposal to apply the law of the place of performance (*lex loci solutionis*). Obviously the State of performance (*locus solutionis*) has a significant relationship to the contract. *Philippine Export and Foreign Loan Guarantee Corporation v. V.P. Eusebio Construction*, G.R. 140047 (July 13, 2004)

41.2. Note that this doctrine further clarifies the applicability of the rule that the law of the place of the perfection of the contract controls. *Philippine Export* directs application of the law of the State with the most significant relationship to the contract in case parties to not elect controlling law, and the place of performance – as well as the place of the perfection of the contract – have significant relationships to the contract.

VIII. Property

42. The basic conflict rule on property is *Art. 16* of the Civil Code that provides that "real as well as personal property is subject to the law of the country where it is situated". When such property is the subject of succession, however, no matter where the property may be situated it is the national law of the decedent that controls the validity of testamentary provisions or the successional rights – including therefore the disposition of property.

42.1. What constitutes the property, what the effects of possession are and similar issues are determined by the law of the place of the moveable property at the time of the commencement or institution of the suit. In general, however, the *situs* of a moveable is where it is at the moment it is acquired or possessed.

42.2. What happens though when action is brought to annul a contract on the basis of fraud? In such cases, the fact that realty is involved is incidental to the principal issue which is the validity of the contract. Italian jurisprudence teaches that issues such as these are resolved by applying the law of the place where the contract was perfected – the *lex loci contractus* – which seems to be a perfectly reasonable position. (cf. Franzoni, 24) The problem however is that even if the contract should be adjudged valid by the laws of the place where the contract was perfected, if it is held infirm by the law of the *situs* of the property, the latter may refuse to give effect to the contract.

42.3. Spanish jurists, commenting on a provision of the present Spanish Civil Code identical to ours, except contracts involving realty from the scope of *lex locus regit actum.* (Iruzubieta, 64) American jurisdictions maintain what, I believe, would be the position taken by Philippine courts. The law of the place where the realty is

> situated governs the validity of a conveyance, including the form and formalities to be observed, the capacity to convey or to take title, and the effect of the conveyance and the nature of the interests created by it. Similarly it is the law of the *situs* that determines the validity and effect of a mortgage, the mode and effect of a foreclosure, rights of redemption and maters of release and discharge. Again it is the law of the situs that governs the form, validity and effect of executory contracts directly affecting real property. (12 Cal Jur 3d [Rev], *Conflict of Laws*, §§ 46-50)

43. The *situs* of movables is the place where the chattel is kept and used. It is the place where the movable is. It follows therefore that it is not necessarily the domicile of its owner. (16 Am Jur 2d, *Conflict of Laws*, § 43) It is the law of the situs of the movable that governs and controls transfers, and whether or not title to personalty actually passes depends on the law of the state where the property was at the time of the transaction, regardless of the owner's domicile or nationality. (*ibid.*, § 44)

44. Owing to the peculiar nature of *intangible property* its situs is deemed to the domicile of the owner. A debt follows the person of the creditor and has its situs in the creditor's domicile. An intellectual property right, such as copyright, follows the right-holder, so that one who has authored a book in the Philippines that is illegally reproduced or copied in Indonesia has cause of action in Indonesia.

45, The *situs* of a ship is determined by the flag it flies, and therefore as a general rule, its situs is the flag-state. Vehicles are again a different problem and Italian law has convenient elected to make the place of destination the law that governs vehicles on the move. (Novelli, 93)

46. Important in this regard is *Art. 1753* of our Civil Code that provides that "the law of the country to which goods are to be transported shall govern the liability of the common carrier for their loss, destruction or deterioration." This means then that excusing and exempting circumstances otherwise provided for in our Civil Code as well as the Code of Commerce, including provisions on limiting liability, yield to the provisions of the law of the place to which the goods are to be transported. It must furthermore be noted that there is no requirement in the law that the goods transported be physically within the foreign jurisdiction to make the latter's laws applicable. It is enough that they be set for transport to the foreign jurisdiction, as evidenced for example by a Bill of Lading or by a Sea Waybill.

IX. Recognition and Enforcement of Foreign Judgments

47. The two terms are justified, as some situations call for "recognition" only, as in the recognition of foreign decrees of divorce, foreign decrees of nullity, foreign decrees of adoption, while others call for "enforcement" consequently, obviously, upon recognition.

48. *Rule 39, Section 48* of the Rules of Court announces the effect of foreign judgments or final orders:

48.1. "In case of a judgment or final order upon a specific thing, the judgment or final order is conclusive upon the title to the thing." Judgments *in rem* or *quasi in rem* are therefore conclusive upon title.

48.2 "In case of a judgment or final order against a person, the judgment or final order is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title." A judgment *in rem* is therefore no more than presumptive evidence.

"In either case, the judgment or final order may be repelled by evidence of want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact." The change introduced by the 1997 revisions was to expose judgments, whether *in rem* or *in personam* to repulsion on any of the grounds provided for in the rules.

49. How enforcement is obtained:

For the enforcement of a foreign judgment, it is necessary that an action be filed before the lower court to give the losing party an opportunity to challenge the foreign judgment on the basis of the grounds provided for in the rules. However, the cause of action will be different in an action for enforcement from that of an ordinary action. In the former case, the cause of action derives from the foreign judgment itself. The matter to be proved in an enforcement action is also different: not the acts or facts that constitute the complaint, but the foreign judgment itself. The Court holds that it is now part of the general principles of international law for a domestic court to lend recognition and to enforce foreign judgments. *Mijares v. Javier,* G.R. 13925 (April 19, 2005)

49.1 Since a foreign judgment *in rem* is conclusive upon title, it is ripe for enforcement after it is recognized by the domestic court. The judgment can therefore be enforced by filing a "Petition for the Enforcement of a Foreign Judgment". That in acting on this petition, the court must receive evidence, when introduced, of want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact is provided for by the Rule itself.

49.2 A judgment *in personam* is merely presumptive evidence. This means that a party seeking its enforcement must bring an action before a domestic court not merely for the recognition of the foreign judgment but making the very same claim he raised in the foreign suit, resting his cause of action on the foreign judgment.

49.3. The Court did promulgate a judgment in *Fujiki v. Marinay,* G.R. 196049 (June 26, 2013) that, in some ways, is disturbing, and, in other ways, enlightening. It seems to classify foreign judgments

declaring the nullity of marriage as judgments *in personam*, which is the reason that it cites Rule 39, Sec. 48(b). But it seems established in jurisprudence – and for good reason – that declarations of nullity, passing as they do on the matrimonial *res* are in fact actions *in rem.* Importantly, however, the Court teaches that when called to enforce foreign judgments, Philippine courts are allowed only "limited review", confined only to those grounds "external to the merits of the case". Quite surprising is the rather overly broad generalization of the Court: "Courts are not allowed to delve into the merits of a foreign judgment." But if one is able to assail a foreign judgment on the basis of "clear mistake of fact or law" – as the present rules provide – how does one avoid delving into the merits of a foreign judgment? What we can read the Court teaching here is that when a foreign court rules on the status of a national of the forum state, it is not for our courts to substitute their judgment for that of the foreign court.

50. Presumption in favor of the foreign judgment; how applied:

When the existence of the foreign judgment is proved, the judgment is presumed to be valid and binding in the country from which it comes, until the contrary is proved. The foreign judgment, was proved to exist, enjoys the presumption of validity, and it would render the presumption meaningless to require that its validity first be established. *Asiavest Limited v. Court of Appeals*, G.R. 128803 (September 25, 1998)

51. Will summary judgment be correct in an action for the enforcement of a foreign judgment?

The prevailing party who brings an action for the enforcement of a foreign judgment will be entitled to a summary judgment when despite the opposition filed by the judgment-debtor, the latter not only acknowledges the foreign judgment against him but has also commenced discharging his obligation under the judgment. In this case, he is estopped from assailing the validity of the foreign judgment, and the issues he raises – be it lack of jurisdiction, or fraud – are sham issues. Summary judgments have two prerequisites: first, that there is no genuine issue of fact; second, that the party who moves for summary judgment is entitled to judgment. *Puyat v. Zabarte,* G.R. 141536 (February 26, 2001)

When the issue is whether or not the foreign law that is stipulated to govern a transaction bars the recovery of all but actual damages there is a genuine factual issue that bars summary judgment that is proper only when there is in fact no genuine factual issue to be resolved. *Manufacturers Hanover Trust v. Guerrero,* G.R. 136804 (February 19, 2003)

52. What about the filing fees that must be paid in an action for the enforcement of a foreign judgment?

The petitioners had won a judgment before the US District Court awarded them over one billion dollars in damages. They then filed a complaint before the RTC Makati for the enforcement of this judgment, paying only PHP 410 in docket and filing fees, claiming that the action for the enforcement of a foreign judgment was not susceptible of pecuniary estimation. However, dismissal followed a motion filed by the oppositors on the ground that the proper filing fees were not paid which, on the basis of the amount sought under the foreign judgment, would have been PHP 472 Million.

An action for the enforcement of a foreign judgment is one capable of pecuniary estimation, but in this case, since it is an action beyond an estate, it is an "action not involving property". *Mijares v. Javier*, *supra*

53. *Philippine Aluminum Wheels v. FASGI*, G.R. 137378 (October 12, 2000) dealt with a judgment that a foreign corporation sought to enforce against a Philippine juridical entity which endeavored to repel the judgment on the ground of fraud. The Supreme Court held that the fraud that could vitiate a foreign judgment was *extrinsic*, not intrinsic fraud. The former fraud is that which goes into the jurisdiction of the court, or that deprives a party against whom the judgment is rendered a chance to defend the action to which he has a meritorious case or defense.

54. Will a foreign arbitral award be recognized and enforced in this jurisdiction? The very phraseology of *Rule 39, Section 48* suggests an affirmative answer. The rule uses the word "tribunal" when it could have very well used "court". Arbitral bodies are not courts but tribunals, so their judgments or final orders, provided they have jurisdiction, fall within the ambit of the rule. *Oil and Natural Gas Commission v. Court of Appeals,* G.R. 114323 (July 23, 1998) may reasonably be cited in support of the proposition that foreign arbitral awards may be recognized and enforced in this jurisdiction. The Supreme Court upheld a judgment of the Civil Court of Dehra Sun (India) which in turn adopted the award by a sole arbiter in the same jurisdiction. I must point out that the judgment here was the subject of a Motion for Reconsideration to which the Supreme Court gave due course. However the resolution of September 28, 1999 did not alter the position of the Court on the acceptability of the Indian court's adoption of the arbiter's award. It merely caused the case to be remanded to the lower court so that the attendant factual issues could more thoroughly be resolved.

55. Finally, can a foreign courts' judgment ever constitute *res judicata*? *Philsec Investment Corporation v. Court of Appeals*, G.R. 103493 (June 19, 1997) leaves no doubt about this. It holds that in this jurisdiction foreign judgments once recognized constitute *res judicata*. For *res judicata* however to lie in favor of a foreign judgment, such judgment should not be afflicted by any of the grounds for repelling a foreign judgment.

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Staying FIT: An Assessment of Feed-In Tariff Policy and Regulation under Philippine Renewable Energy Law*

*Richmund C. Sta. Lucia***

I. Introduction: The Imperative for Sustainable Renewable Energy

We — current and future generations alike — all need clean and sustainable energy.

The desirability, if not sheer necessity, of shifting from traditional fossil fuels to renewable energy ("RE") cannot be denied. Coal-fired power plants paint the sullen picture of smoke being constantly belched into the Earth's atmosphere with impunity. Certainly, the present threat of environmental degradation impacts on the "quality of human life, and more specifically on the full enjoyment of human rights, as well as the achievement of sustainable levels of development respectful of economic, social and cultural rights."[1] In other words, the constant damage being done to the environment results in a patent violation of human rights, such as "the right to life, health, habitation, culture, equality before the law, and the right to property. Many of the human rights enshrined in existing agreements are extremely sensitive to environmental threats."[2] In order to preserve and give due justice to inalienable human rights, something has to be done.

The promise of RE looks bright. RE is currently the emerging trend — both locally and abroad — because of the dire effects of mainstream fossil fuel-based energy. The prevalent use of traditional energy sources has invariably resulted in a phenomenon commonly known as global warming: a rise in temperature which causes changes in weather patterns and natural disasters like storms, flooding, heat waves, and even extinction of certain species.[3] A notion akin to global warming is climate change, which is defined as "a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural

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** Associate, Litigation and Dispute Resolution Department, Angara Abello Concepcion Regala and Cruz Law Offices (ACCRALAW) (2014-present). Certified Public Accountant (C.P.A.). Senior Lecturer, Cesar E. A. Virata School of Business (College of Business Administration), University of the Philippines Diliman (2015-present). Associate, Banking & Finance Practice Group, Quisumbing Torres/Baker & McKenzie Law Offices (2012-14). Editor, PHILIPPINE LAW JOURNAL (2010-11). Member, Order of the Purple Feather (OPF) Honor Society (2007-11). J.D., University of the Philippines, College of Law (2011). B.S. Business Administration & Accountancy, University of the Philippines Diliman (2004).

1 David Hunter, James Salzman, and Durwood Zaelke, International Environmental Law and Policy 1365-66 (2007).

2 *Ibid.*

3 Kathryn L. Schroeder, Environmental Law 328-29 (2008).

climate variability observed over comparable time periods."[4]

Global warming is naturally intertwined with the human-driven "greenhouse effect", where greenhouse gases cause the sun's infrared radiation to be trapped in the Earth's atmosphere, which then causes global average temperature to rise. An author notes that "in the absence of an effort to cut greenhouse-gas emissions, the Earth is heading for an increase in global average temperatures unprecedented in human history."[5] This process, if left unabated, may become the harbinger of an irreversible and perennial environmental crisis.

Certainly, the environmental crisis has had a strong impact on the human polity. In the area of health and sanitation, such environmental crisis "causes substantially more illness, injury, and death than street crime does. [For example,] [p]olluted water is the single greatest cause of human illness and death through disease."[6] Also, the global conundrum as regards our inability to give ample protection to our environment is now becoming "deeply imbedded in the socio-economic fabric of nations."[7] This means that the problems of global warming and climate change can result in a catastrophic outcome on different fronts: politically, socially, and economically, as they are perceived to have the potential to "aggravate the complex problems of development that we struggle with today like poverty, food, security and water availability that threaten to ignite large-scale political and social upheavals."[8]

Thus, we all face a quandary on how to harness needed energy to run industries and homes without harming our natural environment. In all aspects of human life, we must be able to rely on the supply of energy necessary to continue and maintain a decent quality of life. In other words, we need to be secure in our energy needs. Energy security is one of the important goals that a responsible government must strive to attain in order to be able to run its economy and allow its population to continue living normally and decently in this information age.

Here lies the problem: conventional fossil fuels are, by nature, limited. Fossil fuel sources like coal, natural gas, and oil, which are formed from decaying prehistoric plants and animals and takes hundreds to even thousands of years to develop and materialize,

4 Antonio G.M. La Viña, Philippine Law and Ecology, Vol. 1: National Laws and Policies 546 (2012), *citing* the United Nations Framework Convention on Climate Change (UNFCCC), http://unfccc.int/2860.php (last visited June 2012).

5 Lakshman D. Guruswamy, Geoffrey W. R. Palmer, and Burns H. Weston, International Environment Law and World Order 1003 (1994).

6 Yingyi Situ and David Emmons, Environmental Crime: The Criminal Justice System's Role in Protecting the Environment 7 (2000).

7 Oswaldo Aggaoili, Law on Natural Resources and Environmental Law Developments 2 (2012).

8 *Ibid*., *citing* Chief Justice Reynato S. Puno in "*Redefining Humanity: Seeking Environmental Justice in a World Without Restraint.*"

are bound to be depleted sooner or later.[9] Needless to state, energy security remains to be a constant threat to all (without exception) the worlds' economies. Governments must step up to encourage sources of energy that can be continually renewed, unlike fossil fuel sources which cannot provide the unending energy needs of humankind. While energy security is the normative goal, our present condition at the same time calls for a legal system that is geared towards "more environmental sensitivity."[10] This notion reflects "[t]he intent to take environmental concerns more seriously."[11]

Being a renewable resource, RE presents a viable alternative to fossil fuels. RE is also known as non-conventional, green, or clean energy. To wit, Philippine RE law specifically identifies the type of renewables that are subject to regulation, including, among others, solar, wind, ocean, geothermal, biomass, and hydropower.[12]

On the issue of energy security, it is widely considered to have the potential to provide energy security while parrying threats to the natural environment. These energy sources are capable of being renewed and, hence, illimitable. Energy demands are thus satisfied by the delivery of RE electricity right in our lamp posts.

RE is becoming reality due to the Philippine laws and regulations which address the need for energy security while maintaining a positive impact on the environment. These laws include the Philippine Constitution,[13] the Renewable Energy Act of 2008,[14] and the Electric Power Industry Reform Act of 2001,[15] among others. These laws aim to resolve problems with regard to the natural environment and ecology, which ranges from "forest degradation, loss of biodiversity, water pollution, air pollution and solid waste pollution, among other problems."[16]

The Philippines' plans and policies for its abundant RE resource base are akin to the policies and programs of other jurisdictions, such as the United States. Similar to the Philippines, the U.S. National Environmental Policy declares "a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere

9 Nancy K. Kubasek, Environmental Law 283 (2002).

10 Jorge A. Emmanuel, Marvic F. Leonen, and Delfin J. Ganapin, Philippine and American Environmental Legislation and Jurisprudence: A Comparative Perspective (A Roundtable Discussion) 3 (1993).

11 *Ibid.*

12 Section 3, subparagraph (zz), Implementing Rules and Regulations of Republic Act No. 9513 or the Renewable Energy Act of 2008.

13 Article II, Section 16, of the 1987 Philippine Constitution, reads: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

14 Republic Act No. 9513.

15 Republic Act No. 9136.

16 Rodrigo V. Cosico, Philippine Environmental Laws: An Overview and Assessment 5 (2012).

and stimulate the health and welfare of man."[17] This somehow evinces the Philippines' laudable efforts to keep at par with global best practices in environmental legal protection and regulation.

In order for the objectives of environmental protection and energy security to come into fruition, several government agencies and offices supervise, regulate, and implement the legal RE regime in the Philippines. As the lead regulatory agency,[18] the Department of Energy ("DOE") is mandated to formulate the National Renewable Energy Program ("NREP"), as well as to promulgate Renewable Portfolio Standards ("RPS")[19] regulations, award service contracts, and supervise an RE registrar.[20] On the other hand, the Energy Regulatory Commission ("ERC") works as a quasi-judicial agency tasked with the regulation of Feed-in Tariff ("FIT") rates and net metering pricing. Another government office which complements the functions of the DOE and the ERC is the National Renewable Energy Board ("NREB"), which is tasked to recommend policies and regulations with respect to FITs, RPS, net metering, and green energy option methodologies.

Considering the foregoing legal regime on RE as well as the regulators which ensure that the objectives of the law are achieved, it is likewise worthy to note that the protection of the natural environment is supported by Philippine case law. The highest court of the land, the Supreme Court of the Philippines, had the occasion to affirm the objectives of the current regulatory regime relating to the environment, which necessarily has a positive impact on RE and ultimately on the regulatory regime for FITs.

In the landmark case of *Oposa v. Factoran, Jr.,*[21] the Philippine Supreme held that on the issue of legal standing, the Petitioners (who are minors) can file a class suit not only for themselves, but also for succeeding generations. The Supreme Court recognized the legal personality to sue by the Petitioners "in order to seek the cancellation of timber licenses… to promote a balanced and healthful ecology which carries with it the duty to refrain from impairing the environment."[22] Their *locus standi* was based on the concept of "intergenerational responsibility", such that "their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right

17 Eric Pearson, Environmental and Natural Resources Law: Selected Statutes and Regulations 328 (2008).

18 *See* Ruben E. Agpalo, The Law on Natural Resources 43 (2006) for a discussion on the executive departments tasked to preserve and protect natural resources. *See also* Bernardo M. Villegas, Strategies for Crisis: The Story of The Philippine National Oil Company 72 (1983), where it states that the DOE was "also tasked with the formulation of an energy program which would concentrate on the gradual shift of utilization of oil to non-oil sources like hydro, geothermal, coal and other abundant local resources of energy for the ultimate goal of National Energy Independence."

19 Under the IRR of RA 9513, Section 3, subparagraph (bbb) thereof, RPS refers to "a market-based policy that requires electric power industry participants, including suppliers, to source an agreed portion of their energy supply from eligible RE Resources."

20 The Department of Energy Act of 1992; *see also* the Electric Power Industry Reform Act of 2001 or the EPIRA.

21 G.R. No. 101083,30 July 1993, 224 SCRA 792 (1993).

22 Narciso Peña, Philippine Law on Natural Resources 14 (1997).

for the generations to come."[23] This is akin to the concept of "intergenerational equity" as typically referred to in environmental law and renewable energy discourse, which relates to "the idea that development should meet the needs of people today without harming the ability of future generations to also meet their needs."[24]

With the pronouncements in *Oposa*, environmental law and policy was galvanized in Philippine jurisprudence and its importance for the benefit of present and future generations was emphasized. Accordingly, proponents of RE — with its highlight on environmental protection — can invoke the *Oposa* case to ward off any possible adverse lawsuit that may stand in the way in the development of the RE sector, including that with respect to FITs.

To boot, there is extant Philippine law and regulation that governs the legal regime on RE and FITs in the country. The regulatory framework is complemented by responsible government agencies and affirmed by jurisprudence. Armed with a legal, regulatory, and jurisprudential foundation for the Philippine government's efforts to protect the natural environment and promote energy security, it follows that the country must encourage relevant incentives for investments that are environmentally friendly. Consequently, any endeavor that adversely affects the environment should be minimized and even disincentivized. A concrete and sustainable Philippine policy on renewables is in order.

II. Conceptual Framework: The National Renewable Energy Program of the Philippines

In a manner of speaking, RE in the Philippines must "stay fit" and, thus, sustainable and capable of being consistently maintained for purposes of protecting the country's natural environment and ecology, as well as meet the energy demands of the Filipino populace. To realize the auspices of the country's RE prospects and to promote the use of renewable energy technologies, the Philippine government under the administration of President Benigno S. Aquino III spearheaded the National Renewable Energy Program ("NREP") in June 2011. The NREP essentially outlines "a framework for action, existing and future measures, instruments and policies for the promotion of renewable energy as well as a roadmap that will guide efforts towards actualizing the market penetration targets of each renewable energy source in the country."[25]

The NREP lays out the Philippine government's normative strategy and paradigm for the nation's rich supply of renewables which the country seeks to harness for good use. It also affirms the government's commitment to accelerate the exploration, development,

23 *Id.*; citations omitted; emphasis and underscoring supplied.

24 *See* Donna A. Craig, Nicholas A. Robinson, and Koh Kheng-Lian, Capacity Building for Environmental Law in the Asian and Pacific Region 865 (2002).

25 *Available at* http://www.philstar.com/headlines/695943/p-noy-launches-national-renewable-energy-program (last visited 2 August 2015).

and utilization of the country's RE resources. As the lead agency, the DOE is mandated to formulate the NREP in consultation with key stakeholders like industry players, technology providers, prospective investors, and the public *en masse*. To actualize the Philippines' goals for RE, the NREP provides a comprehensive thrust for a sustainable application of RE technologies, and sets out action plans to stimulate investments on RE projects.[26]

During the launch of the NREP in June 2011, President Benigno Aquino III emphasized the need to develop and harness the Philippines' green energy potential. Thus, his government has committed to establish the necessary regulatory infrastructure and implementation mechanisms towards a more affordable and greener power resource base for the country.[27] In order to maximize wide-scale utilization of renewables as well as to promote rural electrification, as much as 30 islands in the Philippines are intended to be energized using hybrid power systems. In turn, 1,500 *barangays* (villages) in the country will be electrified using "clean" energy systems.[28]

Within the timeframe ranging from 2011 to 2030, the NREP sets out to achieve these goals by pegging indicative targets for the delivery of RE. Specifically, the NREP lays down the bedrock for the development and harnessing of the country's renewables by means of encouraging investments in the RE sector and by developing RE technologies. The NREP takes into account the challenges of finding the right balance between meeting the country's energy security needs and providing environmentally sound "green" energy for Filipinos.[29]

The NREP is premised on the fact that the Philippines has a vast reservoir of renewables. RE sources significantly contribute to the country's energy supply mix. In fact, out of the Philippines' total primary energy supply of 40.7 million tons of oil equivalent ("MTOE"), local sources comprise 23.4 MTOE.[30] Out of the local contribution to the supply mix, RE sources contributed the highest share of 68%, which mix is composed of renewables such as geothermal (53%), biomass (33%) and hydro (12%).[31]

Depending on the RE technology, the NREP serves as a guidepost on how the government will go about the future of Philippine renewables. Overall, the NREP aims to maximize the country's renewable energy-based capacity to approximately 15,304 megawatts ("MW") by the year 2030.[32] The government's plans include the following

26 *Available at* https://www.doe.gov.ph/microsites/nrep/index.php?opt=execSummary (last visited 7 August 2015).

27 *Ibid.*

28 *Available at* https://www.doe.gov.ph/renewable-energy-res (last visited 7 August 2015).

29 *Available at* https://www.doe.gov.ph/microsites/nrep/(last visited 3 August 2015).

30 With such indigenous contribution to the country's energy mix, the energy self-sufficiency level of the Philippines reached 57.5%.

31 *Supra* note 25.

32 This is almost three (3) times the Philippines' renewable energy-based capacity in 2010.

capacity projections and installation targets per RE technology:[33]

1. Geothermal – increase capacity by 75%; low-enthalpy geothermal resource assessment completed by 2015; target indicative capacity addition to be achieved by 2027;

2. Hydropower – increase capacity by 160%; construct sea water-pumped storage demonstration facility by 2030; achieve additional target indicative capacity by 2023;

3. Biomass – add 277 MW capacity to the power grid; mandate use of E10 blend for all gasoline-powered vehicles by 2012; achieve target indicative capacity addition by 2015;

4. Wind – add 2,345 MW capacity to the power grid; achieve grid parity by 2025; achieve target indicative capacity addition by 2022;

5. Solar – add 248 MW capacity to the power grid to reach target of 1,528 MW; complete smart grid and concentrated solar thermal power demonstration by 2015; achieve target indicative capacity addition by 2030; and

6. Ocean – develop first ocean energy facility in the country to be operational by 2018; achieve target indicative capacity addition by 2025.[34]

The foregoing milestones and targets ensure that the policies, mechanisms, and rules under RA 9513 are implemented according to the vision of the law. These goals serve as "concrete benchmarks for government to advance its vision of a sustainable energy system with RE taking a prominent role in the process."[35] Corollarily, the framework for RE undergirded by the NREP is derived from the sectoral sub-programs specific to each renewable covered by law.[36] These individual work programs are guided by a "roadmap" in order to achieve market targets for renewable resources. Activities to be performed pursuant to the roadmap include:

1. Industry services including advisory services and assistance to facilitate investments in renewable energy project development;

33 Stern believes that "public support for deployment such as feed-in tariffs, which may be different for different technologies has a strong foundation." *See* Nicholas Stern, *The Economics of Climate Change,* The American Economic Review, Vol. 98, No. 2, Papers and Proceedings of the One Hundred Twentieth Annual Meeting of the American Economic Association 25-26 (May 2008).

34 *Supra* note 25.

35 *Available at* https://www.doe.gov.ph/renewable-energy-res (last visited 7 August 2015).

36 To wit, the renewables covered by RA 9513 include geothermal, run-of-river hydropower, biomass, wind, solar, and ocean.

2. Resource development in order to harness the resource potential of Philippine renewables;

3. Research development and demonstration (RD&D) to ascertain the viability and adaptability of renewable energy projects and technologies in the country; and

4. Technology support in order to improve renewable energy systems to provide better energy security and be competitive vis-à-vis fossil fuels.[37]

To arrive at a better understanding of Philippine RE law and policy, the congressional deliberations for RA 9513 will shed light on the lawmakers' intent behind RE, including the incorporation of incentive systems (such as FITs) in the law. The legislative intent in the bicameral conference on the disagreeing provisions of the House and Senate bills (which later on were enacted into RA 9513) can be gleaned with a closer look into the congressional discussions,[38] excerpts on which are provided below:

"REP. VILLAFUERTE:[39]

"Originally, the version that we had adopted was to adopt either or both of the RPS System or the Feed-in Tariff System. However, the Department of Energy recommended that instead of using either of those phrases that we will vest the Energy Regulatory Board the power to formulate and promulgate a rationalize[d] tariff system for renewable energy. But some of those in the NGOs, the environmental groups, pointed out that there is no inconsistency in both so that they are insisting and recommending that maybe we should just put a permissive authority to the ERC to include a fixed tariff system formula**. <u>In fact, most countries… have adopted the fixed tariff system formula for renewable energy</u>** as against the RPS System, but I think we can do both… depending upon the circumstances and the recommendation of the Renewable Energy Board.

"So, we are going to be proposing, as a final amendment, the inclusion of the following: On a permissive basis, **<u>the ERC may use a fixed tariff system or a feed-in system which may include, you</u>**

37 *Supra* note 25.

38 Bicameral Conference Committee Meeting, 2nd Regular Session, 14th Congress (2007-2010) dated 7 October 2008 on the disagreeing provisions of House Bill No. 4193 and Senate Bill No. 2046 re Renewable Energy Act of 2008. The House Committee on Energy was chaired by Representative Juan Miguel M. Arroyo, and the Senate Committee on Energy was chaired by Senator Juan Edgardo J. Angara.

39 Representative Luis R. Villafuerte of Camarines Sur, Philippines is the principal author of RA 9513.

know, the determination of the fixed tariff to be paid through electricity produced from each type of renewable energy and the mandated number of years that will be used."[40]

xxx xxx xxx

"REP. CASIÑO:

"Still on pricing, distinguished Sponsor, the bill has feed in tariff system, side by side with the net metering system. But for the feed-in tariff, it says here on page 7, that this involves a fixed guaranteed price which shall be set, and I quote, 'at a higher price per kilowatt-hour than the grid price and finally, to be passed on directly to all electricity consumers.' Given the concern of this Representation for cheaper rates, and as stated by the distinguished Sponsor, **it is also the bill's objective to lower electricity rates, may I know how a feed-in tariff system can address this issue of lowering the rates or affordability of renewable energy, considering that they be paying a higher fixed price? In other words, are there mechanisms to compensate for the higher price of renewable energy in the feed-in tariff system, so that at the minimum our poor consumers, probably the lifeline raters or above will not have to pay for additional costs for renewable energy**?

"REP. VILLAFUERTE:

"Well, Madam Speaker, let me lay the basis for my answer. The insertion of the feed-in tariff system was actually a compromise formula that the committee accepted upon the insistence of some of the proponents of such feed-in tariff system. We thought that the best system still would be to adhere strictly to the renewable portfolio standard. However, **we compromised with the insistence of the proponents of the feed-in tariff system that the ERC shall determine and formulate what we describe in the bill as a rationalized tariff for all eligible renewable energy resources.** Now, as a consequence of inserting a proviso on a fixed tariff to this feed-in tariff system, it was made necessary that if there is going to be a tariff mechanism applied to renewable energy generation that involves a fixed guaranteed price for each renewable energy system, the price must have to be set higher per kilowatt-hour than the grid price….

40 Infopack, Legislative Archives Service, Renewable Energy Act of 2008 (RA 9513), p. 259; emphasis and underscoring supplied.

"REP. CASIÑO:

"Well, distinguished Sponsor, **my thinking is more towards coming with a more socially sensitive feed-in tariff system, such that the burden of paying for a higher price for renewable energy will not be spread out equally, but it will also be socially sensitive**. In other words, the poor who are already burdened with paying so much for their power should not be burdened by even higher prices because of this bill, through the feed-in tariff system. And probably, at the appropriate time, we will try to find some kind of a formula to ensure that if a feed-in tariff system will be put in place, then the cost — the poorer sectors, the lower income families will not be made to bear too much of this additional cost.

"REP. VILLAFUERTE:

"Yes**. If such a language and phraseology that is really more socially sensitive, particularly, to the lower levels of consumers, this Sponsor will be willing to accept that**."[41]

Based on the congressional deliberations cited above, the intent of the lawmakers is to formulate a FIT allowance that will be used to incentivize RE developers and spur the growth of the RE sector. As discussed, the FITs will set a guaranteed price per kilowatt-hour per technology for a specific period of time. Considering the possible negative impact on the pricing of electricity, particularly on the lower-level income members of society, the legislators agree that the FITs must utilize a rationalized form of pricing and, at the same time, be "socially sensitive." Indeed, the issue of setting an acceptable FIT rate consistent with the NREP can be daunting. The challenge is how to balance, on one hand, incentives for RE developers and, on the other hand, the accompanying pass-on burden to consumers. More on this dilemma is discussed below in this paper.

Notwithstanding possible issues on FITs and qualms on how they will be implemented, yet it remains that the NREP was formulated to combat climate change, adopt clean energy technology, and foster less dependence on traditional fossil fuels. The NREP continues to affirm the government's thrust for environmental protection, which in turn provides the overriding rationale behind RA 9513. As the policy framework for Philippine renewable energy, the NREP will remain as the catalyst to promote access to clean energy and a sustained effort towards energy security.

To fully achieve the objectives under the NREP as the country's conceptual framework for renewable energy, proper and adequate incentives for investment in renewable energy

41 Infopack, Legislative Archives Service, Renewable Energy Act of 2008 (RA 9513), p. 398-402; emphasis and underscoring supplied.

projects and technologies must be provided as per law and policy. One of the incentive systems mandated under the law is tariff-based, which is designed to manage pricing and risk behavior of prospective investors. This incentive is referred to as the Feed-in Tariff system.

III. The Philippine Feed-In Tariff System

Simply put, Feed-in Tariffs or FITs are incentives granted to developers of RE technologies. Under Philippine RE law, the FIT system is "a scheme that involves the obligation on the part of electric power industry participants to source electricity from RE generation at a guaranteed fixed price applicable for a given period of time, which shall in no case be less than twelve (12) years, to be determined by the ERC."[42] Essentially, FITs offer guaranteed payments on a fixed rate per kilowatt-hour ("kWh") for energy delivered to the energy grid. As a policy mechanism, the FITs reimburse a customer-generator at a specified price for the electricity that is fed into the distribution grid.[43]

The main purpose of the FIT is "to accelerate the development of emerging RE Resources through a fixed tariff mechanism."[44] Such incentive system is mandated by RA 9513 specifically for wind, solar, ocean, run-of-river hydropower, and biomass energy resources. FITs promote RE production as far as developers and investors are concerned because such tariffs "allow market access with more reliable pricing, which provides investment security and reduces financial risk."[45] The concept and hope behind a FIT is that it will "spur greater investment and innovation in renewable energy."[46]

FIT schemes are widely recognized to require electric utility companies to "purchase electricity from clean energy projects as a set rate for a specified period of time, [and] provide the price certainty over a longer term that can make clean energy project viable."[47] FITs may require a utility company to "accept customer-generated electricity at a predetermined price for a long period of time, [allowing] customers to offset their energy usage by their energy production for a set amount, and sometimes even make a profit."[48]

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42 Section 5 of the IRR of RA 9513.

43 John V. Barraco, *Distributed Energy and Net Metering: Adopting Rules to Promote a Bright Future*, 29 J. Land Use & Envtl. L. 365, 392-93 (2014).

44 *Ibid.*

45 Anna Milena Jurca, *The Energiewende: Germany's Transition to an Economy Fueled by Renewables,* 27 Geo. Int'l Envtl. L. Rev. 141, 155 (2014).

46 Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy,* 108 Nw. U. L. Rev. 401, 419 (2014).

47 Kenneth K Odero, *Transforming Africa's Energy Sector: Lessons from International Experience*, 5 Renewable Energy L. & Pol'y Rev. 191, 196 (2014).

48 Gina S. Warren, *Vanishing Power Lines and Emerging Distributed Generation*, 4 Wake Forest J.L. & Pol'y 347, 373 (2014).

With respect to government regulators, PUCs[49] also allow utilities to "implement creative alternatives to reduce their risk in questionable investments… [allowing] 'tariffed rates' and feed-in-tariffs to recover the costs of renewable projects."[50] Accordingly, FITs serve as "a policy mechanism that allows a state utility commission to authorize long-term contracts to clean renewable energy sources, such as wind, solar, and geothermal sources for guaranteed grid access."[51]

Generally speaking, FITs have three key features, *viz.*:

1. guaranteed access to the distribution grid;

2. long-term and stable purchase agreements; and

3. payment levels driven by the cost of the renewable's generation.[52]

How a FIT works can be gleaned by applying it to specific types of renewables. By way of example, in the case of solar and wind energy, FIT programs allow a solar or wind power producer to "receive a power supply contract with a fixed rate during a fixed period for the electricity it produces. The fixed rate under the contract is generally higher than a market price for electricity. Put differently, the contract given under the [FIT] Program guarantees that a solar or wind power producer receives a market price plus additional money for the electricity it produces."[53] Moreover, in the field of biowaste management (for biomass renewables), FITs may be used to encourage the adoption of anaerobic digestion, since FITs typically require utilities to purchase energy from specific sources at considerably favorable prices.[54] This indicates that, more or less, FITs work similarly across RE technologies.

Regarding the process on how FIT policies work in an RE system and the relative success they achieve, Davies and Allen note that:

> "Of the available renewable energy support mechanisms, feed-in tariffs ("FITs") — laws that mandate the purchase of renewable energy at premium prices — often garner praise as the best and most proven

49 Public Utility Commissions.

50 Amy L. Stein, *Reconsidering Regulatory Uncertainty: Making a Case for Energy Storage*, 41 Fla. St. U. L. Rev. 697, 763-64 (2014).

51 William J. Snape, *III Frostpaw Addresses Global Warming: Solving a Big Problem with Old Legal Tools and New Administrative Systems,* 63 Am. U. L. Rev. 1587, 1611 (2014).

52 Sam D. Bolstad, *Your Local Solar Panel Store: Developing State Laws to Encourage Third-Party Power Purchase Agreements and Distributed Generation*, 99 Minn. L. Rev. 705, 735-36 (2014).

53 Yuka Fukunaga, *Renewable Energy Trade and Governance,* Proceedings of the Annual Meeting (American Society of International Law), Vol. 106, 381, 382 (2012).

54 Blake Anthony Klinkner, *Anaerobic Digestion as a Renewable Energy Source and Waste Management Technology: What Must Be Done for this Technology to Realize Success in the United States?,* 9 U. Mass. L. Rev. 68, 72 (2014).

> policy. Feed-in tariffs, it is said, offer an abundance of benefits. They are effective. They send clear market signals. They reduce risk both for investors and for renewable energy facility operators. Thus, because feed-in tariffs provide the kind of certainty investors crave, many observers assert that they are more cost-effective than other renewable support policies, as they moderate the need for risk premiums and reduce renewables' costs through "learning by doing." All this has caused many advocates of renewable energy to heap acclaim on feed-in tariffs, with one observer declaring them simply 'fabulous.'"[55]

In addition to FITs, another common incentive that normally forms part of the incentive system for renewables is a renewable portfolio standard ("RPS"), also known as quota obligation. Under an RPS system, electric utility companies derive a certain share of the electricity they deliver from renewable sources, whereby a FIT can offer "producers of electricity from renewable sources guaranteed grid access and subsidized, long-term rates for their power output."[56] Due to their perceived advantages, FITs by and large have enjoyed considerable support in the investment community, and are "expected to leverage more private capital than RPS due to minimizing the market risk exposure of investors."[57] It bears noting that FITs are "generally supported by the industry, as is greater uptake of renewable energy, provided this will not affect security of supply."[58] Notably, energy security continues to be an end and a goal in itself together with the adoption and implementation of the FIT mechanism in an RE regime.

From a practical standpoint, the costs of developing and delivering the FITs are passed on to the consumers by the utility companies.[59] In effect, FITs reduce the market risk borne by the investors and utility companies. This is described by the growing perception of FITs as a "market-pull mechanism."[60] By requiring that a minimum price be compensated for the energy produced using the policy-supported RE technology, FITs reward the financier who is "willing to fund the capital since there is a floor on the output generation, reducing the risk of default."[61] Naturally, it is essential for FITs that they are guaranteed.[62]

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55 Lincoln L. Davies and Kirsten Allen, *Feed-In Tariffs in Turmoil*, 116 W. Va. L. Rev. 937, 938-39 (2014).

56 *Ibid.*, at 309-10.

57 Felix Mormann, *Beyond Tax Credits: Smarter Tax Policy for a Cleaner, More Democratic Energy Future*, 31 Yale J. on Reg. 303, 337 (2014).

58 Kenneth Palmer & David Grinlinton, *Developments in Renewable Energy Law and Policy in New Zealand*, 32 No. 3 J. Energy & Nat. Resources L. 245, 249-50 (2014).

59 Steven Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 Wake Forest L. Rev. 121, 124-25 (2014).

60 Antoine C. Schellinger, *Energy is Energy: Segregation of Renewable and Fossil Fuels Impedes Energy Security Goals*, 55 S. Tex. L. Rev. 471, 509 (2014).

61 *Ibid.*, at 512.

62 Thomas Brunn & Roman Sprenger, *The Reform of the Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz/ EEG) 2014 in Germany*, 5 Renewable Energy L. & Pol'y Rev. 26, 28 (2014).

The popularity and perceived advantages of FITs in an RE regulatory regime is presently gaining momentum. Banks providing incentives for the financing of RE projects appear to be optimistic. The influx of power purchase agreements, leases, FITs, and other means of financing an RE project and/or technology may result in an increase in uptake of RE in residential areas, such as that of solar energy.[63] In turn, governments are gradually taking a significant role in developing their own policies to promote RE, such as FITs in addition to other incentive systems consisting of, among others, RPS, alternative energy portfolios, RE credits, and tax incentives.[64] Note, however, that as an exception, certain governments may prefer more conventional financial instruments (such as loan and tax incentives) to market-based alternatives similar to FITs.[65] Eventually, the shift to FITs can result in a viable and more competitive RE sector.[66]

To maximize the development of the RE industry, grid operators must prefer connection to the grid of new RE installations generating electricity, even obliged to receive any offered RE over traditional energy sources.[67] In this connection, the case of Germany's FIT regime is instructive. Under German RE law, FITs mandate that the regulator impose on an electric utility the obligation to buy available RE at a competitive price in order to set the playing field between electricity produced from fossil fuels (which is perceived to be less expensive) and RE electricity (which is generally more expensive). Using this methodology in pegging the price of electricity, the use of FITs to promote RE has been considerably effective in Germany's scenario, where the generation of RE increased by over 20 percent over roughly a decade[68] by engaging in a massive support program of FITs to promote RE power.[69] As a corollary, "[a] shift towards ex-ante (incentive-based) regulation should be welcomed."[70]

Anent the positive experience enjoyed by Germany for its FIT program, one author

63 Joel B. Eisen, *An Open Access Distribution Tariff: Removing Barriers to Innovation on the Smart Grid*, 61 UCLA L. Rev. 1712, 1721-22 (2014).

64 Alexandra B. Klass, Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 44 Envtl. L. Rep. News & Analysis 10705 (2014).

65 Teresa Parejo-Navajas, *A Legal Approach to the Improvement of Energy Efficiency Measures for the Existing Building Stock in the United States Based on the European Experience*, 5 Seattle J. Envtl. L. 341, 388 (2015).

66 Kaylie E. Klein, *Bypassing Roadblocks to Renewable Energy: Understanding Electricity Law and the Legal Tools Available to Advance Clean Energy*, 92 Or. L. Rev. 235, 256 (2013).

67 Kyle Weismantle, *Building a Better Solar Energy Framework*, 26 St. Thomas L. Rev. 221, 230 (2014).

68 Rhonda L. Ross, *Beyond Cap & Trade: A Framework For Driving Sustainable Reductions In Greenhouse Gas Emissions*, 4 Seattle J. Envtl. L. 317, 338 (2014). The said period ranges between 1991 and 2002. In addition, the case of Germany shows that the effect of a simple green certificate market on electricity prices is ambiguous and that the optimal combination of instruments to reach two goals simultaneously depends on the cost structures. *See also* Thure Traber & Claudia Kemfert, *Impacts of the German Support for Renewable Energy on Electricity Prices, Emissions, and Firms,* The Energy Journal, Vol. 30, No. 3, 155, 156 (2009).

69 William Boyd, *Public Utility and the Low-Carbon Future,* 61 UCLA L. Rev. 1614, 1675-76 (2014).

70 Gert Brunekreeft & Sven Twelemann, *Regulation, Competition and Investment in the German Electricity Market: RegTP or REGTP,* The Energy Journal, Vol. 26, Special Issue: European Electricity Liberalisation 99, 124 (2005).

observes that:

> "Beginning in 1991, direct taxation on German energy consumers has been used to subsidize cleaner energy. These Feed-In Tariffs ("FITs") were adjusted in 2000 to further support the transition to renewable energy sources. Technological advances — largely the result of FIT subsidization — have increased production and storage capacity significantly. Availability of small-scale solar, wind, and other renewables have helped to localize production and lessen the need for large, centralized facilities. If the goal is cleaner, safer energy and a reduction in GHG emissions, Germany's policy has been a success."[71]

FITs also contribute positively to a greener and cleaner environment in the long run, which is deemed to be consistent with the perceived advantages of an RE system. Accordingly, FITs are "one of the most important and widely used policy tools to address the problems of climate change."[72]

Specific to the region of the Association of Southeast Asian Nations or ASEAN (where the Philippines is a member-state),[73] fiscal measures can be used in order to shift ASEAN's energy consumption towards RE from non-renewable sources of energy. Since long ago, subsidies such as FITs have always been availed of to stimulate the development of indigenous RE sources.[74] For the ASEAN, international institutions can prove helpful. "Financial and technological resources can be pooled and developed through the activities of institutions… through research and capacity building, also provide intellectual and technical resources to developing countries."[75] Moreover, in Italy, "some utility companies have moved to implement projects in developing countries."[76] This opportunity for the development of the RE sector should be taken advantage of by the ASEAN.

The Philippine government is aware of the FIT mechanism as a stimulus for RE growth, considering its nature, scope, and effects under a FIT system. Consistent with regulators' appreciation of advantages of RE and FITs, there are certain guidelines governing the Philippine FIT regime pursuant to current RE regulations, such as:

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71 Adam Arnold, *The Quest for Sustainable Energy: Germany's Nuclear Scrutiny vs. "All of the Above"*, 15 Sustainable Dev. L. & Pol'y 26 (2015).

72 Virginia R. Hildreth, *Renewable Energy Subsidies and the GATT*, 14 Chi. J. Int'l L. 702, 716-17 (2014).

73 The ten (10) member-states of the ASEAN consist of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *See* www.asean.org (last visited 10 August 2015).

74 R.J.G. Wells & Paul Chan, *The Energy Crisis and ASEAN*, Contemporary Southeast Asia, Vol. 2, No. 4, 342, 349 (March 1981).

75 Jacob Werksman, Greening International Institutions xiii (1996). International institutions include the World Bank, GEF and NEFs, and UNDP, as well as the UNCTAD and ENEP.

76 Matthew D'Orsi, *Heated Skirmishes in the Solar Sector: Do Solar-PV Feed-In Tariffs Constitute Trade-Related Investment Measures and Subsidies Prohibited under the WTO Regime?*, 29 Am. U. Int'l L. Rev. 673, 711 (2014).

(1) "Priority connections to the grid for electricity generated from emerging RE Resources such as wind, solar, ocean, run-of-river, hydropower, and biomass power plants within the territory of the Philippines;

(2) The priority purchase, transmission of, and payment for such electricity by the grid system operators;

(3) Determination of the fixed tariff to be paid for electricity produced from each type of emerging RE Resources and the mandated number of years for the application of such tariff, which shall in no case be less than twelve (12) years;

(4) Application of the FIT to the emerging RE Resources to be used in compliance with the RPS. Only electricity generated from wind, solar, ocean, run-of-river hydropower, and biomass power plants covered under the RPS, shall enjoy the FIT; and

(5) Other rules and mechanisms that are deemed appropriate and necessary by the ERC, in consultation with the NREB, for the full implementation of the FIT system."[77]

The above guidelines stress that the Philippine government (especially under the Aquino administration) has set its eyes on developing its RE sector. Towards this end, FITs can play a crucial role in driving the progress of RE. Consequently, the DOE — conscious of its mandate to promulgate rules on FITs — issued Department Circular 2013-05-0009, also known as the FIT Rules (or "DOE Circular").[78]

Under the FIT Rules, the ERC approved the following FIT rates (which are based on the petition of the NREB):[79]

1. Wind - Php 8.53/kWh;

2. Biomass - Php 6.63/kWh;

3. Solar - Php 9.68/kWh; and

77 Republic Act No. 9513, Section 7.

78 Department of Energy Department Circular 2013-05-0009 or the Guidelines for the Selection Process of Renewable Energy Projects under Feed-in Tariff System and the Award of Certificate for Feed-In Tariff Eligibility. The FIT Rules was signed by DOE Secretary Carlos Jericho L. Petilla on 28 May 2013.

79 Here, the dynamics and regulatory jurisdiction among the regulatory agencies involved in the FIT regime (*i.e.*, DOE, ERC, and NREB) can be seen in action.

4. Hydropower - Php 5.90/kWh.

The FIT Rules provides that eligible RE projects will be entitled to the prescribed FIT rates for a period of **twenty (20) years**, after which such tariffs will be based on prevailing market prices.[80] Thus, RE Developers can enjoy the lock-in period of twenty (20) years to avail of the FIT allowances as incentives for developing and operating RE projects that comply with DOE regulations, most especially with respect to commerciality.

The same DOE Circular also provides for the process to be observed in order for RE Developers to avail of the coveted FIT allowances. Pursuant to the DOE Circular, only RE Developers[81] with valid and subsisting Renewable Energy Service/Operating Contracts ("RESCs")[82] may apply for eligibility and inclusion of an RE project under the FIT System.[83] The RE Developer is required to submit to the DOE a Declaration of Commerciality[84] of the RE project, which is presented on the basis of the approved FIT rates and a viable Work Plan.[85] The required submission is for the purpose of issuance of a Certificate of Confirmation of Commerciality[86] under the FIT System.[87]

To apply for the FIT incentives, developers of RE projects must indicate in their application for conversion of their RESCs (*i.e.*, from Pre-Development Stage[88] to Development Stage[89]) that such RE Developer's Declaration of Commerciality is based on the FIT rate approved by the ERC.[90] If the developer holds an RESC that is already at the Development Stage or otherwise an RE Operating Contract,[91] it may already apply

80 *Supra* note 72.

81 *Ibid.*; Section 2(g) defines the term "RE Developer" as "individual/s or juridical entity created, registered and/or authorized to operate in the Philippines in accordance with existing Philippines laws and engaged in the exploration, development or utilization of RE resources and actual operation of RE systems/facilities."

82 *Ibid.*; Section 2(f) defines the term "Renewable Energy Service Contract" as "the service agreement between the Government, through the DOE, and RE Developer over a period in which the RE Developer has the exclusive right to a particular RE area for exploration and development."

83 *Id.*, at Section 3(a).

84 *Id.*; Section 2(d) defines the term "Declaration of Commerciality" as "a written declaration by the RE Developer, duly confirmed by the DOE Secretary, stating the project is commercially feasible."

85 *Id.*, at Section 3(c).

86 *Id.*; Section 2(a) defines the term "Certificate of Confirmation of Commerciality" as "the certificate issued by the DOE confirming the Declaration of Commerciality by an RE Developer."

87 *Id.*; Section 2(e) defines the term "FIT System" as "the operation of an RE Plant under the approved FIT rate within the established installation target."

88 *Id.*; Section 2(f) defines the term "Pre-Development Stage" as "the preliminary assessment and feasibility study up to financial closing."

89 *Id.*; Section 2(f) defines the term "Development Stage" as the "construction and installation of facilities up to operation phase."

90 *Id.*, at Section 3(b).

91 *Id.*; Section 2(h) defines the term "RE Operating Contract" as "the service agreement between the Government, through the DOE, and an RE Developer for the utilization of RE resources in the Development Stage, including actual operation of RE systems/facilities."

for FIT eligibility; it shall, however, include in its submission to the DOE a notarized proof and/or declaration that its RE project is not bound by a contract to supply energy to a Distribution Utility ("DU") or any consumer.[92] This ensures that the electricity to be produced from the RE project will be delivered to the energy grid as regulated by the DOE, and not pursuant to other private undertakings.

Upon submission of the pertinent requirements for FIT eligibility to the DOE, such regulator will complete the processing of the Declaration of Commerciality under the FIT System.[93] In turn, the RE Developer is responsible for securing the regulatory requirements, licenses, and other permits in relation to the same developer's obligations under the RE Guidelines as well as RESC provisions consistent with the Work Plan as approved.[94] Consequently, the DOE undertakes the evaluation process by reviewing the submissions of the RE Developer with respect to the proposed RE project.

If the RE project complies with the requirements for conversion, the DOE will grant a Certificate of Confirmation of Commerciality in favor of the RE Developer. The same certificate will serve as the notice for the RE Developer to proceed with the construction of the RE Project, which is then considered to be at the Development Stage.[95] The Certificate of Confirmation of Commerciality can also be issued to RE projects currently at the Development Stage or those undertaken pursuant to RE Operating Contracts under the FIT System.[96]

With the issuance of the Certificate of Confirmation of Commerciality, the DOE may then issue its endorsement to the National Grid Corporation of the Philippines ("NGCP")[97] for purposes of interconnection requirements, *e.g.*, Grid Impact Study and

92 *Id.*, at Section 3(b).

93 *Id.*, at Section 4(a).

94 *Id.*, at Section 4(b).

95 *Id.,* at Section 5(a).

96 *Id.,* at Section 5(b).

97 The NGCP's website states:

> "Signed into law on December 1, 2008, Republic Act (R.A.) 9511 grants the National Grid Corporation of the Philippines (NGCP) the franchise to operate, manage, and expand the electric transmission business of the country. A product of the EPIRA law, the Franchise Law authorizes NGCP to handle the transmission grid for 25 years, renewable for another 25 years, - for a total of 50-year franchise. The franchise only covers the operations and management of the transmission facilities but the assets, including lines, substations, land, and structures, will remain with the Philippine government through the National Transmission Corporation or TransCo.
>
> "For the duration of the franchise, NGCP shall safely and reliable transmits electricity through the high-voltage transmission backbones, and shall improve and enhance the present transmission system nationwide. The law also subjects NGCP to the regulation and policies of the Energy Regulatory Commission (ERC) in the conduct of its operations. Further, NGCP is expected to report regularly to the Congress of the Philippines to ensure the compliance with regulators and related laws." *See* http://www.ngcp.ph/corporate.asp (last visited 8 August 2015).

Interconnection Agreement, if any.[98] It can be observed that **commercial operation** is the critical reckoning point where the DOE commences the subsequent allocation of the FIT allowance. This encourages RE Developers to attain, as soon as feasible, the point of commercial operations, in order for the DOE to thresh out prospective applicants for FIT allowances who are serious in developing and operationalizing their RE projects, as against those who merely plan and prepare for operations but later on fail to actually start up their projects.

In the course of the life of the RE project, when the RE Developer has attained Electromechanical Completion[99] of such project, the same developer is required to inform the DOE of the fact that it has already reached such point.[100] The DOE upon notice will conduct site validation and inspection of the RE project involved, including its interconnection facility,[101] to ensure that the project has indeed reached the point of Electromechanical Completion.

After site validation and inspection, the DOE will issue either a confirmation or denial, as the case may be, with respect to its Electromechanical Completion.[102] If the DOE confirms the Electromechanical Completion of the RE project, the project will be nominated to the ERC as eligible under the FIT System. This is for purposes of processing the Certificate of Compliance ("COC") under the FIT System, after considering that its interconnection facility is operational.[103]

Afterwards, the RE Developer has to inform the DOE regarding the date of Successful Commissioning of its RE plant. The commissioning is validated by the DOE, after which it will issue a Certificate of Endorsement ("COE")[104] for purposes of FIT eligibility to the ERC on a **"first-come, first-served" basis**.[105] In other words, the DOE would allocate the installation targets for RE resources like run-of-river hydro, wind, solar, and biomass power on a first-to-build basis.[106] This is done by the DOE until the maximum

98 *Ibid.,* at Section 5(c).

99 Under Section 2(c) of the DOE Circular, the term "Electromechanical Completion" means that "the whole plant including all substation and other facilities for grid or distribution system connection is in place but not yet connected and the RE project is ready for commissioning."

100 Under Section 6(b) of the DOE Circular, Electromechanical Completion is considered as attained for purposes of Section 6(a) "if the construction phase is at least eighty percent (80%) completed as may be determined from the RE Developer's Engineering, Procurement and Construction (EPC) contract or construction and development timeline under the approved Work Plan."

101 *Ibid.*, at Section 6(a).

102 *Id.*, at Section 6(c).

103 *Id.*, at Section 6(d).

104 It is required that the COE for FIT eligibility indicate the installed capacity that will be eligible for the FIT rate and the actual date of Commercial Operation. Under the rules, only RE Developers holding a Certificate of Confirmation of Commerciality will be issued a COE.

105 *Ibid.*, at Section 6(e).

106 *Available at* http://manilastandardtoday.com/2013/06/03/energy-issues-feed-in-tariff-rules/(last visited 7 August 2015).

installation target per RE technology is reached or fully subscribed.[107] Lastly, for the sake of transparency and monitoring, the DOE has tasked a monitoring board to show the status of implementation of the FIT System and other updates regarding FIT Eligibility.[108]

In view of the foregoing legal regime on FITs in the Philippines and the regulatory process by which RE Developers can avail of FIT allowances, it is established that the Philippine FITs regime present the regulatory process and rules under which FITs can be applied for and obtained by RE Developers. Now, we beg the next set of questions: does the Philippine regulatory regime on FITs actually work? Are FITs effective as an incentive to potential RE Developers? In other words, what are the concerns that must be addressed in order to ensure a viable, sustainable, and effective FIT System?

IV. Issues in Philippine FIT Regime

While RE as an emerging energy alternative presents numerous advantages, RE also has its own share of problems and concerns in the Philippine setting. RE as a field in energy law is confronted with myriad issues; more specifically, FITs as an incentive scheme for promoting RE are also permeated by certain concerns. This is most especially true with respect to how the regulators will be able to maintain a viable and sustained FIT policy. Although renewables can be easily understood to suffer from some developmental hitches in the course of its emergence as an energy alternative, regulators cannot afford to allow its progress to hamper considering that the necessity for clean sources of energy becomes more apparent from today's environmental hazards and lack of reliable supply of electricity.

Even the DOE itself admits of certain limitations and issues inherent in the RE sector, as follows:

1. inadequate fiscal and financial incentives;

2. socio-environmental issues as well as lack of public awareness of the benefits of green energy projects;

3. lack of commercially viable market for RE technologies and systems; and

4. relatively high and non-competitive cost of RE technology (as compared to conventional coal-fired technologies).[109]

107 *Ibid.*, at Section 6(f).

108 *Available at* https://www.doe.gov.ph/news-events/news/press-releases/2034-doe-issues-circular-on-fit-guidelines-for-re-projects (last visited 7 August 2015).

109 *Available at* https://www.doe.gov.ph/renewable-energy-res (last visited 7 August 2015).

Out of the four (4) issues mentioned above, the first one is supposedly addressed by the allotment of FIT allowances that fundamentally seek to mitigate the risk borne by RE Developers in recouping the financial commitments they invest in RE projects. The last three (3), however, continue to pervade a particular RE project; this notwithstanding the allocation of a FIT allowance in its favor after commercial operation is attained. In other words, FIT allowances in an RE regime do not (nor does it promise to) provide a solution when it comes to generic issues on social awareness, viable markets, and cost of technology. This is another area which regulators have to contend with in another forum or through another tool.

Other issues on Philippines renewables and FITs are noted, such as foreign equity restrictions on RE projects. As the Philippine Constitution only allows up to a maximum of 40% for foreigners,[110] the country is hard pressed to reconsider the limitations imposed on foreign ownership. The drive to relax the nationalist provision in the Constitution is basically meant to encourage clean energy investments in Philippine soil.[111] Carlos Jericho L. Petilla, former Secretary of the DOE, once stated that easing the 60-40 equity rule, which as mentioned under the Constitution limits the ownership of foreign investors in a business venture in the Philippines to a maximum of 40 percent, would be pivotal in promoting renewable energy investments on RE projects which typically involves a high volume of capital.[112] Because foreign ownership pervades RE projects regardless of whether FITs are used to promote the relevant technology, the present work will not cover this particular concern.

Rather, the issues in the Philippine FIT regime that regulators have to deal with and address are, in a nutshell, as follows: (1) Setting of FIT rates, (2) implementation of FIT Rules, and (3) maintenance of energy security. These are discussed *in seriatim* below.

Setting of FIT Rates

Electricity in the Philippines is reputed to be one of the highest in Asia, if not in the

110 Article XII, Section 2 of 1987 Philippine Constitution, states that: "All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. **The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.** Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant." (Emphasis and underscoring supplied)

111 *Available at* http://www.businessmirror.com.ph/renewable-energy-sector-to-see-more-fdi-sans-60-40-rule/ (last visited 3 August 2015).

112 *Ibid.*

whole world.[113] This negative impression of the Philippine energy market has hitherto discouraged investors from choosing the country for their placement of direct investments amid the largely robust Philippine economy, especially recently. One observer posits that while the FIT Rules allows RE investors to complete and implement their investment plans, it is yet possible (even probable) for prospective investors from various sectors to eventually decide not to invest anymore in the country due to the perceived impact of such rules. They imagine the scenario whereby the cost of electricity in the Philippines is made even higher than the current rates "which already happens to be one, if not the highest in Asia."[114] Needless to say, the prices for FIT allowances have to be streamlined.

As expected by some sectors, the maximum installation targets for RE technologies under the NREP may also cause a pricing issue. In order to create the needed push that will drive RE projects to critical mass and further invigorate energy progress, FIT allowances should supposedly aid the government in galvanizing the Philippine market as an RE powerhouse. In the selfsame process, however, the costs that are passed on by the RE Developers to the consumers trickle down to an inequitable situation where electricity prices — which are already high to start with — become even more prohibitive.

It is accepted that the NREP would drive the direction for how FIT allowances will be pegged (as recommended by the NREB). The NREP, as embodied in the FIT Rules, becomes concrete vis-à-vis market players once the rates are ascertained. A commentary on the NREP installation targets, as one of the factors considered in pricing, postulates that when "enough projects are approved to meet the Installation Target of a certain three-year period, no new FITs will be provided for that period. Interested parties will need to apply at the beginning of the next period. Plants outside the FIT scheme will need to sell their output at market prices (which for renewables, living by FITs, means simply 'no go')."[115] *Ergo*, once Installation Targets set by the NREP and the FIT Rules are fully subscribed, the unenviable job of coming up with the right price or rate of allowance for the FITs has to be done.

The setting of FIT rates has always been a challenging endeavor. Admaca and Lojodice describe the process by which RE rates are set: "[g]rowth corridors estimate the amount of renewable capacity a country expects to deploy in a given year. The tariff is then adjusted in accordance with the effective growth path. Caps set a limit to the annual amount of installations. Stepped nature of tariffs introduces a system that defines tariffs for each particular plant based on their generation costs."[116] Incidentally, "[b]oth

113 *Available at* http://www.enerdata.net/enerdatauk/press-and-publication/energy-news-001/philippines-high-electricity-price-keeping-foreign-investors-away_26287.html (last visited 9 August 2015).

114 *Available at* http://newsinfo.inquirer.net/47007/the-trouble-with-the-feed-in-tariff (last visited 7 August 2015).

115 *Available at* http://asian-power.com/regulation/commentary/handcuffs-or-handrails-philippine-limits-fits (last visited 7 August 2015).

116 Nil Atmaca & Ilaria Lojodice, *The Impact of Support Schemes on RES Installations and Retail Electricity Prices*, 5 Renewable Energy L. & Pol'y Rev. 67, 69-70 (2014).

domestic climate change-related law and emerging international law affect energy prices. Domestically, of course, states have clean energy and greenhouse gas initiatives that affect energy prices like renewable energy portfolios and feed in tariffs to encourage renewable energy projects."[117] Certainly, countless interests and factors need to interplay and be considered by the NREB so that it can come up with a relatively acceptable FIT price.

Some significant factors have to be duly considered by the NREB in the pricing equation, such as the expected RE resources to be tapped, the projected development of RE technologies, the installation targets per renewable, the market sentiment of investors, the possible impact on consumers, etc. Nonetheless, the government's policy on the setting of FIT rates should be clear and consistent, since "despite favourable operational and market conditions, unstable policy and weak credibility have held back some investment and pushed up procurement bid pricing."[118] This then leads to a higher price for electricity due to inordinately high passed-on FIT allowances. If the consumers complain, the end-users of electricity themselves may not continue to support FITs which otherwise should have been a commendable effort at incentivizing RE.

While it can be admitted that the rates for FIT allowances have already been determined (based on the recommendation by the NREB and affirmed by the ERC and the DOE) as contained in the FIT Rules, the next question then is whether such feed-in rates — already considered as relatively high — are acceptable to the relevant market players, particularly the consumers. In then end, the FIT price must be right.

Implementation of FIT Rules

Another notable concern is how FIT regulations would be implemented and how the guidelines on other RE policy mechanisms (*e.g.*, net metering, green energy option) are formulated and carried out. The Philippine FIT regime may be of the best sort possible for RE regulation. Nevertheless, a regulation is only as good as its execution. Unfortunately, environmental regulations are often not adopted or designed for proper enforcement.[119]

A key consideration in this regard is the fact that there are tradeoffs inherent in a FIT policy including its implementation and supervision by regulators. Davies and Allen describe this phenomenon of existing tradeoffs in FITs, to wit:

> "There can be no question that feed-in tariffs often have been extremely effective…. Yet the stock story of feed-in tariffs as policy overachievers is beginning to show cracks…. As much as feed-in tariffs

117 James E. Hickey, Jr., *Some Legal Impacts of the Emerging International Climate Change Regime on Energy Prices*, 4 Global Bus. L. Rev. 1, 2 (2014).

118 *Ibid.*, at 481.

119 Robert V. Percival, Christopher H. Schroeder, Alan S. Miller, and James P. Leape, Environmental Regulation: Law, Science, and Policy 937 (2006).

> have created a blue sky for renewables, they also have put clouds on the horizon. In many portraits of FIT function, this goes overlooked. Feed-in tariffs bring benefits, but they also have downsides. Among these, feed-in tariffs can be expensive, a fact that can be exacerbated if, as in some regimes, FIT funds are drawn from state coffers. Feed-in tariffs **can lag behind the technology change** they create, thus generating windfall profits and over-subsidizing the renewable industry. Feed-in tariffs can cause **energy inequity**, benefiting well-off citizens who can afford to install solar panels at the expense of lower-income consumers who have to pay higher electricity bills.
>
> xxx xxx xxx
>
> "Feed-in tariffs also can create enormous turmoil for the existing energy system…. The result: as feed-in tariffs become increasingly effective at achieving their goal, the physical, legal, and economic worlds in which they operate begin to experience, at best, growing pains, and increasingly more often, tumult."[120]

As discussed above, aside from the issue of pricing, FIT regulations carry the burden of being property implemented considering the RE technology to be utilized and the consequent impact it would expectedly make on the obligation to deliver electricity. If the FITs lag behind the relevant RE technology it is supposed to encourage, then there will most likely be a disjoint (or at best, a tangent) between the FIT itself and the means to enjoy such rate (such as the RE technology). As the FITs do not serve their avowed purpose of promoting RE investments, it follows that FITs may be counter-productive: increasing the prices of electricity brought to the grid and eventually bought by users, but RE Developers do not avail of it because their corporate decisions in relation to technology are not affected at all by unattractive FITs.

For example, a solar RE developer or investor may think twice before purchasing or developing a capital-intensive photovoltaic equipment if the impression given by the level of FIT prices is that such rates will not recompense the heavy outlay typically commanded by a particular solar device. "Users who install solar panels connected to the electrical grid receive subsidized payments for the electricity the panels generate."[121]

Clearly, there is a need to harmonize FIT policies and their execution. Apart from the abovementioned, the important reckoning point where FITs can be availed of is commercial operations. Commerciality is the sought-for "finish line" which RE Developers strive to reach for them to be eligible for FIT allotment as per DOE policy and FIT Rules.

120 *Supra* note 54.

121 Gaia Bernstein, *Incentivizing the Ordinary User*, 66 Fla. L. Rev. 1275, 1306 (2014).

Commerciality, however, is a loaded term.

When one speaks of "commercial operations", when exactly does it commence? As can be noted in the procedure under the FIT Rules, a Declaration of Commerciality is made only after conversion from Pre-Development Stage to the Development Stage. The point that must be reached, *i.e.*, the Development Stage, contemplates the construction and installation of RE facilities and then made operational for purposes of delivering RE electricity to the grid. Because the allotment of FITs are made on a "first-to-build" basis, the precise point when commerciality has been reached must be strictly defined. Is it the point where the first RE plant is built? Is it after the plant is completed and made operational, meaning at the point where the first tranche of RE electricity is delivered to the energy grid? If not these points, when exactly? The DOE would find it immensely advantageous to define which of these marks the exact point of "commerciality" so as to ensure that the FIT Rules can be implemented consistently and fairly by the regulators.

Yet another issue is the very agency tasked to collect the FIT allowances from electric distributors. First off, should it be the National Transmission Corporation or TransCo?[122] If not, then which government office or agency? Can the function of collection and custody of FIT funds be delegated or outsourced to private parties? If so, then to whom? As RE regulation is relatively nascent in the country, possible answers to these questions would be necessarily either novel or otherwise merely speculative.

In order to manage FIT remittances and payouts, the rules provide that TransCo was authorized by the ERC to create a "buffer fund." Such fund will ensure "the orderly, regular payment of FIT-All[123] to eligible companies, particularly 'in case some customers [*i.e.*, the distribution utilities] default or delay in their obligations to collect and remit the FIT-All proceeds,' according to the ERC resolution."[124] That the rules presumably authorize TransCo to collect and manage the tariffs did not deter certain parties from raising the issue as regards who is the rightful fund collector and manager. As a matter of fact, there is a pending petition before the Supreme Court arguing that the collection arrangement is a violation of the provisions and intent of the RA 9513.[125]

As one observer puts it succinctly, thus:

> "Nevertheless, the amount of FIT to be collected from customers is, at least at present, many times greater than the amount of FIT-All payable

122 Under Section 4(kk) of Republic Act No. 9136 or the EPIRA, the National Transmission Corporation or TransCo refers to "the corporation organized pursuant to this Act to acquire all the transmission assets of the NPC [National Power Corporation]."

123 FIT-All, a term used under the EPIRA, is simply another reference to FIT allowances.

124 *Available at* http://www.manilatimes.net/feed-tariff-allowance-controversy/158550/ (last visited 7 August 2015).

125 *Available at* http://www.manilatimes.net/feed-tariff-allowance-controversy/158550/ (last visited 7 August 2015).

> to RE producers. Because the regulations governing the administration of feed-in-tariffs only address payment and not collection, critics charge that the framework as devised by the ERC is a form of risk transfer from producers to consumers; producers are, in effect, guaranteed FIT subsidies through the establishment of a pool of FIT-All funds before producing a single watt of electricity.
>
> "Another concern is the absence of guidelines for Transco's handling of the FIT-All fund. For at least the next several years, until more RE producers make themselves eligible to collect the FIT incentive, Transco will be amassing a reserve – at a rate of about P230 million a month, according to Atty. Ancheta's estimate — for which very little guidance apart from who is eligible to receive payouts from it has been provided. Fears that its use could be expanded to serve as a source of funding beyond FIT have been raised due to the way the provision authorizing the creation of the funding pool was written: It describes it as being available to supply "working capital requirements" of RE producers, a definition of 'payable FIT-All proceeds' that many critics find alarmingly broad that could lead to abuse."[126]

While there are no specific guidelines for TransCo's authority and management of the fund for FIT allowances, it cannot be gainsaid that TransCo will be managing a very huge fund for FITs. "Fears that its use could be expanded to serve as a source of funding beyond FIT have been raised due to the way the provision authorizing the creation of the funding pool was written: It describes it as being available to supply 'working capital requirements' of RE producers, a definition of 'payable FIT-All proceeds' that many critics find alarmingly broad that could lead to abuse."[127] Inevitably, the DOE has to come up, sooner than later, with pertinent guidelines and controls that will make sure that FIT collections will be handled by TransCo (or whoever is the rightful collector and custodian, for that matter) to be properly used as incentives for eligible RE Developers.

Maintenance of Energy Security

With respect to the issue on energy security and/equity, it is generally accepted in energy economics that "economic growth both requires and stimulates increases in energy consumption."[128] Another significant obstacle in a FITs regime is "the need to change legal and regulatory systems that promote the inefficient use of resources, discourage technological innovation, or otherwise impede environmentally superior practices."[129]

126 *Ibid*.

127 *Ibid.*

128 Asian Development Bank (ADB), Energy Policy Experience of Asian Countries 31 (1987).

129 Alan S. Miller and Eric Martinot, *The GEF: Financing and Regulatory Support for Clean Energy*, Natural Resources & Environment, Vol. 15, No. 3, 164 (2001).

The question now is: can the Philippine RE regime, specifically with respect to FITs, sustain energy security for the country's constituents in the long run?

To achieve a decent level of energy security, such that the demand of Philippine industries and consumers will be adequately supplied with (preferably indigenous) clean electricity, it is indispensable to keep close cooperation between the government and the private sector. Jhirad notes that there may be a perceived disjunction between public and private values with respect to renewables, specifically in the area of FITs. Thus: "[m]ethods for analyzing investments in renewable energy projects must discriminate between what is economically rational from a national perspective and what is financially attractive to private investors. Actions that a private decision maker will take in his own firm's interest often differ substantially from those that are best from a public point of view. This is particularly true in the case of investments in renewable energy technologies."[130] It is real that the objectives of different regulators may not perfectly match, such that a government "policy that promotes renewable energy could be detrimental to other policy objectives."[131]

For example, the setting up of installation targets under the NREP as implemented by the FIT Rules may present a problem regarding inherent investment risk. "Installation Targets add not just an element of additional and graduated step-wise risk but rather, a brightline cutoff of total and catastrophic project and investment risk. The bundling of policies to promote more interest may then actually mean that a successful volume of interest could in turn kill off the likelihood of success itself."[132] Corollarily, regulators may be beholden to their RE programs and policies but then again may overlook the interest of investors who are inclined to primarily manage risks in emerging enterprises. The above observation leads one to think how the setting of installation targets affects the overall implementation of FIT Rules and how effective such targets are towards attaining the result of energy security when the RE projects work in actuality.

In view of the problems and issues discussed above, the author now attempts to provide possible approaches to resolving these concerns and come up with recommendations that seek to promote the viability and sustainability of the Philippine FIT regulatory regime. Given the primal importance of RE for the future of energy in the Philippines, as well as the supportive role that FITs play in the regulatory regime, it behooves us to look for the right solution.

130 David Jhirad, *Renewable Energy in Developing Countries: Priorities and Prospects,* The Energy Journal, Vol. 8, Special LDC Issue (1987), 105, 118

131 Yuka Fukunaga, *Renewable Energy Trade and Governanc*e, Proceedings of the Annual Meeting (American Society of International Law), Vol. 106, 384-85 (2012). For instance, policy objectives for energy security *per se* is the domain of the Department of Energy, while environmental preservation and conservation belongs to the jurisdiction of the Department of Environment and Natural Resources. In the realm of RE, these objectives, while both laudable, may not be fully consistent.

132 *Available at* http://asian-power.com/regulation/commentary/handcuffs-or-handrails-philippine-limits-fits (last visited 7 August 2015).

V. Possible Solutions and Recommendations

The discussions thus far present the advantages of RE technologies are concrete and promising in that they seek to protect the environment and promote energy security. On the side, FITs play a vital role in incentivizing RE Developers to participate in the development and growth of the Philippine RE sector. In the quest for maximizing the country's RE potential, there may be "growing pains" which, while inevitable, have to be minimized if not altogether eradicated if the Philippine government is to be considered truly serious in achieving the preambular objectives of RA 9513.

To address the myriad issues discussed in the preceding section, Philippine policy-makers and regulators alike may find it beneficial to consider the following recommendations: (1) rationalization of FIT allowances, (2) issuance of clarificatory FIT guidelines, and (3) proactive advancement of energy equity.

Rationalization of FIT Allowances

To mitigate the adverse effect of FITs on increasing electricity prices for consumers, the government must rationalize electricity rates. "By rationalizing energy prices, renewable energy sources become competitive with fossil fuels."[133] This means prices and rates for electricity purchased and consumed must be made more efficient such that price components (which, while beneficial, are avoidable) are trimmed down to the bare minimal essential components. This requires a more in-depth study of the price elements that drive the cost of electricity in the Philippines, and arrive at equitable but competitive FIT rates. Hope then can be given to the less affluent consumers of electricity who are exposed to bear the brunt of unmitigated FIT prices.

While the FIT Rules have, in a way, already set the playing field for industry players, the DOE cannot be considered to have "tied its own hands" or otherwise enjoined to issue further rules or regulations clarifying the present regulations. If it appears based on a cost-benefit analysis that the rates set out in the FIT Rules will not ultimately bring about the intended result of incentivizing RE actors adequately and equitably (and considering that FITs must work under the "socially-sensitive" mindset), it behooves the DOE, ERC and even the NREB to amend or otherwise issue another regulation that will address the pricing issue and rationalize FIT rates accordingly.

One suggested approach to rationalize energy prices is through the use of a feed-in premium "which involves a payment of an amount on top of the market price for electricity."[134] The DOE may consider opting for a feed-in premium as an alternative to

133 Vicente Paolo B. Yu, *Power of the Future: The Nexus Between International Trade Rules and Sustainable Energy Alternatives for the South, in* World Bulletin: Special Issue on Environment and Development 74 (1997).

134 Rafael Leal-Arcas & Andrew Filis, *Legal Aspects of the Promotion of Renewable Energy within the EU and in Relation to the EU's Obligation in the WTO*, 5 Renewable Energy L. & Pol'y Rev. 3, 11 (2014).

the pricing of electricity after considering the economically sound level of FIT allowance as well as the price components (which also have to be revisited). Here, the function of FITs should be coordinated with other RE incentive schemes like RPS, net metering, and green energy option methodology.

To arrive at a competitive FIT price, the regulators must deal with avoided costs.[135] "Because avoided-cost rates are 'not to exceed the incremental cost to the utility of alternative electric energy,' avoided cost traditionally has been understood to reflect the price of acquiring energy from the cheapest possible alternative source."[136] In effect, avoided costs in the Philippine, such as those to be incurred from the purchase of electricity from power producers not devoted to RE projects, have to be taken into consideration so as to maintain a level of pricing that is competitive while, at the same time, socially responsible. The FIT rate must not be too high such that using a cost-benefit approach would convey that an avoided cost could have been the better alternative to buy. This way, FITs are level-pegged to other sources of electricity and, in theory, rationalized.

Again, while the FIT Rules have already "locked-in" the rates of allowances to be allotted to eligible RE Developers, it is suggested that revisiting such rates may prove to be advantageous (if not outright necessary) should the regulators, after a thorough study and review of the matter, determine that the determined FIT rates are not up to the task. Inevitably, after the twenty (20) year period for the current rates to be allotted by the DOE and fully subscribed, pricing is by that time required for the next batch of FIT allowances. At that point, the regulators must make sure that the FITs are rationalized in order to be acceptable to the majority of the stakeholders, keeping in mind the social dimension that FITs play in the complex dynamics of Philippine RE.

Issuance of Clarificatory FIT Guidelines

Another recommended approach to a better understanding and, in effect, implementation of the FIT Rules is by the issuance of guidelines setting out the steps and clarifying the requirements laid down by the DOE. Here, the Monitoring Group of the DOE can be tasked to ensure that the FIT Rules are guided by clear and distinct objectives, action points, timelines, and other regulatory mechanisms that ensure compliance with the FIT Rules.

The benefit of having clear FIT regulations can be gleaned in the case of Japan's wind energy sector. The proposed solutions in the East Asian country, which is also committed to fully harnessing its renewables, include changing its FIT laws and rules

135 Avoided cost' generally is defined as 'the cost to [an] electric utility of the electric energy which, but for the purchase from [a] cogenerator or small power producer, such utility would generate or purchase from another source. *See* Alexander D. White, *Compromise in Colorado: Solar Net Metering and the Case for "Renewable Avoided Cost"*, 86 U. Colo. L. Rev. 1095 (2015).

136 *Ibid.*, at 1134-35; *see also* John S. Moot, *Subsidies, Climate Change, Electric Markets and the FERC*, 35 Energy L.J. 345, 356-57 (2014).

to reduce the cost to utilities and differentiate between offshore and onshore wind power.[137] Other solutions are composed of the following: (1) Purchase Obligation,[138] (2) Lack of Rate Discrimination for Offshore Wind Farms,[139] (3) Connection Costs,[140] (4) Intermittency,[141] and (5) Surcharge Reduction for Energy-Intensive Industries;[142] and (6) Cost to Consumers."[143] As applied to the Philippine case, the suggested approach in the present work, *i.e.*, amending the law and regulations (especially, the FIT Rules), can be a possible solution to ensure proper implementation of FIT allowances. "The Law thus cannot be fully effective until Japan's grid undergoes substantial expansion and modernization."[144]

Currently, there is "a growing worldwide appreciation of the limits of command and control regulation and of the need to change the incentive structures for environmentally detrimental activities."[145] Specifically, in the case of solar energy, "if the goal is to build solar photovoltaic capacity, a feed-in tariff requiring the purchase of that resource makes sense. But if the goal is a larger, system-wide evolution, as will be necessary to address climate risks and transition away from fossil fuels, such policies will ultimately prove insufficient."[146] In other words, while regulation of the Philippine FIT regime may prove to be limited, it is still best for regulators to extend its hand of supervision over its subjects by formulating and implementing clear guidelines that will function as control mechanisms that will equip the country with RE capability.

Proactive Advancement of Energy Equity

It should be established at this point that RE aims to improve energy security and independence of a particular country. In the Philippines, the advancement of energy equity can be achieved by the cooperation of the various stakeholders, of which the government plays a major role. Certainly, the government must take a proactive stance in regulating key players and keeping in check any adverse behavior that may disrupt equitable energy relations. Supply and demand economics must be duly taken into consideration so that the Philippine market will be better off availing of an RE regime

137 Rebecca L. Gibson, *Cast Your Fate to the Wind (Turbines): Strengthening Japanese Wind Energy Law and Policy*, 9 Tex. J. Oil Gas & Energy L. 123, 139 (2013-14).

138 *Ibid.,* at pp. 139-40.

139 *Id.,* at pp. 140-41.

140 *Id.*, at 141-42.

141 *Id.,* at 142-43.

142 *Id.*, at 143.

143 *Id.*, at 143-44.

144 *Id.*, at 144-45.

145 Frederick R. Anderson, Daniel R. Mandeller and A. Dan Tarlock, Environmental Protection: Law and Policy 72 (1990).

146 Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 Harv. Envtl. L. Rev. 371, 406 (2014).

that is pushed by a rational and responsive FIT regime.

All in all, the goal of energy security is foremost. At the center stage for advancing energy equity is the regulator who has a main hand in FIT policy and execution. Being proactive in this endeavor would mean that the FIT regulatory regime will be evaluated based on the vital consequence of promoting RE through FIT mechanisms: the electricity delivered by RE made possible by means of FIT should be adequate and sustainable in order to justify that FITs truly work. After all, the sufficient production and delivery of electricity are the immediate outcomes that a government looks for in utilizing its renewables. That this is done in an environmentally friendly manner is a distinct advantage. In any event, the government must advance, through sound regulation, energy equity and security for its population by means of RE mechanisms. And government will be able to do this by being proactive, *i.e.*, taking calculated but determined initiatives and steps. Once the regulator sets the tone by way of supervision, then everyone else merely follows suit.

Accordingly, if one talks about energy security and the unquenchable need for electricity in this time and age, environmental protection again comes into the picture. "For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind — a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development."[147] Indeed, sustainability is key to the tenets of universal energy security. In order to find the right solution to the Philippine problem regarding energy equity and security, the regulators must remain steadfast in enforcing the rules in relation to FITs.

The foregoing recommendations are meant to fine-tune the current policy and regulations of the Philippine RE regime, specifically with respect to FITs. While notable progress has been made in regulating the country's RE sector, certain aspects in FIT regulation and implementation have to be addressed in order to maximize the opportunities for producing electricity from environmentally-sound RE sources and, in the process, promote energy security for the country. Based on the foregoing assessment of Philippine RE law and policy, it is the hope of the author that the above suggestions and recommendations relating to FITs will further spur ideas, debate, and discourse that will eventually lead towards RE's noble objectives.

VI. Conclusion: Making FITs Work and Beyond

The fitness of Philippine renewable energy law and policy is being evaluated in order to fully realize the objectives of environmental protection and energy security. It is crystal-

147 Patricia W. Birnie and Alan E. Boyle, Basic Documents on International Law and The Environment 3 (1995).

clear that the Philippine FITs regulatory regime must be made to work and surpass the hurdles of pricing, FIT implementation, and energy inequity. As aptly observed by Sullivan:

> "Many cities are looking at increasing specific fuel taxes, developing feed-in tariffs, and applying tax and other incentives for their residents and businesses to change patterns of energy use. So far, these initiatives have made little more than a dent in the overall problem. We still rely massively on oil, natural gas and coal. Alternative energy sources and energy efficiency efforts are making some progress in urban areas, but not fast enough. There is a lot of work to be done."[148]

It is an understatement to say that making Philippine RE regulations sustainable, *i.e.*, staying fit to accomplish its *raison d'etre*, is challenging. The enormous task remains how to maintain a FIT regime that is sustainable and effective for purposes of environmental protection and energy security in the country.

While the Philippine experience with respect to FITs shows it still has a long way to go in order to fully incentivizing investments in renewable energy and hence maximizing its renewable energy potential, the important thing is that the country continues to be in the right direction. With the proper policies combined with effective and proactive implementation of FITs, the future is bright for Philippine renewable energy.

148 Paul Sullivan, *Energetic Cities: Energy, Environment and Strategic Thinking*, World Policy Journal, Vol. 27, No. 4, 11, 13 (2010-11).

Home Court Banking: Jurisdiction of Philippine Local Courts Over Foreign Banks with Local Branches

Nicolo F. Bernardo[*]

I. Introduction

The full entry of foreign banks in the Philippines through Republic Act No. 10641 (RA 10641)[1] authorizing foreign banks to own up to 100% of the voting stock of an existing bank and to invest in up to 100% of the voting stock of a new bank subsidiary in the country gives foreign banks the needed break to fully channel investments.

But with every right comes responsibility. Foreign banks with local branches should be ready to recognize the jurisdiction of local courts even for suits involving transactions executed abroad or notwithstanding clauses providing exclusive local branch liability, whenever Philippine law provides that the same be subject to its banking regulations as the local branch is a mere extension of the foreign head office.

II. Head and Shoulders: Single Entity vs. Separate Entity Doctrine

Under Philippine law, the single-entity doctrine prevails wherein a foreign branch's head office and its branches constitute one corporate entity and treated as one unit.[2] Thus, a foreign bank with a local branch may not excuse itself from the reach of Philippine courts especially when a banking transaction is considered to be imbued with public interest and subject to Philippine banking regulation.

Section 74 of the General Banking Law, or Republic Act No. 8791 (RA 8791) treats as one unit all branches of foreign banks, *viz*:

> *Section 74. Local Branches of Foreign Banks.* — In the case of a foreign bank which has more than one (1) branch in the Philippines, **all such branches shall be treated as one (1) unit** for the purpose of this Act, and **all references to the Philippine branches of foreign banks shall be held to refer to such units.** (underscoring supplied)

The aforecited provision is consistent with Section 20 of RA 8791, which provides that a universal or commercial bank and its branches must be treated as one unit:

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* Legal Officer, Office of the General Counsel and Legal Services, Bangko Sentral ng Pilipinas (BSP).The views and opinions expressed herein are the author's and not necessarily the official position of the BSP.

1 An Act Allowing the Full Entry of Foreign Banks in the Philippines, Amending for The Purpose Republic Act No. 7721, July 15, 2014.

2 See *Banking Laws of the Philippines Book II: The General Banking Law Annotated*, Sec. 20.7, p.148, citing *Marubeni Corp. v. Commission on Internal Revenue*, G.R. No.76573, Sept. 14, 1989.

> Section 20. *Bank Branches.* — Universal or commercial banks may open branches or other offices within or outside the Philippines upon prior approval of the Bangko Sentral. Branching by all other banks shall be governed by pertinent laws.
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> **A bank authorized to establish branches or other offices shall be responsible for all business conducted in such branches and offices to the same extent and in the same manner as though such business had all been conducted in the head office. A bank and its branches and offices shall be treated as one unit.**

Since local branches are mere extensions of the foreign bank's head office, there is a "head office guarantee" provided under Section 75 of RA 8791,[3] where the outstanding liabilities of a local branch must be guaranteed by the foreign bank's head office. The same guarantee is provided under Section 5 of Republic Act No. 7721,[4] as amended by RA10641, which states:

> *Section 5. Head Office Guarantee.* – The head office of foreign bank branches shall guarantee prompt payment of all liabilities of its Philippine branches.

Thus, even if it would be stipulated in a bank agreement that the head office will not be liable for the liabilities of the local branch, known as the "ring-fencing clause" confining liability to the local branch, the same will be considered void for being contrary to law.

Following the logic of the law, *i.e.*, claims against a domestic branch may be assumed by the foreign bank's head office being one entity, then local branches — being mere "extensions" of the foreign head office — can also be made liable to suits for breach of transactions made in the head office or other foreign branches. Again, this is because Philippine law generally makes no distinction between a head office and its branches.

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3 Section 75 of RA 8791 states:

> Section 75. *Head Office Guarantee.* — In order to provide effective protection of the interests of the depositors and other creditors of Philippine branches of a foreign bank, the head office of such branches shall fully guarantee the prompt payment of all liabilities of its Philippine branch.
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> Residents and citizens of the Philippines who are creditors of a branch in the Philippines of a foreign bank shall have preferential rights to the assets of such branch in accordance with existing laws.

4 An Act Liberalizing the Entry and Scope of Operations of Foreign Banks in the Philippines and for Other Purposes, May 18, 1994.

In contrast, American banking law, given its tradition of separate banking regulation per US state, originally developed a "separate entity doctrine" or *situs* rule wherein a head office is considered to be distinct from its branches. Thus, an early court ruling based on a 1919 New York law held that a bank that accepts a deposit at a branch is not liable to return the deposit or honor the check at another branch as the branch is a separate and distinct entity.[5] Under this doctrine, depositors in another state are expected to assume the "sovereign risk" of not being repaid by another branch of the bank in another state as laws differ per state.

With the current trends of federal and international banking, the status of the separate entity doctrine in the US is now unclear.[6] At the federal level, the US Federal Reserve has opined as early as 1918 that

> There is nothing xxx to indicate that branches established in foreign countries are to have a separate existence and constitute separate corporations. On the contrary, it is clear that the parent bank is merely to engage in certain foreign transactions through its foreign branch.[7]

In fact, the separate entity doctrine appears to have been superseded already by the *Digitrex* rationale in the case of *Digitrex, Inc. vs. Johnson,*[8] which held that the separate entity doctrine is no longer valid. Of interest, the presiding judge in *Digitrex*, Judge Whitman Knapp, was the same trial judge in the landmark case of *Citibank, N.A. vs. Wells Fargo Asia Ltd.*[9] In this case, the Singapore branch of Wells Fargo made two time deposits with Citibank Manila. Wells Fargo sued Citibank New York head office for Citibank Manila's failure to repay these deposits. The district court ruled that Citibank New York should assume the liability of its Manila branch. Accordingly, Citibank may repay its offshore depositors using its "worldwide assets" and transfer its funds from outside the Philippines to Manila. Furthermore, the defense of undue administrative burden no longer holds water with the current availability of electronic transmissions.

As an added guarantee that foreign banks with branches in the Philippines will recognize its local banking regulations and consequently be answerable before its courts, the BSP considers as a determining factor for approving applicant foreign banks their existing or potential stable operations in the Philippines relative to doing and *keeping* business and corollarily being continuously subject to local supervision. Hence Section X105.3 (d) of the revised Manual of Regulations for Banks considers the "[l]ong standing

5 *Chtzanowska vs. Corn Exch Bank*, 173 AD 285, 159 NYS 385 (1916).

6 SHAWN E. FLATT, "Citibank, N.A. v. Wells Fargo Asia Ltd.: A Threat to US International Banking?" *Duke Journal of Comparative & International Law* Vol. 1991:241, 253.

7 4 *Federal Reserve Bulletin* 1123 (1918).

8 *Ditrex, Inc. vs. Johnson*, 491 F Supp 66, 68 (SDNY 1980).

9 110 S Ct 2034 (1990).

financial and commercial relationship with, and assistance extended to, the Philippines xxx."[10]

Of course, current banking law only clearly provides for a "head office guarantee," not a "local office or local branch guarantee" for transactions executed in the foreign branch or head office. Still, it can still be argued that being one and the same entity as the foreign head office, the local branch can be made liable for foreign branch transactions if it can be established that there is participation expected from the local branch or there is public interest in the transaction such as in instances of money laundering, and in transactions of offshore banking units with Filipino residents or with local branches as provided under Section 6 of Presidential Decree No. 1034.[11]

In the recent case of *Philippine Deposit Insurance Corporation vs. Citibank, N.A. and Bank of America, S.T. & N.A.*,[12] the Supreme Court affirm the doctrine from the earlier Citibank case as follows:

> The Court begins by examining the manner by which a foreign corporation can establish its presence in the Philippines. It may choose to incorporate its own subsidiary as a domestic corporation, in which case such subsidiary would have its own separate and independent legal personality to conduct business in the country. In the alternative, it may create a branch in the Philippines, which would not be a legally independent unit, and simply obtain a license to do business in the Philippines.
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> In the case of Citibank and BA, it is apparent that they *both did not incorporate* a separate domestic corporation to represent its business interests in the Philippines. Their Philippine branches are, as the name implies, merely branches, without a separate legal personality from their parent company, Citibank and BA. Thus, being one and the same entity, the funds placed by the respondents in their respective branches in the Philippines should not be treated as deposits made by third parties subject to deposit insurance under the PDIC Charter.

10 As revised by Circular No. 858, S. 2014 re Amendments to Relevant Provisions of the Manual of Regulations for banks Implementing Republic Act No. 10641.

11 Section 6 of PD 1034 states:

Section 6. *Transactions of Offshore Banking Units: Regulations*. Transactions of offshore banking units with non-residents or with other offshore banking units shall be freely allowed: Provided, that the Central Bank of the Philippines may establish such safeguards as may be necessary to prevent circumvention of applicable foreign exchange regulations. Transactions of offshore banking units with resident of the Philippines, including those with local commercial banks and local branches of foreign banks authorized to receive foreign currency deposits under Republic Act No. 6426, shall be subject to applicable law and regulations.

12 G.R. No. 170290, 11 April 2012.

For lack of judicial precedents on this issue, the Court seeks guidance from American jurisprudence. In the leading case of *Sokoloff v. The National City Bank of New York*, where the Supreme Court of New York held:

> **Where a bank maintains branches, each branch becomes a separate business entity with separate books of account**. A depositor in one branch cannot issue checks or drafts upon another branch or demand payment from such other branch, and in many other respects the branches are considered separate corporate entities and as distinct from one another as any other bank. **Nevertheless, when considered with relation to the parent bank they are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent bank**, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank and their property and assets belong to the parent bank, although nominally held in the names of the particular branches. **Ultimate liability for a debt of a branch would rest upon the parent bank**. [Emphases supplied]

III. Public Interest Exceptions to Lex Loci Contractus

Generally in conflict of laws, the validity and enforceability of contracts are governed by the proper law of the contract which can be: the *lex loci voluntatis* or the law expressly agreed by the parties; the *lex loci intentionis* or the law intended to bind the transaction; or the *lex loci celebrationis* or the law of the state where the contract was executed.[13]

However, a contract impressed with public interest or public policy may justify the application and enforcement of a local law.[14] Not only the parties have vested interest in the enforcement of the contract but also the State. Parties cannot simply stipulate on ousting local courts of their jurisdiction, which will be void and without legal effect.[15] This is especially true with foreign bank head offices treated as one unit with their local branches in the Philippines and whose transactions (domestic or offshore) are considered to be imbued with public interest.

13 ALICIA SEMIO-DY, *Handbook on Conflict of Laws* (2004), pp.169 to 170.

14 *Pakistan International Airlines vs. Blas Ople*, G.R. No. L-61594, September 28, 1990.

15 *Rafael Molina vs. De La Riva, Rivera*, G.R. No. 2721. March 22, 1906.

In the case of a foreign bank not doing business in the Philippines, the Court, for reasons of public policy, allowed a bank to sue a Filipino resident and to execute a foreign judgment even if the contract violated was executed outside the country. As held in *Hang Lung Bank, Ltd. vs. Hon. Felintriye Saulog et al.*:[16]

> **Since petitioner foreign banking corporation was not doing business in the Philippines, it may not be denied the privilege of pursuing its claims against private respondent for a contract which was entered into and consummated outside the Philippines.** Otherwise we will be hampering the growth and development of business relations between Filipino citizens and foreign nationals. Worse, we will be allowing the law **to serve as a protective shield for unscrupulous Filipino citizens who have business relationships abroad**.

Considering that foreign banks are given the capacity to sue Filipino residents for isolated contracts made abroad despite *not doing business* in the Philippines, the reverse scenario should also be permissible — a Filipino resident may choose to pursue a suit locally for transactions executed in the foreign bank's head office or other foreign branches, especially when such bank, unlike in *Hang Lung*, is considered to have established a "local presence" or doing business here.

While the Rules of Court allows contractual parties to agree on the exclusive venue for filing an action,[17] which may be a ground for motion to dismiss for improper venue,[18] jurisdiction over the subject matter in a judicial proceeding is conferred by law in the manner prescribed by law.[19] To succeed in a motion for dismissal of an action for lack of jurisdiction over the subject matter of a claim, the movant must show that the court or tribunal cannot act on the matter submitted to it because no law grants it the power to adjudicate the claims.[20] The court, after assuming jurisdiction over the case, has the choice-of-law to either apply local law or take into account foreign law.[21] To object to the court's choice of domestic law, the movant must expose any conflict between foreign and local law and prove the existence of such foreign law. In any event, while the Court may

16 G.R. No. 73765, August 26, 1991.

17 Section 4(b) of Rule 4 of the Rules of Civil Procedure states:

> Section 4. *When Rule [on venue of actions] not applicable*. This Rule shall not apply:
> (b) Where the parties have validly agreed in writing before the filing of the action on the exclusive venue thereof.

18 See Section 1 (c) of Rule 16 of the Rules of Civil Procedure.

19 *Kazuhiro Hasegawa and Nippon Engineering Consultants, Co. vs. Minoru Kitamura*, G.R. No. 149177, November 23, 2007.

20 *Id.*

21 *Id.*

choose to recognize a foreign law, it is not limited by it, even in matters regarding rights provided by foreign sovereigns.[22]

IV. Foreign Banks with Local Branches as "Resident" Corporations

Foreign banks with branches in the Philippines are considered "doing business" here and as such, are "resident corporations." By establishing a local branch in the Philippines, the foreign bank is considered to have subjected itself to Philippine jurisdiction, as the Court discussed extensively in *State Investment House, Inc. and State Financing Center, Inc. vs. Citibank, N.A. et al*:[23]

> The Offshore Banking Law, Presidential Decree No. 1034, states "**that branches**, **subsidiaries, affiliation, extension offices or any other units of corporation or juridical person organized under the laws of any foreign country operating in the Philippines shall be considered residents of the Philippines.**"
>
> The General Banking Act, Republic Act No. 337,[24] places "branches and agencies in the Philippines of foreign banks . . . (which are) called Philippine branches," in the same category as "commercial banks, savings associations, mortgage banks, development banks, rural banks, stock savings and loan associations" (which have been formed and organized under Philippine laws), making no distinction between the former and the later in so far, as the terms "banking institutions" and "bank" are used in the Act, declaring on the contrary that in "all matters not specifically covered by special provisions applicable only to foreign banks, or their branches and agencies in the Philippines, said **foreign banks or their branches and agencies lawfully doing business in the Philippines "shall be bound by all laws, rules, and regulations applicable to domestic banking corporations of the same class,** except such laws, rules and regulations as provided for the creation, formation, organization, or dissolution of corporations or as fix the relation, liabilities, responsibilities, or duties of members, stockholders or officers or corporations." (underscoring supplied)

The Court went on to compare the situation of a foreign bank such as Citibank, N.A. with that of foreign corporation that obtained license to do business in the Philippines. The privilege of conducting business in the Philippines comes with the corollary capacity to sue and be sued and be subject to Philippine laws much like any other domestic bank:

22 *Id.*

23 G.R. Nos. 79926-27, October 17, 1991.

24 As repealed by RA 8791, which retains the aforecited provisions in the old law in Sections 74 and 77 of the Act.

> This Court itself has already had occasion to hold that a foreign corporation licitly doing business in the Philippines, which is a defendant in a civil suit, may not be considered a *non-resident* within the scope of the legal provision authorizing attachment against a defendant *not residing in the Philippine Islands*;" in other words, a preliminary attachment may not be applied for and granted solely on the asserted fact that the defendant is a foreign corporation authorized to do business in the Philippines — and is consequently and necessarily, "a party who resides out of the Philippines." Parenthetically, if it may not be considered as a party not residing in the Philippines, or as a party who resides out of the country, then, logically, it must be considered a party who does reside in the Philippines, who is a resident of the country. Be this as it may, this Court pointed out that:
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> The Court cannot thus accept the petitioners' theory that corporations may not have a residence (*i.e.*, the place where they operate and transact business) separate from their domicile (*i.e.*, the state of their formation or organization), and that they may be considered by other states as residents only for *limited and exclusive purposes*. Of course, as petitioners correctly aver, it is not really the grant of a license to a foreign corporation to do business in this country that makes it a resident; the license merely gives legitimacy to its doing business here. **What effectively makes such a foreign corporation a resident corporation in the Philippines is its actually being in the Philippines and licitly doing business here, "locality of existence" being, to repeat, the "necessary element in . . . (the) signification" of the term, resident corporation**. (underscoring supplied)

Philippine law clearly intends that foreign banks be subject to suits, in order "**to prevent foreign [banks] from acquiring a domicile for the purpose of business without taking steps necessary to render them amenable to suits in the local courts**."[25] It is for this reason that Section 76 of RA 8791 provides for a procedure for serving legal processes against foreign banks. For courts to obtain jurisdiction over a foreign juridical entity that has transacted in the country, service of summons may be made on its resident agent recognized by law, and such other means, hence:

> Section 76. *Summons and Legal Process*. — Summons and legal process served upon the Philippine agent or head of any foreign bank designated to accept service thereof shall give jurisdiction to the courts over such

25 *Central Republic Bank & Trust Co. vs. Bustamante*, 71 Phil. 359 (1941).

> bank, and service of notices on such agent or head shall be as binding upon the bank which he represents as if made upon the bank itself.
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> In the absence of the agent or head or should there be no person authorized by the bank upon whom service of summons, processes and all legal notices may be made, service of summons, processes and legal notices may be made upon the Bangko Sentral Deputy Governor In-Charge of the supervising and examining departments and such service shall be as effective as if made upon the bank or its duly authorized agent or head. xxx

V. Philippine Banking Law as Controlling Law

RA 8791 only makes exceptions to the applicability of Philippine banking law on foreign banks when the legal issues concern (i) the creation, formation, organization, or dissolution of corporations, (ii) intra-corporate matters such as the fixing of relations, liabilities, responsibilities, or duties of stockholders, directors, or officers of corporations, and (iii) whenever specific provisions in the law are made to apply only to foreign bank's offices in the Philippines. This is consistent with the Corporation Code which provides that a foreign corporation licensed to do business in the Philippines shall be governed by its laws, with the exception of laws as to its incorporation and intra-corporate matters, as Section 77 of RA 8791 states:[26]

> Section 77. *Laws Applicable.* — In all matters **not specifically covered by special provisions applicable only to a foreign bank or its branches and other offices in the Philippines, any foreign bank licensed to do business in the Philippines shall be bound by the provisions of this Act, all other laws, rules and regulations applicable to banks organized under the laws of the Philippines of the same class**, except those that provide for the creation, formation, organization or dissolution of corporations or for the fixing of the relations, liabilities, responsibilities, or duties of stockholders, members, directors or officers of corporations to each other or to the corporation. (underscoring supplied)

During the bicameral deliberations of said provision and its related articles under the General Banking Law, Chairman Senator Raul Roco stressed that foreign banks "should be treated exactly — as any Filipino bank."[27]

26 See The Corporation Code, B.P. Blg. 68, Section 129.

27 Bicameral Conference on the General Banking Act, Committee on Banks, Financial Institutions and Currencies, April 11, 2000, S-BICAM-F1-277-279.

To be sure, Section 8 of RA 10641 also provides for equal treatment between local and foreign banks with respect to governing laws, thus:

> Section 8. *Equal Treatment.* – **Foreign banks** authorized to operate under Section 2 of this Act, shall perform the same functions, enjoy the same privileges, and **be subject to the same limitations imposed upon a Philippine bank of the same category**. The single borrower's limit of a foreign bank branch shall be aligned with that of a domestic bank.
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> The foreign banks shall guarantee the observance of the rights of their employees under the Constitution.
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> **Any right, privilege or incentive granted to foreign banks or their subsidiaries or affiliates** under this Act, shall be equally enjoyed by and extended **under the same conditions to Philippine banks**. (underscoring supplied)

A similar provision for "equal treatment" between foreign and local banks has been adopted in Section 5 of RA 10641, which states:

> *Section 8. Equal Treatment.* – Foreign banks authorized to operate under Section 2 of this Act, shall perform the same functions, **enjoy the same privileges, and be subject to the same limitations imposed upon a Philippine bank of the same category**. The single borrower's limit of a foreign bank branch shall be aligned with that of a domestic bank.
>
> The foreign banks shall guarantee the observance of the rights of their employees under the Constitution.
>
> **Any right, privilege or incentive granted to foreign banks or their subsidiaries or affiliates under this Act, shall be equally enjoyed by and extended under the same condition to Philippine banks**.[28]

Hence, under Philippine law, both foreign "resident" banks and domestic banks are subject to the same banking regulations, unless otherwise exempted.

28 Emphasis supplied.

VI. Conclusion

Under Philippine law and jurisprudence, the "single entity doctrine" generally treats indistinctively the head office and branches of a foreign bank, as reflected under Sections 74 and 75 of RA 8791 and Section 5 of RA 7721, as amended. Thus, a claim against the head office of a foreign bank may lie against the local branch and vice versa. In other jurisdictions, foreign head offices and their branches may be considered separate; depositors are expected to assume "sovereign risks." However, there is a trend to adopt the single entity regime consistent with emergent best practices in international banking.

In our jurisdiction, a foreign bank that established its local presence is considered to have accepted the conditions of doing business in the Philippines, *i.e.*, to be subject to Philippine banking regulation and to be amenable to suits. As an exception to the principle of *lex loci contractus*, banking contracts, even those transacted abroad in the foreign bank's head office or providing for localized liability, can be imbued with public interest when transaction involved the local branch or a Filipino resident. This is especially true when the foreign bank concerned, for all intents and purposes of the law, is considered to be a "resident bank" for having established a local office. Much as the head offices and branches of domestic banks are considered one and the same entity and should provide the same guarantees in all their branches, foreign banks licensed to do business here cannot expect any less liability and exposure under the "equal treatment" principle unless specifically excepted by law.

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Till the Judge Do Them Part: The Prospect of Absolute Divorce in the Philippines

Cheryl L. Daytec-Yañgot *

ABSTRACT

The Philippines is the only member State of the United Nations without a general divorce law which is attributed to the influence of the Roman Catholic Church for more than 300 years of Spanish colonization. Currently, the Philippine legal regime permits legal separation, annulment, and declaration of nullity of marriage, although divorce by Muslims and indigenous people as well as one validly obtained abroad by a foreigner against a Filipino spouse, is recognized.

Legal separation authorizes the couple's separation from bed and board but leaves the marital cord unsevered. Any new relationship for either party may result in criminal prosecution in a country where marital infidelity is a crime. Annulment and declaration of nullity are concerned with validity and nullity issues. Causes of marital discord that develop after the couple take each other as husband and wife are beyond the province of the latter two remedies.

The Constitution protects marriage as an inviolable social institution. It is argued that this is not an express or implied prohibition of divorce as the dissolution of marital unions where vows of love and fidelity are routinely breached and debased is also necessary to preserve the sanctity of marriage. Divorce is now customary international law which the Philippines must honor, judging from the fact all other UN member States permit it. Divorce is also an aspect of the human rights to marry and to life which the Philippines committed to respect, protect, and fulfill under its treaty obligations. Moreover, despite its strong Roman Catholic background, Philippine culture is receptive to divorce and in fact had a general divorce law for 33 years mostly as a colony of the United States. Religious dogma as basis for Congress' phlegmatic attitude to divorce is misplaced in view of the separation of religion and State and the fact that even Canon Law authorizes annulment of marriage.

Keywords: Annulment, Declaration of Nullity of Marriage, Divorce, Marriage, Psychological incapacity

* 2012–13 Hubert Humphrey Fellow, University of Minnesota Law School, Minneapolis, Minnesota; 2009-2011 Open Society Justice Initiative Fellow; Asst. Secretary General for Research and Founding Member, National Union of Peoples' Lawyers, Philippines. A lecturer, human rights activist, and litigator, Ms. Daytec holds B.A. C., LL.B., M.M. and LL.M. degrees. She thanks Karminn Cheryl Dinney D. Yangot, B.A. Anthropology, University of the Philippines, for the latter's assistance.

INTRODUCTION

> *Formerly, when faith predominated, it was reasonable to believe that marriage was indissoluble because it was the belief that marriage was a divine institution. But now that reason has substituted dogmas, for what motives shall we not make laws for those who need a remedy?*
>
> *-Arturo Tolentino*[1]

Philippine law defines marriage as a contract of permanent union between a man and a woman[2] that vests the parties with rights and imposes on them obligations "to live together, observe mutual love, respect and fidelity, and render mutual help and support."[3] It is constitutionally protected as an inviolable institution and is treated as the cornerstone of the family.[4] The constitutional fiat for the State to protect marriage has been wrongly interpreted to mean that marriage should be like Hotel California — "programmed to receive…but (the spouses) can never leave!"[5]

The Philippines shares stellar billing with the Holy See as the States without a general divorce law, and is the lone United Nations member State holding that record. The Philippine legal regime governing family relations permits legal separation, annulment, and declaration of nullity of marriage. Additionally, divorce by Muslims and members of indigenous communities is recognized. Likewise, a decree of divorce validly obtained abroad by a foreigner against a Filipino spouse reinstates the latter's capacity to marry.

Annulment and declaration of nullity speak to issues of marriage validity. Causes of marital discord that develop after the couple take each other as husband and wife are beyond the province of the two remedies. Even the courts are impotent to address them in cases of dissolution of marriage through actions for declaration of nullity under the Family Code. The Supreme Court expressed its frustration and alarm at cases of marital abuse, child abuse, domestic violence, and incestuous rape[6] which the judiciary could not address within the parameters of the legal environment on marital unions. The only option of aggrieved spouses is legal separation which authorizes physical separation of the spouses but keeps the marital bonds intact. Remarriage or a new relationship on the part of one or both of the spouses gives rise to the possibility of prosecution in a country where breach of one's marital vows is not just a private wrong but also an offense against the

1 Deogracias T. Reyes, *History of Divorce Legislation in the Philippines since 1900*, in 1 (1) PHILIPP STUD 42, 54 (1953), *citing* Arturo Tolentino, *Do We Have an Easy Divorce Law?*, I PHILIPPINE REVIEW 3(1943): *accessed from* http://www.philippinestudies.net/ojs/index.php/ps/article/viewFile/3455/6024.

2 *See* EXECUTIVE ORDER NO. 209 otherwise known as the Family Code of the Philippines (July 6, 1987), art. 1. (Family Code, hereafter).

3 *Id.*, at art. 68.

4 *Id.*, at art. 1.

5 Eagles, *Hotel California* in HOTEL CALIFORNIA (Asylum Records 1977).

6 *Te v. Yu-Te*, G.R. No. 161793, 13 February 2009.

State which exercises police power to ensure that spouses will remain within the bounds of marriage.

Declaration of nullity of marriage under Article 36 of the Family Code is said to be the Philippines' divorce law. Solely anchored on psychological incapacity to recognize marital duties, a nebulous concept borrowed from Canon Law, it involves a procedural thicket not to mention that it poses a financial nightmare for those of moderate means and the poor. Cases rise or fall on the findings of psychological experts who have the herculean task to demonstrate that a spouse had been afflicted of the disorder at the time of or prior to the "I do" ceremony. Needless to state, Philippine jurisprudence is replete with tragic stories of ecstatic characters in fairy tale marriages who metamorphosed into prisoners of violent, discordant, or unhappy unions from which they could not be freed. Very recently in *Kalaw v. Fernandez*,[7] the Supreme Court acknowledged the gaping hole in the legal system when it said that "diagnosed sociopaths, schizophrenics, nymphomaniacs, narcissists and the like," continue to "debase and pervert the sanctity of marriage" because various petitions seeking termination of unions are junked owing to draconian standards that must be satisfied to pass judicial scrutiny.

The inadequacy of remedies for people who want to escape marriages that have irretrievably broken down has intensified the call for divorce. The strongest voices are coming from women's rights advocates who argue that the absence of divorce ultimately operates against women who are most often the victims in abusive marital unions in a society where marriage is still regarded as a patriarchal institution that subordinates wives to husbands, notwithstanding the facially gender-neutral provisions of family laws.

The legal regime affecting the family is very inadequate and has contributed to the perversion of marriage. It is high time to cast aside the traditional concept that only death may put asunder 'what God has joined together' and provide a legal egress for parties trapped in abusive, unhappy, or compelled marriages.

The absence of a divorce law does not preserve the institution of marriage. In effect, the current legal and policy framework desecrates the institution by holding people captives in marital unions where expectations of love, respect, and protection are no longer met or are substituted by routine abuse. Protecting the institution requires the dissolution of marital unions where vows of love and fidelity are cavalierly breached or dishonored because they debauch what the institution stands for.

Politicians are averse to enacting a divorce law for fear of the Roman Catholic clergy on the unfounded belief that a position diametrically challenging religious dogma is the perfect formula for election loss. This fear is written into the laws or is the force behind the legal vacuum on matters of divorce. One politician took his fear to a preposterous

7 G.R. No. 166357, 14 January 2015.

extreme by proposing in Congress an "Anti-Divorce and Unlawful Dissolution of Marriage Act" making it unlawful to pass a divorce law and penalizing through a hefty fine or imprisonment the issuance of decree of legal separation without earnest judicial efforts to reconcile the spouses.[8] Thus, various attempts to amend the Family Code to legalize absolute divorce have been stonewalled. Yet, the fact that more than two-thirds of the Philippine population is Roman Catholic does not translate to opposition to divorce. Judging from the number of petitions swamping family courts seeking the nullification of marriages, Filipinos now realize that preserving the institution of marriage does not have to mean enduring a lifetime of abuse and unhappiness within matrimonial confines. Studies also show that Filipinos are now open to the idea of divorce.

Divorce is now customary international law as gleaned from the fact that all members of the United Nations, save the Philippines, permit it. In a society like the Philippines where marriage remains a patriarchal institution, domestic abuse happens within the confines of marriage. International law strongly condemns domestic violence as a violation of the human right to life and security, among other rights. Divorce as an effective remedy for people especially women who need to escape domestic violence is therefore an international human rights obligation of States including the Philippines.

This paper explores the viability of legally adopting divorce within constitutional and cultural parameters taking into account the collective temperament of present-day Philippine society. Part I discusses the legal remedies provided by the Family Code of the Philippines for spouses who want to leave abusive relationships. Part II delves into the limitations of each of the remedies. Part III discusses divorce as the response to situations that morally justify dissolution of the marriage bond but which are not adequately addressed by the current legal framework. Part IV explores matters that may be taken into consideration by a divorce law.

I. LEGAL REMEDIES OF AGGRIEVED SPOUSES

Under the Family Code, the available legal remedies of married couples who no longer want to be together are legal separation, annulment, and declaration of nullity of marriage. It has to be clear however that Muslims are allowed to have divorce under the Muslim Code of Personal Law. Likewise, indigenous marriages may be dissolved under customary ways.

Divorce obtained abroad may also end the marriage of a Filipino. But the only divorce decree involving a Filipino citizen that the Philippines recognizes under Article 26 of the Family Code is one validly initiated by his or her foreign spouse. In *Republic v. Orbecido*,[9] the Supreme Court recognized that Article 26 intended "to avoid the absurd situation where

8 Christine Esguerra, *Divorce battle starts in House; 2 bills filed*, PHILIPPINE DAILY INQUIRER, 5 January 2013, *accessed from* http://newsinfo.inquirer.net/tag/luzviminda-ilagan.

9 472 SCRA 114 (2005).

the Filipino spouse remains married to the alien spouse who, after obtaining a divorce, is no longer married to the Filipino spouse under the laws of his or her country."

Even if validly obtained abroad, divorce obtained by a Filipino citizen cannot be recognized in this jurisdiction. The Philippines adheres to the nationality principle in regard to the Filipino's civil status, as evident from Article 16 of the Civil Code which provides that "laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."

Legal Separation

Legal separation is a decree issued by the court permitting the husband and the wife to live separately from each other. It does not involve the dissolution of marital bonds. Aside from its other consequences, it separates the spouses from bed and board.

The grounds for legal separation are enumerated by Article 55 of the Family Code as follows: (1) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner; (2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation; (3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement; (4) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned; (5) Drug addiction or habitual alcoholism of the respondent; (6) Lesbianism or homosexuality of the respondent; (7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad; (8) Sexual infidelity or perversion; (9) Attempt by the respondent against the life of the petitioner; or (10) Abandonment of petitioner by respondent without justifiable cause for more than one year.

The grounds for legal separation are, without doubt, anomalies that rock the stability of any union and beg for the dissolution of the marriage bonds as a moral imperative. In other countries, they are grounds for divorce. Unfortunately, the province of legal separation -- also called relative divorce or divorce *a mensa et thoro*[10] -- is to authorize the spouses to separate from bed and board but keeps them married to each other, aside from resolving property, child custody, and child and spousal support questions.

Since it fails to dissolve the bonds of matrimony, legal separation does not reinstate the parties' capacity to remarry. Remarriage is bigamy which is criminally punishable. Legal separation clearly commits the parties to a lifetime of unhappy marriage or marriage only on paper, unless another remedy is legally viable. This is disrespect for the institution of marriage which should be founded on mutual love, understanding, and respect if its purpose is the establishment of conjugal and family life.[11]

10 Literally, divorce from bed-and-board. *See* Chereau v. Fuentebella, G.R. No. 17866 (20 March 1922).

11 Family Code, *supra* n. 2, at art. 1.

Legal separation also has a gendered consequence. A new non-marital relationship for any of the parties exposes him or her to the peril of criminal prosecution for adultery or concubinage. Under the Revised Penal Code, adultery[12] is committed by a married woman and her paramour aware of her marital status when they engage in carnal relation, whether discreetly or not. Every single sex act constitutes adultery. Mere proof of sexual intercourse is sufficient for conviction. The penalty ranges from 2 years, 4 months and 1 day to 6 years of imprisonment. On the other hand, concubinage[13] is committed by a husband and his paramour aware of his marital status when they engage in carnal relations under scandalous circumstance, or when they cohabit within the conjugal dwelling or any other place. Obviously, mere proof of promiscuous sex does not warrant a conviction. The penalty for concubinage ranges from 6 months and 1 day to a maximum of 4 years and 1 day of imprisonment for the husband and destierro for his paramour.

This means that a woman is virtually neutered by legal separation while a man, as long as he is discreet, is not.

Annulment

Annulment, like declaration of nullity, is concerned with issues of validity of the marriage. The Supreme Court declared that annulment of marriage is "in the nature of a court proceeding with the end view of severing the marital bond between husband and wife."[14] It applies to voidable marriages, or those which are valid until annulled on grounds specified in Article 45 of the Family Code.

Marriage is voidable if there is a defect in any of the essential requisites of marriage. The essential requisites of marriage in the Philippines are provided under Article 2 of the Family Code: legal capacity of the contracting parties who must be male and female, both single, and are at least 18 years old, and their consent freely given and not vitiated by any vice. Thus, the grounds for annulment in Article 45 of the Family Code are as follows:

> a) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardians or person having substitute authority over the party, in that order, unless attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;

12 *See* Revised Penal Code, art. 333.

13 *Id.*, art. 334.

14 Niñal v. Bayadog, G.R. No. 133778 (2000).

b) That either party is of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;

c) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts, constituting fraud, freely cohabited with the other as husband and wife;

d) That the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;

e) That either party was physically incapable of consuming the marriage with the other, and such incapacity continues and appears to be incurable; or

f) That either party was afflicted with a sexually transmissible disease found to be serious and incurable.

Courts including the Supreme Court often erroneously interchange annulment with declaration of nullity. The two remedies are distinct not only in terms of grounds but also in terms of consequences.

Declaration of Nullity

Declaration of nullity is the remedy for marriages that are void ab initio or from the very beginning. Void marriages are those that lack essential and formal requisites, which are enumerated in Article 35 of the Family Code,[15] incestuous marriages listed in Article 37,[16] those that militate against public policy enumerated in Article 38,[17] marriages subsequent to annulment or declaration of nullity that do not comply with certain requisites

15 Art. 35. The following marriages shall be void from the beginning: 1. Those contracted by any party below eighteen years of age even with the consent of parents or guardians; 2. Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so; 3. Those solemnized without license ,except those covered by the preceding Chapter; 4. Those bigamous or polygamous marriages not falling under art. 41; 5. Those contracted through mistake of one contracting party as to the identity of the other; and 6. Those subsequent marriages that are void under art. 53.

16 Art. 37. Marriages between the following are incestuous and void from the beginning, whether the relationship between the parties be legitimate or illegitimate: 1. Between ascendants and descendants of any degree; and 2. Between brothers and sisters, whether of the full or half blood. (81a)

17 Art. 38. The following marriages shall be void from the beginning for reasons for public policy: 1. Between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree; 2. Between step-parents and step-children; 3. Between parent-in-law and children-in-law; 4. Between the adopting parent and the adopted child; 5. Between the surviving spouse of the adopting parent and the adopted child; 6. Between the surviving spouse of the adopted child and the adopter; 7. Between the adopted child and a legitimate child of the adopter; 8. Between adopted children of the same adopter; and 9. Between parties where one, with the intention to marry the other, killed that other person's spouse, or his or her own spouse. (82a)"

under Article 53,[18] and those where one or both parties suffer from psychological incapacity to perform essential marital obligations under Article 36.[19]

Void marriages produce no legal effect. Children born out of void marriages are illegitimate as a rule. But children born of void marriages under Article 36 are legitimate.[20] Article 36 mothers a legal absurdity alien to general principles of law as a void act produces no legal effect. But this is not the worst that could be said about the provision.

The subsequent discussion revolves around the application of Article 36 which provides: "A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage *(sic)*, shall likewise be void even if such incapacity becomes manifest only after its solemnization."

II. LEGAL AND POLICY GAPS IN EXISTING REMEDIES

The existing remedies outlined above suffer from holes or what positivists call 'open textures.' As stressed, legal separation preserves marital ties but authorizes the spouses' physical separation. While annulment and declaration of nullity dissolve the marriage, they address only issues of validity or nullity and are unconcerned with causes arising during the union which nonetheless morally justify or underpin the termination of a marriage which has drifted far away from its institutional role as the fount of love, protection, and respect.

The remedy most commonly resorted to is declaration of nullity under Article 36 of the Family Code due to psychological incapacity of one or both of the spouses to perform essential marital duties. Because of the absence of divorce, couples who cannot file actions for annulment because no ground for it exists, the prescriptive period lapsed, or the marriage was ratified, resort to Article 36 if they want their legal union dissolved. This came to be commonly, although inaccurately, called the divorce law of the Philippines.[21] But while divorce does not deny the validity of the marriage prior to it, Article 36 says that the marriage was void *ab initio* which the court must declare.

Article 36 is plagued by a host of other challenges.

18 Art. 52. The judgment of annulment or of absolute nullity of the marriage, the partition and distribution of the properties of the spouses, and the delivery of the children's presumptive legitimes shall be recorded in the appropriate civil registry and registries of property; otherwise, the same shall not affect third person.

Art. 53. Either of the former spouses may marry again after compliance with the requirements of the immediately preceding art.; otherwise, the subsequent marriages shall be null and *void*."

19 Art. 36. A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization

20 As are children born of marriages void under Article 53.

21 Note, however, that divorce is not a validity issue while declaration of nullity is.

The ground is undefined.

The only ground for declaration of nullity under Article 36 is psychological incapacity. One challenge, intended to be an advantage, is that the law does not define psychological incapacity nor does it give examples. Its drafters surmised that an open-ended provision without a definition or illustration of psychological incapacity would not confine the applicability of the provision under the principle of ejusdem generis.[22] Moreover, they envisioned courts interpreting the law on a case-to-case basis, relying upon human experience, expert testimonies on psychological issues, and decisions of church tribunals considering that Article 36 was borrowed from Canon Law.[23] The law was designed to be flexible to allow some resiliency in its application[24] and was not intended to create a prototype after which every case should be patterned and judged.

In 1994, the Supreme Court said in *Santos v. CA*[25] that

> *(p)sychological incapacity refers to no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage which, as so expressed by Article 68 of the Family Code, include their mutual obligations to live together, observe love, respect and fidelity and render help and support."*

Yet, contrary to being resilient in application, psychological incapacity, according to *Santos*, is confined "to the most serious of cases of personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage" which must be characterized by gravity;[26] b) juridical antecedence;[27] and c) medical

22 Salita v. Magtolis, G.R. No. 106429, 233 SCRA 100 (1994), *quoting* ALICIA SEMPIO-DY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 37 (1998).

23 *Id.*

24 *Id.*

25 Santos v. Court of Appeals, 310 Phil. 21 (1995).

26 *See* Republic v Molina, G.R. No. 108763, 13 February 1997. ("Such illness must be *grave* enough to bring about the disability of the party to assume the essential obligations of marriage. Thus, "mild characteriological peculiarities, mood changes, occasional emotional outbursts" cannot be accepted as *root* causes. The illness must be shown as downright incapacity or inability, nor a refusal, neglect or difficulty, much less ill will. In other words, there is a natal or supervening disabling factor in the person, an adverse integral element in the personality structure that effectively incapacitates the person from really accepting and thereby complying with the obligations essential to marriage.)

27 *Id.* ("The incapacity must be proven to be existing at "the time of the celebration" of the marriage. The evidence must show that the illness was existing when the parties exchanged their "I do's." The manifestation of the illness need not be perceivable at such time, but the illness itself must have attached at such moment, or prior thereto.")

incurability.[28]

In the wake of the passage of the Family Code, spates of petitions for declaration of nullity under Article 36 were filed in courts.[29] Unfortunately, many judges and lawyers faced difficulties in applying said novel provision in specific cases[30] as *Santos* seemed to have made the concept of psychological incapacity more nebulous. It created legal gaps. Any legal gap is a mendicant for fillers, a tempting invitation for judicial activism which may amount to legislation spawning separation of powers issues. In fact, because of the legal vacuum in Article 36 and of the difficulties of lawyers and judges in comprehending the concept, the Supreme Court in 1997 laid down in *Republic v Molina*[31] rigid guidelines to be observed by courts when handling Article 36 cases.

> (1) The burden of proof to show the nullity of the marriage belongs to the plaintiff. Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity.
> (2) The root cause of the psychological incapacity must be (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts and (d) clearly explained in the decision.
> (3) The incapacity must be proven to be existing at "the time of the celebration" of the marriage.
> (4) Such incapacity must also be shown to be medically or clinically permanent or *incurable*.
> (5) Such illness must be *grave* enough to bring about the disability of the party to assume the essential obligations of marriage.
> (6) The essential marital obligations must be those embraced by Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children.
> (7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts.
> (8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the state. No decision shall he handed down unless the Solicitor General issues a certification, which will be quoted in the decision, briefly staring therein his rea-

28 *Id.* ("Such incapacity must also be shown to be medically or clinically permanent or *incurable*. Such incurability may be absolute or even relative only in regard to the other spouse, not necessarily absolutely against everyone of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not necessarily to those not related to marriage, like the exercise of a profession or employment in a job. Hence, a pediatrician may be effective in diagnosing illnesses of children and prescribing medicine to cure them but may not be psychologically capacitated to procreate, bear and raise his/her own children as an essential obligation of marriage.")

29 *Id.*

30 *Id.*

31 *Id.*

> sons for his agreement or opposition, as the case may be, to the petition.

The Molina guidelines were widely criticized as judicial usurpation of legislative powers and as a knee-jerk reaction to the State's fear of the denigration of marriage in the aftermath of various petitions to declare marriages void due to psychological incapacity.[32] Previously, the Solicitor-General called Article 36 the "most liberal divorce procedure in the world which is anathema to our culture."[33] The State used culture – not necessarily correctly – as an argument against the nullification of marital unions under the Family Code which it itself enacted. The Supreme Court, in response to the alarm bells rung by the State, responded by issuing the rigorous Molina guidelines.

Thus, instead of providing a way out of unhappiness for individuals in society, Article 36 became an instrument to trap them in unhappy marriages all in the name of preserving the institution of marriage.

The remedy is procedurally and substantively stringent.

Article 36 entails a convoluted procedural nightmare. A successful Article 36 remedy requires the petitioner to prove that psychological incapacity characterized by gravity, juridical antecedence, and medical incurability exists. It is difficult to demonstrate this without a psychological report, which necessitates the hiring of experts. In *Molina*, the Court said that "(t)he root cause of the psychological incapacity must be (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts and (d) clearly explained in the decision."[34]

What stymies Article 36 petitions is the requirement that the psychological incapacity must be characterized by juridical antecedence, that is, the incapacity was present at inception although it became manifest after marriage. Various petitions have been junked because of the operose hurdle in showing juridical antecedence even if the marital unions sought to be declared void had disintegrated beyond remedy. A classic example is *Suazo v. Suazo*:[35]

> *Jocelyn merely testified on Angelito's habitual drunkenness, gambling, refusal to seek employment and the physical beatings she received from him all of which occurred after the marriage. Significantly, she declared in her testimony that Angelito showed no signs of violent behavior, assuming this to be indicative of a personality disorder, during the courtship stage or at the earliest stages of her relationship with him. She testified on the*

32 *Id.*. (The Family Code of the Philippines provides an entirely new ground (in addition to those enumerated in the Civil Code) to assail the validity of a marriage, namely, "psychological incapacity." Since the Code's effectivity, our courts have been swamped with various petitions to declare marriages void based on this ground.)

33 *Id.*

34 *Id.*

35 G.R. No. 164493 (2010).

> *alleged physical beatings after the marriage, not before or at the time of the celebration of the marriage. She did not clarify when these beatings exactly took place whether it was near or at the time of celebration of the marriage or months or years after. This is a clear evidentiary gap that materially affects her cause, as the law and its related jurisprudence require that the psychological incapacity must exist at the time of the celebration of the marriage.*

Enter the experts in psychological behavior upon whom the success or failure of an Article 36 petition will heavily depend. The Supreme Court seminally pronounced in *Marcos v. Marcos*[36] that the person to be declared psychologically incapacitated need not be examined if the totality of evidence is sufficient to warrant a finding of psychological incapacity with its attending characteristics of gravity, juridical antecedence, and incurability. Although this pronouncement in *Marcos* has been reiterated in subsequent cases, the reality is it takes an expert to establish its existence and the fact that it has those characteristics that will pass judicial muster. In *Perez-Ferraris v. Ferraris*,[37] the Supreme Court admitted that it depends heavily on psychological experts to comprehend the complex human personality. In *Hernandez v. Court of Appeals*,[38] the Court highlighted the importance if not indispensability of presenting expert testimony to show the nature of one's alleged psychological incapacity, and to establish juridical antecedence, *i.e.*, it existed at the inception of the marriage. It made clear that "the presentation of expert proof presupposes a thorough and in-depth assessment of the parties by the psychologist or expert, for a conclusive diagnosis of a grave, severe and incurable presence of psychological incapacity."

There has been no petition granted by the Supreme Court where the examination of the person alleged to be afflicted with psychological disorder was dispensed with. And various petitions where expert testimony strongly recommended marital dissolution were cast aside for not making the grade in trying to prove a grave, incurable, and juridically pre-existing psychological disorder. While admitting that they need expert testimony to understand human psychological wirings, the courts have become more expert than the experts. This further convolutes the procedural travails of people desperate for a trajectory out of oppressive or unhappy marriages.

Even the Supreme Court observed that *Molina* which served as a rhetorical hump in Article 36 petitions hampered the resiliency with which the concept of psychological incapacity was intended to be applied.[39] *Molina* became a one-size-fits-all yardstick in the determination of psychological incapacity, with many petitions falling short. The result has been the perpetuation of marital unions that are a travesty to the sanctity of marriage. In *Te v. Yu-Te*[40] and *Kalaw v. Fernandez*,[41] it said:

36 G.R. No. 136490 (2000).

37 G.R. No. 162368 (2006).

38 320 SCRA 76 (1999).

39 *Te*, G.R. No. 161793.

40 *Id.*

41 *Kalaw*, G.R. No. 166357.

> *The unintended consequences of Molina, however, has taken its toll on people who have to live with deviant behavior, moral insanity and sociopathic personality anomaly, which, like termites, consume little by little the very foundation of their families, our basic social institutions. Far from what was intended by the Court, Molina has become a strait-jacket, forcing all sizes to fit into and be bound by it. Wittingly or unwittingly, the Court, in conveniently applying Molina, has allowed diagnosed sociopaths, schizophrenics, nymphomaniacs, narcissists and the like, to continuously debase and pervert the sanctity of marriage.*[42]

Yet, in both *Te* and *Kalaw*, the Supreme Court declared that it was not abandoning the guidelines in *Molina*, but cautioned courts to look at other perspectives in dealing with Article 36 cases. This means litigation under Article 36 will remain hounded by a costly and strenuous remedy to dissolve unions that have no moral excuse to continue existing.

The remedy is expensive and therefore, anti-poor and anti-women.

Aside from being rigid, the remedy is not friendly to poverty and to the party holding the short end of the financial stick: the wife. Not only is the Article 36 remedy inadequate and procedurally convoluted; it is also economically disempowering.

The Article 36 remedy can be protracted. Some cases that reached the Supreme Court took more than ten years to resolve. The remedy pins its success on the report of psychiatrists or psychologists who seemingly have agreed on a high price tag for their services. This has made the process very costly as the litigant has to pay hefty psychological experts' fees on top of legal fees. The legal fees involved in obtaining a decree of nullity of marriage is P200,000 at the minimum,[43] which a minimum wage-earner cannot afford. Regardless of whether it is the man or the woman or both who want out of the marriage, the current law provides for no affordable solution to sever ties in a marriage characterized by regular discord. Due to such limitations, the unhappy couple may remain married for a longer time or till death do them part trapping them to endure cycles of abuse and ineffable loneliness.

Thus, only the moneyed are able to avail of the remedy. It is certainly unfair for people to be forced by the State to remain in loveless or abusive marriages simply because they are poor.

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42 See also *Te*, G.R. No. 161793.

43 Associated Press, *Divorce Ban Shows Catholic Church Power in Philippines*, NEW YORK TIMES, January 16, 2015, accessed from http://www.nytimes.com/aponline/2015/01/16/world/asia/ap-as-pope-asia-philippines-divorce.html?_r=0; Sunshine Lichauco de Leon, *The fight to make divorce legal in the Philippines, CNN-Philippines*, October 6, 2014, accessed from http://edition.cnn.com/2014/10/06/world/asia/philippines-legal-divorce-battle/ (quoting Prof. Solita Monsod: "It is because of a very powerful and conservative church hierarchy, and the dominance of very conservative segments of the catholic laity."); Ana Santos, *Ending a Marriage in the Only Country That Bans Divorce*, THE ATLANTIC, 25 June 2015; *accessed from* http://www.theatlantic.com/international/archive/2015/06/divorce-philippines-annulment/396449/.

The cost of litigation under Article 36 also has gendered implications. Regardless of the gender-neutral language of the Family Code in describing the obligations of the spouses, marriage is still a patriarchal institution that subordinates the wife to the husband. The marital obligations although specified in the Family Code are essentially constructed by culture. Aside from being a contract sanctified by the State, marriage is also a contract that is socially-constructed depending on the cultural environment. How men and women feel about themselves and about one another is configured by the system of gender power relations in society and how culture and law perpetuate this system. Filipino society typifies the wife as the "*ilaw ng tahanan* (light of the home)" and the husband as the "*haligi ng tahanan* (cornerstone of the home)." These stereotypes imply that the wife is expected to be the economically-dependent homemaker and the husband is to be the wage-earner. The good Filipina wife takes care of the family, serves her husband, and does domestic chores well. The good Filipino husband provides for the needs of the family by way of financial support.

Not only do gender stereotypes perpetuate economic dependency of women on men, but they also relegate women to positions where they have little or no bargaining power in the household as, for instance, when wives are deprived of the opportunity to increase their human capital which may entitle them to higher wages, and eventually in the legal system when they want to seek remedies to leave abusive relationships. Because of this dependency which may be exacerbated by learned helplessness and pressures from social expectations, these women stay married to their husbands. In a typical Filipino household where the wife is financially at the mercy of her abusive partner, her travails have a slim chance of being addressed due to the outlays required by the available legal remedies.

A look at cases for declaration of nullity shows wives casting husbands as psychologically incapacitated because they would not earn bread for the family.[44] Wives are accused of being incognizant of marital obligations because they preferred to be somewhere else than home where they should be taking care of husbands and children[45] and they get blamed for their children not doing academically well.[46] A man is expected to be a gentlemen who can be relied upon to find employment while a woman should be "conservative and homely."[47] Essentially, not living up to gendered expectations was hammered upon as a badge of psychological incapacity to perform essential marital obligations.

Thus, despite the language of the Family Code, wives are still expected to take the lead if not sole role in caregiving to children and maintaining the household. They are the ones who are most likely to give up their careers to care for the family. Because of this, wives are therefore more likely to have no or less financial powers compared to their husbands. Even in marriage, and especially in marriage, poverty is feminized. This economic challenge perpetuates women's powerlessness and serves as a deterrent to their escape from unhappy marriages including those where domestic violence is a cycle.

44 *See* Azcueta v. Republic, G.R. No. 180668 (2009).

45 *Kalaw*, G.R. No. 166357.

46 *Id.*

47 *Molina*, G.R. No. 108763.

The remedy does not address common causes of marital breakdown.

The everyday issues that foment the breakdown of a marriage such as marital infidelity,[48] violence or abuse,[49] or the catch-all irreconcilable differences,[50] all of which debase the foundation of the smallest institution of society, are not addressed by the current legal and policy environment on marriage and marital dissolution. Annulment and Article 36 remedies are based on grounds that occurred at or before the inception of the celebration of marriage but not on grounds that occurred during the marriage. They are concerned with issues of nullity and validity which existed during the celebration of the marriage or prior to it.

Hence, in *Marcos*, the Supreme Court emphasized that Article 36 is not to be mistaken for divorce that severs marital ties 'at the time the causes therefor manifest themselves' as it is concerned with a cause, a grave psychological malady 'afflicting a party even before the celebration of the marriage.'[51] It is not the proper remedy when a marriage irretrievably breaks down after the wedding for unforeseen or unforeseeable causes such as inveterate alcoholism, chronic drug dependency, abandonment, or imprisonment for a crime. An unhappy or unsatisfactory marriage cannot be ended by a decree of nullity because it is not null and void.[52] Neither is one where a spouse breached marital vows through sexual infidelity.[53] Said the *Kalaw* Court, "Sexual infidelity *per se* is a ground for legal separation, but it does not necessarily constitute psychological incapacity."[54] In *Republic v. Hamano*,[55] the Supreme Court said that a husband who left for his native Japan supposedly for a holiday, never returned, and stopped supporting his family was definitely irresponsible. However since the abandonment was not shown to be due to psychological disorder, the Court did not dissolve the marital union. The Court said, "There was no proof of a natal or supervening disabling factor in the person, an adverse integral element in the personality structure that effectively incapacitates a person from accepting and complying with the obligations essential to marriage." Similarly, it found no reason to dissolve a marriage where the wife abandoned and did not communicate with her husband and child for more than five years even as it stated that the husband "undeniably and understandably (…) stands aggrieved, even desperate, in his present situation."[56] In another case, the Court pronounced that irreconcilable differences, incompatibility, and conflicting personalities do not amount to psychological incapacity that could anchor a

48 *Suazo*, G.R. No. 164493.

49 *Id.*; *Marcos*, G.R. No. 136490.

50 *Molina*, G.R. No. 108763; Choa v. Choa, G.R. No. 143376 (2002).

51 *Marcos*, G.R. No. 136490.

52 Baccay v. Baccay, G.R. No. 173138(2010); Pesca v. Pesca, 356 SCRA 588.

53 Siayngco v. Siayngco, G.R. No 158896 (2004).

54 *Kalaw*, G.R. No. 166357.

55 G.R. No. 149498 (2004).

56 *Santos*, 310 Phil.

decree of nullity[57] despite the impossibility of cohabitation.

Even a combination of causes of marital asthenia do not necessarily warrant a declaration of nullity. In *Hernandez v. CA*,[58] the marriage was marred by alcoholism and inveterate sexual infidelity of, and physical violence and abandonment by the husband. In *Marcos*, the husband neglected to provide economic support to his family, was violent, and eventually deserted the marriage. In *Republic v. Dagdag*,[59] the husband was held to be emotionally immature and irresponsible, a habitual alcoholic, and a fugitive from justice. In *Siayngco v. Siayngco*,[60] the husband's marital infidelity was compounded by the spouses' loss of love for each other. In *Suazo*, the husband's habitual drunkenness, gambling, and refusal to seek employment concurred with his infliction of physical violence on his wife.[61] In *Republic v. Tanyag-San Jose*,[62] the Supreme Court was presented with a jobless husband who was also hooked to gambling and drugs.

In all these cases which are but a few of several, the Supreme Court did not find psychological incapacity as it stressed the oft-repeated dictum that the failure to perform marital obligations must have nexus to a natal or supervening psychological illness that renders the spouse incognizant of essential marital duties. Difficulty, refusal, and neglect to comply with essential marital obligations do not pass judicial scrutiny for a decree of nullity because these are not an illness.[63] Pointing out the distinction, the Supreme Court articulated in *Navales v. Navales*:[64]

> *Mere difficulty, refusal or neglect in the performance of marital obligations or ill will on the part of the spouse is different from incapacity rooted in some debilitating psychological condition or illness; irreconcilable differences, sexual infidelity or perversion, emotional immaturity and irresponsibility and the like, do not by themselves warrant a finding of psychological incapacity under Article 36, as the same may only be due to a person's refusal or unwillingness to assume the essential obligations of marriage.*

Along these lines, medically proven psychological incapacity, even of a grave nature, cannot underpin an Article 36 action if not characterized by juridical antecedence. The Court refused to dissolve many marriages where the couples have clearly drifted apart because the causes had not been linked to its satisfaction to psychological incapacity existing before the marriage.

Gender-based violence is likewise inadequately responded to. Section 12 of Republic

57 *Molina*, G.R. No. 108763.

58 Hernandez v. CA, G.R. No. 126010 (1999).

59 Republic v. Dagdag, 351 SCRA 425; *Pesca*, 356 SCRA.

60 G.R. No 158896, (2004).

61 *Suazo*, G.R. No. 164493.

62 G.R. No. 168328 (2007).

63 Marable v. Marable, G.R. No. 178741 (2011).

64 G.R. No. 167523 (2008).

Act No. 9710 or the Magna Carta for Women defines violence against women (VAW) as "any act of gender-based violence that results in, or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life." Examples of such concerns were raised by the Supreme Court in *Te*: marital abuse, child abuse, domestic violence, and incestuous rape. Women have no way out of marriages characterized by gender-based violence if it does not qualify as a manifestation of that form of psychological incapacity which anchors an action for declaration of nullity under Article 36. This is what the Court said in one case:

> *While we may concede that physical violence on women indicates abnormal behavioral or personality patterns, such violence, standing alone, does not constitute psychological incapacity. Jurisprudence holds that there must be evidence showing a link, medical or the like, between the acts that manifest psychological incapacity and the psychological disorder itself.*[65]

As a social contract, marriage is a negotiation of roles that pervade axes of class, age, and ethnicity between the husband and wife. Whatever the role expectations are in a marriage, it is nevertheless regarded as the provenance of love and protection to the parties to it and the offsprings they may produce. But a conflict in the execution of social roles may result in the disintegration of the union. Thus, marriage laws should not only concern themselves with the legal nature of marriage as a contract, but also with its social dimension. After all, most marital problems, if not all, result from social and/or economic pressures. The only legal remedy of abused wives is legal separation[66] which does not end the marriage. And then, mere threats of violence do not justify an action for legal separation. Nor does violence *per se*, unless it is repeated or is a form of gross abuse.[67] This lamentably shows how unsympathetic to gender issues the legal regime on marital dissolution is.

The remedy encourages unethical and illegitimate legal strategies.

The stringent requirements for a successful petition under Article 36 and the fact that various problems that morally justify marital dissolution are not grounds for it have encouraged members of the legal profession to be crafty to the point of violating their professional oath. Standing on their own, the grounds for legal separation used as bedrocks of Article 36 petitions cannot be sustained unless they are demonstrated as manifestations of pre-existing psychological incapacity. In *Hernandez*, the Court, confronted with a case where the husband committed repeated physical violence or grossly abusive conduct directed against his wife, habitual alocoholism, chronic sexual infidelity, and abandonment, said:

> *If indeed Article 36 of the Family Code of the Philippines, which mentions psycho-*

65 *Suazo*, G.R. No. 164493.

66 Family Code, *supra* n. 2, at art. 55.

67 *Id.*

> *logical incapacity as a ground for the declaration of the nullity of a marriage, has intended to include the above-stated circumstances as constitutive of such incapacity, then the same would not have been enumerated as grounds for legal separation.*[68]

So lawyers work with psychologists and psychiatrists to create the successful case, one where a person's actions that destabilize the marriage are indicative of a psychological disorder. They paint scenarios and may even be quite creative in coming up with credible tall tales just to show that the supposed psychological disorder has afflicted the sufferer rendering him or her incognizant of marital obligations. They 'photoshop' images of the parties to assert innocence for their clients and employ vitriolic rhetoric to attribute guilt to the adverse parties as the innocence-guilt dichotomy has implications on property rights[69] and custody issues.[70] Banking on their presumed credibility as expert witnesses, psychiatrists and psychologists testify on the gravity and incurability of the disorder which preceded the marriage even though it became manifest after. Such expert testimonies, which appear formulaic to the keen observer, carry great weight during the trial to courts not conversant in the parlance of psychology. Suddenly, an otherwise Mr. Nice Guy is suffering from narcissism and an otherwise Ms. Right is suffering from dependent personality disorder. The two personalities are incompatible spawning irreconcilable differences but lawyers and psychologists will speak euphemisms because *irreconcilable differences* just will not make the judicial cut. There seems to be a template lawyers, psychiatrists, and psychologists came up with and which have been adopted for successful Article 36 petitions.

In some cases, the legal proceedings are the result of extra-judicial negotiations between the spouses. Although collusion is strictly prohibited by the Family Code,[71] it is resorted to by the parties to come up with a scenario that will pass rigorous judicial scrutiny. The legal regime leaves them no choice if they must bury their sham marriage without the emotional baggage associated with rancorous proceedings.

Threats of criminal prosecution are also raised to break the camel's back. Gabriela Women's Party-List's records reveal that criminal complaints for adultery and concubinage are filed in practice and exploited as leverage to make the other spouse cooperate in the action to dissolve the marriage.[72] These complaints are not brought to their logical conclusion since they were only intended as "bargaining suits" and would later on be recanted although pursued during the germinal stages.[73] Tactics like this which trivialize judicial processes contribute to the clogging of court dockets. They are also a form of blackmail which is downright unprincipled.

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68 Hernandez v.CA, *supra* n. 58.

69 Family Code, *supra* n. 2, at arts. 102, 129, and 147.

70 *Id.*, arts. 49 and 213.

71 *Id.*, art. 48.

72 Dionisio P. Tubianosa, *Repeal discriminatory provisions on extra marital affairs in the Revised Penal Code*, House of Representatives, Congress of the Philippines, 27 May 2014, accessed from: http://congress.gov.ph/press/details.php?pressid=7894.

73 *Id.*

In cases where no collusion exists, the parties who may have once declared to the world that they were best friends become the worst enemies. They antagonistically compete with each other for the coveted title of innocent victim and heap blame on the other who must be successfully demonized as the guilty party not only to get a favorable judgment for the nullification of the marriage, but also to have custody of the children and be able to keep the family home.[74] Thus, the court needs to be convinced that the erstwhile best friend was a monster in disguise. The monster's psychological incapacity is constructed through the attribution of a long list of faults amounting to transgression of marital vows. Sadly, an acrimonious parting effected through the court may have lasting effect on the 'uncoupled's' children and even on the way they will relate with each other in the future.

III. DIVORCE AS THE RESPONSE TO LEGAL REMEDIAL GAPS AND CHALLENGES

In the 1939 case of *Sikat v. Canson*,[75] the Supreme Court of the Philippines, presented with the novel question of whether it should recognize a decree of divorce issued by a foreign court, pronounced:

> *The courts in the Philippines can grant a divorce only on the ground of "adultery on the part of the wife or concubinage on the part of the husband" as provided for under section 1 of Act No. 2710. The divorce decree in question was granted on the ground of desertion, clearly not a cause for divorce under our laws.* ***That our divorce law, Act No. 2710, is too strict or too liberal is not for this court to decide****. xxx The allotment of powers between the different governmental agencies restricts the judiciary within the confines of interpretation, not of legislation.*

Undoubtedly, the current legal regime is far from being adequate and effective in addressing various issues that confront marriages. Whatever it lacks in terms of substance and form, a divorce legislation will supply. Now as in 1939, the ball is in the court of the Congress of the Philippines. But Congress has yet to rise to the challenge expressed by the judicial voice years ago.

From 1999 to the present, there have been attempts to introduce divorce in our statute books. In 1999, Rep. Manuel Ortega filed House Bill No. 6993. In 2001, Sen. Rodolfo G. Biazon filed SB No. 782 while Rep. Bellaflor J. Angara-Castillo filed SB No. 878 calling for the legalization of divorce. In 2005, Gabriela party-list representative Liza Maza attempted another divorce bill which was killed. In 2011, Gabriela party-list representatives refiled the bill as H.B. 1799 or "An act introducing divorce in the Philippines, amending for the purpose of Articles 26, 55 to 66 and repealing Article 36 under Title II of Executive Order No. 209, as amended, otherwise known as the Family Code of the Philippines, and for other purposes."

74 Family Code, *supra* n.2, at arts. 69, 70.

75 G.R. No. L-45152 (1939).

The Case for Philippine Divorce

The enactment of a divorce law by the Philippines is both a moral and legal imperative. It is its obligation under customary international law and the Constitution which behooves it to preserve the sanctity of marriage. It is also a response to the prevailing realities in marriages as well as consistent with the current view of contemporary Philippine society desperate for legal solutions to marital disturbances where dissolution is more propitious than preservation.

The Philippines is the only UN member without a general divorce law indicative of refusal to respect customary international law.

Under the incorporation doctrine enshrined in Sec. 3, Article II of the 1987 Constitution, generally accepted principles of international law are part of the Philippine domestic legal system. The Supreme Court, in *Mijares v. Ranada*,[76] explicated how the Philippines is bound to observe generally accepted principles of international law thus:

> *[G]enerally accepted principles of international law, by virtue of the incorporation clause of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations. The* ***classical formulation in international law sees those customary rules accepted as binding resulting from the combination [of] two elements****: the established, widespread, and consistent* ***practice on the part of States****; and a* ***psychological element known as the opinion juris sive necessitates*** *(opinion as to law or necessity). Implicit in the latter element is a* ***belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it****.*

For purposes of determining the presence of customary international law, national legislations are reliable indicators of state practice as the objective element of customary law formation.[77] Such state practice must be general which requires that all or almost all of the affected nations engage in it.[78] To be sure, divorce is allowed in the municipal legal systems of all member States of the United Nations, save the Philippines.[79] It is therefore indubitable that the first element of widespread practice of States is satisfied for the determination of whether divorce has attained the status of customary international law.

Opinio juris as the subjective element of international custom is gleaned from whether

76 G.R. No. 139325, 455 SCRA 397 (2005).

77 H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 80-94 (1972).

78 Jonathan Charney, Universal International Law, 87 AM. J. INT'L L. 529, 537 (1993).

79 The Holy See, the other State without divorce, is a non-member state of the UN but gained full rights of membership except voting rights, submission of resolution proposals without co-sponsoring, and nominating candidates in July 2004. *See*, United Nations General Assembly Session 58 *Resolution 314*. A/RES/58/314.

or not States behave the way they do because of the belief that their action is necessitated by duty and is beneficial to their constituents and humanity in general. In determining the presence of *opinio juris*, the second element indispensable to customary law formation, the existence of widespread behavioral pattern counts.[80] Such indicates that States are acting out of a sense of obligation. Ratification of treaties or adoption of General Assembly Resolutions incorporating norms bearing semblance to the rule held out as customary international law can also serve as evidence of *opinio juris*.[81] Divorce and the right to marry are related norms as will be explained subsequently.

International law explicitly entrenches the right to marry. The Universal Declaration of Human Rights (UDHR) provides: *"Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family (and)(t)hey are entitled to equal rights as to marriage, during marriage and at its dissolution."*[82] This is echoed by the International Covenant on Civil and Political Rights (ICCPR) which recognizes the "right of men and women of marriageable age to marry and to found a family."[83] The Covenant on the Elimination of all Forms of Discrimination Against Women (CEDAW) likewise has a provision recognizing the right to marry.[84] As the Human Rights Committee, the body that monitors States' compliance with the ICCPR, declared, remarriage is an "aspect of the right to marry."[85] Without a divorce law, people detained in marriages that no longer give them happiness and fulfillment cannot exercise this aspect of the right to marry.

The UDHR was adopted by the UN General Assembly including the Philippines in 1948. Sixty-six years since its adoption, it remains to be the foundation of many treaties in the United Nations and is generally regarded as having attained the status of international law. The ICCPR was ratified by 168 States[86] while CEDAW was ratified by 189 States.[87] The Philippines ratified both treaties in 1986 and 1981, respectively. From the overwhelming ratification of CEDAW and ICCPR, it is safe to infer that States provide divorce to their constituents since as parties to the treaties, they have the obligation to respect, promote, and fulfill the human right to marry. Additionally, in all or most states with divorce laws, spousal abuse is a ground for divorce. States recognize that freedom from physical abuse which divorce may guarantee is a necessary corollary of the right

80 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (4th ed. 1990).

81 *Id.*

82 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

83 International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), art. 23(2).

84 Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 Supp. (No. 46) at 193, U.N. Doc. A/34/46, at art. 16(1).

85 Human Rights Committee, General Comment 28, Equality of rights between men and women (art. 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 24.

86 United Nations, Treaty Collection Databases; *accessed from* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

87 United Nations, Treaty Collection Databases; *accessed from* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en.

to life[88] which they are bound to protect as a matter of human rights obligation. There could be no clearer demonstration of *opinio juris* than these. States have divorce laws in compliance with their treaty obligations to respect, protect, and fulfill the right to marry and the right to life.

Hence, divorce is now customary international law which under Article 38(1)(b) of the ICJ Statute is a source of international law and therefore of States' obligation. What distinguishes it from treaty as source of international law is that it need not be consented to by States for it to acquire a binding character. Even States which repudiate its validity are under obligation to recognize and comply with it.[89] Whether the Philippines agrees or not, it is obliged, as a member of the United Nations, to allow divorce; otherwise, it is in breach of its obligations under international law.

The Philippines previously allowed divorce.

It seems to be a national secret that the Philippines in its history as a Republic permitted divorce including absolute divorce.

After the signing of the Treaty of Paris in 1899 under which Spain ceded the Philippines to Spain, the United States Military Government issued General Orders No. 68 on 18 December 1899 which became the Marriage Law. While it provided for rules on nullity of marriage, it was silent on divorce and judicial separation. In the landmark case of *Benedicto v dela Rama*[90] decided in 1903, the Supreme Court said that the *Siete Partidas*, first enacted in 1530 by the Kingdom of Spain and extended to its colonies, was still in force in the Philippines. The Supreme Court said that the *Siete Partidas*' provisions on divorce "remained in force since as civil laws of the state as distinguished from the laws of the church"[91] as they were neither expressly repealed nor modified by General Orders No. 68.[92] However, what the *Siete Partidas* authorized was divorce *quoad thorum et mutuam habitationem* or relative divorce on the ground of adultery of either spouse[93] under Law II, Title X, *Partida* IV.[94] The effect of the relative divorce was to judicially separate a couple *a mensa et thoro* (from bed and board)[95] but it did not destroy the bonds of matrimony.[96] The

88 International Covenant on Civil and Political Rights, *supra* n. 83, at art. 6(1).

89 Dissenting Opinion of Tanaka J., *South-West Africa Cases (Second Phase)*, Judgment of 18 July 1966 (1966) I.C.J. Rep. 284.

90 Benedicto v. De la Rama, G.R. No. 1096, 3 Phil. 34 (1903). See also Ibañez v. Ortiz, 5 Phil. 325 (1905); Del Prado v. De la Fuente, 28 Phil 23 (1914). See also, Reyes, supra n. 1.

91 *Id.*

92 *Ibañez*, 5 Phil..

93 *Id. See also* Goitia v. Campos Rueda, 35 Phil. 252 (1913); U. S.v. Joanino, 27 Phil 477 (1914); *Del Prado*, 28 Phil.; De Jesus v. Palma, 34 Phil 483 (1916); Valdez v. Tuason, 40 Phil. 943 (1920), Ramirez v. Gmur (42 Phil 855); *Chereau*, G.R. No. 17866; Fernandez v. De Castro, 48 Phil. 123; Gorayeb v. Hashim, 50 Phil. 22; Francisco v. Tayao, 50 Phil 42; Re Intestate Estate of Benito Marcelo, 60 Phil. 442 (1934).

94 *Marcelo, id.*

95 *Chereau*, G.R. No. 17866.

96 *Benedicto*, 3 Phil; *Joanino*, 27 Phil.; *Del Prado*, 28 Phil..

provisions of the *Siete Partidas* on the effect of relative divorce on the marriage tie were as follows:

> *Yet, with all this, they may separate, if one of them, commit the sin of adultery, or join any religious order, with the consent of the other, after they have known each other carnally. And notwithstanding they separate for one of these causes, no longer to live together, yet the marriage is not dissolved on that account.*[97]
>
> *So great is the tie and force of marriage that when legally contracted it can not be dissolved, notwithstanding one of the parties should turn heretic or Jew or Moor or should commit adultery.*[98]

Reiterating the limited consequence of relative divorce, the Supreme Court clarified in *Re Intestate Estate of Benito Marcelo*[99] that Section III of General Orders No. 68 providing that "a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife (unless such former marriage had been annulled or dissolved), is illegal and void from the beginning" applied to remarriage after a decree of relative divorce.

In 1917, the Philippine Legislature enacted Act. No. 2710 which permitted divorce *quoad vinculum* or absolute divorce. The effect of the divorce was to separate the couple *ex vinculis matrimonii* (from the bonds of marriage)[100] on grounds of adultery on the part of the wife and concubinage on the part of the husband[101] which made remarriage lawful. Furthermore, conviction under the penal code was necessary as Section 108 of the Act provided that "(a) divorce shall not be granted without the guilt of the defendant being established in a criminal action."[102] However, the severance of marital ties would take effect after the expiration of one year from the date of the divorce decree.[103]

On March 25, 1943, during the Japanese occupation, Executive Order 141 was issued. It permitted absolute divorce and repealed Act No. 2710. Aside from adultery on the part of the wife and concubinage on the part of the husband, nine other grounds for divorce were recognized under Section 2 of Executive Order No. 141: an attempt by one of the spouse against the life of the other, a second or subsequent marriage contracted by either spouse before the marriage has been legally dissolved, a loathsome contagious disease, incurable insanity, impotence, intentional or unjustifiable desertion continuously for at least one year prior to the filing of the action, repeated bodily violable by one against the other to such an extent that the spouses cannot continue living together without en-

97 *Benedicto, id;, Joanino, id., citing* Law 3, title 2, partida 4.

98 *Id., citing* Law 7, title 2, partida 4.

99 Marcelo, 60 Phil

100 *Chereau*, G.R. No. 17866.

101 *See* Act No. 2710, Sec. 1.

102 See also, *Valdez*, 40 Phil.

103 Act No 2710, Sec. 9.

dangering the life of both or either of them, an unexplained absence for three years, and slander by deed or gross insult by one spouse against the other to such an extent as to make further living impracticable.

However, on 23 October 1944, Gen. Douglas MacArthur issued a proclamation "that all laws of any other government in the Philippines, than that of the Commonwealth of the Philippines, were null and void and without legal effect in areas of the Philippines free from enemy occupation." As a result, E.O. 141 was abrogated and Act No. 2710 was revived.

In August 1950, the Civil Code of the Philippines took effect and absolute divorce was expunged from the statute books.

The deliberations of the Civil Code drafters included absolute divorce. According to Tolentino, it was provided as Article 111 of the draft that "divorce may be absolute or relative as the petitioner may choose."[104] Absolute divorce, as proposed by the drafters, was discriminatory against women as it would be grounded on adultery on the part of the wife and concubinage on the part of the husband.[105] Relative divorce, as then proposed was to be grounded on gender-neutrally defined adultery. The draft provided that "adultery by the husband is committed when he has carnal knowledge with a woman other than his wife."[106]

When the draft was brought to the House of Representatives, it was election year and the members of the House received letters from Catholics and the Church clergy opposing absolute divorce.[107] After heated discussions, absolute divorce was deleted.[108] The Senate attempted to re-introduce absolute divorce but eventually bowed to pressures from the House of Representatives.[109] In the end, absolute divorce was junked but relative divorce was retained although the term was replaced with *legal separation* on the behest of women leaders[110] based on any of two grounds: adultery on the part of the wife and concubinage on the part of the husband, and an attempt by one spouse against the life of another.[111] Annulment and declaration of nullity became available to cover problems of validity and nullity.

In 1988, Pres. Corazon Aquino, exercising her legislative powers under the Freedom Constitution, issued E.O. No. 209 otherwise known as the Family Code of the Philippines

104 ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES COMMENTARIES AND JURISPRUDENCE VOL. I (ARTS 1-413) 305 (1987).

105 *Id.*

106 *Id.* (quoting art. 112 of the Draft).

107 JUAN RIVERA, THE FATHER OF THE FIRST BROWN RACE CIVIL CODE (1989) *as cited by* JIM V. LOPEZ, THE LAW ON ANNULMENT OF MARRIAGE 115-116 (2001).

108 *Id.*

109 *Id.*

110 Tolentino, *supra* n. 104, at 306.

111 See art. 97, Civil Code of the Philippines.

replaced the Civil Code of 1950 in terms of personal and family law. The legal remedies now include declaration of nullity of marriage based on psychological incapacity. Foreign divorce is recognized but only if obtained by the alien spouse.[112]

Considering a Philippine history which is interspersed with a period of divorce, it seems misplaced to oppose divorce because it is anathema to Filipino culture. It is not.

Philippine culture is now open to divorce.

In fact, Philippine culture has evolved such that divorce is now acceptable to many Filipinos who are mostly Catholics. The Philippines is the third country worldwide with the largest number of Catholics (as of 2010) with an estimated Catholic population of 75,570,000 or 81% of the total population.[113] This is said to be the biggest obstacle to the adoption of divorce – a claim more ephemeral than real. High regard for the sanctity of marriage does not necessarily mean opposition to divorce. Countries more predominantly Catholic than the Philippines have divorce laws.

Statistics show that there has been an increasing support for divorce by Filipinos. In 2003, the Social Weather Stations (SWS) reported that 36% of percent of Filipinos were in favor of divorce.[114] A 2011 survey conducted by the same body revealed that 50 percent of the respondents voted affirmatively on the legalization of divorce.[115] In the last quarter of 2014, the SWS conducted another survey which bared that 60% of Filipinos supported the passage of a divorce law.[116] It is therefore surprising that despite the rising figures, legislators remain divorced from the idea of divorce.

It is discriminatory to recognize divorce among Muslims and indigenous peoples while denying it from other Filipinos.

Aside from the above challenges, the current legal landscape on marital dissolution fosters discrimination based on economic class and gender. The Article 36 remedy is very expensive, thus, it is not accessible to those who are not moneyed; it therefore favors the economically endowed. To the poor, getting out of an unhappy, abusive marriage is merely an aspiration, a pipe dream to be achieved when they will have obtained financial means. Annulment is based on limited grounds and legal separation preserves the brittle marital ties.

112 Family Code, *supra* n. 2, at art. 26.

113 Pew Research Center, *The Global Catholic Population*, 13 February 2013; *accessed from* http://www.pewforum.org/2013/02/13/the-global-catholic-population.

114 *SWS survey: 36% of Filipinos in favor of divorce*, THE PHILIPPINE STAR, 23 January 2003; *accessed from* http://www.philstar.com/headlines/192524/sws-survey-36-filipinos-favor-divorce.

115 Carlos H. Conde, *The Philippines Stands All but Alone in Banning Divorce*, THE NEW YORK TIMES, 17 June 2011, *accessed from* http://www.nytimes.com/2011/06/18/world/asia/18iht-philippines18.html?_r=0.

116 Paolo Taruc, *SWS: support for divorce growing in Philippines*, CNN Philippines 25 March 2015; *accessed from* http://cnnphilippines.com/news/2015/03/24/survey-pinoys-favor-divorce.html.

The legal framework also discriminates based on religion and ethnicity repugnant to Section 1, Article III of the 1987 Constitution which enshrines equality before the law. Under the rational standard test, there is no rational basis for the differential treatment of people on the bases of race and ethnicity in access to remedies to legally terminate marriages that have broken down. As earlier pointed out, Muslims and members of indigenous communities in the Philippines can have their marital unions legally terminated.

During the period of Martial Law in 1977, President Ferdinand Marcos, exercising his self-arrogated legislative powers, issued Presidential Decree No. 1083 or the Code of Muslim Personal Laws. This recognized divorce but only for Muslims.

Allowing divorce for Muslims while withholding it from non-Muslims uses religion as a basis for classification or distinction which is not reasonable. It has also provided some Filipino men a remedy to legitimize their marital infidelity and/or to obtain divorce by converting to Islam. Regardless of this, the question remains: Why does a Muslim have a remedy out of a marriage that had broken down but a non-Muslim does not?

In 1997, Republic Act No. 8371 or the Indigenous People's Rights Act was passed. Section 29 of the Act provides: "The State shall respect, recognize and protect the right of ICCs/IPs to preserve and protect their culture, traditions and institutions." The National Commission on Indigenous Peoples is authorized to issue Certificates of Tribal Marriage (CTMs), which are legally recognized. Marriages may likewise be dissolved consistent with customary law. In 2004, the National Commission on Indigenous Peoples issued NCIP Administrative Order No. 3, series of 2004, to govern the process of registration of marriages and their dissolution under indigenous customary law.

Recognizing indigenous marital dissolution while not providing an equally accessible remedy to the non-indigenous is equally discriminatory. It is conceded that positive or affirmative discrimination in favor of indigenous peoples is necessary for the enforcement of the equal protection clause on the premise that unequal persons should not be treated equally. But legalizing divorce for the non-indigenous and even the indigenous who got married under the civil law does not erode the protection for indigenous peoples' right to culture or their customary ways.

It is certainly in violation of the equal protection clause to force people to remain in unhappy or abusive marriages simply because they are poor, they are not Muslims, or they are not members of indigenous communities. Happiness is a universal human right.

The State's decision on divorce should not depend on religious dictates.

The Constitution is very emphatic that the Church and the State are separate and the

fence between them is inviolable.[117] The Philippines is a secular state and Philippine society is an amalgamation of dissenting and harmonizing beliefs. The belief of the Catholic Church clergy cannot be imposed on every Filipino. That being said, Congress' decision on divorce should not be held captive by dictates of the Roman Catholic Church's clergy. It bears noting that Pope Francis, during his visit to the Philippines, urged his church's bishops not to judge divorced Catholics. Although there can be no divorced Catholics in the Philippines except those divorced by their foreign spouses, the Pope's statement might hint that he is not opposed to divorce becoming legal in the Philippines, the last no-divorce country with the exception of the Holy See. It is said that the prohibition against divorce "is an imposition rather than a tradition; it is a legacy of the Spaniards who had exploited this country, rather than something which we have imbibed in our system freely(…) (and) is a manifestation of colonial mentality, not a free mentality."[118] The Spaniards used religion to colonize the Philippines and, prior to the American occupation, there was a blurry line between church and secular laws.

Indeed, the absence of a divorce law is rooted in the Roman Catholic Church clergy's strong opposition to it.[119] Despite the provision in the Constitution erecting a wall between the State and organized religion, the Philippines' development as a State has been running on an engine powered in part by Roman Catholic dogma. The Catholic clergy continues to dip its fingers into matters of the State, arguing strongly against the passage of the Reproductive Health law which gives couples access to artificial methods of birth control, among others. Its silence on issues of poverty and human rights violations against indigenous peoples is matched by its resounding voice opposing homosexual rights. In short, the Catholic clergy is too involved in politics and the absence of a divorce law is largely because of it.

Prior to 2011, the Philippines and the more-Catholic Malta were the only States that had no divorce law. In a referendum in May 2011, the people of Malta voted to embrace divorce legally.[120] This move roused vibrant discussions on the legalization of divorce in the Philippines. But the Catholic Church has been very vocal in its opposition to divorce as a way out of marriage.[121] Several lawmakers have backed the claim of the Catholic Church, declaring that the introduction of a divorce bill is unconstitutional.[122]

The Constitution is the fundamental law of the Republic of the Philippines and

117 1987 CONST art. II, Sec. 8.

118 Reyes, *supra* n. 1, at 53-54.

119 Sunshine Lichauco de Leon, *The fight to make divorce legal in the Philippines*, CNN-Philippines, 6 October 2014, *accessed from* http://edition.cnn.com/2014/10/06/world/asia/philippines-legal-divorce-battle/ (quoting Prof. Solita Monsod: "It is because of a very powerful and conservative church hierarchy, and the dominance of very conservative segments of the catholic laity.")

120 Conde, *supra* n. 115.

121 Evelyn Macairan, *Divorce bill good scapegoat for couples – CBCP*, THE PHILIPPINE STAR, 28 March, 2015, *accessed from* http://www.philstar.com/headlines/2015/03/28/1438366/divorce-bill-good-scapegoat-couples-cbcp

122 Jess Diaz, *Divorce Law Unlikely*, PHILIPPINE STAR, 17 June 2014, *accessed from* http://www.philstar.com/headlines/2014/06/17/1335650/divorce-law-unlikely.

should thusly be interpreted not to accommodate the dogmas of religion but to promote the common good of the body politic.

It is hypocrisy to oppose divorce on religious scruples when Article 36 was based on Canon Law.

To be very sure, Article 36 which allows declaration of nullity of marriage based on psychological incapacity to perform essential marital obligations was inspired by Canon 1095 of the Canon Law which permits a party to obtain an annulment from the Catholic Matrimonial Tribunal. As articulated by the Supreme Court in Molina:

> Since the purpose of including such provision in our Family Code is to harmonize our civil laws with the religious faith of our people, it stands to reason that to achieve such harmonization, great persuasive weight should be given to decisions of such appellate tribunal.. (and that) (i) deally — subject to our law on evidence — what is decreed as canonically invalid should also be decreed civilly void."[123]

Under Canon 1095, the following are considered incapable of contracting marriage: (1) those who lack sufficient use of reason (as distinguished from mental illness); (2) those who lack judgmental discretion concerning the matrimonial rights and duties to be mutually handed over and accepted; (3) those, who due to a serious psychic anomaly, cannot assume the essential obligations of matrimony.[124]

Coquia, citing Gerardo Ty-Veloso, a former presiding judge of the Metropolitan Marriage Tribunal of the Catholic Archdiocese of Manila, says that the following are accepted grounds for canonical annulment of marriage: homosexuality in men or lesbianism in women, satyriasis in men or nymphomania in women, extremely low intelligence, immaturity, permanently recurring epilepsy, and habitual alcoholism.[125] It appears that the Church is even cruel because even extremely low intelligence and epilepsy which are afflictions rather than manifestations of refusal to assume marital obligations are grounds for canonical dissolution of marital bonds.

Even before States legalized divorce, the Catholic Church was already nullifying marriages. Why can the Roman Catholic Church terminate marriages based on its religious dogma while Caesar cannot do the same based on Caesar's law?

123 *Molina*, G.R. No. 108763.

124 *Id.*

125 JORGE R. COQUIA, CHURCH AND STATE LAW AND RELATIONS 336 (2007).

Divorce respects the validity of the marriage prior to dissolution unlike Article 36.

It is further hypocrisy to oppose divorce when there is merely a tortured distinction between it and declaration of nullity under Article 36 except that the latter is much worse in terms of legal consequence. While divorce recognizes the validity of the marriage prior to the dissolution, declaration of nullity recognizes that no legal marriage ever took place at all. From a strictly Catholic point of view, therefore, the couples in such void ab initio marriages were living in sin! There have been cases of couples "married" for two decades or more whose unions were dissolved for being void ab initio due to psychological incapacity. The parties may have always regarded themselves to be in a real marriage – at least while it was a source of love, respect, and protection – but the law effectively says they were living an illusion and, under Catholic doctrines, a debauched existence.

Divorce is similar to annulment in that it recognizes the legal existence of the marriage prior to dissolution. By recognizing the legality of the marriage prior to dissolution, it respects and therefore saves the institution of marriage. But marriage is supposed to be a union of people bound together by mutual love, respect, understanding, and support. When these vanish, the marriage becomes a sham or shameful mockery of the institution. Divorce, by dissolving such unions thereby eliminating arrangements that debase matrimony, restores marriage to its lofty place of sanctity.

Arguments Against Divorce and Counter-Arguments

Divorce is unconstitutional as it violates the sanctity of marriage.

There is a high regard for the sanctity of marriage as a sacrament in the Philippines which is a predominantly Catholic country. Opponents of divorce claim that it violates the 1987 Philippine Constitution Article XV, Sec 2 which states:

> *Marriage is an inviolable social institution, is the* ***foundation of the family*** *and shall be protected by the State.*

This view is not uniquely Filipino.[126] The US has once proclaimed that "marriage is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there could be neither civilization nor progress."[127] However, the Constitution's textual articulation of its high regard for the sanctity of marriage does not necessarily translate to demurrer to divorce. Marriage is constitutionally protected as an inviolable institution but this does not rule out marital dissolution. Even the Court said that Congress has the power to define all aspects

126 *See* KRISTIN CELELLO, MAKING MARRIAGE WORK: A HISTORY OF MARRIAGE AND DIVORCE IN THE TWENTIETH-CENTURY UNITED STATES 18 (2009).

127 Maynard v. Hill, 125 U. S., 210; 31 L. ed., 659.

of marriage and the strategies for its protection, declaring that in promoting it as the foundation of the family, the State should defend it from marriages that cannot measure up to the challenge.[128] Divorce is one such strategy.

Divorce is in fact an expression of respect for the inviolability of marriage, as it dissolves unions that have metamorphosed into a form and substance no longer holding the institution sacred. By terminating those unions which ceased to be founts of love, protection, support, and respect for the spouses, it educates people on what should and should not be permitted in a marital union and regulates the institution.

The Family Code characterizes marriage as a special contract of permanent union but the notion of permanence must not imprison spouses within impenetrable walls of unhappiness with each other. In the United States, permanence of marital bonds was the dominant view regardless of the presence or absence of love or happiness, until it was challenged by the concept of marriage "as a partnership between two individuals which was terminable at the will of those involved when the marriage failed to meet the needs of either party."[129] *Permanence* is not necessarily synonymous to *inviolability*. As the Court said in *Reyes v. Reyes*,[130] "[B]lind adherence by the courts to the exhortation in the Constitution and in our statutes that marriage is an inviolable social institution… trenches on the very reason why a marriage doomed from its inception should not be forcibly inflicted upon its hapless partners for life." Besides, one of the essential requisites of marriage is consent;[131] it should remain a consensual contract. The moment it metamorphoses into a compelled relationship, it ceases to be what it should be as envisioned by the Family Code. It becomes an arrangement which coerces people to stay married to husbands and wives who exist as such in name only, a situation which the *Kalaw* Court called a "great injustice."[132] The parties to it evolve from spouses to detainees trapped in a forced union.

In *Ilusurio v. Ilusorio*,[133] the Supreme Court said

> *The law (Articles 68 and 69 of the Family Code) provides that the husband and the wife are obliged to live together, observe mutual love, respect and fidelity. The sanction therefor is the "spontaneous, mutual affection between husband and wife and not any legal mandate or court order" to enforce consortium.*
>
> *Obviously, there was absence of empathy between spouses Erlinda and Potenciano, having separated from bed and board since 1972. We defined empathy as a shared feeling between husband and wife experienced not only by having spontaneous sexual intimacy but a deep sense of spiritual communion. Marital union is a two-way process.*

128 *Kalaw*, G.R. No. 166357.

129 Nicole D. Lindsey, *Marriage and Divorce: Degrees of "I Do," An Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL'Y 265, 267 (1998).

130 Reyes v. Reyes, G.R. No. 185286, 628 SCRA 461 (2010).

131 Family Code, *supra* n. 2, at art. 2.

132 *Kalaw*, G.R. No. 166357.

133 G.R. No. 139789, 19 July 19, 2001.

Marriage is definitely for two loving adults who view the relationship with "amor gignit amorem" respect, sacrifice and a continuing commitment to togetherness, conscious of its value as a sublime social institution.

Thus, the mantle of the constitutional protection to marriage does not extend to unions existing to pervert or insult the institution. Acts in breach of one's marital vows result in personal injuries to the offended spouse and are also an assault directed at the institution. The State must be vigilant in preserving the foundation of society but to extol the sacredness of marriage, it must be equally vigilant in weeding out unions that have hopelessly and irremediably deteriorated[134] by paving a legal egress out of them.

Divorce destroys the family.

Anti-divorce quarters also fear that once divorce is allowed, the family which, according to the Constitution is founded on marriage,[135] will be shaken. Sec. 1, Art XV of the Constitution indeed provides: "The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development." Specifically, it is argued that when the marriage crumbles, the children will suffer.

Indeed, there are studies showing that children of divorce display signs of trauma or emotional disorder but this might be attributable to the interparent conflict or violence that presages the marital dissolution. It is conceded that divorce may have adverse effects on the emotional or psychological health of children. But an abusive, dysfunctional marriage may also inflict harm and generate adverse effects on them. Staying together in a sham marriage, a couple can inflict injury on themselves and their children, that compelling them to stay married because the law permits no way out generates a greater injustice that forces them and their children to further endure pain.[136]

If error in the calculation of damage must be committed, it must be on the side of caution. Caution dictates that divorce saves children from having to witness and be stressed by the abuse that takes place in the household from which they may suffer second hand trauma that will affect them for the rest of their lives.

As early as 1979, the European Court of Human rights said in *Airey v. Ireland*[137] that Ireland violated Article 8 of the European Convention on Human Rights when it denied a woman an effective access to a protective legal mechanism that could enable her to escape an abusive marriage. The woman did not have the financial means to petition for legal separation, the only remedy then available as Ireland had no divorce law yet. Ordering Ireland to provide free legal services to her, the ECHR said:

134 H. R. HAHLO, THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE 362 (1975).

135 1987 CONST. art. XV, Sec 2.

136 *Kalaw*, G.R. No. 166357.

137 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.

> *As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together.*[138]

A divorce law will lead to a high incidence of divorce.

Oppositors of divorce are also concerned that its legalization might open the gates for a deluge of cases that will attack and weaken the institution of marriage. Human experience, including in the Philippines, invalidates this apprehension. There is no direct, causal relationship between the enactment of divorce and high divorce rates.

Many couples remain married for a long time, despite living in countries where divorce is legal. For one, divorce was previously legal in the Philippines until 1950. Yet, the family as the basic social institution was not shattered and did not become dysfunctional. It is reported that since 1917 up to 1950 when the Philippines allowed absolute divorce, only 800 divorces were granted.[139] For another, some indigenous peoples have been practicing divorce yet there is no prevalence of divorce in their communities. For still another, Filipino Muslims/Muslim Filipinos practice divorce under the Code of Muslim Personal Law of the Philippines and there are no reports of the Muslim family disintegrating because of divorce. Despite the fact that all countries — save the Philippines and the Holy See — allow divorce, marriage is still highly prized as an institution and marriage rates surpassed the record more than a century ago.[140]

The issue of divorce should not be dissected with a psychic if not paranoid lens that sees hypothetical dangers within its range of vision. Divorce is an effect rather than a cause. It is a response or expression of the State's sympathy to situations of married people in dire straits, and women in abusive, violent marriages. The absence of a law permitting it should not be bandied as a badge of pride to show that a country prizes marriage. The reality is that the absence of a divorce law has condemned people deserving of second chances in oppressive marriages or has rendered illicit their newfound happiness with other people. As early as more than 60 years ago, progressive minds in the Philippines said it succinctly:

> *It is for such broken useless families that divorce is intended. The law merely gives legal sanction to an already existing moral fact. In this sense, divorce does not destroy the family or the home; what has already fallen asunder cannot be further broken.*[141]

138 *Id.*, para. 33; emphasis supplied.

139 Reyes, *supra* n. 1, *citing* House Group Favors Relaxing Curbs on Absolute Divorce, Evening News, 21 July 21, 1948) 12, *quoting* Representative Pacifico Lim, Chairman of the Lower House Subcommittee on Book I of the Proposed Civil Code.

140 Katharine T. Bartlett, *Saving the Family From the Reformers*, 31 U.C. DAVIS L. REV. 809, 815-16 (1998).

141 Reyes, *supra* n. 1, citing Arturo Tolentino, *Do We Have an Easy Divorce Law?* I PHILIPPINE REVIEW 3 (1943).

Divorce leads to legalization of other illegitimate activities.

It is also the apprehension of anti-divorce quarters that legalizing divorce is sure to set a precedent to legalizing other "illegitimate" activities. How this will happen, it has not been explained. What is clear is that without divorce, marital infidelity is the recourse of couples who are sentenced to unhappy marriages "till death do us part" if they try a second shot at personal happiness. Marital infidelity is illegitimate and always criminal if committed by the woman,[142] and sometimes criminal if committed by the man.[143]

Take the case of *Suazo*.[144] J and A met in 1985 and in 1986, their parents arranged their marriage. Very young and unemployed, the couple lived with A's parents and stopped schooling. To support themselves, J took any job she could find and worked as househelp of A's relatives. A refused to work, gambled, was often drunk, and would physically abuse J. In 1987, J left her husband who eventually started a family with another woman. In 1997 or ten years after their separation, J filed a petition for declaration of nullity of their marriage claiming that A was psychologically incapacitated to comply with the essential obligations of marriage. In 2010, the Supreme Court denied the case with finality stating that while J was able to prove difficulty, neglect and refusal of A to perform marital obligations, she was unable to show that these were "rooted in some debilitating psychological condition or illness."[145]

So A and J remain legally married but have been separated for almost 30 years. Meantime A has been living with another woman for more than two decades with whom he has children. How does our law view this set-up? The Supreme Court in *Gabriel v Ramos*[146] verbalized how our society characterizes sexual relations of a married person with someone other than his her spouse: a "conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness; or is willful, flagrant or shameless conduct showing moral indifference to opinions of respectable members of the community, and an inconsiderate attitude toward good order and public welfare." The fact that such relationship endured for over a decade or that it appears to be acquiesced in by people within the couple's radar including the legal spouse does not take the union out of the illicit.[147] A's union with another woman will remain illicit as long as there is no divorce.

IV. SOME LEGISLATIVE CONSIDERATIONS

The Philippines must develop a legal regime to deal with cases that are not addressed

142 Revised Penal Code, *supra* n.12.

143 *Id, at art. 334.*

144 *Suazo*, G.R. No. 164493.

145 *Id.*

146 A.M. No. P-06-2256, 10 April 2013.

147 *Id.*

by existing laws on dissolution of marriages in keeping with the constitutional mandate to preserve the sanctity of marriage. Divorce is viewed as the remedy to problematic marriages that can neither be fixed nor addressed by the existing legal regime. However, this paper suggests some considerations that must be taken into account in a divorce law.

The remedies available in law - annulment and declaration of nullity - to dissolve marriage apply only when the grounds existed or occurred at the time of the marriage and are concerned with the validity or invalidity of marriage. Divorce must then be adopted to address insurmountable marital difficulties beyond the domain of existing remedies. Since legal separation does not sever the marriage bonds, divorce must be introduced as a legal remedy for parties who desire more than separation from bed and board. Thus, the grounds for legal separation under Article 55 all of which justify marital termination, should be adopted as grounds for divorce as well as the acts considered as violence against women and their children under Republic Act No. 9262 and the Magna Carta for Women. Irreconcilable differences are not a ground for annulment, declaration of nullity, or even legal separation. Yet it is a common cause for the breakdown of marriage. It should be adopted as a ground for divorce but to prevent its frivolous invocation, it must concur with the actual or legal separation of the spouses for a certain period. In other jurisdictions, since irreconcilable differences are not a fault-based ground, the lapse of one to two years is mandatory before the couple may be allowed to divorce.[148]

To ensure that children will not be neglected as a result of the divorce, the law must impose appropriate measures to protect the interests of children and guarantee their economic well-being, such as the delivery of their presumptive legitimes similar to the provision of Article 51 of the Family Code applicable to annulment and declaration of nullity. Custody should be decided in the best interests of children. Divorce must come with economic protections for dependent children.

The divorce law should provide for spousal support taking into consideration matters as gender construction of roles. Although the relegation of the wife to the role of homemaker is no longer as pervasive as it used to be, society still casts her as the one in charge of child care and maintenance of the household in the private sphere while her husband takes charge of the financial upkeep of the family. This is also reinforced in decisions of the courts in family cases. Because of the social construction of gender roles, many wives give up their careers and are relegated to homemaking functions. Marital dissolution may expose them to economic insecurities, which may force them to endure abusive marriages. Spousal support must also be awarded to a spouse whose contribution has not been in terms of finance but in terms of maintaining the household. This too is a contributing factor to the earning capacity of the other spouse. Without one spouse staying at home to care for dependent children, a person cannot work outside of the home.

The law must also provide for spousal support for the spouse who is awarded custody of dependent children including those of tender age or with special needs. The spouse

148 A. SCOTT LOVELESS, *ET AL*., THE FAMILY IN THE NEW MILLENNIUM: STRENGTHENING THE FAMILY 315 (2007).

in such case may be handicapped in seeking full-time employment as she or he needs to devote attention to the children.

To prevent fears of a 'Mexican divorce,' it is recommended that aside from the existence of a ground for divorce, there must be a mandatory waiting period or cooling-off period before the court may begin to hear the petition for divorce, unless the party seeking the remedy establishes to the satisfaction of the court that s/he has been separated in fact or legally from the other spouse for at least six months.[149] The period should be sufficient for the party to decide intelligently whether or not to pursue the divorce. However, the suspension of proceedings should not apply where the ground invoked is domestic violence or other forms of abuse. Suspension in such cases would expose the abused spouse and children to risks to their lives and safety.

To ensure that the remedy is affordable, the law must do away with *Molina*-like requirements. Divorce as a remedy for people in troubled marriages should not come at a price which the minimum-wage earners could barely afford even after a year of working. The Public Attorneys' Office must train certain lawyers on family law and assign them to attend solely to family cases. This will ensure the poor's access to effective legal remedy of divorce.

Mandatory mediation may also be applied in divorce cases; in fact, in the United States, recourse to mediation in the area of family law has been steadily climbing.[150] Mediation shortens the divorce proceedings and reduces cost for legal services as issues ancillary to divorce need not be heard in court which requires a lawyer's services. Mediation can facilitate the resolution of disputes involving property, post-divorce support, and child visitation and custody issues.[151] It may also cultivate long-term relationships and friendship between the erstwhile spouses and new families they may establish, and foster restorative justice. It also exposes the family members to less trauma compared to an adversarial court proceeding. It will also reduce the crowding of courts which is a perennial justice issue in the Philippines. However, where the ground for divorce is domestic violence, mediation should not be made mandatory. Its beneficial goals may not be realized in a situation where the parties are not equals. In cases of domestic violence, there is imbalance in power relations. Victims argue that the "dynamics endemic to an abusive relationship preclude the possibility of collaborative decision making, even with a skilled mediator."[152] If the petition alleges domestic violence, the court should not order mediation at all. If in the process of mediation, domestic violence is established, the court should terminate it.

149 Art. 58 of the Family Code provides: "An action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition." This six-month period is intended for "cooling off" to give time to the spouses to reflect and resolve their differences and effect a possible reconciliation.

150 Alison Gerenser and Megan Kelly, Family Mediation: An Alternative to Litigation, 68 FLA. B.J. 49, 49 (1994).

151 *Cf.* Republic Act No.9285 (2004). Issues in family cases except grounds for legal separation and validity of marriages may be subject to mediation.

152 Peter Salem and Ann L. Milne, Making Mediation Work in a Domestic Violence Case, 17 FAM. ADVOC. 34, 36 (1995).

To prevent clogging court dockets of Family Courts, a plausible consequence of legalizing divorce, Congress should pass a law creating more courts and limit the jurisdiction of Family Courts to exclude criminal cases. To quell fears that divorce as a remedy might be abused resulting in precipitate divorce applications, the divorce law should adopt the rule in the Family Code that mandates the State, through the Office of the Solicitor-General and the public prosecutors,[153] to participate and ensure that the institution of marriage is amply protected from frivolous suits.

V. PARTING WORDS

The Philippines is the only member State of the United Nations without a general divorce law which is attributed to the influence of the Roman Catholic Church for more than 300 years of Spanish colonization. Currently, the Philippine legal regime permits legal separation, annulment, and declaration of nullity of marriage, although divorce by Muslims and indigenous people as well as one validly obtained abroad by a foreigner against a Filipino spouse, is recognized.

Legal separation authorizes the couple's separation from bed and board but leaves the marital cord unsevered. Any new relationship for either party may result in criminal prosecution in a country where marital infidelity is a crime. Annulment and declaration of nullity are concerned with validity and nullity issues. Noting dysfunctional marriages marred by domestic violence, incompatibility, sexual infidelity, desertion, and other forms of spousal abuse, the Supreme Court of the Philippines lamented its lack of competence to dissolve them because the cases do not submit issues of validity or nullity. Although one of the grounds for declaration of nullity of marriage is psychological incapacity to perform essential marital obligations which is based on Canon Law, the remedy entails protracted procedural and evidentiary nightmare and is expensive. A successful petition may have to involve unethical legal practice, as well as exaggerated if not fabricated psychological reports. Only the rich can afford the rigorous process of declaration of nullity of marriage under Article 36 of the Family Code which is the so-called divorce law of the Philippines, although unlike divorce, it does not recognize that a marriage ever took place despite the couple's having been 'married' for decades.

The Constitution protects marriage as an inviolable social institution. It is argued that this is not an express or implied prohibition of divorce as the dissolution of marital unions where vows of love and fidelity are routinely breached and debased is also necessary to preserve the sanctity of marriage. The constitutional mandate to preserve marriage is also a mandate to undo marital unions which pervert and dishonor vows to "love and to hold, in sickness and in health, for richer or poorer." There is nothing sacred in a marriage marred by spousal abuse, infidelity, irreconcilable differences, and refusal to perform marital duties. The gaping hole in the law has led to the legitimization of the existence of marital unions that debauch the sanctity of marriage as an institution serving as the provenance of love, honor, respect, and protection for the parties.

153 Family Code, *supra* n. 2, at art. 48.

Because of the absence of a general divorce law, the Philippines is presiding over a society where many marriages have become prisons for women victims of gender violence, where marital infidelity is the only way out for people who deserve a second chance at marital bliss, where loveless unions are hypocritically held out as marriages, where unhappiness is more prized than freedom. Calls from civil society and women's rights advocates for the adoption of a general divorce law have been intensifying. Yet, in the last decade-and-a-half, proposals to adopt absolute divorce have been stonewalled in Congress.

Divorce is now customary international law which the Philippines must honor, judging from the fact all other UN member States permit it. Divorce is also an aspect of the human rights to marry and to life which the Philippines committed to respect, protect, and fulfill under its treaty obligations. Moreover, despite its strong Roman Catholic background, Philippine culture is receptive to divorce and in fact had a general divorce law for 33 years mostly as a colony of the United States. Religious dogma as basis for Congress' phlegmatic attitude to divorce is misplaced in view of the separation of religion and State and the fact that even the Roman Catholic Church authorizes annulment of marriage. It is noteworthy that Article 36 of the Family Code which provides psychological incapacity as a ground for declaration of nullity of marriage was borrowed from Canon Law.

The Philippines must therefore enact a divorce law. Being the only member of the United Nations without a divorce law is not a badge of pride; it can lead to an international pariah status.

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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.ph Email: ibp.publication@gmail.com