Way back more than a century ago, President Rodrigo Roa Duterte would have gained much needed support from our forefathers Rizal, Aguinaldo and Mabini as they, too, advanced Federalism. As early as 1899 to 1900, two attempts had been made by Filipinos to set up either an 11-State Federal Republic or a 7-State Federal Constitution. The Americans rejected both and instead led the Philippines to a Commonwealth. Then came the 1935 Philippine Constitution which was generally drafted based on the American model, minus its federal foundations. Since then, many have clamored for a shift to a parliamentary system and a federal republic because of the notable limitations in the prevailing political system. One of them was no less than the late Senator and Statesman Claro M. Recto who presided the drafting of the 1935 Constitution. Proposals championing federalism were never adopted as the 1973 and 1987 Constitutions never departed from the centralist unitary government scheme.

Moreover, the restoration of democracy in the country gave birth to the Local Government Code of 1991. The Code which was sponsored by Senator Aquilino Pimentel, Jr., popularly known as the “Father of the Philippine Local Autonomy”, introduced the concepts of decentralization and devolution in favor of local government units. As if it were not enough, the same father is now stressing the need for further decentralization and thus calls for the Philippines to be federalized. Not only that, the advent of the new millennium brought renewed agenda to put federalism on the table. There were proposals coming from Mindanao Council of Leaders, Partido Demokratikong Pilipino-Lakas ng Bayan, Citizens’ Movement for a Federal Philippines, Coalition for Charter Change and the 2005 Consultative Commission on Charter Change. Promising as they may seem, they nonetheless remain just that — mere proposals, failed attempts.

Viewing the current unitary system as “antiquated”, President Duterte launched a nationwide campaign promoting a charter change for federalism beginning late 2014. The President strongly expressed that Federalism will facilitate better delivery of services to the people. Parallel to this, he endeavors to scrap in his administration the concept of “Imperial Manila”, which according to him is “biased” as the distribution of public funds is disproportionately favored to Metro Manila. He also advocates Federalism as the best cure to problems in Mindanao which suffers the most from ethno-religious conflicts.

Now more than ever, the Federalist proposal hurled highly divisive issues. Proponents and dissenters alike have thrown their contentions as to whether or not the planned departure is viable, necessary or applicable in the Philippine setting. There are questions as to what model shall be adopted, how many regional states shall be installed, what constitutional process shall be followed in amending or revising the fundamental law of the land, etc. Some legal
authorities, political scientists, and social experts are asking if the principle of decentralization enshrined in the Local Government Code has already been exhausted. True enough, the issue on Federalism is all-encompassing as it entails not only political but also administrative, legal, fiscal, geographical, cultural and social aspects of the Filipinos as a nation.

This paper however delimits the discussion on some legal and social issues pertinent to the adoption of the parliamentary-federal government as announced by the Duterte administration. The work also includes some recent developments to the topic. As of December 1, 2016, Local Government Development Foundation (LOGODEF) and PDP-Laban Federalism Institute led the presentation of the Philippine semi-presidential federal model of government accomplished by the Federalism Study Groups of the PDP-Laban Federalism Institute before Senate President Aquilino “Koko” Pimentel III.

I. The Social Pros and Cons of the Federal System

Federalism has been the choice of governmental organizations of all the world’s largest countries. Countries such as Australia and the United States of America have all adopted a federal system of government. As observed from these countries, it is best to look closely at the advantages and disadvantages of this type of government to be able to analyze if such system of government would be applicable to the Philippines.

A. Advantages of Federalism, Internationally

One of the most prominent advantages of a federal system of government is accommodating regional preferences and diversity (de Walker, 1999). In most countries where immigration is rampant, there will always be diversity as the citizens or residents tend to come from different countries, or races, as espoused in the United States of America. A closer look in the world’s largest countries would show that most of its citizens are not native Americans or Canadians. In fact, the Center for Immigration Studies in the United States found that in the year 2013, at least 41.3 million of the US population were immigrants. They came from various parts of the globe such as South Asia, China, Guatemala, as well as Saudi Arabia. Taking this into mind, advocates of federalism state that a federal system of government enables a country to take into account various social attitudes, cultures as well as economic bases. By dividing the country into several federal states, it could pave the way for a better understanding for these multi-cultural differences, as well as provide better solutions for economic, social or financial woes.

In a study by de Walker in 1999, he noted that in a federal system of government, there is a greater chance for the community to participate in government. In a federal system of government, citizens would be given more opportunities to be able to suggest policies for implementation by the government. A closer look at the United States would tell us that through federalism, the citizens have a say in the policies to be followed in their states. It would largely depend on the values, religion as well as their culture. For example, diverse

issues need not be resolved nationwide, but can be resolved in each federal state. One state such as Colorado may legalize marijuana, while other federal states may not. In connection to this, there will be a greater opportunity to give a micro-level focus on various economic and social ills of the country. Not only are the citizens given more chances to participate and think of solutions for these problems, they could voice it out in their state governments, as opposed to approaching the central government which could entail a longer process to finally get the solutions that they need.

A federal system of government would also lead to a better supervision of the government. The division of the government into smaller state governments means that citizens could closely monitor all actions of the government. In fact, a person could have various points of access to the government, as he could approach not only the state government, but also the federal government. A federal system may give local state governments initiative to develop certain policies that are adapted to their culture and surroundings. In addition to this, creative and innovative solutions in dealing with the country’s problems may be well within our reach because of citizen empowerment and strengthening the powers of local government. Such democratization will lead to creativity, efficiency and local self-reliance for local state governments instead of just depending on the national government for policies and solutions for the ills of the nation.

Most countries which have adopted federalism such as Australia and the United States have attested that a federal type of government better protects individual rights and freedom. An individual’s personal freedom is taken into consideration. Federalism would divide and disperse the powers of the government, by devolving most of the functions of the government to the local state governments instead of giving all the power to the national government, which would better protect people’s liberty.

B. Disadvantages of Federalism, Internationally

For a federal system of government, having a lot of federal states means different laws and regulations for each state. In effect, this could lead to possible chaos. In Australia, Zimmerman and Finlay have pointed out that one criticism of federalism is that the complex nature of a federal type of government would lead to uncertainty, and such uncertainty would diminish accountability between the federal government and the state governments. Having this kind of problem will not only confuse citizens, but such uncertainty will cause dissatisfaction with the government for not being able to take responsibility for its actions.

Another major disadvantage of federalism is that it could lead to an inequality between state governments. While it is certainly pleasing that federal states will be given freedom to allocate their income for their projects, inevitably it may also result to inequality. There will be federal states which are richer in terms of resources as opposed to other states, and this may cause other federal states to be left behind. Instead of hastening economic development,

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5 Geoffrey de Q. Walker, Rediscovering the Advantages of Federalism* in Papers on Parliament No. 35
federalism may only forward a couple of richer federal states while leaving other federal states stuck in a ditch. This could mean differences in utilities provided by the federal states as well as the quality of the public services that federal states may provide. In short, the inequality with regard to resources could also mean a lack of uniformity in providing quality in public service.

One basic concern in federalism is the perpetuation of corruption and the misuse of power. In any type of government, it is particularly difficult to do away with corruption. It is highly embedded in most governments. Federalism will not be able to solve this problem as those federal states who mostly rely on local elites will only lead to a perpetuation of their power in office. Most voters will not vote for anyone else, but those elites who have access to a wide array of resources which could help their federal state.

Adopting a federal system of government will also lead to a heavy burden on operating costs and expenses. To be able to shift to a federal system of government which requires more public institutions will also mean a large dent in the government’s budget allocation. This will not bode well in third world countries who are still struggling with economic and financial development.

C. Federalism in the Philippine Setting

In the Philippines, advocates of federalism have rallied behind the notion that federalism will be able to give us a better way to address our cultural differences. Being in an archipelagic country, the variety of influences that we have acquired from various ancestors remains to be undisputed. The Moros have a certain way of doing things, as do the Cebuanos. This only means that a specialized state government for each region or federation could prove to be beneficial to our country, as this entails each state government to understand the problems of each region, and be able to solve such conflicts in a specialized manner in accordance to their culture. In comparison to the US, the different ethnic communities in the country would be heard and their culture would be taken into consideration insofar as policies are concerned. Most importantly, the different voices of those who are less likely to be heard, such as the Moros in Mindanao, would be addressed in a federal type of government. It would lessen the notion that only those people in Metro Manila are benefitted by the various industrial developments undertaken by the government.

The advantage of citizen empowerment and local initiatives are certainly phenomenal ideas for the country. More and more Filipinos crave democracy and there is a growing need to be able to participate in policy-making. In a federal type of government, addressing and listening to citizens to be able to help provide solution to social and economic problems would be an ideal way to deal with today’s problems. It is usually citizens who have first-hand experience with regard to those everyday problems, and most public officials do not get to experience such struggles on an everyday basis.

One of the main problems in the Philippines that federalism hopes to address is the Moro conflict. The problems in Mindanao and its continued quest for autonomy remains to be a subject of dispute until now. In fact, the Bangsamoro Basic Law intends to do just that, by abolishing the autonomous region in Mindanao and giving the Bangsamoro its own political


11 International Institute for Democracy and Electoral Assistance. Federalism. May 2015 available at https://www.researchgate.net/file.PostFileLoader.html?id...assetKey...
identity by giving the Moros their own government, which is addressed by the proposed federal system of government.

A dilemma of federalism in the Philippine setting is that it could mean further division in our country. Most regions in our country only earn a small amount of income, either due to the lack of export products or lack of tourism in the region. This could mean that these regions may experience being left behind as opposed to other regions who are far richer in resources and revenue from various sources.

The Philippines has a history of corruption deeply embedded in our public institutions. By adopting a federal system of government, it is highly possible for political dynasties to perpetuate themselves into power. Voters will most likely vote for elites with more political resources and it would just provide more avenues for political dynasties to control more regions.

II. Constitutional and Other Legal Issues

Pursuing the adoption of a federal system of government would never be an easy task for all the three independent branches of our state. It requires a complete overhaul and the primary and most tedious process would be on how to incorporate this type of governmental set-up into our Constitution. This actually calls for a substantial change in the very law that gives life to the present system.

The subtopic, aside from addressing some constitutional issues, endeavors to provide legal bases for Duterte administration’s proposed federal set-up which may include the “Dual Executive Branch”, “Unicameral Legislature”, “Parliamentary-Federal Government”. This also gives the overview of what the French and German Federal Governments comprise from which President Duterte wishes to pattern the proposal.

A. Amendatory Process of the Present Constitution

For the Philippines to be able to convert into a federal type of government, there needs to be an overhaul of the entire structure of the government. As of now, the Philippines adopts the presidential system of government which is composed of the executive branch which handles the administration and implementation of laws and policies, the legislative branch which is in charge of making the laws, and lastly the judiciary which is in charge of interpretation of laws. The 1987 Constitution specifically adopts this type of government. To be able to switch to federalism, there needs to be a constitutional convention to be able to amend or make a new Constitution altogether.

As the 1987 Philippine Constitution was worded, Article XVII, section 1 provides: “Any amendment to, or revision of, this Constitution may be proposed by: 1) The Congress, upon a vote of three-fourths of all its Members; or 2) A constitutional convention.”

It is clear that the function of moving for a constitutional change has been granted by the Constitution not to this country’s chief executive nor to the judiciary but to Congress. A power so broad that the legislature may exercise when national circumstances demands so. Furthermore, section 2 of the same article provides:

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“Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter. The Congress shall provide for the implementation of the exercise of this right.”

The shift from the current structure of government to federalism is in reality not just an amendment per se, it is a revision of the Constitution. People’s initiative, as embodied in Section 2, is applicable only to an amendment and does NOT EXTEND TO ANY REVISION. As discussed in the case of Lambino, et. al. vs. Commission on Elections, “Revision” implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old... Amendment implies continuance of the general plan and purpose of the law, with corrections to better accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail.

Since it would seem that any major change in governmental scheme would be interpreted as a revision and not just a mere amendment, then it is only proper that it goes through the more thorough process of deliberation. And such power is expressly granted to the presumed wisdom of the legislature in formulating laws and statutes that would be for the benefit of the people – their constituents as a whole. Introducing a federal type of governance would be to entirely depart from that type of government granted under our Constitution. It is a change so vast that would require lawmakers to carefully re-examine each and every portion of said supreme law of the land.

As of now, there is already a pending bill in the Senate which calls for the convention of the Congress as a constituent assembly to revise the Constitution to establish the federal system of government.

B. Decentralization and Federalism

Decentralization, simply put, is the redistribution or delegation of power from a central authority to regional and local authorities. On the other hand, Federalism is special in a sense that the Central Government cannot just take away the power of each regional government because it is granted to the latter by the supreme law of the land, the Constitution. Under a Federal system, each of the states will be independent. Each will have its own constitution, its own government, and its own court system in contrast to local governments which only exercise power given to them by the central government.

Decentralization, as aptly stated by some scholars, became the source and the root of abuses exemplified by the governing authority of a state. It became the means to accumulate power and superiority over the entirety of the nation. Federalism, on the contrary, gives the smaller political subdivision the power to manage the affairs of their territory without fear or favor from the central authority, with lesser interference, and minimal control.

By the power of the 1987 Constitution, the local government units were given a direct

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14 G.R. No. 174153, October 25, 2006
grant of local autonomy, this meant that local government units were free to pass ordinances as well as levy taxes as long as they were within the limits of the law and the Constitution. This is the current set-up of our unitary government. What will be the major changes in case federalism is to be adopted?

One major change is the amount of income of the local government units to be remitted to the central government. As of now, under Section 284 of the Local Government Code, all local government units are mandated to give all their income to the national government, and in turn, they will receive a 40% share in the internal revenue allotment of the taxes collected by the Bureau of Internal Revenue. In President Duterte’s proposal of federalism, the state governments (local governments) will be able to keep 70% of their income, and only remit 30% to the central government. Duterte claims that this will address the problem of unfair distribution of funds in so far as the regions are concerned.

The second major change is that in federalism, there is freedom given to the state governments to be able to hasten their economic development without relying on resources from the central government, because they have their own funds and will not be hindered by the central government. Unlike in the current unitary form of government, the local government units still have to rely on their internal revenue allotment shares because in reality, most taxes they levy only answer for a small portion of their expenses. In fact, under our current system of government, local government units still have to obtain approval from the national government on how to spend their budget.

C. Semi-Presidential Federal Government with a Unicameral Parliament

To further understand how the proposed system would operate, it is best for us to define what a Federal Parliamentary form of government is. It can be broken down into two aspects: the federalism structure and the parliamentary form.

The federal structure embodies a government wherein a territory is controlled by two varying levels of government. One level is the National or Federal Government that primarily administers issues concerning the entire populace of the state—those that affect the country as a whole like foreign relations, national security, immigration, citizenship and naturalization, postal service, monetary currency, interstate commerce and transportation and communication. The other is the Regional or State Governments whose powers are limited only to those that concern their localities such as peace and order, trade and commerce, taxation, natural resources, education, health, etc.

In the parliamentary form, the executive branch derives its authority from the legislature. The Prime Minister being accountable to the Parliament, must always enjoy the full confidence and trust of the latter. Consequently, the parliament is accountable to the citizens. On the other hand, in a semi-presidential form of government, there is also a fusion of the executive and legislative branches of the Government. However, the executive powers

16 Alex B. Brillantes, Jr. and Donna Moscare, Decentralization and Federalism in the Philippines: Lessons from Global Community, (November 30, 9:25pm)
are being shared by the President as Head of the State and the Prime Minister as Head of the Government.

Article VII, Section 1 of the 1987 Philippine Constitution provides:

“The executive power shall be vested in the President of the Philippines.”

In the Philippines, the power of the Executive Branch is vested with the President, who also acts as head of state and Commander-in-Chief of the Armed Forces. The President is responsible for implementing and enforcing the laws written by Congress and also appoints the heads of the government cabinet.

As of press time, President Duterte and some of the members of the Congress are pushing forward the proposed federal system with a parliamentary government. Comparison was even made in wanting either that kind of federalist government established in France or in Germany. It has been suggested however by legal scholars that what Pres. Duterte wanted is to pattern the set-up from the German government. Though the Federal President of Germany is for protocol purposes, its office is largely ceremonial. Since it has a parliamentary system, the office of the Chancellor is usually considered more powerful than that of the President. So all in all, it can be inferred that under the present proposal what President Duterte is trying to achieve is to have a “Dual Executive” with powers shared between the President (Head of The State) and the Prime Minister (Head of the Government).

The president will share executive powers with an equally powerful prime minister in a new government model being prepared by a group of experts tapped to study the Philippines’ shift to a federal system. Under this “dual executive” structure, the President will still be in charge of foreign policy and national security while the Prime Minister will run government with his Cabinet, said political science professor Edmund Tayao, executive director of the Local Government Development Foundation. The proposed model in a semi-parliamentary setup will address the problem of removing an unpopular President through the tedious process of impeachment. Instead, Tayao said the Prime Minister, who will serve as the head of government, could be made accountable and ousted by a vote of no confidence.18

D. French-type or German-type Government and the Local Government Code of 1991 Compared

A semi-presidential system of government characterized the Republic of France, where both a president and prime minister shares executive powers. It also has a bicameral parliamentary system made up of the National Assembly (lower house) and the Senate. France is further divided into 22 administrative regions.19 Conversely, the German Government is a republic with a parliamentary democracy and a bicameral system of government. The Federal Government consists of the Chancellor and his or her ministers who are drawn from the members of the Bundestag.20 Germany is divided into 16 states (Länder). Each state has its own constitution, legislature, and government, which can pass laws on all matters except those, such as defense, foreign affairs, and finance, which are the exclusive right of the federal

As enunciated in the Local Government Code of 1991, the Philippines follows a decentralized form of governance. There is a central authority from which the smaller political subdivisions of the state derive their powers. These political units exercise autonomy up to a certain extent only.

Germany’s regions hold powers which are not so restrained by the head of the government itself except only on matters so reserved for the national government. They can even enforce and enact their own constitution unlike in the Philippine set-up. Our regions can only do so much in the administration of their territorial affairs and it still must be compliant with the laws implemented by the legislature. Each local government unit still adheres to the decision of the central body of the state and the state exercises a good amount of dominion over the former. Interference by the President as the overseer of their local or domestic affairs is nothing but a by-product of this current structure.

Furthermore, both in France and Germany, the President exercises a limited scope of power as they are elected only as mere Heads of State which in principle, is for ceremonial purposes only. Their powers are so limited as there is still the Prime Minister who acts as the Head of the Government – unlike in the Republic of the Philippines where the executive branch, most especially the President, has power so broad that it encompasses many aspects of governance in the country’s entirety. Regions or local government units shall be subject to the supervision of this central authority, and some says, they have been subjected to so much control by the latter.

III. Viability of its Implementation

Evolving into a new structure of government would entail a large amount of money to be able to fund not only the federal government, as well as all those regional governments to be set up in a federal type of government. It would require billions of pesos just for the reorganization of the governments and the delivery of state services. States will then have to spend for the elections of their officials. These are just the initial steps. Truth be told, the Philippines as of this moment is in no position to make the switch to federalism, as it must be taken into account the tremendous amount of foreign debt incurred over the years to fund government projects as well as infrastructures. A constitutional convention may have to be called for that purpose to initiate the shift but even that is hard to bring into realization given the numerous oppositions in our current political arena.

One of the main reasons why federalism is advocated in the Philippines is because of the concept of “Imperial Manila”. This term was coined because most of the development in the country is found in Metro Manila, while other regions are left behind. It is important to note that through observation, it is quite obvious that much focus has been given to Metro Manila as opposed to other regions of the country. By mainly focusing on one part of the country while completely neglecting the other regions would result in inequality. However, this does not go to show that federalism will be able to absolutely solve inequality.

Federalism, like devolution, is a double-edged sword. Thus, deliberations must

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be thorough and participatory. We have acknowledged in this panel discussion that federalism alone will not be able to solve problems related to armed conflicts, ethnic and cultural diversity, equitable development, efficient delivery of services and local democracy. If done haphazardly, it can lead to further problems. Remember that the process of changing the constitution will entail costs and there will be additional costs with the creation of a new layer of government. Framers will have to look at various models of federalism (dual v. cooperative, symmetrically, asymmetrical, etc.) and what other institutional arrangements can be combined (presidential, semi-presidential, parliamentary, etc.) before deciding which model or institutional combination would be more appropriate for the Philippines given its own history, political culture and socioeconomic conditions. The public should also be involved in information dissemination and public discussions. A well-informed public, after all, will approve the resulting charter change proposal.23

Duterte has strongly brought forward Rizal’s vision of a Philippine federal republic. His call for its favorable consideration will bring the nation from a unitary form of government born from the roiling blood of a colonial past to a federal form of government unfolding a future from an ancient heart.24

“For better or for worse, the proposal to change our present unitary system of government to a federal system and to do this through Congress acting as a constituent assembly, if accomplished, will be a truly revolutionary one, a real paradigm shift in our constitutional order,” Retired Supreme Court Justice Vicente V. Mendoza is right after all.

Introduction

Philippine competition laws are primarily contained in Republic Act No. 10667, also known as the “Philippine Competition Act” (“PCA”). The PCA took effect on 8 August 2015, and its Implementing Rules and Regulations on 3 June 2016. Other competitions laws are found in earlier legislations, such as Act No. 3247, Act No. 3518, Article 186 of the Revised Penal Code, Article 30 of the Civil Code of the Philippines, Commonwealth Act No. 138, Republic Act No. 8293, 6675 and 5921, as amended by Republic Act No. 9502, Republic Act No. 8479 and Republic Act No. 9136, among others. Some of these legislations have been impliedly amended, modified and/or repealed by the PCA.

The objective of competition laws is to protect consumer welfare and advance domestic and international trade and economic development. By promoting competition, it is argued that consumers are materially better off because competition increases consumer choice and reduces the cost of purchasing goods and services. Apart from improved consumer welfare, competition is also believed to improve market efficiency as a mechanism for allocating goods and services, promote entrepreneurial spirit, encourage private investments, facilitate technology development and transfer and enhance resource productivity. Unencumbered market competition also serves the interest of consumers by allowing them to exercise their right of choice over goods and services offered in the market.

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1 Published in the Manila Bulletin on 24 July 2015.
2 Published in The Philippine Star and The Philippine Daily Inquirer on June 3, 2016.
3 An Act To Prohibit Monopolies And Combinations In Restraint Of Trade.
4 An Act Amending The Corporation Law Act Numbered Fourteen Hundred And Fifty-Nine, As Amended, And For Other Purposes. (Section 20)
5 Monopolies and combinations in restraint of trade.
6 An Act to Give Native Products and Domestic Entities the Preference in the Purchase of Articles for the Government.
7 An Act Providing for Cheaper and Quality Medicines, Amending for the Purpose Republic Act No. 8293 or the Intellectual Property Code, Republic Act No. 6675 or the Generics Act of 1988, and Republic Act No. 5921 or the Pharmacy Law, and for Other Purposes.
10 Section 55 of the PCA impliedly modified, amended and repealed Article 186 of the Revised Penal Code, Section 4 of Act No. 3247, Sections 24 and 25 of RA 9502, Section 43(u) of RA 9136
11 Section 2, PCA.
13 Section 2, id.
14 Id.
The PCA provides the legal framework to ensure that competition in business is protected from unfair practices and also promoted in Philippine industry. This objective of providing the legal framework is important because it has been suggested that it increases “competitiveness not only for domestic consumers, but also for industries that rely on efficient overseas trade and export markets.”15 In this sense, competition law and policy have an underlying economic objective – that is aimed at providing the framework for industry to improve its competitiveness and efficiency, and at the same time deliver rewards to consumers.16

To achieve this, the PCA mandates the State (1) to promote and enhance competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole,17 (2) preventing and regulating acts and conducts that would amount to anti-competitive behavior18 and (3) penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions.19

Constitutional Policy on Competition

The constitutional policy on competition is principally embraced in Section 19, Article XII of the 1987 Constitution. It provides:

The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.20

There are four policy directions that can be drawn from the various Supreme Court decisions interpreting the said provision.21 First, Section 19 promotes the desirability of, and encourages a multi-player competition as the means to regulate the market. Second, monopolies are not per se prohibited but may be allowed only when it would serve public interest. Third, Section 19 prohibits only contracts or combinations in restraint of trade that are injurious to the public. And fourth, while Section 19 embraces the free market system as a creed, it does not endorse unfettered competition.

Competition as a means to regulate the market: prevention of monopoly and combinations in restraint of trade.

In *Tatad v. Secretary of the Department of Energy*,22 the Supreme Court held that Section 19, Article XII is anti-trust in history and spirit. The fundamental principle Section 19

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15 Law and Business, *id.*
16 Law and Business, *id.*
17 Section 2(a), *id.*
18 Section 2(b), *id.*
19 Section 2(c), *id.*
20 Section 19, Article XII of the 1987 adopts Section 2, Article XIV of the 1973 Constitution save for the particular reference to “private” monopolies. Section 2, Article XIV of the 1973 Constitution provides:

Section 2. The State shall regulate or prohibit private monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

22 G.R. No. 124360, 5 November 1997
espouses is essentially competition. The Court recognized that competition “alone can release the creative forces of the market,” thus:

Through competition producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services, and thus matches their desires with society’s opportunity costs... There is a reliance upon the operation of the ‘market’ system (free enterprise) to decide what shall be produced, how resources shall be allocated in the production process, and to whom the various products will be distributed. The market system relies on the consumer to decide what and how much shall be produced, and on competition, among producers to determine who will manufacture it.  

According to the Court, the desirability of competition serves as a justification for regulation, and even prohibition of unmitigated monopolies, the absolute prohibition against combinations in restraint of trade and the interdiction of unfair competition. Consequently, the Court adopted a stringent policy against barriers to new players and viewed with suspicion monopolistic and oligopolistic markets, thus:

The kind of competition that can unleash these creative forces is competition that is fighting yet is fair. Ideally, this kind of competition requires the presence of not one, not just a few but several players. A market controlled by one player (monopoly) or dominated by a handful of players (oligopoly) is hardly the market where honest-to-goodness competition will prevail. Monopolistic or oligopolistic markets deserve our careful scrutiny and law which barricade the entry points of new players in the market should be viewed with suspicion. 

In Tatad, the Supreme Court struck down RA 8180 in its entirety for being violative of Section 19. The Court observed that at the time the downstream oil industry is controlled by a foreign oligopoly, namely, Shell, Petron and Caltex, which were then characterized as the only major league players in the oil market. The Court held that the core provisions of RA 8180 imposed substantial barriers to the entry and exit of new players in the downstream oil industry as they would entail prohibitive cost of setting up refineries for the prospective players who may wish to enter the market. These barriers, in effect, inhibit the formation of a truly competitive market and only reinforce the maintenance of oligopoly.

24 Id.
25 Id.
26 An Act Deregulating the Downstream Oil Industry and For Other Purposes.
27 (1) Section 5(b) which imposed a 4% tariff differential between imported crude oil (3%) and refined petroleum products (7%); (2) Section 6 which required refiners and importers to maintain a minimum inventory equivalent to 10% of their respective annual sales or forty days of supply; and (3) Section 9(b) which defined “predatory pricing” as “selling or offering to sell any product at a price unreasonably below the industry average cost so as to attract customers to the detriment of competitors”
28 The tariff differential works for the benefit of the oligopoly as they already have existing refineries of various capacities while the new players may have to spend billions to set up their own, otherwise, they will suffer a huge disadvantage of increasing their product cost by 4%. The inventory requirement also works for the immense benefit of the oligopoly because of their storage facilities while a huge disadvantage to the new players because of the prohibitive cost of erecting their own storage facilities. Finally, “considering these significant barriers established by R.A. No. 8180 and the lack of players with the comparable clout of PETRON, SHELL and CALTEX, the temptation for a dominant player to engage in predatory pricing and succeed is a chilling reality. (Tatad v. Secretary, id.)
The desirability of competition was also a primary rationale for averting a possible (not actual) combination in restraint of trade and price fixing in the case of Gokongwei, Jr.\textsuperscript{29} albeit set in a different context. It involved a stockholder of San Miguel Corporation (“San Miguel”) who was the president and substantial stockholder of Universal Robina Corporation and CFC Corporations, the direct competitors of San Miguel. The stockholder acquired sufficient number of shares that would qualify him to sit in the Board of Directors of San Miguel. Prior to the election of directors, the by-laws of San Miguel were amended disqualifying a competitor from becoming a director. Thus, the core issue was whether the disqualification of a competitor to sit in the board of San Miguel is reasonable. Notably, there was no express statutory prohibition on a competitor to sit in the board of a competing corporation. Nevertheless, the Court upheld the amendment of the by-laws as reasonable ratiocinating that the election of a competitor of San Miguel in its board can bring about an illegal situation, \textit{i.e.} combination in restraint of trade.

In upholding the amendment, the Court highlighted the desirability of competition as a policy to regulate the economy, thus:

> Basically, these anti-trust laws or laws against monopolies or combinations in restraint of trade (referring to Section, Article XIV of the 1973 Constitution and Article 186 of the RPC) are aimed at raising levels of competition by improving the consumers’ effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unflettered competition as the rule of trade. “It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices and the highest quality ...” They operate to forestall concentration of economic power. The law against monopolies and combinations in restraint of trade is aimed at contracts and combinations that, by reason of the inherent nature of the contemplated acts, prejudice the public interest by unduly restraining competition or unduly obstructing the course of trade.\textsuperscript{30}

It was then concluded that a person cannot serve as a director in any two or more corporations, if such corporations are, by virtue of their business and location of operation, competitors so that the elimination of competition between them would constitute violation of any provision of the anti-trust laws.\textsuperscript{31} It is thus clear in the mind of the Court that “there is a statutory recognition of the anti-competitive dangers which may arise when an individual simultaneously acts as a director of two or more competing corporations. A common director of two or more competing corporations would have access to confidential sales, pricing and marketing information and would be in a position to coordinate policies or to aid one corporation at the expense of another, thereby stifling competition.”\textsuperscript{32} Moreover, the Court

\textsuperscript{29} Supra, 24.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} Citing Clayton Act.
\textsuperscript{32} \textit{Id.} The Court further explained:

> The argument for prohibiting competing corporations from sharing even one director is that the interlock permits the coordination of policies between nominally independent firms to an extent that competition between them may be completely eliminated. Indeed, if a director, for example, is to be faithful to both corporations, some accommodation must result. Suppose X is a director of both Corporation A and Corporation B. X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B at the same time he could hardly abstain from

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\textsuperscript{29} Supra, 24.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} Citing Clayton Act.
\textsuperscript{32} \textit{Id.} The Court further explained:
observed that “shared information on cost accounting may lead to price fixing. Certainly, shared information on production, orders, shipments, capacity and inventories may lead to control of production for the purpose of controlling prices.”

In Red Line Transportation, the Supreme Court disallowed the enforcement of an agreement which tended to create monopolies. In that case, the petitioner and respondent entered into an agreement that prohibited each other from operating in any of the territory covered by the routes of the other, as well as acquiring any certificate of Public Convenience of any operator who may have a route in the said territory. The Court pointed out that the kind of agreement that the parties (which were public utilities) have entered has impaired public convenience and interest. The Court observed that public utilities are more strictly limited in the kinds of contracts in restraint of the free flow of trade, commerce and communication because of their duty to give equal service to the public.

They can make no contracts inimical to that duty. As a general proposition, all contracts and agreements, of every kind and character, made and entered into by those engaged in an employment or business impressed with a public character, which tend to prevent competition between those engaged in like employment, are opposed to the public policy and are therefore unlawful. All agreements and contracts tending to create monopolies and prevent proper competition are by the common law illegal and void.

In Energy Regulatory Board v. Court of Appeals, the Supreme Court debunked the oppositer’s position that the establishment of a service station near its vicinity would cause ruinous competition. In allowing Shell’s construction and operation of a gasoline station, the
Court held that it is a policy of the government to allow the interplay of market forces with minimal government intervention as a solution to the problems of the oil industry, thus:

The policy of the government in this regard has been to allow a free interplay of market forces with minimal government supervision. The purpose of governing legislation is to liberalize the downstream oil industry in order to ensure a truly competitive market under a regime of fair prices, adequate and continuous supply, environmentally clean and high-quality petroleum products. Indeed, exclusivity of any franchise has not been favored by the Court, which is keen on promoting free competition and the development of a free market consistent with the legislative policy of deregulation as an answer to the problems of the oil industry.

**Monopolies are allowed only to serve public interest but are subject to regulation.**

The 1987 Constitution, as it is worded, does not necessarily prohibit monopolies. The use of the word “regulate” in the Constitution indicates that some monopolies may be allowed if properly regulated by the State. A determination must first be made whether public interest requires that the State should regulate or prohibit private monopolies. To illustrate, by their very nature, certain public services or public utilities such as those which supply water, electricity, transportation, telegraph, etc. must be given exclusive franchises if public interest is to be served. Such exclusive franchises are not violative of the law against monopolies.

The cases of Anglo-Fil Trading Corporation v. Hon. Lazaro, Philippine Ports Authority v. Hon. Mendoza and Agan v. PIATCO (and allied cases) are illustrative of the establishment of monopolies was sanctioned by the Court on the belief that these monopolies will serve the interest of the public. All these cases are in unison to declare that monopolies are not per se prohibited.

In these cases, the Philippine Ports Authority passed a circular requiring the integration of cargo handling (stevedore and arrastre) services providers into one entity, which was granted a special permit to the exclusion of all other existing operators. The net effect is the creation of a monopoly. The Court justified the establishment of the monopoly on the basis of public interest. The Court held that “Competition can best regulate a free economy. Like all basic beliefs, however, that principle must accommodate hard practical experience. There are areas where for special reasons the force of competition, when left wholly free, might operate too destructively to safeguard the public interest.” The Court accepted the posture of the PPA that the integration was expected to produce to following advantages (1) optimum utilization of equipment, facilities, and labor; (2) improved and stabilized labor compensation; (3) larger capital base; (4) increased borrowing base; (5) savings in overhead costs; (6) flexibility of operations; (7) maintenance program improvement; (8) uniform reporting and accounting system; and (9) better dealing with the government.

In Agan, what was involved was the Build–Operate-and-Transfer contract for the construction,

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37 Philippine Ports Authority v. Hon. Mendoza, id.
38 Anglo-Fil Trading Corp. v. Lazaro, G.R. No. 54966, 2 September 1983.
39 Id.
41 Philippine Ports Authority v. Hon. Mendoza, id.
42 Id.
operation and maintenance of NAIA IPT III. PIATCO, the concessionaire, argued on the strength of its amended concession agreement that certain fees are no longer subject to the regulation of Manila International Airport Authority (“MIAA”). The Supreme Court held that the amended concession agreement is not valid because the Constitution provides that monopolies must be regulated in the public interest:

Monopolies are not per se prohibited by the Constitution but may be permitted to exist to aid the government in carrying on an enterprise or to aid in the performance of various services and functions in the interest of the public. The operation of an international passenger airport terminal is no doubt an undertaking imbued with public interest. In entering into a Build–Operate-and-Transfer contract for the construction, operation and maintenance of NAIA IPT III, the government has determined that public interest would be served better if private sector resources were used in its construction and an exclusive right to operate be granted to the private entity undertaking the said project, in this case PIATCO. Nonetheless, the privilege given to PIATCO is subject to reasonable regulation and supervision by the Government through the MIAA, which is the government agency authorized to operate the NAIA complex, as well as DOTC, the department to which MIAA is attached.

While it is the declared policy of the BOT Law to encourage private sector participation by “providing a climate of minimum government regulations,” the same does not mean that Government must completely surrender its sovereign power to protect public interest in the operation of a public utility as a monopoly. The operation of said public utility cannot be done in an arbitrary manner to the detriment of the public which it seeks to serve. The right granted to the public utility may be exclusive but the exercise of the right cannot run riot. Thus, while PIATCO may be authorized to exclusively operate NAIA IPT III as an international passenger terminal, the Government, through the MIAA, has the right and the duty to ensure that it is done in accord with public interest.43

Section 19 prohibits only contracts or combinations that unduly restrain competition.

A categorical declaration has been made by the Supreme Court that combinations in restraint of trade and unfair competition are outrightly prohibited by the Constitution.44 However, there are early cases, e.g. Del Castillo v. Richmond,45 Ollendorf v. Abrahamson,46 and Ferrazini v. Gsell47 which upheld contractual obligations prohibiting a contracting party from engaging in a business similar to that of their former employer as long as the restriction on the exercise of trade is limited as to time, place and trade. At the time, the authorities cited by the Supreme Court were primarily based on foreign jurisprudence and its analysis was purely legalistic without touching the implications in the market competition.

It was only in Avon Cosmetics, Inc., et al. vs. Leticia H. Luna48 where the Supreme Court clarified the principles enunciated in the earlier cases in the context of contract law. The Court considered the particular circumstances of the case, the nature of the contract and the possibility of foreclosing competition. In said case, what was being challenged was an

43 Id.
44 Id.
45 G.R. No. L-21127, 9 February 1924.
46 38 Phil. 585.
47 34 Phil. 697.
48 G.R. No. 153674, 20 December 2006
exclusivity contract prohibiting the respondent from selling products of Avon’s competitors.

The Court interpreted the phrase “restraint of trade or occupation” to embrace acts, contracts, agreements or combinations which restrict competition or obstruct due course of trade. However, those which are prohibited by the Constitution are contracts which are against public interest. In other words, contracts restricting trade or business, taking into account the particular circumstances of the case and the nature of the contract involved, may not be covered by the constitutional proscription if it is a reasonable protection to the party in whose favor it is imposed.

The question then is when should a stipulation be considered unreasonable. The Court held that “only those arrangements whose probable effect is to foreclose competition in a substantial share of the line of commerce affected can be considered as void for being against public policy. The foreclosure effect, if any, depends on the market share involved. The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations.”

**The State has a right to intervene in competition when public interest so requires.**

While the Philippines adhere to the free enterprise system, our kind of free market system allows the hand of the government to intervene when public interest so requires. As held by the Supreme Court in *Tatad*:

Beyond doubt, the Constitution committed us to the free enterprise system but it is a system impressed with its own distinctness. Thus, while the Constitution embraced free enterprise as an economic creed, it did not prohibit per se the operation of monopolies which can, however be regulated in the public interest. Thus too, our free enterprise system is not based on a market of pure and unadulterated competition where the State pursues a strict hands-off policy and follows the let-the-devil devour the hindmost rule. Combinations in restraint of trade and unfair competitions are absolutely proscribed and the proscription is directed both against the State as well as the private sector. This distinct free enterprise system is dictated by the need to achieve the goals of our national economy as defined by section 1, Article XII of the Constitution which are: more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged. It also calls for the State to protect Filipino enterprises against unfair competition and trade practices.

By far, there has been no Supreme Court ruling applying the foregoing. The closest case is *Republic of the Philippines v. MERALCO* where the Supreme Court upheld the regulatory rate approved by the then Energy Regulatory Board (now, Energy Regulatory Commission or “ERC”) which reduced the rate adjustment applied for by MERALCO to be collected from its consumers. The Court held:

The business and operations of a public utility are imbued with public

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50 The case cannot be considered on point as MERALCO is a distribution utility whose rates are within the statutory power of the ERC to regulate.
interest. In a very real sense, a public utility is engaged in public service—providing basic commodities and services indispensable to the interest of the general public. For this reason, a public utility submits to the regulation of government authorities and surrenders certain business prerogatives, including the amount of rates that may be charged by it. It is the imperative duty of the State to interpose its protective power whenever too much profits become the priority of public utilities.

Notably, MERALCO is a distribution utility, a regulated entity whose rate is subject to the approval by the ERC.\(^{51}\) What about those competitive and open businesses, e.g. like generation?

There is a case decided by the ERC which invalidated the prices in the Wholesale Electricity Spot Market (“WESM”) for the months of November and December 2013. In ERC Case No. 2014-21, the ERC intervened in the market pricing mechanism in the WESM by voiding the trading prices of the several trading intervals. In said intervals, the bid caps set by the ERC had been breached by price spikes, which do not ordinarily occur in the absence of anti-competitive conducts or behavior. The ERC found tightness of energy supply in the market between the months of November and December 2013 which coincided during the Malampaya shut down.

Notably, the intervention by the ERC in the market was made in the regime of the EPIRA which defines “generation” as a competitive market albeit with the reservation for the interest of the public.

The lack or failure of competition necessitates government intervention to protect the consumers from unreasonably high market prices as shown by the fact that the bid cap of Php62,000/MWh became the market clearing price even during off-peak hours. In this case, “regulation is necessary because social and private costs and benefits, and hence incentives, are misaligned.” Government intervention is needed if there is a failure in the market to correct any inefficiency and prevent these from happening again. As pointed out by John Stiglitz (2009, Regulation & Failure), “the purpose of government intervention is to address potential consequences that go beyond the parties directly involved, in which private profit is not a good measure of social impact.”\(^{52}\)

**Overview of the PCA**

The key provisions of the PCA are found in Chapters III (Prohibited Acts), Chapter IV (Mergers and Acquisitions), Chapter V (Disposition of Cases), Chapter VI (Fines and Penalties) and Chapter VII (Enforcement). The PCA enumerates the types of restrictive practices that are illegal and the relevant penalties for persons who engage in such conduct. These conducts can be the subject of administrative, civil or criminal proceedings.

For example, persons violating Chapter III (Sections 14 and 15) and Chapter IV (Sections 17 and 20) can be liable to pay fine from P100 million to P250 million.\(^{53}\) Other violations are penalized by a fine of not less than P50 thousand up to P2 million.\(^{54}\)

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\(^{51}\) Section 4(q) and Section 22, RA 9165.

\(^{52}\) ERC Case No. 2014-21, 3 March 2014.

\(^{53}\) Section 29(a), id.

\(^{54}\) Section 29(d),id.
Violations of Sections 14(a) and (b) can attract criminal penalty on corporate officers, directors, or employees holding managerial positions, who are knowingly and willfully responsible for such violation. The Office for Competition (OFC) of the Department of Justice is responsible for conducting preliminary investigation and prosecution of criminal cases. However, it is the PCC which initiates the criminal action by filing the criminal complaint with the OFC after conducting a preliminary inquiry in accordance with Section 31 of the PCA.

A private party, regardless of the amount involved, can institute a separate and independent civil action before the RTC if he suffers direct injury by reason of any violation of PCA. But this can be done only after the Philippine Competition Commission (“PCC”) has completed the preliminary inquiry under Section 31. Notably, the PCC in the exercise of its administrative power can issue a consent order for payment of damages to any private party/ parties who may have suffered injury.

Apart from the foregoing, there is a variety of remedies that are available to the PCC against a conduct that is found to be anti-competitive. These remedies include injunctions, requirement of divestment, disgorgement of excess profits and adjustment or divestiture orders including orders for corporate reorganization.

The PCA and its IRR are enforced by the PCC, which is composed of a Chairman and four (4) Commissioners. Similar to other jurisdictions, the PCC has the primary jurisdiction over competition matters. The initiation of a civil or criminal action for breaches of the PCC, and even in competition related issues not expressly covered by the PCA, is subject to the PCC’s power to conduct preliminary inquiry.

Prohibited Acts

Broadly speaking, the PCA prohibits the following anti-competitive trade practices: (1) anti-competitive agreements between and among competitors and those agreements which have the object or effect of substantially preventing, restricting or limiting competition; (2) abuse of market dominance; and (3) mergers and acquisitions that would have the effect or likely effect of substantially preventing, restricting or lessening competition in the relevant market or in the market for goods and services as may be determined by the PCC.

Anti-competitive agreements

There are three (3) types of anti-competitive agreements, namely: (1) agreements which are prohibited per se, like restricting competition as to price, or components thereof,
or other terms of trade, and price fixing at an auction or any form of bidding, and market allocation and other practices of bid manipulation;\(^\text{65}\) (2) agreements whose object or effect will substantially prevent, restrict or lessen competition, such as setting, limiting or controlling production, markets technical development or investment, and dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means;\(^\text{66}\) and (3) a catch-all provision (agreements that do not fall under Section 14[a] and [b]) on anti-competitive agreements which have the object or effect of substantially preventing, restricting or lessening competition.\(^\text{67}\)

The general elements of anti-competitive agreements are: (1) the parties are competitors; (2) there is an understanding between or among the parties towards the accomplishment of a particular object; (3) the agreement must have substantial foreclosure effect on the relevant market; and (4) there is no objective justification for such understanding.\(^\text{68}\)

Price fixing is included in the first type of anti-competitive agreements (\textit{per se} prohibited agreements). The rationale of prohibiting price fixing arrangements is based on the effects on consumers. It is advanced that price fixing arrangements are deemed to lessen competition and lead to inflated prices for consumers.\(^\text{69}\) Bid manipulation is likewise included in the first type of agreement. Section 14(a) covers private and public bidding. In \textit{per se} prohibited agreements, substantial foreclosure effect is not required and objective justification may not be raised as defense.

The second and third types of anti-competitive agreements are considered as measures of protecting competition. The phrase “substantially prevents, restricts or lessens competition” means that the act must have or can have the effect of competitors from competing (preventing), growing (restricting) or stating (lessening in the market).\(^\text{70}\) In other words, act must have a foreclosure effect on competition.\(^\text{71}\)

\textit{Abuse of market dominance}

There are ten (10) kinds of acts or conducts under Section 15 that are considered as abuse of market dominance. The general elements are: (1) the entity must have market power (or a dominant position in the relevant market); (2) the entity takes advantage of this power through abusive conduct; (3) the conduct must have substantial foreclosure effect on the relevant market; and (4) there is no objective justification for the conduct.\(^\text{72}\)

In general terms, abusive conducts under Section 15 includes refusals to supply, predatory pricing, market leveraging, price squeezes and vertical restraints, among others. Third line forcing or exclusive dealing is also prohibited because it limits the ability of the buyer to choose between suppliers of another product. This absence of choice distorts the

\(^\text{65}\) Section 14(a), \textit{id.}
\(^\text{66}\) Section 14(b), \textit{id.}
\(^\text{67}\) Section 14(c), \textit{id.}
\(^\text{68}\) Lim and Recalde, \textit{supra.}
\(^\text{69}\) Law and Business, \textit{supra.}
\(^\text{70}\) Lim and Recalde, \textit{The Philippine Competition Act: Salient Points and Emerging Issues}, Rex Book Store, Manila.
\(^\text{71}\) Id.
\(^\text{72}\) Lim and Recalde, \textit{id.}
market and is harmful to competition because it removes potential customers away from rivals in favor of a particular supplier.\textsuperscript{73}

It should be noted that Section 15 does not prohibit monopoly or substantial market power or the accumulation of that power by competitive means, such as superior efficiency or economic performance.\textsuperscript{74} The proviso under Section 15 expressly stipulates that “nothing shall be construed or interpreted as a prohibition on having a dominant position in a relevant market or on acquiring, maintaining and increasing market share through legitimate means that do not substantially prevent, restrict or limit competition.”

**Prohibited mergers**

Mergers and acquisitions play an important role on the growth of businesses. While business expansion can be achieve through internal or “organic” growth, many enterprises prefer mergers and acquisitions “to improve shareholder wealth and allow the new larger entity to enjoy synergistic benefits that flow from the merger.”\textsuperscript{75}

The law on mergers and acquisitions aims to ensure that while growth of business is encouraged, the proposed merger or acquisition will not have the effect or likely effect of substantially lessening competition in a market. This aim can be implied from the notification requirement of the proposed merger under Section 17. Under Section 20, merger or acquisition agreements that substantially prevent, restrict or lessen competition in the relevant market or in the market for goods or services as may be determined by the PCC shall be prohibited.

\textsuperscript{73} Tony Ciro, et al, supra.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
Philippine Depositary Receipts: Mass Media’s Existing or Emerging Loophole To Constitutionally Mandated Full Filipino Ownership?

Lorenzo E. Delgado*

Quando aliquid prohibitur ex directo, prohibitur et per obliquum.¹ What cannot be legally done directly cannot be done indirectly. If acts that cannot be legally done directly can be done indirectly, then all laws would be illusory.²

Need not be told that the State has and will always recognize the great importance of mass media in the stability and development of the nation. Mass media acts as “gatekeepers”, the determining factor that decides whether or not a message can successfully flow from the transmitter to the receiver.³ The State therefore has the duty to protect said industry, ensuring that the same is within the control of its citizenry and far from the fetching influence foreign control carries.

With the current trend of customization and diversification of financial instruments to heed the need of investments and thus entailing ways and machinations to suit the wants and demands of potential and existing investors, Philippine corporations engaged in mass media sought the use of Philippine Depositary Receipts (PDRs) to obtain foreign investment without being under the sanction of violating the constitution.

Hence, will the issuance of PDRs to foreigners, regardless of its underlying shares and whether the same will be exercised or not, curtail the Constitutional mandate of total Filipino ownership in mass media?

It is believed to be so.

Regardless of different scenarios pertaining to the issuance of PDRs of mass media corporations to foreigners such as whether the underlying shares are entitled to vote or not and whether the said PDRs are exercised or not, the primordial consequence of which is that the said PDRs will enable foreigners to control mass media corporations, a situation which was sought to be prevented by the Constitution.

Mass media corporations namely ABS-CBN, GMA and Rappler, even at the expense of recognizing the constitutional prohibition of foreign ownership in the industry of mass media, have acknowledged the ability of PDRs to obtain foreign investment, to wit:

“The PDRs unlocked the share value of ABS-CBN, allowing foreigners to participate in a media enterprise whose ownership is constitutionally limited to Filipinos. With foreigners allowed to buy PDRs, ABS-CBN shares which have long been undervalued,

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¹ Editor-in-Chief of The Bedan Review
³ Tawang Multi-Purpose Cooperative vs. La Trinidad Water District, G.R. No. 166471, March 22, 2011
can now play catch-up with regional media counterparts.”

“Holders of the PDRs will enjoy only the economic benefits of the shares underlying the receipts without voting and other ownership rights. PDRs will allow foreigners to invest in a media enterprise whose ownership is constitutionally limited to Filipinos.”

“Rappler is the first and only media startup in the Philippines to join broadcasting network giants ABS-CBN and GMA in offering Philippine Depositary Receipts or PDRs to international investors. PDRs are financial instruments that foreign funds can buy into, allowing media and other Filipino firms that must keep foreign ownership at 40%, to raise funds globally.”

With said recognition, it is imperative to understand the nature and consequence of PDRs.

A Philippine Depositary Receipt(s) (PDR) is a security which grants the holder the right to the delivery of sale of the underlying share. A PDR consists of a deposit price and an option price, which is considered as payment when the buyer opts to exercise his option of converting said PDRs to a corporation’s share. PDRs are not evidences or statements nor certificates of ownership of a corporation. However, each PDR represents a share, even in a restricted company, and when bought by a foreign entity, gives the buyer the right to all the dividends due the shares of stock acquired.

Under International Accounting Standards 32.16, a financial instrument is an equity instrument only if (a) the instrument includes no contractual obligation to deliver cash or another financial asset to another entity, and (b) if the instrument will or may be settled in the issuer’s own equity investments, it is either: (i) a non-derivative that includes no contractual obligation for the issuer to deliver a variable number of its own equity instruments; or (ii) derivative that will be settled only by the issuer exchanging a fixed amount of cash or another financial asset for a fixed number of its own equity instruments.

PDRs therefore, even in an accounting perspective, are deemed to be considered as an equity instrument on the ground that the instrument will or may be settled using, in this case delivering, the issuer’s (mass media corporation’s) own equity investment or shares of stocks. The same fact was corroborated by one of Philippine’s leading mass media corporation which recognized PDRs in its Financial Statement as part of its equity.

Hence, being an equity instrument and enabling the holder thereof to be the ultimate recipient of the benefits accruing therein, i.e. dividends, PDRs indubitably has the ability to enable foreigners to exercise control over a media corporation despite absence of legal title to the same.

4 http://www.abs-cbnpdr.com/pdr.php
9 The Manila Times: An Indonesian tycoon’s media empire in the Philippines exposed, April 12, 2016.
10 Roy vs. Herbosa, G.R. No. 207246, November 22, 2016
The Constitutional and legal mandate:

Section 11, Article XVI of the 1987 Constitution provides:
1. The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.12

Consistent with the State policy of developing an economy that is effectively controlled by Filipinos, the Constitution explicitly reserves the ownership and operation of public utilities to Philippine nationals, who are defined in the Foreign Investments Act of 1991 as Filipino citizens, or corporations or associations at least 60 percent of whose capital with voting rights belongs to Filipinos.

The above-quoted constitutional provision undoubtedly states that the ownership and management of mass media must be totally under the control of Filipinos.13 Said requirement was reiterated by Republic Act No. (R.A.) 7042 otherwise known as Foreign Investment Act, as amended by R.A. 817914 and its Implementing Rules and Regulations as well as Executive Orders15 which has, from time to time, reiterated the same in order to emphasize the mandatory requirement of full ownership of Filipinos to mass media corporations’ shares.

In view of the said constitutional and legal provisions, the Securities and Exchange Commission issued SEC Memorandum Circular No. 8 Series of 2013 prescribing the guidelines on compliance with the Filipino-foreign ownership requirements prescribed in

12 Section 11, Article XVI of the 1987 Constitution
13 Section 11, Article XVI of the 1987 Constitution
14 An Act to Further Liberalize Foreign Investments, Amending for the Purpose Republic Act 7042, and for Other Purposes
15 List A of Annex to Executive Order No. 184 Series of 2015: Promulgating the Tenth Regular Foreign Investment Negative List. The following industries are required to be wholly owned by Filipino corporations:
1. Mass Media except recording (Art. XVI, Sec.11 of the Constitution; Presidential Memorandum dated 04 May 1994)
2. Practice of all professions *1 (Art. XII, Sec.14 of the Constitution, Sec. 1 of R.A. 5181, Sec. 7. J of R.A. 8981)
   a. Pharmacy (R.A. 5921)
   b. Radiologic and x-ray technology (R.A. 7431)
   c. Criminology (R.A. 6560)
   d. Forestry (R.A. 6239)
   e. Law (Art. VIII, Section 5 of the Constitution; Rule 138, Sec. 2 of the Rules of the Court of the Philippines)
3. Retail trade enterprises with paid-up capital of less than US$2,500,000 (Sec. 5 of R.A. 8762)*2
4. Cooperative (Ch. III, Art. 26 of R.A. 6938)
5. Private security agencies (SEC. 4 of R.A. 5487)
6. Small-scale mining (Sec. 3 of R.A. 5487)
7. Utilization of marine resources in archipelagic waters, territorial sea, and exclusive economic zone as well as small-scale utilization of natural resources in rivers, lakes, bays, and lagoons (Art. XII, Sec. 2 of the Constitution)
8. Ownership, operation and management of cockpits (Sec. 5 of P.D. 449)
9. Manufacture, repair, stockpiling and/or distribution of nuclear weapons (Art. II, Sec. 8 of the Constitution)*3
10. Manufacture, repair, stockpiling and/or distribution of biological, chemical and radiological weapons and anti-personal mines (various treaties to which the Philippines is a signatory and conventions supported by the Philippines)*3
11. Manufacture of firecrackers and other pyrotechnic devices (Sec. 5 of R.A. 7183)
the Constitution and/ or existing laws by corporations engaged in nationalized and partly nationalized activities. Section 2 thereof provides:

Sec. 2 – All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino Ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.

The advent of said memorandum circular inevitably requires that mass media corporations must comply with the one-hundred percent Filipino ownership not only through its outstanding shares of stock entitled to vote in the election of directors but also the total number of outstanding shares of stock, whether or not entitled to vote.

Corollary, the Foreign Investments Act’s implementing rules explain that for stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential.16

On this score, the Implementing Rules and Regulations of the Securities Regulation Code defines beneficial owner or beneficial ownership as any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power, which includes the power to vote or direct the voting of such security, and/ or investment returns or power, which also includes the power to dispose of, or direct the disposition of such security.17

In defining full beneficial ownership, the Implementing Rules and Regulations of FIA itself requires that mere legal title is not enough to meet the required Filipino equity, which means that it is not sufficient that a share is registered in the name of a Filipino citizen or national, i.e. he shall also have full beneficial ownership of the share. If the voting right of a share held in the name of a Filipino citizen or national is assigned or transferred to an alien, that share is not be counted in the determination of the required Filipino equity.18

In the same vein, if the dividends and other fruits and accessions of the share do not accrue to a Filipino citizen or national, then that share is also to be excluded or not counted.19 Thus, if a “specific stock” is owned by a Filipino in the books of the corporation, but the stock’s voting power or disposing power belongs to a foreigner, then that “specific stock” will not be deemed as “beneficially owned” by a Filipino.20

Therefore, what is required is not merely legal title but full beneficial ownership over the shares of stock, having the right to all the benefits accruing to the stockholder by virtue of the shares, i.e. dividends, which, if said shares underlies a PDR, said full beneficial

16 Gamboa vs. Teves, G.R. No. 176579, October 9, 2012
17 Roy vs. Herbosa, G.R. No. 207246, November 22, 2016
18 Id.
19 Id.
20 Id.
ownership will be absent to the stockholder, considering that the holder of the PDR and not the stockholder will have the right to obtain the benefits accruing to the shares of stock regardless of lack of ownership over the same.

Foreign control in mass media corporations:

It is beyond cavil that there is a need to acknowledge existence of numerous corporate control-enhancing mechanisms, besides ownership of voting rights, that limits the proportion between the separate and distinct concepts of economic right to the cash flow of the corporation and the right to corporate control.\textsuperscript{21}

Control is the power to govern the financial and operating policies of an enterprise so as to obtain benefits from its activities.\textsuperscript{22} Ownership of voting shares or power alone without economic control of the company does not necessarily equate to corporate control. A shareholder’s agreement can effectively clip the voting power of a shareholder holding voting shares. In the same way, a voting right ceiling, which is “a restriction prohibiting shareholders to vote above a certain threshold irrespective of the number of voting shares they hold,” can limit the control that may be exerted by a person who owns voting stocks but who does not have a substantial economic interest over the company.\textsuperscript{23} So also does the use of financial derivatives with attached conditions to ensure the acquisition of corporate control separately from the ownership of voting shares, or the use of supermajority provisions in the bylaws and articles of incorporation or association.\textsuperscript{24}

Indeed, there are innumerable ways and means, both explicit and implicit, by which the control of a corporation can be attained and retained even with very limited voting shares, i.e., there are a number of ways by which control can be disproportionately increased compared to ownership so long as economic rights over the majority of the assets and equity of the corporation are maintained.\textsuperscript{25}

Therefore, it is a corporate reality that control can exist regardless of ownership of voting shares. And to allow the issuance of PDRs by mass media corporations to foreigners subjects the mass media industry to foreign control, regardless of ownership of its shares, in utmost disregard of the intent of the constitution.

Foreigners can greatly control and influence corporate decision-making processes even if they do not have legal title to the shares. Non-stockholders or persons or entities that do not have shares of a subject corporation registered under their names can remain in effective control, albeit indirectly, of those with controlling interest by just having specific property rights (“use and title”) in equity given to them while the legal title of the property given to another.\textsuperscript{26}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} Concurring Opinion: Velasco, Jr., J, Roy vs. Herbosa, G.R. No. 207246, November 22, 2016, citing Gamboa vs. Teves, G.R. No. 176579, October 9, 2012 citing SRC Rule 3(E) of the Amended Implementing Rules and Regulations (IRR) of the SRC and Sec. 3(g) of The Real Estate Investment Trust Act (REIT) of 2009
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Dissenting opinion: Mendoza, J., Roy vs. Herbosa, G.R. No. 207246, November 22, 2016 citing Black’s Law Dictionary (2nd Pocket ed. 2001 p. 508).
\end{itemize}
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Trust: A Tool for Estate Planning

Atty. Nicasio C. Cabaneiro, CPA

One of the most common tools in estate planning is the use of a Trust, an arrangement under which one can place his assets for his or someone else’s benefit (the beneficiary) under the control of a trustee.

The concept of Trust was introduced in the Philippines by the Americans and was formally incorporated in the New Civil Code of the Philippines in 1950. For many years, this concept has been mistaken and confused with the “trust certificate” which was actually an instrument issued by banks in the early 1970’s and is more synonymous with a time deposit, or with a “trust receipt” which is an instrument being availed of by importers as a corollary to a letter of credit application and as a security to a credit accommodation. This confusion is unfortunate considering that Trust is probably the most versatile and effective transaction a person with property could enter into. While in the United States and some European countries, they have sophisticated and more advanced rules on Trust, it is unfortunate that in the Philippines, this tool in estate planning is still not very much recognized as to its varied uses and benefits.

Meaning of Trust

Trust is a legal instrument or device whereby a person called a Trustor delivers part or all of his properties to another person called Trustee who administers and manages the property/ies for the benefit of designated person/s called Beneficiaries. The term “person” may refer to an individual or natural person or a juridical person like a corporation.

It is a transaction usually composed of three parties (trustor, trustee and beneficiaries), each with his own obligations and rights, and involving properties and property interests to address various kinds of purposes. The most notable feature of Trust is grounded on the fact that the legal title to the property is in one person while the beneficial interest which is referred to as the “equitable title” is in another person. The legal right and control are in the trustee, subject to the duty of applying and using the property as directed by the trustor, while the right to enjoy the benefits from the property is in the beneficiary of the trust.

Under the New Civil Code, Trust may be implied or express. Implied trust is created by operation of law, as for example when a person acquires property by mistake, he is considered by the law as a trustee while he holds the same for the real owner of the property. Express trust is established by the mutual stipulation of the parties or of the trustor.

In this article, I will only discuss express trust which is the most commonly used in the trust business or industry.

I. Basic Elements of an Express Trust

A. Parties to the Trust

1. The trustor or grantor – the owner or the person giving the property in trust, who should have the legal capacity to effectively transfer property outright by gift, assignment,
exchange or sale. Thus, a person under a legal disability to sell or donate a property, such as a minor or a mentally disable person, could not be a trustor.

2. The **trustee** – the person or institution in whom the confidence is reposed as regards the management of a property for the benefit of another person. The trustee may either be a natural person or a corporation or an institution.

3. The **beneficiary**/ “cestui que trust” – the person who is to receive the benefits from the trust or for whose benefit the trust has been created and is sufficiently identified as such. The beneficiary may be the trustor himself or persons other than the trustor, as for example, the trustor’s children or a foundation like Tuloy sa Don Bosco Streetchildren Foundation in Alabang, Muntinlupa City.

**B. Manifest intention to establish a trust.**

The person creating the trust must expressly show that he is seriously intending to enter into a trust arrangement. Imperfect expression of intent may result in converting the arrangement into some other form of contract, management or probably a simple agency relationship.

**C. Trust Property**

The subject matter of the trust or the ‘res’ must be clearly identified. It is important that the property to be transferred in trust must be existing, lawful, definite and transferrable. Anything that has an economic value and which a person may own and to which he may own and to which he may transfer legal title, by gift or sale, is a property that may be conveyed in trust. Hence, a trust may be constituted on real estate, household effects, cash, stocks, bonds and other securities, livestock and growing crops, works of art, jewelry and other tangible things.

Trust property need not be a tangible thing; it may be comprised of a claim, such as a right of action for breach of contract or upon a promissory note. For example, a trust may exist in life insurance policies or the proceeds thereof, or may consist of patents, copyrights, goodwill, trademarks and trade secrets.

**D. A lawful purpose**

If the trust violates a law or it is against morals, public policy or public order, the trust will be void and of no effect. Hence, a trust will be void if it involves the commission of a criminal act by the trustee, or if the trustee encourages the neglect of parental duties, restrains marriage, religious freedom or the performance of public duties.

**II. Trust terms must be sufficiently stated in the trust instrument.**

The trust instrument must at least show the following:

1. The beneficiaries and the extent of their interest;
2. The subject matter of the trust or the trust property;
3. The purpose or purposes of the trust;
4. A recitation of the powers and duties of the trustee to facilitate the orderly administration of the trust and the fulfillment of the trustor’s desires.

**III. Who can be an Institutional Trustee?**

A bank, investment house or any corporation can be an institutional trustee, provided that it is duly authorized or licensed by the Monetary Board of the Bangko Sentral ng Pilipinas
to perform trust and fiduciary business. In the case of authorized banks or investment houses, the trust or fiduciary business is normally carried out through their Trust division, department, group, unit, section, or any other form of aggrupation. In the case of trust companies or trust corporations, the entire company or corporation is involved in carrying out the trust or fiduciary business, precisely because the company is establish for this particular business.

IV. Why will you benefit more in appointing an Institutional Trustee?

1. **Financial Responsibility and Responsiveness** – To be responsible is to be able to meet financial obligations; to be responsive is to be ready and willing as well as able, to meet them as they are determined. The institutional trustee is financially responsible not only by its own capital and surplus but also by the reserves it is required to put up for its trust business. Unlike a natural person as trustee, an institutional trustee is more compelled to maintain its financial responsiveness otherwise it may forfeit the patronage of people seeking trust service.

2. **Government Supervision** – The institutional trustee is under constant and continuous government regulations, examination and supervision by various government entities, specifically the Bangko Sentral ng Pilipinas, to ensure that the institutional trustee manages the trust property in the best interest of the beneficiary thereof.

3. **Group Judgment/Objectivity** – In the administration of trust, problems may arise which may require the advice and judgment of persons who, although not specialists, have sound judgment and are not subject to personal biases as regards the trust accounts presented to them for their deliberation. The institutional trustee obtains the group judgment of its officers, its Trust Committee and its Board of Directors.

4. **Specialization** – In trust administration institutions, the management of a trust is the work, not of one, but of several specialists. Hence, there are specialists, for example, in the investment of trust funds; in the management of business; in bookkeeping and accounting; in tax work; in research, in documentation, etc.

5. **Continuity of Capacity** – In the trust institution, continuity of capacity is to be found in the succession of trust officers. Incapacity or unavailability of one trust officer handling the account does not disrupt the servicing of the account because in a normal corporate set up, a successor or replacement or substitute immediately takes over.

6. **Continuity of Existence** – The life of a corporation or institution is almost perpetual. Corporate life under the Corporation Code of the Philippines is fifty (50) years renewable every fifty (50) years. The trustor feels assured that the institutional trustee he chooses will continue to be in existence and be prepared to serve his needs as well as his beneficiaries of the second and even the third generation.

V. What can you expect of an Institutional Trustee?

1. Fidelity to the trustor’s interest;
2. Compliance with trustor’s instructions and with the terms of trustor’s agreement with the trustee;
3. Full disclosure of the details of trustor’s investments;
4. Separation of trustor’s money from the business of the bank and from the money of its other clients, except in the case of Common Trust Funds where participants become proportionate owners of a pool of investments;
5. Execution of all investments at the best possible prices and at the least transaction costs;
6. Scrupulous care, safety and prudent management of trustor’s assets;
7. Confidentiality about trustor’s financial affairs.

VI. What are the services offered by an Institutional Trustee?

The institutional trustee offers its clients a wide array of trust and other fiduciary services. These services range from the very simple safekeeping to the more complicated management of estates or retirement funds. In all these instances, the financial institution as trustee takes the side of the works in the interest of the client. The client may be an individual, a corporation, or an institution.

The various services offered by an institutional trustee may be classified under three (3) general categories as follows:

A. Fiduciary/Trusteeship

The institutional trustee acts as the fiduciary when it is appointed by the court and serves as the executor or administrator of the properties left by a deceased person, as guardian of the estate of a minor or an incapacitated person, and a trustee of a legally constituted trust.

When the institutional trustee serves as a trustee of a legally constituted trust, it acts as fiduciary in the fullest sense. As trustee, it holds the legal title (the trust property is registered in the name of the trustee for and in behalf of the beneficiary) over the trust property for the benefit of the beneficiary who is said to hold the equitable title. This means that, with respect to the entire world, except the beneficiary, the owner of the property is the trustee. However, unlike a true property owner, the trustee is not entitled to use the trust property for its own gain. Instead, it is supposed to manage the trust asset for the benefit or for the good of the beneficiary.

B. Advisory

Under this role, the institutional trustee makes financial recommendations to the client as in, for example, the proper timing for selling or buying stocks, or which investment outlets to go into for maximization of yields, or the prospects of foreign currency investment, or transfer of assets at the least tax cost, etc. In addition to the financial advice, the client gets access to the in-depth and comprehensive investment research and analysis available to the institutional trustee because of its resources and extensive network. Some smart owners of big owners of portfolios split their money among several investment advisory accounts with the different institutional trustees and, after comparing the financial recommendations of these financial advisors, make their investment decisions based on where the weight of well-informed opinion lies.

C. Agency

As an agent, the institutional trustee does not take legal title to the property under its agency. The institutional trustee acts in behalf of the client in a representative capacity.

Examples of these services are as follows:

1. Safekeeping - The property owner turns over his securities and other valuables to the institutional trustee as agent. The institutional trustee has no other duty than to keep them safely and in due time return them to the owner or deliver them upon the owner’s order or instructions.
2. **Custodianship** - As custodian, the main duties of the institutional trustee are to safekeep, preserve the property and to perform ministerial acts with respect to the property as directed by the client, such as collecting and crediting interest and dividends, attending to calls, maturities and conversion of securities. Stocks and bonds are the usual subject matter of custodianship.

3. **Management of Assets** - The institutional trustee as managing agent, undertakes to perform on behalf of the client, managerial duties and responsibilities appropriate to the kind of assets comprising the agency account and in conformity with the terms of the agency. The managing agent performs all the usual duties of a custodian plus participation in the active management of the assets of the agency account. The assets remain in the name of the client but the management of the assets is largely placed in the good judgment of the institutional trustee. The client may grant the trustee the authority to exercise full discretion in the management of the assets. This gives the trustee maximum flexibility necessary to enable the trustee to react in a timely and efficient manner to changes in the financial market that could have significant effects on the client’s investment portfolio. Some clients may opt to limit the discretion of the trustee by requiring that the investments be made in accordance with a set of guidelines established beforehand and reviewed from time to time jointly by the client and the trustee.

4. **Escrow** - The institutional trustee as escrow agent for two contracting party protects their individual interests by ensuring that the terms and conditions mutually agreed upon by these two parties in a separate contract, are fulfilled. As a disinterested party, the escrow agent holds in custody the properties delivered to it by each of the contracting parties. The escrow agent monitors the conditions upon the performance of which, or the event upon the occurrence of which, the escrow agent shall deliver specific assets to the party entitled to receive them in accordance with the agreement between the parties. This service is convenient for transactions such as buying/selling of assets on installment basis, or disposition of assets subject to mandate restrictions or clearances.

5. **Attorney-in Fact for Various Purposes** - The client grants the institutional trustee as agent the power and authority to perform one or more specific acts in behalf of the client. The client meanwhile avails himself of the services of the institutional trustee’s personnel who are experienced, competent and skilled in the performance of the delegated set/s.

**VII. How flexible is trust?**

Trust is flexible such that it can be modified from time to time to suit changing situations and objectives. However, certain limitations are to be considered and observed namely:

1. **Irrevocable Living Trust** - No changes may be made which would alter the irrevocable natures of the trust; this applies also to an Irrevocable Life Insurance Trust where the insured has designated an irrevocable beneficiary of insurance proceeds.

2. **Revocable Living Trust** - The trustor can change its terms such as the beneficiary designation, how the fund will be invested, manner of disposition or distribution of the fund to the beneficiaries; he may even terminate the trust at any time he so wishes.

3. **Testamentary Trust** - The trustor can change its term anytime during the life of the trustor. The trust becomes operative and the terms of the trust become final only upon his death.

4. **Retirement/Pension Trust** - The trustor (the employer) cannot amend the terms of
the trust where such amendment would constitute the diversion of all or a part of the principal and/or income of the fund to purposes other than those specified in the Retirement/Pension Plan.

5. **Sinking Fund Management, Trust Indenture, Escrow Agency, Collateral and Similar Arrangements** – Amendments in the terms can be made only upon mutual consent of the trustor and the beneficiary.

In any trust arrangement, however, the trustor and, in some cases the beneficiary, can change the trustee at any time.

**VIII. How safe is your money in the Trust Institution?**

Although not an obligation of the trust institution and not insured with the Philippine Deposit Insurance Corporation, money placed with a reputable trust institution is just as safe, if not safer, than money in a savings or time deposit account with a bank. There are enough safeguards instituted through current government regulations and industry practice, namely:

1. **Capitalization Requirements/License**

   Not every bank or investment house can engage in the business of trust and other fiduciary functions. Only those authorized by the Bangko Sentral ng Pilipinas (BSP) may do so. And the BSP has set very high standards and stringent measures for financial institutions that are engaged in trust business.

   Under a circular issued by the Monetary Board, an applicant for a trust license must have a combined capital account of not less than P250 million. This means that the total of its unimpaired paid-in capital, earned surplus and undivided profits, excluding amounts it had set aside for income taxes as well as unbooked valuation reserves and other capital adjustments required by the BSP, must be at least P250 million. Hence, the trust business is limited to banks and investment houses who can show their capability to be financially responsive.

   Sometime July 2015, the Monetary Board in order to spur the interest in the establishment of stand-alone trust corporations adjusted the minimum capitalization requirements. Previously, a trust corporation was required to put up a minimum paid-in capital of P300 million at inception. The new guidelines have reduced this to P100 million at inception, but is coupled with a five-year transition period within which the trust corporation should eventually increase its capital to P300 million. The lowering of the minimum capital requirements is not only intended for banks, but also for other market entrants who desire to engage in the trust business but find the previous P300 million requirement too restrictive.

2. **Reserves**

   Before a trust institution with trust license can actually accept money in trust, it must also make an initial deposit of at least P500,000.00 with the Bangko Sentral ng Pilipinas, in the form of eligible government securities, as security for the trust institution’s faithful performance of its trust duties. If, while doing business, the assets that a trust institution holds in trust exceeds P50 Million, the trust institution must place with the BSP additional government securities to maintain its deposit at the equivalent of at least 1.0% of total value of the trust assets it is managing. This deposit likewise serves as security that the trust institution will perform its duties well. At no time can the security deposit be less than P500,000.00. In
addition to the basic security deposit, the BSP requires liquidity reserves of varying rates for common trust funds and for certain types of trust and other fiduciary arrangements.

3. **“Prudent-Man” Rule**

Under this rule, the trust institution is required to “administer the funds or property under its custody with the skill, care, prudence and diligence necessary under the circumstances then prevailing that a prudent man, acting in like capacity and familiar with such matters, would exercise in the conduct of an enterprise of a like character and with similar aims.”

**Investment Restrictions/Disclosure.** The BSP regulations on trust spell out some of the specifics of the **Prudent-Man** rule in a set of investment rules that limit the placement of funds in safe outlets, such as in government securities like Treasury Bills, or in loans fully secured by a hold out on deposits with a bank, by real estate mortgage, or by a pledge of movable properties. Investment can be made outside this restricted list only if the transactions are fully disclosed to the clients and approved by the latter prior to execution. For practicality, many trust institutions disclose these deviations to the client before an account is opened and the client’s approval is embodied in the trust instrument itself.

Also the BSP regulations prohibit certain acts which, although not necessarily unsound, could unduly expose the trust funds to some risks. For example, unless the transaction is fully disclosed and is specifically authorized by the owner, money held in trust cannot be lent to a corporation that is owned at least 50% by the trust institution. Likewise, specific authorization is needed before the trust department of a financial institution could place funds in the same financial institution’s own money market desk. And when an investment, as for example, a long term-loan is transferred before maturity from one trust account to another, a specific client authorization is also required.

4. **Periodic Reports to Client/BSP**

Informative reports are required to be made by the trustee to the client and other parties who have legitimate interest in the trust. These reports must be given at least quarterly, and must consist of a balance sheet, an income statement, a schedule of earning assets and an investment activity report. With these reports, a client could closely monitor the movements of his account and take up with his account officer any misgivings he has on his trust account. The trustee likewise submits to the BSP periodic reports on the trustee’s trust business.

5. **Yearly Triple Audit**

The trust institution is required to submit itself to an annual triple audit: one by its own internal auditors, a second by the independent external auditors of the trust institution, and the third by the examiners of the Bangko Sentral ng Pilipinas. These audits, which have the common purpose of determining whether the trust business of the financial institution is being conducted in accordance with the law and regulations, serve as effective deterrents against unsound practices and fraudulent schemes.

6. **Earmarking/Separation of Accounts**

Trust assets are required to be kept separate and distinct from all other assets of the trust institution’s business; trust books and records are separate and independent from other books and records of the trust institution. The records of each trust account are separate from those of all other accounts and are adequately identified.
7. **Preference of Claims**

No assets held by the trust institution, as a trustee, shall be subject to any claims other than those of the parties (trustor/beneficiaries) interested in the specific trust accounts.

8. **Check-and –Balance Mechanism/Group Judgment**

No single person controls the entire process of administration of trust fund. The Board of Directors, the Trust Committee and the Trust Officer are all involved. Normally, transactions involving the trust account require dual signatories for implementation and trust assets are under the joint custody of at least two persons, one of whom shall be an officer of the trust institution, designated for that purpose by the Board of Directors.

9. **Reasonable Trust Fees**

The fees are based on the cost of services rendered and the responsibilities assumed; not based on the excess of the income derived from the investment of trust fund over a certain amount of percentage. Otherwise, the trustee will tend to be reckless in the investment of the trust fund just so it can get highest yield for the fund and eventually get a bigger fee.

10. **Reputation of the Trust Institution**

No respectable trust institution would want to have its name sullied by scandals and scams perpetrated by its own people. Every institution now operating would like, instead, to develop and maintain a reputation of prudent investment and efficient administration. A trust institution worthy of its name “Trust,” will always make sure that the client’s account is safe, that it achieves reasonable growth for the funds it manages and that its accounts yield adequate income for its clients.

In conclusion, I would like to state that contrary to the understanding of some people that trusts are only for the wealthy, this is not true. Anyone can utilize a trust in their estate plan as an instrument to distribute assets effectively and efficiently upon death or to put stipulations on assets gifted to children.
Tax Reform: 
Creating Real Changes in Society through 
the Destructive Power of Taxation

Antoinette Temanil*, Aldrin Jose Cana**
and Lorenzo Delgado***

“Every act of creation is first an act of destruction.”
— Pablo Picasso

I. Introduction

Every state has a duty to its people; a duty to provide for their needs, to protect them from harm, to reduce social inequalities, and to promote their general welfare. In order for the state to perform this duty it became necessary to impose enforced contributions from the people in the form of taxes. Hence taxes emanated from necessity. Because of this necessity the U.S. Supreme Court in the case of McCulloch v. Maryland held that “the power to tax involves the power to destroy; ... the power to destroy may defeat and render useless the power to create”, describing not the purpose of the said power, but the degree of vigor with which the taxing power may be employed in order to fulfill these duties. Thus in order to create revenues for the state, to provide opportunities for economic advancement to the people and maintain the prize of civilization, that destructive power of taxation has to be continuously imposed and implemented, and in relation to this the said power must continue to be responsive to the subsequent economic developments, the ever changing ways of doing business, not only in one state but in the whole global community, in order to be competitive and efficient since business transactions are no longer limited in one state economy. The dramatic increase in globalization of trade has led to harmful tax practices, such as transfer pricing and tax havens, which have resulted in tremendous losses of tax revenues for governments. Temporality and transition is certain in the nature of taxation, and as new business emerges, and new loop holes are created in order to minimize or avoid the payment of taxes the government should destroy the old system in the name of creating a better procedure of levying and collection, so that the government will be able to maintain the necessary burden of preserving the State’s sovereignty, and a means to give the citizenry an army to resist aggression, a navy to defend its shores from invasion, a corps of civil servants to serve, public improvements designed for the enjoyment

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2 Article II Section 4 of the 1987 Constitution of the Philippines provides that “The prime duty of the Government is to serve and protect the people”
3 National Power Corporation v. City of Cabanatuan, G.R. No. 149110, 9 April 2003
4 McCulloch v. Maryland, 17 U.S. 327 (1819)
5 1 Cooley 179-181
7 BIR Revenue Regulations No. 2-2013
8 A country or jurisdiction in which foreign individuals or countries can take advantage of policies that provide little or no tax liability, allowing them to avoid paying at least some taxes in their home country. Other terms are secrecy jurisdiction or offshore haven. Retrieved from http://www.voanews.com/a/panama-papers-what-is-a-tax-haven/3276065.html
of the citizenry and those which come within the State’s territory and facilities, and protection which a government is supposed to provide. Failure to address these changes in the global community means that the current tax system has not generated the desired regulation needed to create a robust environment for business to enable firms to compete better in the regional as well as the global market contrary to the policy of the state, and the failure to address these issues may be counterproductive.

II. Previous Tax Reforms

During the Marcos Regime, our government was in a fiscal crisis, the system of taxation was unresponsive, it was unnecessarily complicated, and very difficult to administer. Despite successive laws increasing taxes, actual revenues decreased, while the main burden of taxation fell on those least able to support it — the low and middle-income classes rather than the rich. And of the rich, those hardest hit were the most productive; for the tax system was a major disincentive to private enterprise, hence change was not optional, it was a necessity. The first major reform of the tax laws occurred after the EDSA Revolution with Mrs. Aquino’s 1986 Tax Reform Program, introducing for the very first time the concept of VAT to our tax system. In her Budget Message the president pledged to undo the evils of the past and to lay the foundation for an equitable, responsive, and fair tax system. The reform was a success. It raised tax effort (taxes as percent of GDP) to a peak of 17% in 1987. Both tax effort and revenue effort rose steadily.

By contrast to the successful 1987 tax reform program, in 1997 then President Ramos introduced the second major tax reform program, ironically billing it as the “comprehensive” tax reform program which seeks to widen the tax base, simplify the tax structure to minimize undeclared revenues and overstated deductions, and to make the system more elastic (DBM 1996). The program has 3 major components: 1) Income tax reform; 2) Excise tax reform, and; 3) Fiscal incentives reform, which is arguably the best part of the Comprehensive Tax Reform Program. Unfortunately it was not comprehensive, it was long-winded rather than swift, and that the VAT base was narrowed rather than expanded. Several aspects of the reform program such as the MCIT and VAT on banks were passed but was not implemented. The legislative subsequently made the situation worse when it approved several laws granting tax incentives resulting to the impairment of the economic efficiency of our tax system. Based on the Reside Paper there is no direct correlation between incentives and attracting domestic or foreign investments and that the provision of fiscal incentives is very costly, yet in spite of the fact that they continue to be provided, there is limited evidence of their efficacy in inducing investment across countries. Incentives have very limited power to induce investments. Rather, incentives are of secondary importance compared to other more potent inducers of investment. In fact in 2011 the Department of Finance in its Tax Expenditures Report stated

10 R.A. 8424, Section 2
11 Executive Order No. 273, July 25, 1987
that Php144 billion of revenue was lost by the government due to redundant fiscal incentives for investments that would have been undertaken by investors regardless of the incentives\(^\text{17}\). 

Due to these budget deficits, President Arroyo had to look for additional sources of revenues to sustain basic social services which resulted into the creation of the E-VAT (expanded VAT) reform, in order to broaden the VAT base. The expanded VAT includes the “sale or exchange of services,” for entities whose gross sales or receipts have exceeded PHP1.5 million in the past twelve months. All kinds of services for a fee, remuneration or consideration are subject to VAT, including toll gates\(^\text{18}\) which however was not implemented by the said administration. During the Arroyo administration, the BIR issued revenue memorandum circulars (RMCs) that ordered the VAT collection on expressway tolls. RMC No. 52-2005, dated 28 September 2005, was specifically devoted to the VAT liability of the “Tollway Industry.” On several occasions, the BIR demanded that the Toll Regulatory Board (TRB), which was then headed by the Transportation and Communications Secretary Leandro Mendoza, implement the VAT collection. Mr. Mendoza, a known agent of Mrs. Arroyo and a politicized TRB, simply ignored the BIR.\(^\text{19}\)

In the recent Aquino administration our economy grew faster than it did in any period which has been validated by improve credit ratings. This growth was achieved particularly through remittances and revenue from the BPO industry allowing the government to double social services spending\(^\text{20}\) leading to growth and macroeconomic stability resulting to job creation and poverty reduction. Despite this fact however, millions Filipinos are still living in poverty\(^\text{21}\); hence, the duty of the state to its people has not yet been truly fulfilled which is why there are some groups who are clamoring for a tax reform arguing that our current tax system is inadequate, inefficient, unresponsive and limiting, therefore it has to be changed; that much more can be done to ensure that everyone, especially the marginalized, will benefit from higher growth through a better tax system. However, the transition towards a better tax system was not favored in the previous administration by some stakeholders who were benefitting from the current status quo, and because of fear of revenue losses on the part of the government in the estimated amount of P173.8 billion made by the Department of Finance.\(^\text{22}\)

Like the previous administration which was successful in the Sin Tax Reform, the Duterte Administration is undergoing yet another major, tax reorganization of income taxes, other excise taxes and VAT. The details have yet to be finalized, but one thing is for certain: Change is coming.

III. Problems with Current System of Taxation

“Turmoil has engulfed the Galactic Republic. The taxation of trade routes to outlying star systems is in dispute.”\(^\text{23}\)

\(^{17}\) Gerard Daval-Santos, Fiscal incentives: How rationalization beats abandonment, Business World Online, May 19 2014

\(^{18}\) Diaz v. Secretary of Finance, G.R. No. 193007


\(^{20}\) Simpler, Equitable, Efficient Tax System, PHILIPPINE INQUIRER, December 28, 2014

\(^{21}\) More than 26 million Filipinos remain poor with almost half, or a little more than 12 million, living in extreme poverty and lacking the means to feed themselves, according to official government statistics for the first semester of 2015, Retrieved from http://newsinfo.inquirer.net/775062/12m-filipinos-living-in-extreme-poverty

\(^{22}\) DOF Submits First Package Of Tax Reforms To Congress, RAPPLER, September 27, 2016

A. Fiscal Adequacy

Despite the reduction of the ratio of debt in relation to our GDP, our national debt which was P2.06 trillion in the year 2000 has tripled in amount to P5.955 trillion at the end of 2015. This is a major problem which was brought about by our high reliance on indirect taxes-taxes on trade and on domestic sales-that had low income elasticities. The Philippines were also faced with problems of erosion of the tax base and difficulties in administering the existing tax system. There is no doubt that the current tax code, which is termed as the “comprehensive” tax reform program, is the product of the collective and brilliant minds of both the legislative and executive departments, and that there is no doubt as to the presumption of its validity and correctness, however such presumption is not conclusive, and in light of the changes in the socio-economic and political milieu, it is no longer responsive and therefore ineffective.

For tax reform to be effective it must be founded on a clear understanding of the first principles of the economics of taxation. The basic principles of a sound tax system consist of the following, namely 1) fiscal adequacy; 2) theoretical justice; and 3) administrative feasibility. In Chaves v. Ongpin fiscal adequacy requires that sources of revenue must be adequate to meet government expenditures and their variations.

At the present the Duterte Administration is intentionally increasing the share of public spending at 21 percent of the gross domestic product (GDP), which is much higher than the average government spending of 16.6 percent of GDP over the past ten years. In his proposed national budget for 2017 which he describes as “for the people”, the President clearly intends to spend more, abandoning the fiscally conservative approach which was adopted during the previous Aquino administration, and in line with the recommendation of the IMF in its September 2015 annual report. Despite the dramatic increase in expenditures the principle of fiscal adequacy is present considering that the country’s international reserve is at a respectable level of $85.5 billion; that the debt-to-GDP ratio which was previously mentioned is currently at its lowest; that a tax reform which is promised to be more comprehensive is on its way to be implemented. Hence our revenue sources more than sufficiently covers our government expenditures.

B. Equitability

The second principle of a sound taxing system is theoretical justice. It postulates that a good tax system must be based on the taxpayer’s ability to pay in line with the constitutional mandate that the Congress shall evolve a progressive system of taxation. For many years, taxpayers have been unnecessarily overburdened by inequitable measures overlooking their respective capacities to pay, and this unfairness and inequality are all acknowledged by the congress in several pending bills in the House of Representatives and in the Senate all seeking to lower the rates of taxes on persons and corporations.

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26 G.R. No. 76778
27 Renan Piamonte, Budget of the Philippines Inc., MANILA TIMES, August 24, 2016
29 Ibid
30 Section 28 (1), Article VI, 1987 Constitution of the Philippines
C. Administrative Feasibility

The last principle of a sound taxing system is administrative feasibility which means that taxes should be capable of being effectively enforced. Hence it may not lay down obstacles to business growth and economic development.\(^{31}\) The BIR needs to significantly improve its administration of the tax system. Ranked as 127th out of 189 economies\(^ {32}\) when it comes to the ease of paying taxes, it was shown that it takes 193 staggeringly slow hours for a single company to pay 36 kinds of taxes here in the Philippines,\(^ {33}\) that is about the same time it takes Toyota to build 10 vehicles.\(^ {34}\) Aside from the retarded collection process another obstacle to economic growth and development is the Philippines high corporate tax rates.

D. Outdated Tax Rates

Virtually all governments are keen to attract foreign direct investment (FDI). It can generate new jobs, bring in new technologies and, more generally, promote growth and employment. Hence, it is the policy of the State to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations, and governments, including their political subdivisions, in activities which significantly contribute to national industrialization and socio-economic development to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws. Foreign investments shall be encouraged in the enterprises that significantly expand livelihood and employment opportunities, and shall be welcome as a supplement to Filipino capital and technology in those enterprises serving mainly the domestic market.\(^ {35}\) However, due to our outdated tax rates, the Philippines is losing direct foreign investments, which is widely considered to be one of the most crucial factors in helping developing economies grow, in comparison to other emerging markets in South East Asia\(^ {36}\) resulting to an annual decline of 8% to $120 billion last year, according to a report by the Association of Southeast Asian Nations (ASEAN). Another flaw in the current system which discourages investment is that we are taxing corporate profits twice, once at the company level and again at the individual level as dividends.

IV. Tax Reform: A matter of Social Justice

In the Philippines all aspects of law, including the transitions towards a better taxing system have always been exercises colored by both the politics and the economics of the administration. Though economic matters provide for the rhyme and the reason for the tax reform, nonetheless the resulting outcome is always shaped politically by the key holders, such as the state, corporations, as well as other neighboring countries.

The Philippines has the highest corporate income tax systems among the Association of the Southeast Asian Nations (ASEAN) economies and has the second highest in personal income tax next to Thailand and Vietnam’s 35%, thus many have said that it is high time for the tax reform.\(^ {37}\) As the entire ASEAN region moves towards a borderless economic community;

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32 Auditing and tax consultancy firm Pricewaterhouse Coopers (PwC) has a study – “Paying Taxes 2015” – which provides tax-related information on 189 economies. Data included in the study are the total tax rate per country, the average number of hours to file taxes (for companies), and various case studies from different economies. Retrieved from https://www.pwc.com/gx/en/paying-taxes/pdf/pwc-paying-taxes-2015-low-resolution.pdf
33 Retrieved from https://www.moneymax.ph/blog/whats-being-done-to-fix-the-philippine-tax-system/
34 It takes Toyota about 17-18 hours to build a car from start to finish, Retrieved from https://www.toyota.co.jp/en/kids/faq/b/01/06/
35 Foreign Investment Act of 1991, R.A. No. 7042, Section 2
instead of aligning our current tax system with that of other state economies in order to attract foreign investments and be economically competitive, our tax system remained to be at the peak of corporate income taxation making the Philippines economically unattractive and incompetent which is why tax reform is no longer simply an economic or political matter. It is a matter of social justice.

Based on our experience during the first major tax reform during the Cory Administration and the failed comprehensive tax reform introduced by President Ramos, to ensure the success of the tax reform it must be done at the start of the administration. With a fresh mandate from the people, and by describing the 2017 budget “for the people” the first package of the proposed bills made by the Duterte Administration has a higher probability of being approved and the intended results are more likely to be achieved. Moreover, the proposed tax reforms are more likely to be efficient and equitable in line with the presidents’ all-out war on drugs which could help him sustain the country’s robust growth while alleviating poverty.

The 32% personal and 30% corporate income tax are two of the most common agendas of bills that have been proposed by different lawmakers. One of them is Senator Angara who emphatically explained upon filing his new income tax reform bill that there is no difference between the rich and poor who are both paying 32% of their income as tax to the government. He explained that under the National Internal Revenue Code of 1997, individuals with taxable income of over P500,000 are taxed with a fixed amount of P125,000 plus the 32 percent of the excess over P500,000. However, the value of P500,000 in 1997 does not have the same value today due to inflation hence the middle income earners who were mostly taxed at 25% in 1997 are now pushed into the top tax bracket at 32% percent together with the billionaires of our country because of our outdated tax system which is no longer equitable and progressive as mandated by the fundamental law of our land. The said tax proposal earned a lot of support from Filipinos in different sectors while reiterating the number of years that had passed since the time when the present income tax rate schedule was first used as a basis for computing tax due from individual taxpayers. But despite the overwhelming support from Filipino people, the same was not approved during the previous administration invoking the possible revenue loss of P30 Billion.

In reforming the corporate and personal income tax as proposed by our legislators, the Bureau of Internal Revenue estimates that our government would cost around P 30 billion pesos. It now creates many questions as to how our government would recover or compensate the said projected revenue loss. For while this amount may be regarded as a mere fraction of the total state budget which is P3-trillion as submitted by our President to the congress, many financial analysts consider the same as significant because of the possibility that there would be an increase in the infrastructure spending of the current administration. Following the many criticisms, the current administration eyes to bolster the reformation also of the Value Added Tax Revenue as supplementary revenue by increasing it from 12% to 14%, the President’s current tax plans likewise reiterate his promise to tighten perks for foreign investor, with the

V. Change is Coming

As shown above, tax reform has always played an important role in every change of administration as it largely affects the operations and the success of the government. In our country, the government generates revenues mainly through personal and income tax collection, although a small portion of non-tax revenue is also collected through fees, licenses, and income from other government operations and state-owned enterprises. An effective revenue raising method has long been targeted by our government to help achieve the envisioned society of our constitution where people are provided sufficient economic and social benefits. In line with this, our legislators for the past two decades aimed to improve the tax administration system to comply with the progressive system of taxation whereby the payment of tax would depend largely on one’s ability to pay. However, changing the way taxes are collected and managed is an essential part of the process. That is why numerous proposals have already been passed to improve tax collection, directly and indirectly, such as Personal Income Tax, Value Added Tax, and Corporate Income Tax. The idea of tax reform is not something new in our country. Even the First Aquino Administration in 1986 had used the same coupled with the introduction of value added tax as a means of reducing fiscal imbalance and improving tax collection after inheriting a large fiscal deficit from the previous administration. This is actually a good manifestation of the very broad power of taxation as it can include the prerogative to increase / decrease the level of taxation of all people by the government at any time. It makes the tax system more progressive or less progressive, or simplifying the tax system and making the system more understandable or more accountable. The DOF estimated that the overall loss of government revenue due to the proposed tax reforms would reach P173.8 billion, but said it would be offset by potential gains from revenue-enhancing reform.

**LIST OF PROPOSED AMENDMENTS**

<table>
<thead>
<tr>
<th>Author</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Romero “Miro” S. Quimbo</td>
<td>(HB 4829) Adjusting the taxable income brackets and setting a flat for Self-Employed and Corporations</td>
</tr>
<tr>
<td>Salvacion “Sally” S. Ponce-Enrile</td>
<td>(HB 210) Increasing the tax brackets from 7 to 13 with a rate ranging from 2.5% - 32%</td>
</tr>
<tr>
<td>Magtanggol I T. Gunigundo</td>
<td>(HB 4099) Reducing the top bracket tax rate from 32% to 30% and a flat rate of 15% for Corporations</td>
</tr>
<tr>
<td>Arthur C. Yap</td>
<td>(HB 4849) Increasing tax brackets from 7 to 8 with a rate ranging from 2% to 30%</td>
</tr>
<tr>
<td>Roman T. Romulo</td>
<td>(HB 4880) Reducing tax brackets from 7 to 6 and two-part implementation with a rate ranging from 13%-30% for 2016 that will become 10%-28% in 2017</td>
</tr>
</tbody>
</table>

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Reducing tax brackets from 7 to 5 and three part implementation with a rate of 15%-32% this 2015, 13%-28% this 2016, and 10%-25% this 2017

Imposing a flat rate of 10% for professionals

Reduction of tax brackets from 7 to 6, three part implementation of individual tax rates of 15%-32% from 2015, 13%-28% for 2016, and 10%-25% for 2017 as well as for Corporation Income Tax Rates of 30% for 2015, 27% for 2016, and 25% for 2017

Adjusting tax brackets and lowering income tax rates, with the highest rate to be reduced from 32% to 25% by 2017

Adjusting tax brackets, lowering income tax rates, and exempting Marginal Income Earners (not Over P60,000); with automatic indexation to inflation every 6 years.

Adjusting tax brackets and lowering income tax rates, with automatic indexation to inflation every 6 years without need for legislative action

First Package

The Department of Finance officially started on the road to tax reform with the formal submission of a bill outlining the first batch of proposed tax reforms to the House of Representatives which includes the restructuring of the personal income tax system and the expansion of the value added tax (VAT) base by reducing the coverage of its exemptions. The maximum rate of personal income tax will be reduced over time to 25% from the current 32%, except for the highest income earners. The DOF estimated that the overall loss of government revenue due to the proposed tax reforms would reach P173.8 billion, but said it would be offset by potential gains from revenue-enhancing reform. These include an estimated gain of almost P200 billion from raising fuel excise tax, P164.4 billion from broadening the tax base through VAT-based expansion, around P18 billion for an excise tax to be applied to sweets, and P33.8 billion from rationalizing fiscal incentives. However, to offset lower income taxes, the president plans to remove exemptions from VAT, including VAT exemptions of senior citizens for luxuries.

VI. Comparative Analysis

A. Individual Tax Rate Schedule

Since the effectivity of 1997 NIRC up to now, the Income of residents in Philippines is taxed progressively up to 32%. Resident citizens are taxed on all their net income derived from sources within and outside the Philippines. For nonresident, whether an individual or not of

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44 DOF submits first package of tax reforms to Congress, RAPPLER, September 27, 2016
46 13th month pay may be slapped with tax under reform push, ABS-CBN News, September 28, 2016
the Philippines, is taxable only on income derived from sources within the Philippines.47

TAX TABLE - PRESENT INDIVIDUAL TAX RATE SCHEDULE

<table>
<thead>
<tr>
<th>TAXABLE INCOME is:</th>
<th>TAX DUE is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not over P 10,000</td>
<td>5%</td>
</tr>
<tr>
<td>Over P 10,000 but not over P 30,000</td>
<td>P 500 + 10% of the excess over P 10,000</td>
</tr>
<tr>
<td>Over P 30,000 but not over P 70,000</td>
<td>P 2,500 + 15% of the excess over P 30,000</td>
</tr>
<tr>
<td>Over P 70,000 but not over P 140,000</td>
<td>P 8,500 + 20% of the excess over P 70,000</td>
</tr>
<tr>
<td>Over P 140,000 but not over P 250,000</td>
<td>P 22,500 + 25% of the excess over P 140,000</td>
</tr>
<tr>
<td>Over P 250,000 but not over P 500,000</td>
<td>P 50,000 + 30% of the excess over P 250,000</td>
</tr>
<tr>
<td>Over P 500,000</td>
<td>P 125,000 + 32% of the excess</td>
</tr>
</tbody>
</table>

SENATE BILL 147 is one of the many pending bills in the Senate which seeks to amend section 24 of the National Internal Revenue Code of 1997 or the tax code. It was filed on June 30, 2016 by Senator Villar after the previous administration had rejected the proposal of Senator Angara. The author of the bill hopes that the President would be more open to this idea in amending and lowering the personal income tax rate for the benefit of our countrymen. In reading the preamble of the bill, the same reiterates the fact that the Philippines has one of the highest average tax rate in the ASEAN following Vietnam and Thailand. The senator even argued that rich and highly developed Singapore has the lowest marginal tax rate at both ends of its tax bracket spectrum, at 2% for the lowest qualifying income earners and 20% for the wealthiest while in our country, the tax rate established by law ranges from 5% for the lowest income earners to 32% for the wealthy. And yet those paying within the 32% bracket, those earning just a little over P500,000 pay income tax at the same rate as those earning in the millions. Our more advanced ASEAN members even see that at certain income levels, our taxpayers should have more disposable cash or purchasing power in their hands to enable them to have a decent life for themselves as well as for their families. This is one of the reasons why it is very difficult for us to understand or comprehend how these rich countries require their citizens to pay taxes that are way lower than ours. In addition to high taxes, Filipinos are having difficulties to meet the expensive demands of daily living due to inflation. 48

TAX TABLE - PROPOSED INDIVIDUAL TAX RATE SCHEDULE

<table>
<thead>
<tr>
<th>TAXABLE INCOME is:</th>
<th>TAX DUE is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not over P 20,000</td>
<td>5%</td>
</tr>
<tr>
<td>Over P 20,000 but not over P 60,000</td>
<td>P 1,000 + 10% of the excess over P 20,000</td>
</tr>
<tr>
<td>Over P 60,000 but not over P 140,000</td>
<td>P 5,000 + 15% of the excess over P 60,000</td>
</tr>
<tr>
<td>Over P 140,000 but not over P 280,000</td>
<td>P 17,000 + 20% of the excess over P 140,000</td>
</tr>
<tr>
<td>Over P 280,000 but not over P 500,000</td>
<td>P 45,000 + 25% of the excess over P 280,000</td>
</tr>
<tr>
<td>Over P 500,000 but not over P 1,000,000</td>
<td>P 100,000 + 30% of the excess over P 500,000</td>
</tr>
<tr>
<td>Over P 1,000,000</td>
<td>P 250,000 + 32% of the excess over P 1,000,000</td>
</tr>
</tbody>
</table>

To illustrate the effect of this proposed amendment, we will compute the savings that an individual taxpayer may have after applying the proposed tax schedule. First, we should

compute the tax liability of an Individual taxpayer using the current tax schedule and then compare it with the tax liability derived using the proposed tax schedule. For Example: If Juan dela Cruz is employed with a monthly salary of P 50,000 per month and he is married with three qualified dependent children. His take home pay will only be P 40,208 by using the current personal income tax schedule.

**TAXABLE COMPENSATION INCOME (P 50,000 X 12MONTHS)** P 600,000  
**LESS: PERSONAL EXEMPTIONS**  
**BASIC PERSONAL EXEMPTION** (P 50,000)  
**ADDITIONAL PERSONAL EXEMPTION (P25,000 X 3)** (P 75,000)  
**EQUAL TAXABLE NET INCOME OF** P 475,000  
First 250,000 - P 50,000  
Excess (P 475,000-250,000) @ 30% P 67,500  
**ANNUAL INCOME TAX DUE** P 117,500  
**MONTHLY INCOME TAX DUE (117,500/12 MONTHS)** P 9,792  
**TAKE HOME PAY** (P 50,000 – 9,792) P 40,408

But using the proposed amendment in section 24 of the NIRC, Mr. Juan dela Cruz would have a take home pay of P 42,188 which allows him to have an additional savings amounting to P 1,780 per month.

To illustrate:

First 280,000 - P 45,000  
Excess (475,000-280,000) @ 25% P 48,750  
**ANNUAL INCOME TAX DUE** P 93,750  
**MONTHLY INCOME TAX DUE (93,750/12 MONTHS)** P 7,812  
**TAKE HOME PAY** (P 50,000 – 7,812) P 42,188

Another interesting proposal is from the Department of Finance who is also working to finalize their new tax brackets which primarily changes the 32% ceiling to 25%. Under their proposals, those who are earning P 25,000 or less would be exempted from tax because according to them, a common household would have to earn P 25,000-27,000 per month to have a decent life hence that is the bracket they would base on. DOF aims to implement the new tax system by the first quarter of 2017 but would still depend on how quick the congress can pass the measure. The proposed tax system is similar to suggestions made by tax experts such as the Tax Management Association of the Philippines.49

**B. Corporate Income Tax Rate**

The tax rate in our country for both domestic and resident foreign corporations is 30% based on net taxable income. Excluded from the income tax are dividends received from domestic corporations; interest on Philippine currency bank deposit and yield from trust funds. It is important to note that foreign corporations, whether resident or nonresident, are taxable on income derived from sources within the Philippines. **HOUSE BILL 2379** was filed by House Deputy Speaker Miro Quimbo which seeks to adjust the income tax rate from 30% to 25% by amending the National Internal Revenue Code of 1997. According to him, corporate

income taxation framework in the country poses a “great threat” in light of the Association of Southeast Asian Nations (ASEAN) integration. With lower tax rates, higher investments are projected, potentially bringing Philippine investment levels closer to the ASEAN member-countries. In turn, this may increase the country’s competitiveness, stimulate the country’s economic growth, and consequently, encourage the growth within the ASEAN. 50

**C. Value-Added Tax**

In many discussions about tax reform, proposals to increase the Value Added Tax from 12% - 14% are made primarily to compensate the projected revenue loss of the BIR from the reduction of personal and corporate income tax. 51 However, some argue that increasing the VAT would just render nugatory the very objective of tax reform because it is an indirect tax that can be shifted by the manufacturer, wholesaler and retailer to the direct consumer by way of imposing higher prices in the primary commodities. 52 Thus, the savings of an ordinary employee coming from the reduced personal income tax would just pass through their hands. To illustrate this argument, we will use the previous illustration. The proposed tax reform would allow Mr. Juan dela Cruz to save an additional amount of P 1,780. Let us assume that his previous take home pay amounting to P 40,408 prior the proposed tax reform are all being spent on goods that are subject of vat. So to compute the input tax from it we will divide P 40,408 by 1.12 to arrive at P 36,079 exclusive of vat expenditures. From this, we are able to determine that his previous vat expenditure is only P 4,329, the difference of P 40,408 and P 36,079 exclusive of vat. Applying now the proposed Value-Added Tax rate which is 14% to P36,079 we will arrive at P5,052, an amount that is higher by P 722 compared to his previous vat expenditure of P 4,329. In effect his saving is not really P 1,780 after the tax reform, but only P 1,056 after considering the additional tax expenditures from the proposed increase in VAT. Therefore, the proposal to increase vat could really affect the savings that an employee would receive from the proposed tax reform.

Interestingly, this argument was already discussed in the case of Tolentino vs. Secretary of Finance where the Supreme Court ruled that while Value Added Tax is regressive in nature, marginal income earners are mostly consuming products that are exempted from vat, or if not exempted are subject of zero rated hence the consumption price for these marginal earners will not be materially affected by the proposed increase in VAT. 53

Corporations and other business entities whose transactions are subject of VAT are also affected in this proposed vat increase. For while they can shift the same to the direct consumer by imposing higher prices, the same could affect the demands of their products especially if these are luxurious goods which would then lead to the reduction of their gross revenue. This is the main reason why other proposals such as raising excise taxes on oil products; and restructuring the excise tax on automobiles, save for buses; cargo vans, jeeps, jeepney substitutes, special purpose vehicles as well as trucks are also made because they are well aware that increasing the VAT alone is not enough to cover the projected revenue loss. 54

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VIII. Conclusion

One of the basic principles of Fiscal Policy is the rule of Fiscal responsibility that every proposed revenue or expenditure measure should always have an implication that is neutral on the overall fiscal position of the government just to help ensure fiscal sustainability. The said principle is very important especially when the government’s revenue does not meet the ideal tax administration or when the revenue couldn’t even meet the public expenditures needs.

A. Advantages

After analyzing carefully the projected revenue loss by the Bureau of Internal Revenue, the same should not prevent us from pursuing the tax reform because tax policies that are well designed have the potential to improve economic growth of our country. This is the reason why our legislators are confident in proposing these tax bills which reduce the Individual and corporate income tax rates albeit there are many criticisms. First, if we lower our corporate and individual income tax rate, it would make our country more competitive not only in the ASEAN but also with our Asian neighbors because investors would no longer have the fear that they might just suffer huge losses from their investments long before they could reach the payback period for their capital investments because of high taxes. More investments would create more jobs reducing unemployment rate. Second, if we lower tax rates, the same could inspire professionals, businessmen, corporations and other entities subject of tax especially the large taxpayers to be honest in declaring the proper amount of tax and instead disengage from the current system of widespread underpayment and tax evasion for they would no longer consider our tax system as being confiscatory and unjust. Third, the direct beneficiaries of these proposals are individual employees and other small time entrepreneurs which would mean that a big part of their gross earnings will become either additional savings or more disposable income which would allow them to enjoy more of their hard-earned income. Even Speaker Belmonte and Senator Angara are one in saying that if we will just compare the value of money nowadays and the value of money since the time when the present NIRC took effect, we would realize that it’s high time that the government should lower taxes. A lower tax rate for individual would be of much help in stimulating economic growth because the same would mean less pressure for employers to increase wages and therefore would create more savings and more consumers spending. Fourth, if we lower tax rates, chances are, many taxpayers would pay on time without any complain for unfair tax assessments because they would consider the same as fair and just which would then boost the overall tax collections of our government in the long run. Improving tax collections would allow the government to circulate better the money in different projects improving the overall economy of our country, that is why the fears of those who criticize these proposals are not absolutely true. The same beliefs and conclusions are in line with what late US President John F. Kennedy said before that lowering tax rates has positive impact because it could boost businesses, economic growth and larger tax revenues.

Luckily, the executive and legislative are united in pursuing the tax reforms which means that we could reasonably expect that a new tax system will be passed in the present administration. However, despite the abovementioned there are still many stumbling blocks like corruption, non-strict implementation, tax evasion and thus there’s no absolute guarantee that all tax changes will improve economic performance without possible legal implications. Stated differently, it is not the reduction of rates alone that could really help our economy to grow since the taxpayers are expected in return to obey and cooperate in paying their taxes correctly. This is why we are not surprised about the advocacy of Department of Finance
(DOF) to amend the Bank Secrecy Law (R.A. No. 1405) and strengthen the Anti-Money Laundering Act (R.A. No. 9160, as amended just to ensure that the government would get what is fair from the taxpayers. Thus, even the Joint Foreign Chamber suggested to them to draft a bill for the proposed amendments which must be submitted to the Congress as soon as possible, while AMLA amendments under consideration in the Congress have not been reported out of the committee. If this amendment would be approved, our country would no longer be considered as one of the three countries in the world having strict bank secrecy laws along with Lebanon and Switzerland. It would be easier also for the government to prosecute those who are not declaring their income from illegitimate sources that should have been taxable also. Philippine revenue collection authorities would have better access to domestic bank accounts in order to strengthen their capacity to collect the correct personal income taxes from all taxpayers so as to ensure that this projected revenue losses from the tax reform would fully be addressed.\textsuperscript{55}

**B. Disadvantages**

Research group IBON said that the Department of Finance’s (DOF) proposed tax reform program relieves the rich and burdens the poor. The group said that this will worsen inequality in the country and should be replaced by a tax program that taxes the rich instead and is backed with the required political will. The DOF proposed tax reform program seeks to raise an additional Php600 billion by 2019. IBON noted that it will do this by raising taxes on the country’s poor majority and reducing taxes paid by the rich and big corporations.

According to the group, the rich will benefit from lower income taxes, property-related taxes, and capital income taxes: 1.) The top personal income tax rate will go down from 32\% to eventually just 25\%. Around 6.7 million deserving wage and salary earners also stand to benefit from the DOF’s plan to update 19-year-old tax brackets. These will result in Php139.0 billion less revenues for the government in just the first year of implementation. 2.) The corporate income tax will go down from 30\% to 25\%. Corporations will pay Php34.8 billion less in income taxes. 3.) The tax rate on property-related transactions of the wealthy will be cut. The estate tax of 20\% will go down to 6\% of the value of property being transferred. Donor taxes and transaction taxes on land will also be cut. The rich will pay Php3.5 billion less in estate and donor taxes. 4.) The tax on interest income earned on peso deposits and investments will also go down from 20\% to 10\%. The rich will pay Php1.0 billion less in capital income taxes

IBON observed that the DOF plans to offset lower taxes paid by the wealthiest Filipinos by increasing taxes on the poor majority. The poor will suffer higher prices from value-added tax (VAT) being charged on previously exempt items, higher excise taxes on petroleum products, and a new sweets tax:

1. The 12\% VAT will be charged on the widest range of consumer items in the country’s history with exemptions on just very few necessities like raw food, education and health. Consumers will pay Php163.4 billion more for the same goods and services.
2. There will be higher excise taxes of Php6-10 per litre or kilogram on diesel, LPG, kerosene and the entire range of oil product prices. Consumers will pay Php178.2 billion more when they buy oil products or pay for correspondingly more expensive goods, services and transport fares.
3. The sugar excise tax starting at Php5 per kilogram will increase the prices of sugary

foods, fruit drinks, sodas, sweetened tea and coffee, sports drinks, and other sweetened products. Consumers will pay Php18.1 billion more for the sugary products they buy.\textsuperscript{56}

**In Closing**

For all the confusion happening in the present, the all out war on drugs, and the clash between bedans who are occupying key governmental positions, despite all of these a consensus has emerged in one important area, that the current corporate-tax system is broken, like our penal system\textsuperscript{57}, hence it is imperative that a tax reform must take place. Our government is in a phase of the creative process focusing on “destruction” of the flaws in the system in order to pave the way for a sound tax system. Within a few months we will learn the details of the tax reform. Uncertainty abounds. The details have yet to be finalized, but one thing is for certain: Change is coming.

\textsuperscript{56} Retrieved from www.ibon.org/2016/09/dof-tax-reforms-relieve-rich-while-burdening-poor-ibon/

\textsuperscript{57} Andrew Kats, *This Photograph Makes Life Inside a Philippines Jail Look Like Dante’s ‘Inferno’*, TIME, August 3 2016 Retrieved from http://time.com/4438112/philippines-overcrowded-prison-manila-rodrigo-duterte/; See also: www.preda.org/media/research-documents/the-situation-of-the-philippine-penitentiaries/
Transborder Parks for Peace and Conservation

Ambassador Amado S. Tolentino*

I. Introduction

It is a fundamental rule in international law that States exercise sovereign right over all natural resources in their territory. The enactment of legislation for the establishment, conservation and management of protected areas, including the resources found therein, is in pursuance of such a sovereign right. Lately, however, the idea emerged that States, and the international community, in general, have an interest in the conservation of natural areas and the biological diversity they contain. As a matter of fact, recent international legal instruments such as the World Heritage Convention and the Biological Diversity Convention show that the concept of national sovereignty must be tempered by the recognition of the interest of the international community in the conservation of resources found in different jurisdictions. The fact that states voluntarily accept limitations in their sovereignty by agreeing to international obligations to conserve some of their natural resources provides a basis upon which national legislation on protected areas, as well as bilateral agreements on border area management may be developed.

With the emergence of new thoughts on national sovereignty, transfrontier protected area management came into the forefront. Transfrontier protected areas include transnational parks, transfrontier reserves, transborder parks, borderline, cross-border or border parks, international peace and historic parks, friendship park, meaning protected areas that meet across transnational borders. A study conducted by IUCN (World Conservation Union) in 1988 revealed 70 border parks involving 65 countries (Annex A). Among those not included are Montecristo Mountains bordering El Salvador, Guatemala and Honduras, and the Turtle Islands Heritage Protected Area established by the Philippines and Malaysia in 1996. Various degrees of cooperation exist in those border parks. Some have joint planning and management practices, while in others, virtually no interaction occurs.

The transborder park concept appears to be best developed in Europe where there are thirty-six international borders. Twenty-four pairs of transboundary parks were identified, including one or more parks in twenty countries. At least four areas have legal agreements; the rest rely on informal arrangements and practices. In the case of German—Belgian park, for instance, an international consultative committee with representatives from two countries regularly meet to discuss and resolve transfrontier problems and the pursuit of other common targets. The legal basis is the 1981 Germund Agreement, which gave legal international status to the German—Belgian National Park.

A close look at a world map of parks and reserves will show that many protected areas are established along boundaries of countries. Among the reasons are scarce human population, great scenic value and the abundance of biological diversity in those areas. Moreover, parks on the borderline promote bilateral understanding and strengthen ties among countries.

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This article provides state-of-the-art review and is intended to be a means of documenting the knowledge and experience gained through legislation and institutional development on transfrontier parks management. As a guide, it can only give directions on developing a legal framework for border parks and should not be treated as prescription, manual or standard. It simply illustrates the distillation of status and format with respect to legislation and machinery as tools for sustainable development through effective protected border area management.

2. Functions and Values of Border Parks

The significance of contiguous areas is viewed both as an expression of understanding among nations and as a means of facilitating cooperative approaches and shared responsibilities in the conservation of heritage resources. There are, therefore, three possible functions of transfrontier parks. These are: (1) promotion of peace; (2) protection of the environment and effective management of the resources; (3) preservation, understanding and enhancement of cultural values, especially the lot of indigenous peoples.

Many border parks in Europe were established as an aftermath of World War II. Among these are German—Dutch, German—Belgian and German—Luxembourg parks. Likewise, the Czechoslovakian—Polish parks were the result of unusual border situations after the war. A more recent example is the public pronouncements of Nicaragua’s former President Ortega and Costa Rica’s former President Arias on the creation and cooperative management of a series of peace parks (Peace Through Parks) on their common border. Thus far, an international policy committee has been created for the parks. Planning field surveys and cooperative discussions are being conducted. Officials from the environment agencies of both countries made impressive presentations of their plans for the peace parks at a meeting in Costa Rica.

Indeed, while many border parks today function primarily for the purpose of recreation, tourism and environmental protection, peace and the improvement of relationships were the reasons they were initially established.

Border parks serve the interests of environmental and natural resource management by improving protection of internationally shared resources such as rivers, lakes and scenic vistas; increasing protection for migratory species which cross boundaries; reducing risks and levels of transnational hazards and pollutants such as fire and air pollution; and allowing fuller and easier enjoyment of recreational facilities.

Most important of all, border parks help improve the economic and social conditions, as well as the security of indigenous peoples. For example, the Maasai tribes in Kenya and Tanzania benefit from their improved ability to visit friends and relations across the border, exchange information, hold tribal ceremonies and even improve cattle breeds. Another success story relates to the Awa Indians of Ecuador who live in the 120,000 hectare Awa Ethnic Forest Reserve, which adjoins a similar reserve in Colombia. Several Ecuadorian Government agencies, along with NGOs, are working to create suitable conditions for sustainable activities of the Awa Indiwans both in the reserve and in the surrounding region, in order to protect them and preserve their culture.

Finally, transborder parks have great value in preserving natural areas and promoting the coordinated and harmonized management of natural resources. They also help countries
maintain unpopulated buffer zones. There are even instances when they assist in controlling the spread of disease, like what the Los Katios National Park (Colombia) and the Parque Nacional Fronterizo Dairen (Panama) did to control the spread of foot and mouth disease among animals. Indeed, the idea of an international network of border parks as zones of peace is one worth pursuing.

3. Some existing Transborder Parks in the World

Poland and Czechoslovakia pioneered the establishment of transborder parks through the Krakow Protocol signed in 1925, which resulted in the establishment of three joint parks, namely; Tatrzanski—High Tatra, Pieninski—Pieniny and Krakonoski—Krkonose, all located along the Polish—Czechoslovak border. Actually, the reason behind the Krakow Protocol was to bring the conflict between the two countries over the frontier line in the Tatras mountain range to a peaceful solution. Joint councils were created for each park as a framework for cooperation. Consultations between two countries on the “twinned” parks concern the harmonization of park regulations, scientific research, and tourism, as well as wildlife and forest management.

3.1 Asia

a. Turtle Islands Heritage Protected Area (Philippines and Malaysia)

In 1996, the Governments of Malaysia and the Philippines entered into a Memorandum of Agreement for the establishment of the Turtle Islands Heritage Protected Area, consisting of six islands designated by the Philippines, and three islands designated by Malaysia, which are habitats of the endangered green and hawksbill turtles. The Agreement calls for an integrated management program which highlights, at the minimum, the following; (1) Implementation of a uniform approach to conservation and research that is oriented towards wise management of protected areas; (2) Establishment of a centralized database and information network on marine turtles; (3) Development of appropriate information awareness programs targeted towards the inhabitants of the designated islands; (4) Development and implementation of a staff training and development program; and (5) Development of ecotourism projects. A Joint Management Committee was created as the policy-making body of the protected areas, with authority to collaborate with international organizations involved in marine turtle conservation. The representatives of the Contracting Parties to the Joint Committee may also recommend to their respective governments the enactment of such laws as may be necessary to attain the objectives of the Agreement.

b. Manas Wildlife Sanctuaries (Bhutan and India)

Among the most significant conservation areas in the entire Indian sub-continent are the adjoining Manas Wildlife Sanctuaries along the border of India and Bhutan. Their wide area, as well as the diversity of species found therein, makes the sanctuaries very important for conservation purposes. The two countries informally cooperate, particularly reserve wardens on both sides of the border.

Only the Indian portion is inscribed in the World Heritage List.

c. Sundarbans Reserve (India and Bangladesh)

Though not directly adjacent, the Sundarbans Reserves of India and Bangladesh are proximally and functionally linked. The reserves protect part of the world’s largest extent of mangrove forests, in the Bay of Bengal. Among the important species identified in the reserves
are highly mobile populations of saltwater crocodiles, black finless porpoises and numerous types of waterfowl, which freely move in the reserves.

The World Heritage Committee (UNESCO) encourages Joint Cooperative Management of the Sundarbans Reserves.

d. Reserve (Indonesia and Malaysia)

A very ideal buffer zone exists between Malaysia and Indonesia on account of the fact that it is uninhabited for military and security reasons. Malaysia declared the zone (Lanjak Entimau) in Sarawak a reserve, which prompted Indonesia to establish an adjoining reserve, Genung dan Karimum (Indonesian Borneo).

### 8.2. South and Central America

**a. Iguacu–Iquazu Border Parks (Brazil and Argentina)**

Examples of border parks individually listed in the World Heritage List are the Argentinian Iguazu and Brazilian Iguacu National Parks, referring to adjoining parks surrounding the Iguazu Falls, which form part of the border between the two countries. Inasmuch as questions of sovereignty delay further moves, a joint management advisory committee has been recommended to address issues on the impacts of the parks on upstream deforestation and hydroelectric project development.

**b. Montecristo Mountains (El Salvador, Guatemala and Honduras)**

In November 1987, an agreement was signed between El Salvador, Guatemala and Honduras, designating Montecristo Mountains an international biosphere reserve. Each country takes charge of the management of the areas under their respective jurisdiction through a jointly formulated management plan done in "homogenous way" by the Parties. However, information is not available on whether the agreement had been ratified by the three countries and/or currently enforced.

**c. La Amistad International Park (Costa Rica and Panama)**

In 1979, the La Amistad (Friendship) International Park was jointly declared by the Presidents of Panama and Costa Rica at a meeting of IUCN. The area, which contains the highest diversity of species of fauna and flora in Central America, will be managed through a process of mutual consultation. Of the two countries, the Costa Rican side is already in the World Heritage List.

**d. Los Katios National Park (Colombia) and Parque Nacional Fronteriz Dairien (Panama)**

Located at the isthmus of Panama (the meeting point of Central and South America) is the Parque Nacional Fronteriz Dairien, which is right beside the Los Katios National Park and forest reserves of Colombia. Establishment of this border park was brought about by the mutual concern and interest of the two countries to set up an inspection zone, specifically to control the spread of foot and mouth disease among animals. A number of technical meetings on joint management of the border zone protected areas have been undertaken by Colombia and Panama.

The Dairien National Park in Panama is in the World Heritage List.
3.3 North America

a. Waterton—Glacier International Peace Park (Canada and USA)

The Waterton Lakes National Park (Alberta, Canada) and the Glacier National Park (Montana, USA) were designated Waterton—Glacier International Park not by a treaty, but by two separate laws adopted by the Canadian Parliament and the US Congress in 1932. The two pieces of legislations did not, in any way, affect the legal status of the two parks since 1910 (USA) and 1911 (Canada). They simply established a basis for a form of cooperation between the park authorities of the two countries with regard to cooperative law enforcement, staff orientation/training exchanges, interpretative publications, sharing of data in resource management and emergency responses, including search and rescue activities. In 1987, the Waterton—Glacier International Peace Park Days of Peace and Friendship Accords were signed wherein the two countries listed a number of areas in which their respective Park Services will work together. These include, among others: (1) Passing legislation to allow visitors with valid entry permits for one park to visit the other without paying a second entry fee; (2) Developing with certain Customs and Immigration officials initiatives which emphasize to the visitor the international nature of the Peace Park; and (3) Making additional requests to the International Boundary Commission to have its legislation amended so the boundary swath will be allowed to regenerate. Thus far, cooperation between the two countries has resulted in protection of and international ecosystem and encouraged international tourism. Recent international travelers to the park commented on the ease in crossing the international boundary between the two countries. Actually, the Accords could lead to an international boundary clearing exemption on the 30km common boundary of the parks, as well as reciprocal entrance fees.

The Waterton—Glacier International Peace Park remains as the largest international park undertaking in the world.

b. Roosevelt Campobello International Park (Canada and the USA)

The Roosevelt Campobello International Park is a Canadian island and not a true transboundary park. The international boundary between the USA and Canada is the St. Croix River, a few kilometers away from Campobello Island. For many years the summer home of President Franklin Delano Roosevelt, 32nd president of the USA, the island is accessible from the USA by bridge and from the New Brunswick mainland by air or by boat. The international park, which includes a number of historic buildings and 105 hectares of surrounding land, was established by a treaty between the USA and Canada. The treaty creates a six-member international commission, three from each country, appointed by the Canadian Prime Minister and US President, respectively, which lays down the management policy for the Park. Staffing, funding, and management of the international park are equally shared by the two countries.

c. Berengia International Park (Russia Federation and USA)

IUCNs (World Conservation Union) General Assembly in Costa Rica (1988) and Australia (1991) adopted resolutions encouraging the creation of an international park between the USSR and the USA. Thereafter, a Geneva summit between the leaders of the two countries resulted in, among others, a USA—USSR Agreement on Cooperation in the Field of Environmental Protection which is the basis of present efforts to draft legislation for the Supreme Soviet and the US Congress to establish the park.

Strong cooperation for the establishment of the International Park exists in the
Russian Federation, through the Russian Parliament and Ministry of Environment and Natural Resources, while on the US side, the Department of Interior, through the National Park Service, liaises with the US Congress. Because of the different pace of the legislative processes on both sides, the possibility of issuing executive proclamations as an initial step in formally designating the International Park is being discussed at the moment.

Though originally conceived as the Bering Land Bridge World Heritage Site, a preliminary assessment of a technical working group to investigate cooperation in the Siberian/Alaskan border have recommended an international park between Chukotka and Alaska, covering land and water areas, with cooperative management programs for shared marine species and pollution control.

A work plan has been drawn by designated principal officials from the US and Russian Federation. Pending formal issuance of legal instruments, the International Park continues to be the umbrella mechanism for field research and inventory within candidate sites on both sides.

3.4 Africa

a. Serengeti National Park and Mawa Game Reserve (Tanzania) and Masai Mara National Reserve (Kenya)

The migratory nature of the wildlife resources in Africa accounts for the abundance of border parks in the continent. Three such border parks/reserves in East Africa are the Masai Mara National Reserve in Kenya, and the Serengeti National Park and Maswa Game Reserve in Tanzania. A common occurrence within the border of the parks is the seasonal migration of hundreds of thousands of big grazing mammals, notably wildebeests, zebras, lions, and other predators, depending on their grazing requirements. All three reserves/parks share responsibility for the functioning of the great mammal migration known worldwide. Joint cooperation in the areas’ management encompasses resource-monitoring programs, including anti-poaching concerns. The transnational pair of reserves/parks is known to have improved the conditions of the Maasai tribe herders, and as the political differences between the two countries are resolved, a tourist route is in the offing for other parks in both countries, not just the border parks.

b. Parc National Du W (Benin, Burkina Faso and Niger)

Established by the French colonial government in 1954, The Parc National du W consists of three border parks in West Africa’s Benin, Burkina Faso and Niger. The park is referred to as “W” because of the double loop made at the point by Niger River. Coordinated management of the over 1 million hectare park is encouraged, to counter the negative impacts of livestock over-grazing, poaching and phosphate mining. There is a proposal for a single management authority for Parc W, which also embarked on a fund-raising campaign for its operations.

3.5 Europe

a. German Luxembourg Nature Park (Germany and Luxembourg)

The German—Luxembourg Nature park is a joint park established in 1964, by a treaty between the two countries. Among the significant provisions of the treaty are (1) the non-diminution of the total forest area in the park and the (2) creation of a joint commission before which park management plans should be submitted. The joint commission may also
make recommendations to the governments on future management programs, as well as the harmonization of national rules, regulations and guidelines on park management.

b. Wadden Sea (Denmark, Germany and the Netherlands)

Inter-state cooperation in the conservation of a shared ecosystem is best exemplified in Europe by the management of the Wadden Sea mudflats, which extend along the shores of Germany, Denmark and the Netherlands. Although no treaty as yet exists for its joint management, frequent meetings of the countries’ representatives, urged on by NGOs, resulted in the 1982 Joint Declaration to Protect the Wadden Sea by the three countries, covering general conservation and management objectives. Thereafter, an Advisory Committee for the area drafted a conservation strategy which attempts to coordinate the efforts of the countries involved. Thereafter, a coordinated series of internationally designed wetland sites and nature reserves were established. Furthermore, an Agreement for the Conservation of the Wadden Sea Seals was signed by the three countries.

Apart from the transfrontier parks described above, and the rest enumerated in “Annex A”, there are many potential border parks which could be established on the basis of three main rationales, namely; resolution of border disputes, more effective management of shared resources and symbols of international peace, goodwill and cooperation. Among those parks identified at the Border Parks Workshop held during the 1988 First Global Conference on Tourism–A Vital Force for Peace (Vancouver, B.C., Canada) are: (1) The demilitarized zone between North and South Korea, which was unpenetrated by people during the last 65 years. The zone is now regarded as a de facto wildlife refuge. The DMZ National Park, as referred to in some literature, is a good illustration of the beneficial effects of military activities on nature and natural resources; (2) the transborder forests of Vietnam, Cambodia and Lao People’s Democratic Republic, habitat of the Kouperey or gray ox of Indochina, one of the rarest large animals on earth, is another candidate transborder forests of the Asian region. Surveys to determine boundaries began after the cessation of hostilities among the border countries; (3) La Ruta Maya, which refers to a proposed international peace park on the Belize, Guatemala and Mexican borders which will protect both pre-Colombian archaeological sites and rainforest habitat; (4) AN international peace park along both sides of the Evvos River between Turkey and Greece. Apart from the benefits of instituting an integrated management regime for the area that would also protect the important wetland site of Lake Gala, the proposal could also lead to more harmonious relations between Turkey and Greece. The “twinning” of the Korup National Park in the Cameroon with the proposed Oban National Park in Nigeria. The two parks contain one of the most important natural tropical forests remaining not only in West Africa, but in the whole continent. Protection of the catchment forest is very significant for downstream benefits. Moreover, the whole catchment area would benefit from coordinated regional management of its natural resources.

4. Legal Basis for Agreements on Transborder Parks

Among the international legal instruments which are of particular importance for the conservation of natural areas, including border parks, are the 1972 Stockholm Declaration and the 1982 World Trade Center for Nature. The Stockholm Declaration states: “The natural resources of the earth, including air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate” (Principle 2). It further provides “-man has a special responsibility to safeguard and wisely manage the heritage of
wildlife and its habitat which are now gravely imperilled by a combination of adverse factors. Nature conservation including wildlife must therefore receive importance in planning for economic development.” (Principle 4). The World Charter for Nature, on the other hand, proclaims principles of conservation of natural areas, among which is the requirement that special protection be given to unique areas, to representative samples of all the different types of ecosystems and to habitats of rare and endangered species.

Among conservation treaties, the 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural State was the first to lay down obligations for the Parties concerned to consult with each other when a Party intends to establish a protected area contiguous to the frontier of another Part, and to cooperate after the creation of the part or reserve. Said London Convention was replaced by the 1968 African Convention on the Conservation of Nature and Natural Resources which did not specifically carry over the requirement. Be that as it may, under the African Convention, whenever a natural resource is of common interest to two or more contracting Parties, these States shall undertake to cooperate in the conservation, development and management of such resources. While no mention is made of border parks, such areas can be considered of common interest.

In later years, the three most important international treaties dealing with the conservation of ecosystems are the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the 1979 Berne Convention on the Conservation of European Wildlife Habitat and Natural Habitats and 1972 World Heritage Convention.

The Ramsar Convention requires Contracting Parties to consult with each other about implementing obligations arising out of the Convention, especially in the case of a wetland extending over the territories of more than one Party. The same provision could be used to encourage cooperation between Parties with respect to border Ramsar sites, of which there are quite a few. Under the Berne Convention, the Parties “undertake to coordinate, as appropriate, their efforts for the protection of natural habitats when they are situated in frontier areas.”

The World Heritage Convention, on the other hand, recognizes the international importance of certain resources, and provides for international assistance in restoring, preserving and managing World Heritage Sites. The Convention maintains a World Heritage List based on the criteria set by a World Heritage Committee. So far, there are 16 natural World Heritage Sites located along international boundaries. Only two of these were jointly inscribed. These two are Mt. Nimba in Guinea and Ivory Coast, and Kluane and Wrangell—St. Elias in the United States and Canada. Inclusion in the World Heritage List allows sites access to the World Heritage Fund for preservation purposes.

Another international legal instrument which mentions the conservation of natural areas is the 1982 UN Convention on the Law of the Sea. The Convention sets forth a general obligation to protect “rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” (Article 194-5)/ This provision is the basis for the development of the UNEP Regional Seas Protocols dealing specifically with protected marine and coastal areas, including contiguous marine parks or reserves.

The 1972 Mediterranean Protocol to the Mediterranean Regional Sea Convention, for instance, provides that, “if a Party intends to establish a protected area contiguous to the
frontiers or to the limits of the zone of national jurisdiction of another Party, the competent authorities of the two Parties shall endeavor to consult each other with a view to reaching agreement on the measures to be taken and shall, among other things, examine the possibility of the establishment by the other Party of a corresponding protected area of the adoption by it of any other Regional Sea Convention and the 1990 Kingston Protocol to the Wider Carribean Region.

The above quoted provision of the Mediterranean Protocol, however, is very limited in scope, as it simply requires consultation and, to a certain degree, cooperation between the Parties. The Kingston Protocol went a step further by requiring Parties to undertake joint management measures. Despite many appeals for transboundary cooperation, in reality, very little seems to have been achieved. However, the situation is different in Europe. An increase in cooperation in the management of border protected areas was noted, which prompted the Council of Europe to persuade the governments of its Member States to accept the idea of transfrontier parks. Relevant examples are the following: (1) The Swiss National Park was advised to establish contact with the adjacent Stelvio National Park Italy for the purpose of establishing an agreed protection policy; (2) The Governments of Spain and France were invited to consultations, under the auspices of the Council of Europe, with a view to determining the legal basis and practical arrangements for cooperation between the Spanish Parks of Odesa and Monte Perdido and the French Western Pyrenees National Park, and the form which a joint body to manage the whole protected area could take. So far, only a Cooperation Charter between the Nature Conservation Administration of the Two Countries has been signed.

At the sub-regional level, the 1985 ASEAN (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, Cambodia, Myanmar, Laos) Agreement on the Conservation of Nature and Natural Resources provides that “Contracting Parties” shall especially cooperate together with a view to the conservation and management of border or contiguous protected areas.

Noteworthy mention is the innovative provision in the draft of IUCN International Covenant on Environment and Development which says:

“Parties shall cooperate in the conservation, management and restoration of natural resources which occur in areas under the jurisdiction of more than one State, or fully or partly in areas beyond the limits of national jurisdiction. To this end, (a) Parties sharing the same natural system shall manage that system as a single ecological unit notwithstanding national boundaries. They shall cooperate on the basis of equity and reciprocity, in particular through bilateral and unilateral agreements, in order to develop harmonized policies and strategies covering the entire system and the ecosystems it contains. With regard to aquatic systems, such agreements shall cover the entire catchment area, including the adjoining marine environment. (b) Parties sharing the same species or population, whether migratory or not shall treat such species or population as a single biological unit. They shall cooperate, in particular, through bilateral and multilateral agreements, in order to maintain the species or population concerned in a favorable conservation status. In case of a harvested species or population, all the range Parties of that species or population shall cooperate in the development and implementation of a joint management plan to ensure the sustainable use of that resource and the equitable sharing of the benefits deriving from the use.” (Article 43)
5. Legal Strategies for Transborder Park Management

It is a rare instance when existing transfrontier protected areas were simultaneously established. Even the first international park undertaking in the world, the Waterton—Glacier International Peace Park, between Canada and the United States, was originally established at different times and “twinned” only in 1932. A most recent example of protected areas joined from the outset is the Turtle Islands Heritage Protected Area as embodied in a document entitled “Memorandum of Agreement between the Government of the Republic of the Philippines and the Government of Malaysia on the Establishment of the Turtle Islands Heritage Protected Area” (1996).

There are many reasons for the rarity of simultaneously established border protected areas. Usually one country is more ready and capable to protect its border for its scenic, recreational or other values than the adjacent country. Other reasons range from border disputes, political unrest, intensive logging and other deforestation practices, physically difficult areas to occupy, land tenure conflicts, illegal settlement in protected areas, opposition from tribal groups, corrupt practices and even criminal practices such as narcotics trafficking.

At the global level, there are areas over which there is unclear or disputed sovereignty and about which there is non-delineation of borders for protection and management of the resources purposes. Once of such areas is Antartica. NGOs, led by Greenpeace, have proposed making the entire continent a World Park. The legal ramifications of such an idea are many, and remains unresolved.

Regionally, a similar situation of unclear or disputed sovereignty could be attributed to the Spratly Islands in the South China Sea, which are claimed by six countries. Serious thought is being given to the long-standing suggestion for an ASEAN Area of Cooperation in the Spratly’s as well as the possibility for its designation as an international marine peace park and sanctuary through multilateral cooperative options available. Another example is the Rio Grande River, which defines part of the boundary between Mexico and the United States. As the river changes its course, pockets of areas attain an unusual status, shifting in sovereign possession between the two countries. In the latter instance, issues are resolved by an International Boundary and Water Commission established by the United States and Mexico.

What bodes well for transborder protected areas is the current worldwide interest in unified action to control borderless environmental problems like air and water pollution, and environmental issues like non-indigenous species introduction in the field of biodiversity conservation. In particular, the following will hopefully facilitate appropriate management of border areas: (1) National awareness regarding the importance of border area conservation; (2) Newly acquired consciousness by local communities that the preservation of their natural and cultural heritage is both a matter of pride and a vehicle for socio-economic development and improved environmental quality, (3) Upsurges of interest in the eco-cultural tourism industry; (4) Concern of international development agencies and NGOs with the sustainable development of protected areas, including conservation of the great variety of species found therein.

There are many options for establishing border parks, and many opportunities exist whereby nations could be encouraged to cooperate in the joint management of border areas. The migratory nature of the wildlife resources in many parks in Africa accounts for the
abundance of transfrontier parks in that continent. A number of initiatives to use border parks as a means of bi-national cooperation also exist in Central America. In fact, a letter of intent to use border parks as a means of bi-national cooperation also exist in Central America. A letter of intent has already been signed by Nicaragua and Costa Rica, and a draft action plan prepared, for an international protected area for peace along the San Juan River watershed between the two countries. The location was the site of a previous military operation as well as extensive rural migration. Better control of such activities as cactus gathering, border crossings, and turtle nesting sites are the motivating factors for a proposed border park between Mexico and the United States near the Big Bend National Park, and other border park possibilities along U.S.–Mexico boundary in Arizona, U.S.A. and in the Gulf.

5.1 Establishment of Transborder Parks through Legal Instruments

Border parks are in reality autonomous administrative units usually created under their own enabling acts or Parks Law, with their own implementing rules, regulations and guidelines and possessing their own budgets. More often than not, they are separately established without consultation with the neighboring country, and are therefore set up at different times for different reasons. This is exemplified by the France-Italian Parks Complex. In 1922, the Grand Paradiso Natural Park was established in the Italian Alps, primarily to protect the ibex, the wild goat of Europe immortalized in many Upper Paleolithic cave paintings. The protection afforded by the Italian Park proved inadequate because although the ibex winters in the Alps, its summer is spent in France, leaving them unprotected. After many failed attempts, France was finally able to set up the La Vannoise National Park in 1963. Twinning of the two parks, which occurred only on 1972, stretched the common frontier of the parks to fourteen km instead of six km resulting to a fauna sanctuary of about 2,400 ha. On account of said developments the endangered ibex are now better protected, year-round.

Similarly, the Swiss National park established in 1914 in the Engandine on the border with Italy was without a point of contact with Stelvia National Park established by Italy in 1935 a short distance from the Engadine. The expansion of the boundaries of Stelvia Park in 1974 resulted in a wide “corridor” specifically to join up the two parks.

The Waterton–Glacier International Peace Park mentioned above is also an example of two parks created by two distinct national laws, managed by their respective autonomous authorities. It is not the outcome of an international treaty.

Bilateral agreements certainly create border parks. An example is the Memorandum of Agreement which created the Turtle Islands Heritage Protected Area (Philippines and Malaysia). A classic example is the Krakow Protocol (1925), signed between two world wars, on the occasion of the settlement of a border dispute between Poland and Czechoslovakia. The Protocol provided for the creation of protected areas along their common border and for a tourist agreement to facilitate access by visitors. However, the protected areas referred to were established at a much later date. These protected areas are: Tatras National Park (Czechoslovakia 1948 and Poland 1954); Pieniny Park (Czechoslovakia 1963 and Poland 1954); and Karkonosze (Czechoslovakia 1963 and Poland 1959). Take note, however, that while the parks were created by virtue of the Krakow Protocol there were no official agreements made between/among the parks.

International agreements like the 1933 London Convention relative to the Preservation
of Fauna and Flora in their Natural State also led to the establishment of transfrontier parks. This is particularly true in Africa, where the European powers, following similar developments in their respective jurisdictions, adopted a protected areas policy in their colonial territories. Examples are Park “W”, established by the French colonial government, now consisting of three national parks under the territorial jurisdiction of Benin, Burkina Faso and Niger, as well as the Boucle de la Pendajari National Park (Benin) and the Arly Wildlife Reserve (Burkina Faso).

5.2 Management of Transborder Parks through Institutional Arrangements

Apart from legal instruments, e.g. frontier agreements, institutional arrangements are used for border parks management. Oftentimes, legal instruments/institutional arrangements are complementary/supplementary to situations created by the presence or absence of the other. For instance, in the absence of frontier agreements, specific cooperative bodies for border parks management are used to settle border management specific cooperative bodies for border parks management are used to settle border management problems or issues. This is illustrated by the International Pryreness Commission established by Spain and France to deal not only with border issues between the two countries but also with problems related to poaching and hunting offenses. In the same way, a France—German—Swiss Commission was set up in 1975 in Bonn to study environment and lend-use planning issues on the frontier areas of the three countries.

A typical example of a legal instrument as a basis for transfrontier parks management without mention of a body created for cooperative management purposes is the Agreement of 29 December 1949 between Norway and the USSR which provides in part “for cooperation in all fields relating to the protection of game, including birds and the establishment of hunting seasons along certain parts of the frontier.

Cooperative institutions for transfrontier protected areas management are best exemplified by a joint commission for the management of the German-Luxembourg Nature Park, created by the renewable Clervaux Treaty. The commission, however, has only advisory powers. Binding discussions can only be made by the respected national authorities, or must be embodied in a bilateral agreement. Another example is the use of a commission appointed by the Conseil de l’Entente for the management of Park “W” (Benin, Burkina Faso, Niger). The Conseil de l’Entente is a regional international organization created by Togo, Ivory Coast, Niger, Burkina Faso and Benin as a forum for consultations on diverse topics including technical cooperation and economic development. A Parks and Reserves Coordinating Commission was established by the Council to handle such matters as harmonization of laws for Park “W” management and joint training of wardens. Ultimately, a single authority is envisioned to administer Park “W”.


On account of the fact that transfrontier parks involve vast expanses of areas, their management is indeed complex. The steps involved, e.g. scientific selection of key flora and fauna habitats, drawing up of management plans, implementation actions, monitoring and assessment, are tedious processes. Even the task of managing a national border park is a difficult one. Add to that the complications which can be brought about by the cooperative efforts required in dealing with an international frontier, and one can imagine the political and managerial complexities that can ensue.
As a first step, it would do well for a country to review and have an inventory of existing protected natural areas along its border. The inventory should identify shared monuments of nature, such as mountain ranges and waterfalls, as well as routes of migratory species, tourism trends and other forms of transfrontier interactions. It would do well for the inventory to also include potential additional border areas to complement the existing protected border area system, as area expansion is a common feature of the transfrontier parks system.

Border parks can only be effectively established and cared for if there are responsive legal instruments and institutional arrangements for their protection/management. This is brought about by the uniqueness of frontier parks in the sense that they presuppose two or more governments, as well as two sets of legal base, providing the necessary authority for action. It is, therefore, important to review the adequacy of the national legislative framework for a transborder park, taking into consideration the following points: (1) The legislation should authorize a competent authority to protect the area by force of law; (2) The legislation should be in accordance with international conservation agreements, as well as local traditions, institutions and ecological conditions; (3) The legislation should consider the inhabitants inside the adjacent to the frontier park, and should recognize indigenous peoples’ rights, including their participation in park management; and (4) De-listing or reduction of the size of a border park should only be by legislation, and for extraordinary reasons/circumstances.

In drafting a framework agreement for twinning transborder parks, three key principles should be borne in mind: (1) Management objectives should be ecologically sound and achievable with the technical and financial resources on hand, or which may become available. (2) Existing institutions/infrastructure should be utilized; and (3) Top level/national support, as well as wide public participation, should be ensured, for its political and social acceptability.

Actually, the framework agreement referred to above is a cooperative agreement for the integrated management of border protected areas. This requires, among others: (1) Consistent management plans prepared for each side of the border; (2) Establishment of a joint working-level consultative committee; (3) Harmonized law enforcement regulations; (4) Provision for a sustainable financing strategy. Care should be taken to ensure that the agreement will, in no way, imply the relinquishment of control over a national territory. In instances where governments are reluctant to enter into cooperative agreements, it is the task of non-governmental organizations (NGOs) to push for one.

Among practical management activities which could be the object of joint cooperative efforts are: law enforcement, border crossing, permits, customs clearances, regulations, search and rescue operations, local people/tribal communities concerns, wildlife disease prevention and control, fire prevention and other emergency procedures, species re-introduction and non-indigenous species introductions. Regular staff exchanges, shared research and results projects, complementary publications and compatible communications systems could be worked out too. Special consideration should be given to sustainable activities of the resident population, whether they are cultural minorities or migrant settlers. Such cooperative efforts could be further enhanced by joint staff training programs, and complementary public information, awareness and education. Frontier parks would also mutually benefit from joint tourism marketing efforts which could lead to development of areas adjacent to the parks, thereby highlighting their role in regional development. To address all these types of activities, close coordination is required of the park authorities from both sides of the border protected areas.
In consonance with the cooperative thrust of recent international environmental agreements, joint efforts of parks authorities should extend to familiarization with conservation treaties, particularly on the obligations and benefits to be derived therefrom. Among the conventions referred to are those on wetlands, biological diversity, world heritage, and migratory species.

Most important of all, a financing strategy is a vital aspect of the mechanism for the management of a transfrontier protected area. A popular and accepted method of such strategy is the creation of a trust fund in addition to budgetary appropriations from national or local governments. Financing could also come out of the revenues and other funds generated by the border parks.

Legal instruments for transborder protected areas should, therefore, include the establishment of a Fund which should allow the allocation of the revenue realized from the activities within the areas directly to the Fund, and the use of such funds for the protection and management of the border areas. The kind and amounts and possible sources of revenues, including the application of the sources of the Fund, may be specified in the legal instrument.

Conclusion
Sometime in the past, border peace parks proponent John Maclead asked: “Why not seed the borderlines of the worlds with peace parks and gardens, nature preserves, and wilderness areas that encourage cultural and physical development of youth, respect for and appreciation of wildlife and irreplaceable landscape? These border peace parks are precious places where peoples share and where they celebrate what they share: history, culture, beliefs, landscape.” At another time, Henry Thoreau wrote in part “in wildness is the preservation of the world.”

As we move on in this millennium, there is a general acknowledgement of the fact that the world is becoming not only economically but also ecologically interdependent. This was brought about by transboundary environmental problems such as marine pollution, acid rain, global warming which cannot be solved unilaterally by national governments. This is where the potential lead role of the concept of border parks come in. Border parks can provide ecological models, as well as symbols of effective resource management and conservation, as long as the legal frameworks and institutional arrangements that will show the benefits of cooperation in a world of decreasing appreciations of boundaries are set in place.

Could it be what Henry Thoreau meant when he wrote “in wildness is the preservation of the world?”
References


International Review for Environmental Strategies
## Annex A

### Global List of Border Parks

#### Asia

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<tr>
<th>Park Name</th>
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<td>Tindu WMA (Papua New Guinea)</td>
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<td>Udaipur &amp; Valmikik Nagar (India)</td>
<td>Royal Chitwan (Nepal)</td>
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<td>Samunsam &amp; Tanjung Datu (Sarawek)</td>
<td>Hutan Sambas (Kailmantan)</td>
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<td>Yot Dom and Khao Phanom Dong Rak (Thailand)</td>
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<td>Futien (China)</td>
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#### South and Central America

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#### Europe

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<td>Pyrenees Occidentales (France)</td>
<td>Ordessa (Spain and others)</td>
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<td>“W” in Benin, Burkina Faso and Niger</td>
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<td>Virunga (Zaire)</td>
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<td>Niokola Koba (Senegal)</td>
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<td>Gebel Elba (Egypt)</td>
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The Philippines and its Archipelagic Rebirth
under the 1982 United Nations Conventions on the Law of the Sea (UNCLOS)

Ambassador Rolando S. Gregorio

UNCLOS is now widely regarded and recognized as the Constitution for the Oceans and Seas. (Supreme Court Associate Justice Antonio T. Carpio, the most authoritative legal expert on the Philippine claim in the West Philippine Sea conflict wrote in his Research Paper “Grand Theft of the Globl Commons”). The ARCHIPELAGIC DOCTRINE of UNCLOS regards an archipelago as a single unit.

UNCLOS gives due importance to “archipelagic states” which are but a few. The Philippines, being an archipelagic state, benefits so much. The recent pronouncements by the Permanent Court of Arbitration in the Hague on the Arbitration between the Republic of the Philippines and the People’s Republic of China on Jurisdiction and Adminisibility and later its ruling in favor of the Philippines are worth mentioning. The UNCLOS codification of international law on the oceans and the seas into one coherent system most likely helped the Permanent Court of Arbitration in its historical judicial task.

In the near future, conflicts of similar nature are not far-fetched and it is safe to say that it would be an easier task for any international tribunal to do its work.

For example, Webster’s New Universal Dictionary defines archipelago “as any large body of water studded with islands.” Archipelago, it says, came from the Greek words “archi” (chief) and “pelagos” (sea). Based on this etymology, the emphasis was on a body of water. On the other hand, international law books, including that of former Supreme Court Associate Justice Isagani Cruz defines an archipelago as “a group of islands, including parts of islands, inter-connecting waters and other natural factors favor an intrinsic geographical, economic and political entity, or which historically have been regarded as such.” Islands were given more importance.

UNCLOS provided a middle ground on the different emphasis when it said that “an archipelagic state means a state constituted wholly by one or more archipelagos and may include one or more islands.” In the case of the Philippines, our emphatic declaration on the second sentence of Art. 1 on our National Territory that: “The waters around, between and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines” is same as that of UNCLOS on internal waters of archipelagos except, in place of regardless, it was irrespective and in place of Philippines, it was State. Additionally, “subject to its exclusive jurisdiction” after the State concluded the UNCLOS statement. This undoubtedly enforces our declaration of exclusive sovereignty over our archipelagic internal waters.

It also helps that the UNCLOS definition de-emphasized the difference between the two definitions of archipelago. Be that as it may, it would be prudent to consider China’s major
shift of gear, from land to water, so to speak, on this matter. The 2015 “China Military Strategy, declared that the traditional mentality that land outweighs the sea must be abandoned, and great importance has to be attached to managing the seas and oceans and protecting maritime rights and interests.

For instance, what if China intrudes into the international waters of either the Philippines (7,100 islands) or Indonesia (17,508 islands), the two largest mid-ocean states? Because of their geography and lack of resources, they can hardly secure their coastlines and internal waters, more so their contiguous zone, exclusive economic zone (EEZ) and continental shelf under the UNCLOS. Devoid of naval resources to defend their coastlines and internal waters, they could only resort to peaceful settlement. The UNCLOS archipelagic doctrine becomes the only handy recourse for the Philippines or Indonesia in this kind of disregard for international law.

The developments in the West Philippine Sea and on oceans and seas in Asia are worth watching and assessing because China, although a party from the beginning and as a signatory without reservation to UNCLOS, refuses to recognize and abide with the recent binding rulings of the Permanent Court of Arbitration on the South China Seas – West Philippine Sea dispute.

More disturbing, among other things, are reports from open reliable sources about Hina’s grand design in the South China Sea:

- China wants to control the South China Sea for economic and military purposes. China wants all the fisheries, oil, gas and mineral resources within the 9-dashed lines. China already takes 50% of the annual fish catch in the South China Sea as more than 80% of its coastal waters are already polluted. China has the largest fishing fleet in the world, with 200,000 sea-going vessels and 2,640 long-distance ocean-going vessels. China’s per capita fish consumption is the highest in the world at 35.1kg/year to feed 1.4 billion people, while the rest of the Asia’s per capita consumption is only 21.6kg/year.

- China is the largest net importer of petroleum in the world. The South China Sea is rich in methane hydrates – said to be one of the fuels of the future. China wants to secure all these methane hydrates for itself.

As to China’s military, naval and civilian capabilities to protect its interest, take a look at these:

- China is mass-producing destroyers, frigates, corvettes and other warships at a faster rate than any other country in the world history during peacetime. Its one aircraft carrier shall be two sooner than later.

- According to the U.S. Office of Naval Intelligence, “During 2014 alone, more than 60 naval ships and crafts were laid down, launched, or commissioned, with a similar number expected through the end of 2015.”

- China has a Second Navy – The Coast Guard. China deployed recently a 10,000-ton coast guard vessel, the world’s largest blue water coast guard vessel. A second 10,000-ton sister ship is under construction. China has more coast guard vessels than Japan, Vietnam, Malaysia and the Philippines combined. China’s Coast Guard is the largest blue water coast guard fleet in the world.

- China has a third Navy – Maritime Militia. China has maritime militia consisting
of hundreds of thousands of fishermen who are well trained to spy on foreign warships, harass foreign fishing vessels, and act as eyes and ears for the PLA Navy. Their fishing vessels, numbering about 20,000, are equipped with China’s Beidou satellite navigation and communications systems. The PLA’s official newspaper declared: “Putting on camouflage these fishermen qualify as soldies, taking off the camouflage they become law abiding fishermen.”

This awesome unraveled power was contained in Justice Carpio’s “Research Paper on the South China Sea – West Philippine Sea Dispute.” The odds seem formidable, yet, he believes that it is our solemn duty to avert the loss of what we won in the Permanent Court of Arbitration last year. This law professor is one with the esteemed Justice that we owe it to ourselves and the future generations of Filipinos to fulfill said duty.

Finally, let us appreciate and be caring of our bountiful and beautiful archipelago. GOD BE WITH US AS EVER!
I. Introduction

It is of popular view that the Data Privacy Act of 2012 was intended to support the Business Process Outsourcing (BPO) industry, complementing other incentives intended to attract foreign investment. The BPO industry, coined as the “Sunshine industry,”¹ is accepted as a significant contributor to the Philippine economy, demonstrating its capability to generate jobs and increase Gross Domestic Product. The law is touted as a measure to “boost confidence in both the country’s booming Information Technology and Business Process Outsourcing (IT-BPO) industry and growing e-governance initiatives.”² This should not, however, be taken to mean that the law exists principally for the BPO industry, because the collection, use, and storage of personal data of individuals is not confined to any particular industry. In fact, one of the biggest repositories of personal data is the government, and the law accordingly provides specific obligations for government agencies.³ The Data Privacy Act of the Philippines, as opposed to data protection laws in some jurisdictions, covers both public and private sector.

It bears emphasis that the Data Privacy Act should never be considered as catering primarily to interests of the business sector or government agencies because at its core is the obligation to protect the data privacy rights of individuals whose personal data are collected, used, stored, or otherwise processed.⁴ The law itself orders that “any doubt in the interpretation of any provision of this Act shall be liberally interpreted in a manner mindful of the rights and interests of the individual about whom personal information is processed.”⁵ The individual or the data subject⁶ should be acknowledged as the nucleus of the law, because more than being just legislation to support certain industries or promote innovation and economic growth, the Data Privacy Act is legislation for human rights.

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⁴ Data Privacy Act, §3(j). Processing is defined broadly in the Data Privacy Act, referring to any operation or any set of operations performed upon personal information including, but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data.
⁵ Data Privacy Act, §38.
⁶ Data Privacy Act §3(c)( Data subject refers to an individual whose personal information is processed.)
In the Declaration of Policy, the law provides — 

It is the policy of the State to protect the fundamental human right of privacy, of communication while ensuring free flow of information to promote innovation and growth. The State recognizes the vital role of information and communications technology in nation-building and its inherent obligation to ensure that personal information in information and communications systems in the government and in the private sector are secured and protected. 7

This declaration emphasizes the duty of the State to uphold the right to privacy. While the section states “privacy, of communication”, noting the only time that the word “privacy” is mentioned specifically in the Bill of Rights, 8 the aspect of privacy that is covered by the law is the right to information privacy. This aspect is built on the same principles that hold privacy as a right protected by the Constitution. The right to privacy is “the right to be let alone” and boldly claimed by U.S. Supreme Court Justice Louis Brandeis as “the most comprehensive of rights and the right most valued by civilized men.” 9 He explained in this wise —

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth. 10

The right to privacy is at the crucible of the Bill of Rights, supporting the right of persons to life, liberty and property, due process, the right of the people to be secure in their persons, houses, papers, and effects and the right against self-incrimination. Freedom of speech and of the press, freedom of religion, freedom of movement and freedom of association—the full enjoyment of these depends on freedom from unwarranted government intrusions, and a guarantee that individuals are entitled to a reasonable expectation of privacy in their personal lives. Upholding the right to privacy means acknowledging that an individual’s dignity has value. As an aspect of privacy, “informational privacy” 11 must be viewed under the same lenses, and afforded the same protection. The right to information privacy refers to the right of individuals to control information about themselves, and to have the ability to determine what information about them is collected or disclosed, how their personal data is to be used and for what purpose.

7 Data Privacy Act §2.
8 PHIL. CONST. ART III, §3.
10 Id. (Emphasis supplied)
11 In Whalen v. Roe 429 U.S. 589 (1977), the U.S. Supreme Court expounded that cases characterized as protecting “privacy” involved two different kinds of interests, and that one of this is the individual interest in avoiding disclosure of personal matters.
Implicit also in the “Declaration of Policy”\textsuperscript{12} of the Data Privacy Act is the recognition that even as the law protects the right to privacy, it also articulates that free flow of information should be ensured. This should allay fears that the Data Privacy Act could be used as a shield to curtail access to information or to impede innovation and research. The law assures that data protection is not an obstacle for people to obtain benefits from utilization of personal data. The policy statement directs support for open data initiatives, freedom of information and other forms of data sharing. At the same time, it emphasizes that the use of personal data comes with a responsibility. The rights of data subjects should, at all times, be a paramount consideration. Those who exercise control over personal data processing and all forms of data sharing should adhere to data privacy principles and implement appropriate organizational, physical and technical security measures for personal data protection.

The importance of the right to information privacy should be put into context. More than a hundred years ago, an engineer predicted that “man will see around the world. Persons and things of all kinds will be brought within focus of cameras connected electrically with screens at opposite ends of circuits, thousands of miles at a span.”\textsuperscript{13} This prediction was fulfilled in the last few decades, christened as the information or digital age, where technology has been revolutionizing the way things are done and where information has become readily available to more people.

The advancements in information and communication technology allowed people around the world to be connected, for all kinds of data to be collected and shared, and for volumes of data to be accumulated. It has often been mentioned that 90\% of the world’s data have been generated only in the last few years.\textsuperscript{14} Information is a valuable commodity, changing how everyday life is experienced. It is the new currency of power.\textsuperscript{15} When Edward Snowden disclosed classified documents of the National Security Agency of the United States of America, the world was taken aback at the widespread surveillance being conducted by the U.S. Government, including surveillance activities directed against known allies.\textsuperscript{16} Snowden’s revelations renewed privacy concerns but likewise affirmed how information is a sought-after product.

Information is critical for decisions affecting national and economic security, foreign and domestic policies, and other legitimate interests of public authorities. In addition to these, governments also recognize how meaningful use of data coupled with innovation can improve public services and foster growth. Governments launch projects that take advantage of technology to be able to use data in making people’s lives better.\textsuperscript{17} In the same manner,

\textsuperscript{12} Data Privacy Act §2.
\textsuperscript{14} SINTEF, Big Data, for better or worse: 90\% of world’s data generated over last two years (May 22, 2013) available at https://www.sciencedaily.com/releases/2013/05/130522085217.htm (last accessed Dec. 27, 2016).
\textsuperscript{15} Sponsorship speech of Senator Edgardo Angara for S.B. 2965, An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this purpose a National Data Protection Commission and for other Purposes (Sept. 21, 2011) (“In this digital era, information is the currency of power – valuable, coveted, but at a very high risk.”).
\textsuperscript{17} See, for example, Estonia’s e-government and e-residency programs, United Kingdom’s Government Digital Services, and United States Digital services, Mexico’s National Open Data Policy, Tunisia’s Open Government Partnership.
The Philippine Congress currently seeks to expand the scope of authorized State surveillance activities,\(^{18}\) to guarantee freedom of information access,\(^{19}\) and to institutionalize open data initiatives.\(^{20}\)

The generation of data is not an exclusive activity of governments. When Facebook acquired WhatsApp, the public was assured that there will be no data sharing between the companies, but the companies have since then backpedaled.\(^{21}\) A change in privacy policy now required new users of WhatsApp to consent to the data sharing between the companies to avail of the messaging service. The private sector has long been capitalizing on data collection and use of people’s information to advance their economic and commercial interests. Private companies invest on big data and analytics.\(^{22}\) Data sets about people can be sold and bought. Individuals are being profiled based on their online activities, or on data collected about them offline, often with consent.

It should come as no surprise that both government and private sector engage in initiatives that deal with personal data processing. Information is the driving force for change and those unable to adapt to the information age would be left behind. The challenge is to reap the benefits from the availability of information while ensuring that use of personal data will not negatively impact the rights and freedoms of those individuals about whom personal data is processed. Prioritizing data privacy and personal data protection is not only timely, but necessary. The changing times lead the Court to say that —

> The concept of privacy has, through time, greatly evolved, with technological advancements having an influential part therein. This evolution was briefly recounted in former Chief Justice Reynato S. Puno’s speech, The Common Right to Privacy, where he explained the three strands of the right to privacy, viz: (1) locational or situational privacy; (2) informational privacy; and (3) decisional privacy.\(^{23}\)

Due to the advances in technology, the challenges in upholding the right to information privacy has likewise become greater. Personal data protection is no longer just about manual records being kept in filing systems secured by lock and key. The right to information privacy now involves cybersecurity and cyber resilience, including protecting personal data against

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\(^{18}\) See, for example, An Act Expanding the Scope and Coverage of RA 4200, Otherwise known as An Act to Prohibit and Penalize Wiretapping and Other Related Violations of the Privacy of Communication and for other Purposes, SB 1210, 17th Congress, First Regular Session, (Oct. 19, 2016).

\(^{19}\) See, for example, An Act Implementing the People’s Right to Information and the Constitutional Policies of Full Public Disclosure and Honesty in the Public Service and for other purposes, SB 1208, 17th Congress First Regular Session (Oct. 19, 2016).

\(^{20}\) See, for example, An Act Institutionalizing the Establishment of the Philippine Big Data Center, SB 688, 17th Congress, First Regular Session, (Aug. 11, 2016); An Act Requiring the Registration of Subscriber Identity Module (SIM) Cards in Mobile Phones SB 1219, 17th Congress First Regular Session (Oct. 20, 2016).


malwares, ransomwares and other cyberattacks. To consider, however, that data privacy is only about cybersecurity would be a myopic view. Strengthening systems requires adhering to data privacy principles, and implementing privacy, both by design and by default, in data processing systems.

In the Philippines, admittedly, there remains the need to embrace a culture of privacy, built on acceptance of information privacy as a fundamental human right. While the Data Privacy Act became law in 2012, it was not until March of 2016 that the National Privacy Commission, an independent body mandated to implement and administer the law, was constituted. As of August 2014, over one hundred (100) countries worldwide have developed their own data protection regulations. As compared to many other countries, personal data protection in the Philippines is still at its infancy. In August, 2016, in a report titled “Data Danger Zones”, the Philippines is ranked as No. 143 out of over 170 nations evaluated on the ability “to keep digital information safe, private and secure.” Improving this ranking requires a confluence of factors, including an enabling socio-political environment that would allow the National Privacy Commission to function independently in the performance of its regulatory and enforcement functions, and the presence of multi-sectoral cooperation and coordination from both government and private sector, strengthened by the collective commitment to comply with the Data Privacy Act.

II. Right to Information Privacy

The US Supreme Court acknowledged the right to privacy as an important right in 
Griswold v. Connecticut, explaining that the penumbras of the Bill of Rights guaranteed zones of privacy. In the Philippines, the opportunity to make a similar declaration came when the right to privacy was raised before the Philippine Supreme Court in Morfe v. Mutuc. In this case, the Court was called to decide on whether the periodical submission by a government officer or employee of his Statement of Assets and Liabilities was unconstitutional for being

24 Data Privacy Act, §11. The general privacy principles under the Data Privacy Act of 2012 requires adherence to the principles of transparency, legitimate purpose and proportionality.

25 See Implementing Rules and regulations of Republic Act No. 10173, known as the “Data Privacy Act of 2012” [IRR] (August 24, 2016), §26(b), which expounds on the concept of “privacy by design” and “privacy by default.” It provides in part:
1. The policies shall implement data protection principles both at the time of the determination of the means for processing and at the time of the processing itself.
2. The policies shall implement appropriate security measures that, by default, ensure only personal data which is necessary for the specified purpose of the processing are processed. They shall determine the amount of personal data collected, including the extent of processing involved, the period of their storage, and their accessibility.

26 The first Privacy Commissioner and Chairman of the National Privacy Commission is Raymund Enriquez Liboro. He is assisted by two Deputy Privacy Commissioners: Ivy D. Patdu for Policy and Planning, and Damian Domingo O. Mapa for Data Processing Systems.


violative of due process and the right against self-incrimination. The Court, considering the case as one of first impression, declared that “The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection.”

In ruling against the constitutional challenge, the Court also established that the right to privacy is not absolute:

Even with due recognition of such a view, it cannot be said that the challenged statutory provision calls for disclosure of information which infringes on the right of a person to privacy. It cannot be denied that the rational relationship such a requirement possesses with the objective of a valid statute goes very far in precluding assent to an objection of such character. This is not to say that a public officer, by virtue of a position he holds, is bereft of constitutional protection; it is only to emphasize that in subjecting him to such a further compulsory revelation of his assets and liabilities, including the statement of the amounts and sources of income, the amounts of personal and family expenses, and the amount of income taxes paid for the next preceding calendar year, there is no unconstitutional intrusion into what otherwise would be a private sphere.

Justice Ynares-Santiago, speaking through her dissent in *KMU, et al., v. The Director General, NEDA, et al., and Bayan Muna Representatives et al., v. Ermita, et al.*, classified the right to privacy as an inalienable right of an individual to be let alone. She also discussed the attributes of informational privacy, but again cautions that the right is not absolute:

The basic attribute of an effective right to informational privacy is the individual’s ability to control the flow of information concerning or describing him, which however must be overbalanced by legitimate public concerns. To deprive an individual of his power to control or determine whom to share information of his personal details would deny him of his right to his own personhood. For the essence of the constitutional right to informational privacy goes to the very heart of a person’s individuality, a sphere as exclusive and as personal to an individual which the state has no right to intrude without any legitimate public concern.

One of the earliest legislation relevant to the right to information privacy was Republic Act No. 4200, An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the privacy of Communication, and for other purposes, otherwise known as the Anti-Wiretapping Law, which prohibits unauthorized tapping of any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept or record any communication or spoken word. While prohibiting the recording of private communication, the law exempts from the prohibition wiretapping done by law enforcement in relation to surveillance activities for certain crimes when authorized by written order of the Court. Under the Constitution, the

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31 Id.
32 Id.
34 Id.
35 Id.
37 Anti-Wiretapping Law, §3.
privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise, as prescribed by law.\textsuperscript{38} The right to information privacy is not limited to private communications. It covers the protection of personal data and the right of individuals to control information about themselves, without regard to whether the information was generated in the context of a private communication.

In the Philippines, various laws provide for information privacy, either by protecting privacy in general or criminalizing privacy violations.\textsuperscript{39} In 2008, the Supreme Court issued the Rule on the Writ of Habeas Data.\textsuperscript{40} The writ of habeas data is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party.\textsuperscript{41}

While the Rule on the Writ of Habeas Data affirms the need to protect information privacy, it is a summary remedy. It has been invoked in several cases where there is an apparent violation of the right to information privacy, but the affected data subjects often do not get relief for failure to show that the privacy violation affects the right to life, liberty or security.\textsuperscript{42} In Lee v. Ilagan, the Court emphasized:

As the rules and existing jurisprudence on the matter evoke, alleging and eventually proving the nexus between one’s privacy right to the cognet rights to life, liberty or security are crucial in habeas data cases, so much so that a failure on either account certainly renders a habeas data petition dismissible, as in this case.\textsuperscript{43}

The right to information privacy is a fundamental human right. The violation of the right to information privacy, by and of itself, however, will be insufficient to support the petition for habeas data. The Court consistently requires a clear showing of how the privacy violation

\textsuperscript{38}Phil. Const. art III, §3.
\textsuperscript{40}A.M. No. 08-1-16-SC, Rule on the Writ of Habeas Data (Jan. 22, 2008).
\textsuperscript{41}Rule on Writ of habeas Data, §1.
\textsuperscript{43}Lee v. Ilagan, G.R. No. 203254, October 8, 2014.
affects the right to life, liberty and property. In those cases, where the information privacy violation fails to meet the jurisdictional requirements of the writ of habeas data, the person about whom personal data is processed is not left without a remedy. In 2012, through R.A. No. 10173 or the Data Privacy Act of 2012, the right to information privacy was specifically upheld in law, mandating protection of personal data and crystallizing the rights of data subjects or individuals about whom personal data is processed. Under the Act, data subjects have the right to complain before the National Privacy Commission on violations of their information privacy or cases of personal data breach.

The Data Privacy Act of 2012 upholds the right to information privacy while supporting free flow of information. The law imposes obligations on those involved in the processing of personal data to safeguard the information being collected, used, or stored. The end in view is that the confidentiality, integrity and availability of these personal data are protected, and that the concerned individuals will not be unduly prejudiced as a result of the processing. Personal data should be protected because its unauthorized or unlawful collection, use or disclosure could lead to the commission of crimes against individuals about whom data is processed, or could cause them other forms of injury and damage.

Unauthorized access to personal data can be used to perpetuate identity fraud and to commit other crimes. Information that may be used to enable identity fraud include financial documents, usernames, passwords and other login data, biometric data, information in identification documents or licenses, and other unique identifiers like Philhealth, SSS, GSIS, and TIN number. Earlier this year, media reported how a public school teacher allegedly became the victim of identity fraud after posting his Identification Card issued by the Professional Regulation Commission in social media.  

In 2008, a video clip of what is now known as the “Cebu Canister Scandal” was uploaded on YouTube.com, showing hospital staff jeering and laughing after the successful extraction of a metal spray bottle canister from a patient’s rectum. Hospital staff declaring “Baby out”, the extracted canister being sprayed, and the video spreading from cell phone to cell phone constitute utter disregard for the patient’s privacy. The face of the patient was not shown in the video, but later when interviewed by media, the patient said that everyone eventually found out about his identity. The patient was angry at the invasion of his privacy. When he consented to the operation, he did not fathom that the successful operation also meant that his private affairs will be exhibited to the public, or that people would make assumptions about his life, subjecting him to ridicule or judgment. This case exemplifies how the unwarranted disclosure of personal data could cause injury to a data subject. A violation of privacy is essentially an affront to human dignity.

In upholding the right to information privacy, people should be made aware of the value of their personal data. Daniel Solove, an expert in privacy law, wrote about why privacy

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Privacy is a limit on government power, as well as the power of private sector companies. The more someone knows about us, the more power they can have over us. Personal data is used to make very important decisions in our lives. Personal data can be used to affect our reputations; and it can be used to influence our decisions and shape our behavior. It can be used as a tool to exercise control over us. And in the wrong hands, personal data can be used to cause us great harm.

Personal data is essential to so many decisions made about us, from whether we get a loan, a license or a job to our personal and professional reputations. Personal data is used to determine whether we are investigated by the government, or searched at the airport, or denied the ability to fly. Indeed, personal data affects nearly everything, including what messages and content we see on the Internet. Without having knowledge of what data is being used, how it is being used, the ability to correct and amend it, we are virtually helpless in today’s world. Moreover, we are helpless without the ability to have a say in how our data is used or the ability to object and have legitimate grievances be heard when data uses can harm us. One of the hallmarks of freedom is having autonomy and control over our lives, and we can’t have that if so many important decisions about us are being made in secret without our awareness or participation.

Personal data is being processed in volumes, often using automated processes for further use. In availing of services, entering into financial transactions, applying to school or for a job, and many other activities, personal data is being collected and stored. The Philippines, despite its notorious problem with internet connectivity, continue to be among the world’s top users of social media sites. These social media sites entice users because they provide a free platform for a host of online activities, while actually collecting the personal data of its subscribers. The government through its various agencies process personal data of individuals who provide information to obtain health and social welfare benefits, to get pension or law enforcement clearance, to apply for licenses, to register as voters, and in general to avail of public services. Without safeguards, there will be no limits to how private and public sector collect and use personal data.

The volume of data about individuals being processed on a daily basis and the corresponding risks to data subjects arising from unlawful or unauthorized access, as well as the possibility of using profiling and other automated processes to make decisions affecting people’s lives, makes it imperative that those who process personal data be accountable for the protection of data subjects.

III. Data Privacy Act

The Data Privacy Act of 2012 was signed into law on August 15, 2012. Its


48 While the numbers vary from anywhere between 25% to 95%, surveys indicate that utilization of social networking sites in the Philippines is high compared to other countries not only in the Asia-Pacific region but also globally, earning for the country the moniker —The Social Networking Capital of the World. Social Networking Capital of the World available at http://www.nicojr.com/2011/05/the-philippines-is-the-social-networking-capital-of-the-world/ (last accessed Dec. 27, 2016).

49 The bill that eventually became R.A. No. 10173 or the Data Privacy Act of 2012 was principally sponsored by Senator
Implementing Rules and Regulations took effect on September 9, 2016. The principles enshrined in the Data Privacy Act were based on the European Parliament and Council’s Directive 95/46/EC (DPD) and the Asia Pacific Economic Cooperation (APEC) Privacy Framework. The Data Privacy Act was also influenced by the reform initiatives on the DPD, which later led to the adoption of the General Data Protection Regulation (GDPR) on April 27, 2016. In fact, many of the new provisions introduced by the GDPR had already been earlier incorporated to the Data Privacy Act, such as the right to portability or breach notification.

The Data Privacy Act (“Act”) created the National Privacy Commission, which was given the mandate to administer and implement the provisions of the Act, and to monitor and ensure compliance of the country with international standards set for data protection. This means that in addition to the provisions of the Act, due consideration should be given to accepted international principles and standards for personal data protection. The guiding policy is to safeguard the fundamental human right of every individual to privacy while ensuring free flow of information for innovation, growth, and national development.

**Personal Data**

The Act applies to the processing of personal data by any natural or juridical person, in the government or private sector. As can be gleaned from its title, the purpose of the Act is for the protection of “individual personal information,” referring to personal data of a natural person. This means that information about corporations or juridical persons are beyond the scope of the Act. Information not deemed “personal data” are likewise excluded from the application of the law.

Personal data refers to any information that could be used to identify an individual. If on the basis of a given information or set of information, the identity of a natural person can be known, then the information is personal data. Examples of personal data include the name or photograph of a person, his or her fingerprint, and identification cards and numbers. Anonymous information or aggregated data can no longer be used to identify a natural person.

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54 Data Privacy Act, §19.

55 Data Privacy Act, §20(f).

56 An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this purpose a National Privacy Commission, and for Other Purposes, Republic Act No. 10173, chap II §7 (2012)

57 IRR, §2.
and is thus no longer considered as personal data. Statistical data by itself is aggregate data, which will not lead to the identity of any particular individual.

It must be noted that the IRR of the Act uses the term “personal data” when referring to all types of information relating to individuals, regardless of the sensitivity or privileged nature of the information, and shall refer to the following collectively:

a. “Personal information” refers to any information, whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify an individual.

b. “Sensitive personal information” refers to personal information:
   1. About an individual’s race, ethnic origin, marital status, age, color, and religious, philosophical or political affiliations;
   2. About an individual’s health, education, genetic or sexual life of a person, or to any proceeding for any offense committed or alleged to have been committed by such individual, the disposal of such proceedings, the sentence of any court in such proceedings;
   3. Issued by government agencies peculiar to an individual which includes, but is not limited to, social security numbers, previous or current health records, licenses or its denials, suspension or revocation, and tax returns; and
   4. Specifically established by an executive order or an act of Congress to be kept classified.

c. “Privileged information” refers to any and all forms of data, which, under the Rules of Court and other pertinent laws constitute privileged communication.\(^{58}\)

The classification is important because under the Act there are specific provisions that apply only to personal information, as distinguished from sensitive personal or privileged information.\(^{59}\) Sensitive personal and privileged information as a general rule should not be processed except if with consent of the data subject, or when specifically authorized by law.\(^{60}\) This is because the sensitivity of the personal data also means that unlawful or unauthorized processing would be more prejudicial or lead to greater harm to the data subjects.

Personal data, regardless of classification, allows one individual to be distinguished from another, or otherwise identified. This means that the Identification of a person can be reasonably or directly ascertained from the information. It is still personal data even if the information by and of itself would not make the data subject identifiable, but when put together with other reasonably available information would allow identification. Reasonableness, for this purpose, will be evaluated based on the probability, difficulty and potential of identification, including required time, cost and skill.

The Act applies to the processing of personal data, performed through automated means or manual processing, if the personal data are contained or are intended to be contained in a filing system. “Processing” refers to any operation or any set of operations performed

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\(^{58}\) Data Privacy Act, §3(h)(l)(k).

\(^{59}\) See for example Data Privacy Act, §12 which applies to personal information as distinguished from sensitive personal information, and §13 which applies to sensitive personal and privileged information. See also Data Privacy Act, Chap. VIII on Penalties, defining several crimes on the basis of whether the information is personal information or sensitive personal information. See Data Privacy Act, §11, which applies to personal, sensitive personal and privileged information collectively.

\(^{60}\) Data Privacy Act, §13; IRR, §22.
upon personal data including, but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data. The Act will apply whether the personal data being processed is only a single record or an entire database with volumes of data, and whether contained in paper or electronic files.

**Personal Information Controller and Personal Information Processor**

As a general rule, the Act imposes obligations on any natural or juridical person involved in the processing of personal data, whether in the government or private sector. These would be the “personal information controllers” or “personal information processors.”

The “Personal information controller” refers to a natural or juridical person, or any other body who controls the processing of personal data, or instructs another to process personal data on its behalf. This refers to the corporation itself or the government agency, acting through its board or officials. It may refer to an individual, when the individual is the sole owner and decision-maker of an enterprise involved in personal data processing. The term does not refer to the employee in charge of computer systems, those who encode data, or the head of the IT department. The personal information controller exercises control over the processing of personal data. There is control if the natural or juridical person or any other body decides on what information is collected, or the purpose or extent of its processing.

For illustration, consider, for example, a hospital that processes personal data of its patients. It does so through its employees or consultants, such as the nurses or physicians. It may also do so through an IT employee that manages the electronic records in the hospital. In this case, the hospital is the personal information controller, not the nurses, physicians or IT personnel, because the latter process personal data only in behalf of the hospital.

In contrast, when a doctor has his or her own private clinic, and he or she keeps the medical records of his or her patients, then the doctor, as an individual, would be the personal information controller. The one who ultimately decides or who has the responsibility to decide what, how or why personal data is processed is the personal information controller.

Consider now, as another example, a hospital that enters into a contract with a company providing electronic medical record services, or other hospital information management system. The hospital, in effect, instructs the provider to process personal data of its patients. The hospital retains control over the processing because the EMR provider does not have the authority to use the personal data of the patients for any purpose under than pursuant to the agreement with the hospital. The hospital remains the personal information controller, while the EMR provider is the personal information processor.

The “Personal information processor” refers to any natural or juridical person or any other body to whom a personal information controller may outsource or instruct the processing of personal data pertaining to a data subject. If a personal information processor uses the personal data for a purpose other than pursuant to the instructions of the personal

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61 Data Privacy Act, §3(j); IRR, §3(o).
62 Data Privacy Act, §3(h); IRR, §3(m).
63 IRR, §3(m).
64 Data Privacy Act, §3(i); IRR, §3(n).
information controller, then the personal information processor, by its actions, also become the personal information controller. Going back to the earlier example, if the EMR provider stores and discloses the electronic medical records to a pharmaceutical company it is affiliated with, then the EMR provider is acting as a personal information controller. This means, the EMR provider is also obligated to comply with the obligations of a personal information controller under the Data Privacy Act. Thus, if the disclosure to another company is without consent of the patient, the EMR provider’s further processing of the medical records may constitute a crime.

It must be pointed out that a natural person who processes personal data in connection with his or her personal, family, or household affairs, by express provision of law, is not to be considered a personal information controller. Thus, when an individual keeps a directory of names, addresses and phone numbers for purely personal purposes, the individual is not a personal information controller. When the directory of contacts is being used for example as a client list, or for a professional or commercial activity, then the individual will be considered a personal information controller. Being a personal information controller means the individual would have to comply with the obligations imposed on the personal information controller under the Data Privacy Act.

Scope of Data Privacy Act

The Act applies to the processing of personal data, in and outside of the Philippines when the data subject is a citizen or resident of the Philippines, or when the processing of personal data is being done in the Philippines. When the processing is done outside the Philippines, and personal data relates to a citizen and resident of another country, Philippine laws would apply when the processing is being done by a person or entity with links to the Philippines, such as when the natural or juridical person involved in the processing of personal data is found or established in the Philippines. For these kinds of cases, whether Philippine law would apply would depend on the particular circumstances of the case, taking into account international law and comity.

In order for the National Privacy Commission to effectively implement the extraterritorial application of the Data Privacy Act, it should participate in regional and international initiatives for cross-border enforcement, such as the Global Privacy Enforcement Network or Asia-Pacific Economic Cooperation (APEC) Cross-border Privacy Enforcement Arrangement. One of the controversial cases on personal data breach involved an investigation on the reported hacking of the Ashley Madison website, targeted at people seeking a discreet affair. Through the APEC Cross-border Privacy Enforcement Arrangement, the privacy authorities of Canada and Australia conducted a joint investigation, which lead to resolution of the case. Working towards effective cross-border enforcement, the National Privacy Commission, during its first year, had been accepted as member of the International Conference of Data Protection and Privacy Commissioners (ICDPPC), and the Asia Pacific Privacy Authorities forum.

65 Data Privacy Act, §3(h); IRR, §3(m).
66 Data Privacy Act, §§4,6; IRR, §4.
67 Data Privacy Act, §§4,6; IRR, §4.
69 Id.
70 Kenny, Kathy (October 2016), PH Privacy Commission Gets International Accreditation, accessed on 16 December 2016,
As a general rule, the Data Privacy Act applies to the processing of all types of personal data. The Act specifies categories of information where it will not apply. These are:

a. Information about any individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual, including:
   1. The fact that the individual is or was an officer or employee of the government institution;
   2. The title, business address and office telephone number of the individual;
   3. The classification, salary range and responsibilities of the position held by the individual; and
   4. The name of the individual on a document prepared by the individual in the course of employment with the government;

b. Information about an individual who is or was performing service under contract for a government institution that relates to the services performed, including the terms of the contract, and the name of the individual given in the course of the performance of those services;

c. Information relating to any discretionary benefit of a financial nature such as the granting of a license or permit given by the government to an individual, including the name of the individual and the exact nature of the benefit;

d. Personal information processed for journalistic, artistic, literary or research purposes;

e. Information necessary in order to carry out the functions of public authority which includes the processing of personal data for the performance by the independent, central monetary authority and law enforcement and regulatory agencies of their constitutionally and statutorily mandated functions. Nothing in this Act shall be construed as to have amended or repealed Republic Act No. 1405, otherwise known as the Secrecy of Bank Deposits Act; Republic Act No. 6426, otherwise known as the Foreign Currency Deposit Act; and Republic Act No. 9510, otherwise known as the Credit Information System Act (CISA);

f. Information necessary for banks and other financial institutions under the jurisdiction of the independent, central monetary authority or Bangko Sentral ng Pilipinas to comply with Republic Act No. 9510, and Republic Act No. 9160, as amended, otherwise known as the Anti-Money Laundering Act and other applicable laws; and

g. Personal information originally collected from residents of foreign jurisdictions in accordance with the laws of those foreign jurisdictions, including any applicable data privacy laws, which is being processed in the Philippines.  

The enumeration identifies special cases which are given greater flexibility under the Act. This is because the special cases refer to information that are being processed in the exercise of a constitutional right, a necessary public function for national or economic security, or because of the conceded public benefit of the processing activity. This proceeds from the recognition that the right to privacy, particularly information privacy, is not absolute. Under the General Data Protection Regulation (GDPR), while there is no absolute exemption, the GDPR allows member States to “restrict by law certain obligations and rights when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard specific important interests including public security and the prevention, investigation,
detection or prosecution of criminal offences or the execution of criminal penalties, including
the safeguarding against and the prevention of threats to public security.\footnote{72}

In most cases, the right to privacy would need to be balanced with other fundamental
freedoms or the State’s exercise of its police power. A claim therefore that the Data Privacy
Act does not apply to a particular information would have to be evaluated on a case to case
basis. As guiding principles:

1. The non-applicability should be understood as being limited to the particular information
only, and does not extend to personal information controllers or personal information
processors. This means that those involved in the processing of personal data remain subject
to the obligation of implementing security measures for personal data protection. Unless
directly incompatible or inconsistent with the processing of the enumerated information, the
personal information controller or personal information processor shall uphold the rights of
data subjects, and adhere to general data privacy principles and the requirements of lawful
processing.\footnote{73}

2. The non-applicability of the Act for the special cases will only be to the minimum extent
of collection, access, use, disclosure or other processing necessary to achieve the specific
purpose, function, or activity. The flexibility allowed the special cases is to be understood as
the information being exempted from specific provisions of the Data Privacy Act only when
complying with the same will frustrate the collection, access, use, disclosure or other processing
needed for the achievement of the specific purpose, function or activity.\footnote{74}

3. In all cases, the determination of any exemption shall be liberally interpreted in favor of
the rights and interests of the data subject.\footnote{75}

For example, while the Act does not apply to information necessary to comply with
the reporting requirements of the Anti-Money Laundering Act, this does not mean that the
banks processing the information will be exempted from complying with the other obligations
and requirements under the Act. To the minimum extent necessary to comply with the
AMLA reporting requirements, the banks may process the relevant personal data without
need of asking for consent from data subjects. The bank is, however, still prohibited to disclose
without authority the same information to any third party outside those provided for in the
Anti-Money Laundering Act. Also, the bank, as personal information controller, remains
obligated to implement organizational, physical and technical security measures for personal
data protection.

The non-applicability in the Act is intended to support particular interests because
of their presumed benefit to the public or because they relate to fundamental freedoms
guaranteed by the Constitution. In Sections 4(a), (b) and (c) of the Act, the non-applicability is
for purpose of allowing public access to information that fall within matters of public concern.

\footnote{72} GDPR, Recital 19.
\footnote{73} IRR, §§5-6.
\footnote{74} IRR, §§5-6
\footnote{75} IRR, §6; See also Data Privacy Act, §38. \textit{Interpretation}. – Any doubt in the interpretation of any provision of this Act shall
be liberally interpreted in a manner mindful of the rights and interests of the individual about whom personal information
is processed.
The right to data privacy and right to information are often viewed to be irreconcilable and incompatible, however, these two rights complement each other and are both geared towards promoting personal protection and government accountability.\(^76\) The Data Privacy Act envisaged the limitations on the right to privacy prescribed by the State policy of full public disclosure of all its transactions involving public interest, and by the fundamental right of the people to information on matters of public concern.\(^77\) The Act also does not apply to personal information processed for journalistic, artistic or literary purpose, in order to uphold freedom of speech, expression, and the press, and to personal information that will be processed for research purpose, in order to support ethical and responsible research intended for a public benefit.\(^78\)

The Act does not apply to information necessary in order to carry out the functions of public authority, in accordance with a constitutionally or statutorily mandated function pertaining to law enforcement or regulatory function, or to the extent of processing required to comply with the Credit Information System Act and the Anti-Money Laundering Act.\(^79\) This means that public authorities will not be hindered from performing lawful activities intended for public health, public order, and national or economic security. In the exercise of governmental function, however, it is critical to emphasize that the non-applicability provided in the Data Privacy Act is not absolute, and that the right to privacy finds greatest relevance when the infringement is being justified as a legitimate act of government. The non-applicability provided in the law does not also mean that an individual can no longer inquire upon the validity or legitimacy of the data processing being done by government. The Bill of Rights is, after all, intended precisely for the protection of an individual against possible abuses of the State.

In Section 4(g), the non-applicability of the Act to personal information originally collected from residents of foreign jurisdictions, in accordance with their laws,\(^80\) was meant to support BPO industries in recognition of their contribution to the Philippine economy. The intent is to accommodate the possible difference in laws governing the collection of personal information, and would have to be evaluated on the particular circumstances of the claim of non-applicability. In all cases, the personal information controllers and personal information processors remain to be covered by the law including the implementation of security measures for data protection.

The interpretation of the non-applicability provided in the Data Privacy Act should be strictly construed in order to uphold the rights of the data subject. These are in the nature of exceptions which are subject to the rule of strict construction.\(^81\)


\(^{77}\) Phil Const. art. II §28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest; Phil Const. art III. §7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

\(^{78}\) Data Privacy Act, §4(d); IRR, §5(b)(c).

\(^{79}\) Data Privacy Act, §4(e)(f); IRR, §5(d)(e).

\(^{80}\) Data Privacy Act, §4(g); IRR, §5(f).

When the statute itself enumerates the exceptions to the application of the general rule, the exceptions are strictly but reasonably construed. The exceptions extend only as far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exceptions. Consequently, the existence of an exception in a statute clarifies the intent that the statute shall apply to all cases not excepted. Exceptions are subject to the rule of strict construction.

Data Privacy Principles

Section 11 of the Data Privacy Act allows the processing personal data, as a general rule, subject to the following:

1. Compliance with the requirements of the Act and other laws allowing disclosure of information to the public; and
2. Adherence to the principles of transparency, legitimate purpose and proportionality.

While the principles emphasized by the Data Privacy Act are transparency, legitimate purpose and proportionality, these principles should be interpreted in the context of the general data privacy principles recognized in other jurisdictions. The APEC Privacy Framework, for instance, enumerates nine (9) basic principles which are similar to the European Union’s Directive and the Data Privacy Act, such as: (1) Preventing Harm; (2) Notice; (3) Collection Limitations; (4) Uses of Personal Information; (5) Choice; (6) Integrity of Personal Information; (7) Security Safeguards; (8) Assess and Correction; and (9) Accountability. The APEC Framework likewise explicitly stated that the right to privacy must not thwart governmental interests authorized by law, including activities intended to protect national security, public safety or other relevant and imperative public policies.

The principles of transparency, legitimate purpose and proportionality are also consistent with the Data Privacy Principles under the EU Data Protection Directive and GDPR. These principles serve as backbone of the data privacy principles defended by the Act:

a. Transparency. The data subject must be aware of the nature, purpose, and extent of the processing of his or her personal data, including the risks and safeguards involved, the identity of personal information controller, his or her rights as a data subject, and how these can be exercised. Any information and communication relating to the processing of personal data should be easy to access and understand, using clear and plain language.

b. Legitimate purpose. The processing of information shall be compatible with a declared and specified purpose which must not be contrary to law, morals, or public policy.

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82 Id.
83 Data Privacy Act, §11; IRR, §§17-20.
85 Id.
c. Proportionality. The processing of information shall be adequate, relevant, suitable, necessary, and not excessive in relation to a declared and specified purpose. Personal data shall be processed only if the purpose of the processing could not reasonably be fulfilled by other means.

The principle of transparency substantially empowers the data subject to exercise control over the processing of his or her personal data. It includes the principle of fairness, and requires that personal data be “collected for specified and legitimate purposes determined and declared before, or as soon as reasonably practicable after collection, and later processed in a way compatible with such declared, specified and legitimate purposes only.” Adhering to the principle of transparency means upholding the rights of data subjects. These rights, provided in Section 16 of the Data Privacy Act, gives the Data Subjects the demandable right to have access to information about themselves being processed by a personal information controller or personal information processor. A data subject should know that his or her data is being processed, and he or she should be furnished information about what personal data is being processed, the why and how of the processing, intended disclosures, access and storage of the personal data, and the identity and contact details of the personal information controller or its representative. A data subject should always be informed that he or she has a right to file a complaint before the National Privacy Commission.

The rights of data subjects, in general, include:

1. Right to be informed on matters pertaining to the processing of personal data, including intended changes to the processing;
2. Right to object to the processing of personal data;
3. Right to access upon demand;
4. Right to correct errors and inaccuracies in the personal data being processed;
5. Right to erasure or blocking of personal data when no longer necessary for the purpose of collection, and when rights of data subjects are already being violated;
6. Right to data portability, or the right to request for copies of his or her personal data which are being processed by electronic means in commonly used formats;
7. Right to damages when the data subject is injured by an unlawful or unauthorized processing, or by other acts

86 IRR, §18
87 Data Privacy Act, §11(b)
88 Data Privacy Act, §11(a).
89 Data Privacy Act, §§16-19; IRR, §§34-37.
90 Data Privacy Act, §§16(a)(b); IRR, §34(a).
91 Data Privacy Act, §§16(b); IRR, §§34(b).
92 Data Privacy Act, §16(c); IRR, §§34(c).
93 Data Privacy Act, §16(d); IRR, §§34(d).
94 Data Privacy Act, §16(e); IRR, §§34(e)
95 Data Privacy Act, §18; IRR, §36.
violating his or her rights as data subject, and
8. Right to file a complaint with the National Privacy Commission.

The principle of legitimate purpose requires that personal data be processed fairly and lawfully. Those who process personal data should also ensure that the personal data is accurate, relevant and where necessary for purposes for which it is to be used, kept up to date. The Act provides the criteria for lawful processing in Sections 12 and 13. Personal information, as distinguished from sensitive personal and privileged information, may be processed unless a law prohibits the processing. On the other hand, processing of sensitive personal and privileged information is prohibited, except when the data subject consents, or when specifically authorized by law.

In both the Data Privacy Act and the GDPR, consent, as a general rule, is required for processing of personal data. Consent refers to any freely given, specific, informed indication of will, whereby the data subject agrees to the collection and processing of his or her personal, sensitive personal, or privileged information. Based on the Act and its IRR, there is consent:

1. The Data subject agrees to the collection and processing of his or her personal or sensitive personal information, or all the parties to the exchange agrees to the collection and processing of privileged information;
2. The consent was freely given, specific and proceeds from being informed of:
   a. The purpose, nature and extent of processing;
   b. The period or conditions when consent is deemed effective, or information on how consent can be withdrawn;
   c. Rights of data subject;
3. Consent is evidenced by written, electronic or recorded means. A lawful representative or an agent specifically authorized by the data subject to do so may also give consent on behalf of the data subject.

Obtaining consent is a process, and should not be viewed as limited to having a data subject sign a form or tick a box. Efforts should be directed towards obtaining meaningful consent, or one that is premised on actually informing the data subject the purpose and the processing activities for which consent is being obtained. The test to determine whether consent was obtained fairly and lawfully is whether the data subject would be unreasonably surprised by the processing activities. The Data Privacy Act does not allow implied consent, and consent should be evidenced by written, electronic or recorded means. The data subject should opt in to the processing of his or her personal data as opposed to making “consent” the

96 Data Privacy Act, §16(f); IRR, §§34(f).
97 Data Privacy Act, §§7(b)(k), 16-19; IRR, §§19(b),(d),(e),(f)34-37.
98 Data Privacy Act, §11(b).
99 Data Privacy Act, §11(c).
100 Data Privacy Act, §§12-13.
101 Data Privacy Act, §12.
102 Data Privacy Act, §13.
103 Data Privacy Act, §3(b); IRR, §3(c).
default.

Given however the changing times and rapid technological advancements, a framework based on consent would have to accommodate a framework centered on accountability. The principle of accountability requires the personal information controller to be accountable for complying with the law, to use contractual and reasonable means to provide a comparable level of protection when personal data under its control or custody is being processed by a personal information processor or third party, and to be able be able to demonstrate this compliance.\textsuperscript{104} In the digital age, collection of volumes of personal data occur either because data subjects would easily choose convenience and benefits over their information privacy, or because the direction of legislative thrusts and policy making is towards greater data sharing. The Data Privacy Act itself recognizes that there are processing activities where consent is no longer required, and where the rights of data subject may be limited. Part of the principle of legitimate purpose is to ensure that the rights of data subject are protected even as they consent to the use of their personal data, and even more so, when the use of their personal data is compelled or otherwise authorized by law.

The principle of proportionality\textsuperscript{105} requires that the processing of personal data be only to the minimum extent necessary to achieve the declared, specified and legitimate purpose. It includes the principle of purpose limitation and data minimization, such that from the time of collection, only personal data that is necessary and compatible with declared, specified, and legitimate purpose shall be collected. The personal data collected shall be retained or stored only in so far as may be necessary for the said purpose, or when the retention is specifically authorized by law.

The principle of proportionality is important when evaluating the data processing activities in both government and private sector. While consent may have been given for a particular purpose, or while a law may authorize the collection of personal data by a government agency, these should not be taken as an authority to collect any and all personal data without restriction. If personal data is not necessary for the purpose of processing, then the personal data should no longer be collected. Keeping and storing personal data that are not really needed to achieve a particular purpose only serves to increase the risks to the data subjects in the event of a personal data breach. Also, the nature of the personal data being processed and the extent of processing determines the level of security required for personal data protection. The larger the volume and the more sensitive the personal data processed, the greater will the required security measures be.

Organizational, Physical and Technical Security Measures

The Data Privacy Act does not prohibit processing of personal data but merely imposes obligations and requirements on those involved in personal data processing to ensure protection of the fundamental rights and freedoms of the data subjects.

In Whalen v. Roe, the United States Supreme Court was called upon to decide on the constitutionality of a statute allowing the State of New York to collect, record and store personal data of individuals in a centralized computer file, where the individuals, pursuant to a doctor’s prescription, obtained drugs with known medical benefits but at the same time

\textsuperscript{104} Data Privacy Act, §21; IRR §§50-51.

\textsuperscript{105} Data Privacy Act, §11(c)(d)(e)(f).
can be potentially abused.\textsuperscript{106} It was argued that the existence of the database poses a threat to the privacy of the individuals, which if disclosed could damage their reputations. It was alleged that the privacy concern was sufficient to make patients reluctant to use and physicians reluctant to prescribe such drugs. The Court was of the opinion that the statute on its face was not a threat to privacy, and that there were sufficient safeguards to protect personal data. The decision included a recognition of the threat to privacy in the government processing of personal data:

\begin{quote}
We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. \textbf{The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.} Recognizing that, in some circumstances, that duty arguably has its roots in the Constitution, nevertheless New York’s statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual’s interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data – whether intentional or unintentional – or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.\textsuperscript{107}
\end{quote}

The Court rejected the claim of violation of informational privacy due to the legitimate interests of the State to control drug abuse in the United States and uphold the health of the citizens while assuring the public that there are numerous safeguards implemented to avoid the danger of unauthorized disclosure.\textsuperscript{108} This case, decided in 1977, already recognized that processing of personal data comes with a responsibility. It is, in all cases, never enough to obtain meaningful consent from a data subject, or to have legal authority to process personal data. Upholding the right to information privacy requires more than a legitimate basis for processing. It must go hand-in-hand with a commitment to ensure that the personal data being processed is protected. Under the Data Privacy Act, those who process personal data are obligated to implement organizational, physical and technical security measures.

Before the Data Privacy Act became law, these principles were argued by Justice Consuelo Ynares-Santiago in her dissent in \textit{KMU v. The Director General, NEDA}\textsuperscript{109} when the Court was called upon to rule on the constitutionality of \textit{Executive Order No. 420 (2005)} requiring all government agencies and government-owned and controlled corporations to streamline and harmonize their identification systems. Justice Ynares-Santiago wrote:

\begin{quote}
As the erosion of personal privacy by computer technology and advanced information systems accelerate, the individual’s ability to control its use has diminished. Sharing of data among government agencies and private and
\end{quote}

\begin{flushright}
\textsuperscript{107} Whalen v. Roe, 429 U.S. 589 (1977) (emphasis supplied).
\textsuperscript{109} Dissenting Opinion of Justice Consuelo Ynares-Santiago in G.R No 167798 and G.R No. 167930 (19 April 2006).
\end{flushright}
public organizations are not uncommon. Aside from the chilling prospect that one’s profile is being formed from the gathering of data from various sources, there is also the unsettling thought that these data may be inaccurate, outdated or worse, misused. There is therefore a pressing need to define the parameters on the use of electronic files or information, to be properly initiated by a legislative act and not formulated in a mere executive order masquerading as an internal regulation, as in the case of E.O. No. 420.

Even granting that E.O. No. 420 constitutes a valid exercise of executive power, it must still be struck down because it falls short of the guarantees laid down in Whalen v. Roe and Ople v. Torres. There is no specific and foolproof provision against the invasion of the right to privacy, particularly, those dealing with indiscriminate disclosure, the procedure for the gathering, storage, and retrieval of the information, an enumeration of the persons who may be authorized to access the data; and the sanctions to be imposed against unauthorized use and disclosure. Although it was mentioned in Section 3 of E.O. No. 420 that the data to be collected will be limited to the enumeration therein, yet it failed to provide the yardstick on how to handle the subsequent and additional data that will be accumulated when the ID is used for future governmental and private transactions.

Thus, we reiterate the caveat enunciated in Ople v. Torres that ‘the right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good. It merely requires that the law be narrowly focused and a compelling interest justifies such intrusions. Intrusions into the right must be accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions.’ We reiterate that any law or order that invades individual privacy will be subjected by this Court to strict scrutiny.  

Under the Data Privacy Act and its IRR, the processing of personal data comes with the duty of implementing proper safeguards to uphold the right to information privacy. These measures should aim to maintain the confidentiality, integrity and availability of personal data being processed:

Personal information controllers and personal information processors shall implement reasonable and appropriate organizational, physical, and technical security measures for the protection of personal data.

The personal information controller and personal information processor shall take steps to ensure that any natural person acting under their authority and who has access to personal data, does not process them except upon their instructions, or as required by law.

The security measures shall aim to maintain the availability, integrity, and confidentiality of personal data and are intended for the protection of personal data against any accidental or unlawful destruction, alteration, and disclosure, as well as

110 Dissenting Opinion of Justice Consuelo Ynares-Santiago in G.R No 167798 and G.R No. 167930 (19 April 2006) (emphasis supplied).

against any other unlawful processing. These measures shall be implemented to protect personal data against natural dangers such as accidental loss or destruction, and human dangers such as unlawful access, fraudulent misuse, unlawful destruction, alteration and contamination.\textsuperscript{112}

Organizational security measures include the designation of an individual or individuals accountable for the compliance with the Data Privacy Act, developing data privacy policies, capacity building for human resource, and procedures for personal data breach management.\textsuperscript{113} Physical security measures include limiting physical access to workstations and ensuring that the data processing systems will be secured against natural disasters, power disturbances, external access, and other similar threats.\textsuperscript{114} Technical security measures refer to measures intended to maintain the confidentiality, integrity, availability, and resilience of their processing systems and services.\textsuperscript{115} These also include implementing safeguards to protect computer networks, regular monitoring for security breaches and a process for regularly testing, assessing, and evaluating the effectiveness of security measures.\textsuperscript{116} These measures impress the need for change, which must involve the decision-makers and top management. These also clarify that data privacy must be approached holistically, with a view to strengthening the data processing system as whole rather than as an exclusive concern of IT personnel or cybersecurity experts.

The Data Privacy Act provides that the “determination of the appropriate level of security under this section must take into account the nature of the personal information to be protected, the risks represented by the processing, the size of the organization and complexity of its operations, current data privacy best practices and the cost of security implementation.”\textsuperscript{117} It is important that an individual or organization processing personal data be aware of the risks represented by the their processing. One of the recommendations of the National Privacy Commission is to conduct a privacy impact assessment, which should guide the implementation of policies, procedures and security measures for data protection. In addition, the National Privacy Commission provided further guidelines on data protection through its circulars on Security of Personal Data in Government Agencies,\textsuperscript{118} Data Sharing involving Government Agencies,\textsuperscript{119} and Personal Data Breach Management.\textsuperscript{120}

The obligation to implement security measures cuts across industries, and covers both public and private sector. These may entail additional time, costs and manpower, but to refuse to assume the obligation for data protection while continuing to enjoy the benefits of using personal data is irresponsible and shows disregard for rights of data subjects. In cases of personal data breach, the cost of a breach will be much higher than the cost of compliance.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{112} IRR, §25.
\item \textsuperscript{113} Data Privacy Act, §20; IRR, §26.
\item \textsuperscript{114} Data Privacy Act, §20; IRR, §27.
\item \textsuperscript{115} Data Privacy Act, §20; IRR, §28.
\item \textsuperscript{116} Data Privacy Act, §20; IRR, §28.
\item \textsuperscript{117} Data Privacy Act, §20; IRR, §29.
\item \textsuperscript{118} NPC Circular 16-01, Security of personal data in government agencies (Oct. 10, 2016).
\item \textsuperscript{119} NPC Circular 16-02, Data sharing agreement involving government agencies (Oct. 10, 2016).
\item \textsuperscript{120} NPC Circular 16-03, Personal Data breach management (Dec. 15, 2016).
\end{itemize}
As in most cases in life, an ounce of prevention is better than a pound of cure. It is well to note that violation of the Data Privacy Act may correspond to criminal acts, for which the law imposes heavy penalties. In addition to recommending the prosecution of crimes to the Department of Justice (DOJ), the National Privacy Commission may impose sanctions for violations of the Act, such as:

1. Issuing compliance or enforcement orders;
2. Awarding indemnity on matters affecting any personal data, or rights of data subjects;
3. Issuing cease and desist orders, or imposing a temporary or permanent ban on the processing of personal data, upon finding that the processing will be detrimental to national security or public interest, or if it is necessary to preserve and protect the rights of data subjects;
4. Recommending to the Department of Justice (DOJ) the prosecution of crimes and imposition of penalties specified in the Act;
5. Compelling or petitioning any entity, government agency, or instrumentality, to abide by its orders or take action on a matter affecting data privacy;
6. Imposing administrative fines for violations of the Act, these Rules, and other issuances of the Commission.

In order to ensure free flow of information and enjoy the benefits of technological advancements, those involved in the processing of personal data must commit to comply with the law, which means upholding the rights of data subjects, adhering to data privacy principles and implementing adequate safeguards for data protection. The Data subjects deserve no less

**IV. Culture of Privacy**

The Data Privacy Act of 2012 is a law that upholds the right to information privacy. It puts at center stage the data subject or the individual whose personal data is being collected, accessed, used or stored. Those who process the personal data of data subjects are either the personal information controllers or personal information processors, and the law requires them to adhere to the data privacy principles of transparency, legitimate purpose and proportionality. The personal information controllers and personal information processors are also mandated to implement organizational, physical and technical security measures appropriate to the risks represented by their processing. The National Privacy Commission, the body tasked to administer and implement the law, is mandated to assist both public and private sector in complying with the Act, and to provide a remedy for those persons who may have experienced a privacy violation or personal data breach.

The Data Privacy Act is a statute that heavily borrows from similar laws or regulations in other countries. It is a comprehensive law that if enforced effectively would significantly increase trust and confidence in companies processing personal data in the Philippines. This is important if the country intends to continue attracting foreign investment and capturing

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122 Data Privacy Act, §§25-37.
123 Data Privacy Act, §7(i).
124 IRR, §9(f); See also Data Privacy Act, §§7 (a)(b)(c)(d)(i); See also Soriano v. Laguardia, G.R. No. 164785, April 29, 2009.
the market for Business Process Outsourcing industry, among others. Internationally, many countries have an established data privacy framework, and their laws restrict transfer of personal data to jurisdictions without an adequate level of protection. The Philippines must meet the challenge of demonstrating a robust data protection regime, not just for the potential economic gains, but also because the digital age requires protection of data subjects.

There is a need to embrace a culture of privacy if true change is to be achieved. Both public and private sectors must acknowledge information privacy as an important component of nation building. Complying with the Data Privacy Act should not be seen as a burden, but as a means towards establishing best practices that would, in the end, be for the benefit of all. Complying with the Data Privacy Act should not be seen as an obstacle, but as a foundation for establishing best practices, that would, in the end, be for the benefit of all. For the people, this requires awareness of their rights under the Act, an appreciation of the value of their personal data, and their own commitments to upholding the right to information privacy.

Admittedly, embracing a culture of privacy is not without challenges. The right to privacy had a strong proponent in Justice Louis Brandeis who wrote *The Right to Privacy* with Samuel D. Warren more than a century ago. Justice Brandeis continued articulating the right to privacy as member of the Supreme Court, notably in his dissent in *Olmstead v. US*, but it would not be until decades later that the right to privacy would be acknowledged as a fundamental human right. It would seem, however, that the right to privacy remains hounded by continuing questions on its relevance.

Indeed, one can ask why privacy, particularly information privacy, should matter. What is the place of the right to privacy in a digital world where people freely share details about their personal lives? What is wrong in sharing personal data in exchange of economic or social benefits? Why should privacy be important when majority of the Filipinos worry about how to put food on the table, where to get medicine or find work or how to send their children to school? Why should privacy be important when one has nothing to hide?

It should not be surprising that the right to privacy, by default, has become the expendable right. The right to privacy is readily sacrificed because its violation is relegated to simply being an inconvenience that one can live with in exchange for tangible benefits. This is particularly true for information privacy. Thus, people fill in a raffle entry with their personal details for a chance to win a prize. They would avail of reward and discount cards even if told that data about their spending habits will be collected. They will share their personal data for fifteen minutes of internet fame. The danger, however, is not that people are willing to give up their privacy, but that they do so because privacy for them has little value.

Embracing a culture of privacy means changing this mindset. The value of information privacy goes beyond protecting personal data against unauthorized disclosure to prevent identity theft or related crimes. Justice Brandeis considered the right to privacy as being written in the Constitution to secure the “conditions favorable to the pursuit of happiness.”

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believed in man’s spiritual nature, and how man would aspire for more than material things. Privacy should be seen as being inherent in the freedoms enshrined in the Constitution. In the same vein, information privacy is necessary to realize all the benefits of being in a society governed by the rule of law. An individual’s personal data can both uplift and destroy. When privacy is trivialized, it becomes easier to corrode the human spirit, exposing society to attacks against fairness, justness and common decency. It becomes easy to disregard the privacy of others, paying no heed to consequences.

People share unverified reports and use personal data to shame, bully and spread misinformation, without regard to how quickly reputations are destroyed. An utter indifference to privacy is seen when medical conditions of patients are disclosed and sensitive procedures performed on patients are published online. The fact of a successful treatment does not justify invasions of privacy. These violations of privacy can also be acts of depravity, like those parents using poverty as justification for selling sexual photographs of minors, or allowing their young children to stand naked before a web camera for cash, thinking “no harm, no foul.”

Disregard for privacy can also be discriminating. People are quick to waive their right to information privacy—even more so, for those who are underprivileged and who have less in life. It is often easy to ask them to consent to the use of their personal data if what they will get in return go to basic needs-food, medicine, shelter. At a certain point, however, the right to privacy should not be a luxury that is reserved for a few. It should never be the case, for example, that a patient in a government charity hospital deserves less privacy than a prominent personality in a private hospital. The right to information privacy is especially vital when it involves those who feel powerless to claim it, either because they are unaware of its existence or because they are constrained by circumstance to waive their rights.

The right to information privacy shields people from the awesome powers of the state, affords individuals the freedom to make decisions about themselves, and guarantees that there will be accountability when the right is violated. To this end, government, private sector and individuals should exert efforts towards protection of personal data. The zones of privacy should be zealously guarded. Embracing a culture of privacy requires that people do not become complacent, lest the society becomes conditioned that privacy does not matter. Everyone is a data subject and the right to privacy is for all. Becoming callous to privacy violations corrupts the foundations of fundamental rights, making people more exposed and vulnerable with every violation. Upholding the right to privacy and information privacy would be a collective commitment to the empowerment of people to exercise control over their lives free from unwarranted intrusions. While the right to privacy is not absolute, any infringement should be allowed only when absolutely necessary, and never to the extent of sacrificing human dignity.

129 Id.
Facebook Election: The Effect of Social Media on the 2016 Elections

Carmelita Capili, Hanna Macapintal, and Lorenzo Delgado

#ChangeIsComing

In the 2016 Philippine Elections, the social media was the lifeblood of information dissemination, which is why many deem it to be the first social media election. With over 49 Million active facebook users, election candidates took a page out of The Playbook and applied the Lorenzo Von Matterhorn using facebook, twitter, and other online accounts as a new form of personal marketing, making deep emotional connections with followers, and tweeting their way into public service. Through social media, election candidates were able to reach a wide population of possible voters and were able to influence their decisions at a low cost, and at times at no cost at all which changed the traditional way of campaign elections. Facebook has helped voters to be prepared about the coming election and it has deepened their political involvement in the process.

However, the effect of social media cannot be said to be purely beneficial. Social media has been a source not only of information, but also misinformation, harassment and discrimination under the guise of freedom of speech and expression. But it is not just the candidates who are being the subject of harassment. On March 22, 2016 Renee Karunungan posted a meme describing now president elect Rodrigo Duterte as a “lazy choice” which went viral. It garnered 13,000 reactions and 4,000 shares. As a result she received death threats and other forms of online harassment. Under the declaration of principles of the Fair Election Act: “the State shall ensure that bona fide candidates for any public office shall be free from any form or discrimination and harassment.” The issue that heretofore arises is whether the use of social media as a tool for election propaganda is violative of the Fair Election Act, and whether the prohibition against discrimination and harassment is limited only to bona fide candidates.

Philippine Fair Elections Act

The rising popularity of social media during elections as an effective tool for promotional political activities poses new challenges to the existing regulatory framework. A major advantage of social media over traditional media is its potential to reach a large mass of people instantly at almost any time with negligible cost. Messages posted on social media can be multiplied when shared, and this multiplying effect allows candidates who are subject

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1 This was the campaign message of the Duterte-Cayetano tandem, available at http://asianjournal.com/lifestyle/ change-is-coming-a-warm-welcome-to-the-newly-elected-ph-president/
2 Social Media: A Game Changer in Philippine Elections; by Maria Isabel T. Buenaobra; April 27, 2016; asiafoundantion.org
3 A play originally designed to lure women to sleeping with men by generating a series of websites devoted to the incredible life of the man’s fake persona which is uploaded to the World Wide Web [Barney Stinson’s The Playbook; The Lorenzo Von Matterhorn, p. 78]
4 The April 24 presidential forum generated over 1.9 million tweets using #PilipinasDebates2016, the highest engagement on Twitter for a presidential debate this year. [ Social Media: A Game Changer in Philippine Elections; by Maria Isabel T. Buenaobra; April 27, 2016; asiafoundantion.orgs]
5 Anti-Duterte voter files a complaint vs. Internet Bullies; Voltaire Tupaz; May 2, 2016; Rappler
6 Republic Act No. 9006
to restrictions on election spending to communicate faster and easier but at a much lower cost. However, despite said benefits, the increasing use of social media such as Facebook, Twitter, personal blogs and video-sharing sites during elections raises serious concern as to its regulation. The Commission on Elections (COMELEC) has been pressed with controversial issues on regulation of social media campaigning without crossing the line of freedom of expression. Also, question such as whether or not social media use constitutes as violation of Fair Election Act now comes into picture. In this paper, we stand on the negative.

The passage of the Republic Act (RA) 9006, an act otherwise known as the Fair Elections Act, on 12 February 2001 aims to supervise or regulate the enjoyment and utilization of all franchises or operation of media communication to guarantee or ensure equal opportunity for public service including access to media time and space. While the passage of the “Fair Elections Act” was enacted to ensure free, orderly, and credible elections, the Comelec is now facing another dilemma now brought by the rise of digital age. How the Comelec monitors and at the same time limit the use of the aspiring public servants the resources available on social media for their campaign became pressing ordeals that needed to be resolved.

Although digital media could fall under the catch-all phrase “all other forms of election propaganda not prohibited by the Omnibus Election Code or this Act,” the campaign regulations focus on radio, TV and print media. Broadcast ads are regulated on the basis of airtime, and print ads on the basis of size and frequency of release. The law is silent as to social media campaign. This may be used by some politicians to their advantage while circumventing the law on Fair Elections Act to the detriment of other candidates who may be financially challenged.

In an attempt to cover online campaign ads, the Comelec provided for some safety nets and issued COMELEC Resolution 9615 on January 15, 2013 and Resolution 10049 on February 1, 2016.

Under the auspices of the Fair Elections Act or Republic Act 9006, new online campaign regulations, specifically on direct online advertising is now in place nationwide. Resolution 9615 contains in very specific detail all the implementing rules and regulations. It covers both donated advertisements as well as those paid for by the bona fide candidates themselves. There are also provisions on online campaigning through blogs and micro-blogs, and sharing of opinion through social networking platforms. For example, online propaganda may only be published three times a week at the most per website.

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9 R.A. 9006, Sec. 2.
13 Rules And Regulations Implementing Republic Act No. 9006, Otherwise Known As The “Fair Elections Act”, In Connection With The 09 May 2016 National And Local Elections. February 1, 2016.
14 Regulating online campaign with COMELEC Resolution 9615. (February 8, 2016).
Resolution 10049 also provides rules for ad sizes and frequency of online publication. Online advertisement, whether procured by purchase or given free of charge, shall not be published more than three times a week per website during the campaign period. For this purpose, the exhibition or display of the online advertisement for any length of time, regardless of frequency, within a 24-hour period, shall be construed as one instance of publication. Broadcast programs which are the main content of online streaming or video website pages shall not be considered online election propaganda. However, in recognition of freedom of expression, the resolution exempted anything that fell “within the scope of personal opinion” from the definition of election propaganda subject to regulation. The Commission on Elections (Comelec) has maintained that it will not regulate the use of social media as potential medium of campaign in the 2016 elections by reason of online accounts being “personal spaces.”

While noting that the use of social media is free, Jimenez, Comelec spokesperson, said that the poll body is mainly concerned on the cost of campaign material being uploaded online, as these may be included in a politician’s total cost of campaign. Concern about sharing of election messages via social media by any individual or group, or any feedback or commentaries generated thereof should be deemed as publication or distribution of election advertisements and hence any expenses so incurred by the individual or group should have the prior authorization from the candidate or his agent and be counted towards the candidate’s expense limit. Indeed, although using the online world as a distribution network has to be free, but the cost that comes with producing online election propaganda may be counted as part of campaign expenses. Cost could include several and many things from Internet real estate – like websites, design, hosting, and management services; consultants; digital influencers; event organizing and even advertorials through bloggers, twitters and almost anyone in Cyberspace.

Accounting all of them properly irrespective of the fact that the materials are placed online, boils down to the ultimate goal of keeping things in check and leveling playing field.

Recommendations

As society continues to immerse itself deeper into the “digital age” social media is no longer a simple medium for expressing ones own ideas and political beliefs. Given the accessibility and anonymity that sites such as Facebook, Twitter and Instagram generally provide, social media may be used as a tool to evade the otherwise strict regulations imposed on politicians during the campaign. While existing regulations provide limitations regarding online publications, the rules are not so broad as to encompass the advertisements that appear on social media accounts especially because COMELEC has expressed its unwillingness to regulate social media, dubbing it as relating to “personal spaces”. However, it is common knowledge that companies have already been taking advantage of social media as a tool to reach a wider audience by paying the website a particular amount so that the users are compelled to see their advertisement on the screen. The ease with which an individual can do this allows

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15 Comelec Resolution No. 10049, Sec 9(c),
18 Cheung, C. & Leung, A. (30 October 2015) “Regulation Of The Use Of Social Media In Election In Selected Places.” Research Office Legislative Council Secretariat
politicians the luxury of simply paying the website to ensure that their ads or propaganda will be seen by its users. Considering the sheer number of individuals who use social media today, the politician will thus be able to disseminate his platform and garner support by posting online and by paying less than he would if he had advertised in regulated mediums such as print or television ads. The problem arises from the fact that since these ads appear on social media, they can be done under the guise of “personal opinion” and the ads can be made to appear as if they were made by mere supporters and not by the politician’s actual campaign team. Through this, the campaign team may effectively circumvent the rules regarding the limitations on expenses.

Thus, the researchers recommend that COMELEC broaden the scope of the above-mentioned resolutions to specifically include advertisements that were posted on social media. The COMELEC may delineate online activity that can properly be classified as personal opinion as against the paid political ads that intermittently appear on people’s “home page/s” or “news feed/s” regardless of whether or not they follow the politician involved. In order for COMELEC to correctly determine the overall expenses paid by each politician, it is imperative that it regulates expenses for social media as this has proven to now be an integral part of every campaign trail. It should thus specifically require in its resolutions that the politicians declare the expenses paid, if any, for the use of social media as a medium for promotion, propaganda and/or advertisements. The standards imposed regarding television and print ads should likewise be applied to social media ads such as the size and frequency of release.

Further, the researchers submit that a specific and detailed procedure be implemented by COMELEC for the specific purpose of verifying the afore-mentioned expenses. For example, the COMELEC may require direct confirmation of the declared expenses from the sites themselves, without which the politician may be reprimanded and penalized. It may also require certification from the politician that he shall not use social media as a means of paid promotion and advertising under the guise of any other private citizen or corporation, under pain of penalty. The penalties for violations of the expense limit or the non-compliance with the verification and/or certification may be adopted from the existing penalties in the Fair Elections Act and from the above-stated resolutions of COMELEC.

Conclusions

All told, the researchers have found that the existing regulations that govern social media vis-à-vis elections are sparse and leave much room for circumventing the other regulations that are presently in place. Given the fact that social media is not directly addressed by the rules themselves, the most important step to be taken is to provide a strictly demarcated procedure whereby COMELEC may effectively uphold the existing regulations covering elections such as expense limits and prevention of harassment. However, it must also take into consideration the freedom of speech of individuals and must take pains not to infringe on their right to express their views on their own social media accounts. The result of imposing a procedure to regulate paid promotion, propaganda and advertisements will serve to maintain the equal playing field that the COMELEC seeks to establish amongst candidates and to promote the state policy which ensures that bona fide candidates for any public office shall be free from any form or discrimination and harassment.
CO-ME-LEAK:
The Biggest Data Privacy Violation in Our Time

Dawna Bandiola and Lorenzo Delgado

The 1987 Constitution\(^1\) provides the powers and functions of the COMELEC, one of which is the enforcement and administration of all laws and regulations relative to the conduct of election, plebiscite, initiative, and referendum. During the election hype, there was a COMELEC Leak exposing voters’ information to the public. Personal data of up to approximately 70 million registered voters in the Philippines was compromised\(^2\) but despite this, the COMELEC through their spokesperson, merely shrugged it off saying that “There is no sensitive information there.”\(^3\)

Under Section 3 (l) of the Data Privacy Act the term “Sensitive personal information” refers to the following personal information:

1. About an individual’s race, ethnic origin, marital status, age, color, and religious, philosophical or political affiliations;
2. About an individual’s health, education, genetic or sexual life of a person, or to any proceeding for any offense committed or alleged to have been committed by such person, the disposal of such proceedings, or the sentence of any court in such proceedings;
3. Issued by government agencies peculiar to an individual which includes, but not limited to, social security numbers, previous or current health records, licenses or its denials, suspension or revocation, and tax returns; and
4. Specifically established by an executive order or an act of Congress to be kept classified.

Contrary to the COMELEC’s claim however, a hacker group called LulzSec Pilipinas\(^4\) claims to have hacked comelec.ph and that they have dumped the database of about 70 million of Filipino voters and have published all the data at archive.org. According to them, the database contains a lot of sensitive information, such as the voter’s sex, civil status, year of birth, month of birth, day of birth, birth province, birth city, resident province, resident city, resident barangay, street, precinct, precinct code, fingerprint data and passport information. They also made a search engine over that sensitive data, all for the sake of “lulz” causing a massive breach of data privacy in our country, which shows that the COMELEC was correct in saying that there is no sensitive information there. They are not sensitive data, rather they are ultra-sensitive. And it is not just the voters’ information which is vulnerable, they recently leaked the Certificate of Candidacy of 12 Senators.\(^5\)

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\(^1\) Const. (1987), Article IX Sec. 2
\(^3\) Retrieved from https://blog.malwarebytes.com/cybercrime/2016/04/comelec-breach-data-released-online-fully-searchable/
\(^4\) Lulzsec Pilipinas is a local version of the hacking group lulzsec International who was responsible of several high profiled attacks years ago
\(^5\) Retrieved from https://www.pinoyhacknews.com/lulzsec-pilipinas-strikes
An internet and ICT rights advocate organization\textsuperscript{7} posted tips to help protect the Filipinos from identity theft, due to the leak exposing their pertinent personal information. The voters’ information stolen from the COMELEC can be used in a million different ways by unscrupulous marketers, politicians, and criminals to the prejudice of the public in general such that, it may lead to identity theft, flying voters, and manipulation of the election results.

Due to the vast evolution of technology, COMELEC has been facing these situations that would challenge its competency and transparency as a constitutional electoral body. One such situation is data hacking. It is defined as the gaining of access, whether wanted or unwanted, to a computer and viewing, copying, or creating data without the intention of destroying data or maliciously harming the computer.\textsuperscript{8}

Now the very issue that comes to mind is that: whether or not the COMELEC is at fault. Is the COMELEC responsible for the leak? Can they be held liable?

The COMELEC, in our opinion, is responsible based on the following reasons:

First, the law expressly mandates that it is its duty to preserve the sanctity of every voter’s information. \textit{Absoluta sentential expositore non indiget}, when the language of the law is clear, no explanation of it is required.\textsuperscript{9} Failure to comply with its duties raises a \textit{prima facie} presumption that the COMELEC is remiss in the performance of these duties. Section 20 of the Data Privacy Act provides the following:

\begin{quote}
SEC. 20. Security of Personal Information. – (a) The personal information controller must implement reasonable and appropriate organizational, physical and technical measures intended for the protection of personal information against any accidental or unlawful destruction, alteration and disclosure, as well as against any other unlawful processing. 
(b) The personal information controller shall implement reasonable and appropriate measures to protect personal information against natural dangers such as accidental loss or destruction, and human dangers such as unlawful access, fraudulent misuse, unlawful destruction, alteration and contamination.
\end{quote}

Section 21 thereof states that each personal information control is responsible for the personal information which it has in its possession:

\begin{quote}
SEC. 21. Principle of Accountability. – Each personal information controller is responsible for personal information under its control or custody, including information that have been transferred to a third party for
\end{quote}

\textsuperscript{6} Retrieved from https://www.pinoyhacknews.com/lulzsec-pilipinas-strikes
\textsuperscript{7} Retrieved from Democracy.Net.PH
\textsuperscript{8} Data Hacking, available at http://www.urbandictionary.com/define.php (last visited November 30, 2016)
\textsuperscript{9} Augustus Caesar Gan vs Hon. Antonio Reyes, G.R. No. 145527 May 28, 2002
processing, whether domestically or internationally, subject to cross-border arrangement and cooperation.

Second, common sense dictates that when something wrong happens involving the rights of another, (in this case the voters) the person who has knowledge of such violation (the COMELEC) should immediately notify or disclose it to the person or persons whose rights were violated. In fact Section 20 (f) of the Data Privacy Act provides that:

(f) The personal information controller shall promptly notify the Commission and affected data subjects when sensitive personal information or other information that may, under the circumstances, be used to enable identity fraud are reasonably believed to have been acquired by an unauthorized person, and the personal information controller or the Commission believes but such unauthorized acquisition is likely to give rise to a real risk of serious harm to any affected data subject. The notification shall at least describe the nature of the breach, the sensitive personal information possibly involved, and the measures taken by the entity to address the breach. xxx

Instead of warning the public as to the unfortunate incident and the prejudicial effects of the hacking incident, instead of telling them what to do and how to protect their privacy and personal information which were supplied to them, confident that they would safeguard it, instead of being honest to the public, they chose to disregard the existence of the issue claiming that there is no sensitive information leaked, contrary not only to the said law, but also to the policy of the State in promoting a high standard of ethics in public service. It is an elementary rule in law that public officials and employees shall at all times be accountable to the people and shall discharge their duties with utmost responsibility, integrity, competence, and loyalty.

Third, in failing to report the hacking incident to the National Privacy Commission, the COMELEC did not discharge its duties with utmost responsibility, integrity, competence and loyalty. In claiming that there was no sensitive information involved, COMELEC did not act with utmost responsibility which manifest that they chose to uphold their own personal interest over that of the public by avoiding hacking incident rather than recognizing it and assuming responsibility thereof. In our opinion they violated the norms of conduct of public officials as provided in R.A. 6713 known as the Code of Conduct and Ethical Standards for Public Officials and Employees. Under Section 4 A (e) of the said law the COMELEC should have been responsive to the public. The Commission is duty bound to extend prompt, courteous, and adequate service to the public, and to provide information and to ensure its openness of information. The Data Privacy Act imposed duties on data controllers and protects the rights of data subjects. Under Rule VII Section 30 of the Implementing Rules, it provides that:

Section 30. Responsibility of Heads of Agencies. All sensitive personal information maintained by the government, its agencies, and instrumentalities shall be secured, as far as practicable, with the use of the most appropriate standard recognized by the information and communications technology industry, subject to these Rules and other issuances of the Commission. The head of each government agency or instrumentality shall be responsible for complying with the security requirements mentioned herein. The Commission shall monitor government agency compliance and may recommend the necessary action in order to satisfy the minimum standards.

Since the data which was maintained by the COMELEC were sensitive personal information, and since the law expressly provides for their responsibility with respect to such
information they are clearly responsible. They have a duty to report the incident to the National Privacy Commission, and the data subjects clearly have the right to be informed\textsuperscript{10} of what has transpired, which is related to their data information, and in connection to this the data subject also have the right to be indemnified for any damages sustained due to the unlawfully obtained or unauthorized use of their personal data, taking into account any violation of their rights and freedoms as data subjects.

However, responsibility is not automatically tantamount to liability. In Vinuya v. Romulo, the Supreme Court held that “the question whether the Philippine government should espouse claims of its nationals against a foreign government is a foreign relations matter, the authority for which is demonstrably committed by our Constitution not to the courts but to the political branches.”\textsuperscript{11} Immunity then, unlike in other jurisdictions, is determined not by the courts of law but by the executive branches. Thus, even if the court finds that the COMELEC is responsible for the data leak, the executive branches could easily defeat the claim by invoking the royal prerogative of dishonesty, and conveniently hide under the State’s cloak of invincibility against suit.

Conclusion

The only solution is to aim and focus on the improvement of security codes used in safeguarding the voters’ records. The COMELEC must be proactive, rather than reactive. However, the Commission cannot do it alone since not all key officials of COMELEC are tech-savvy. The commission must seek assistance and coordinate with Information and Communication Technology (ICT) experts in order to address the current situation. It cannot be denied that data hacking, a form of cybercrime, is now prevalent. But still, it is avoidable. As a Constitutional commission, COMELEC should bear the consequences of all matters falling within its authority and must endeavor to resolve all matters that would threaten its competency and credibility. It must be able to take into consideration all factors that would help improve the performance of its functions to ensure the people of a clean election.

\textsuperscript{10} R.A. No. 10173, Section 16
\textsuperscript{11} G.R. No. 162230, April 28, 2010.
Abstract

Lawyers are regarded as guardians of the law. They have the duty to protect people’s lives and property as well as the society within the realms of justice, ethics and law. San Beda College has gained its reputation of producing good lawyers along with other known schools with names such as Maximo Amurao, Efren Dizon, our current President, Mr. Rodrigo Duterte, former Senator Rene Saguisag, the late Senator Raul S. Roco, former Department of Justice (DOJ) Secretary and now Senator Leila De Lima, Commission on Elections Chairman Sixto Brillantes Jr., COMELEC Commissioner Rene Sarmiento and six Justices of the Supreme Court – Florenz D. Regalado, the holder of the highest bar exam grade in the country, Justo P. Torres Jr., Antonio M. Martinez, Romeo J. Callejo Sr., Antonio Eduardo Nachura and Jose Catral Mendoza. Because of this San Beda is considered not just to be a law school. San Beda is a brand name, and nobody looks at a Bedan Lawyer without a mark of distinction. Aside from the fact that our President is a bedan, most of the cabinet members, if not all, are also Bedans. This is why some articles refer to it as a shift in school power. The purpose of this study is to identify the distinctive marks of a typical Bedan lawyer as perceived by the students in four attributes namely, character and traits, competency, spirituality and community. The descriptive-survey method was used in this study to get the perceptions of the students through a survey questionnaire. The sample size in the study was 100 and a stratified random sampling was employed to proportionately represent the students from the different year levels. Similarities and differences were noted in the students’ perceptions when grouped by year level but collectively, they perceived a typical Bedan lawyer according to the four attributes as one who shows honesty, integrity and trustworthiness at all times. He/She has good communication skills, creative, flexible and adaptive and he/she is a model of Benedictine spirituality living out the values and principles of prayer, work, peace, service and excellence. He/She treats everybody fairly, respects the rights and ideas of others and helps to develop a sense of civic and professional responsibility in the community.

Introduction

A lawyer is a licensed professional entitled to draw up wills, contracts and other legal documents, to offer legal advice and opinions, and to prosecute or defend people in law courts. They work for private law firms, legal aid, or in offices at the federal, provincial and municipal level of government, as well as for businesses.
Lawyers work in a variety of fields, from criminal law to divorce law to patent law, navigating the legal system on behalf of their clients. They perform valuable role, especially as law is intertwined with every aspect of the society.

As cited by Tattrie (2011), according to Human Resources and skills Canada, a lawyer’s main duties are advising clients on legal issues, researching legal precedents and gathering evidence, pleading clients’ cases before courts, tribunals and boards, drawing up legal documents related to real-estate transactions, wills, divorces and contracts, negotiating civil disputes and acting as executor, trustee or guardian in estate and family law matters.

Being a lawyer is an honor, responsibility and a livelihood. As such, the practice of law requires skills, attitude, character, and moral virtues to be able to achieve the best results for his/her client and to fulfill as well as his/her role as partisan advocate.

The practice of law is imbued with tremendous ethical responsibilities. The law invests in them, the presumptions of honesty and good faith in the practice of their profession. As lawyers are constantly faced with the temptations of unethical behavior, they are regulated severely. Most serious lapses of ethical behavior are severely punished up to the point of disbarment from their legal practice.

Atty Quitain in his book, “The Good Lawyer” said, “Lawyers must continue to believe that theirs is a profession of integrity and there are still many lawyers out there who choose to keep their dignity over dishonest wealth.” The author believes that righteous lawyers can still make a difference in a profession marred by scandal and shame.

Every lawyer wants to be a good lawyer. All lawyers want to serve their clients’ interests well and, by the end of a career, feel they have made a contribution to the communities that they value. (Linder & Levit, 2013).

Legal futurist and analyst, Jordan Furlong, says that traditionally there were six core competencies lawyers needed: analytical ability, attention to detail, logical reasoning, persuasiveness, sound judgment and the ability to write (although he says this one seems to be optional for some). Now, with changing client demands and a rapidly evolving legal landscape, Furlong thinks these new six skills need to be added to create a complete modern lawyer. Namely, collaboration, emotional intelligence, financial literacy, project management, technological affinity and time management. These core competencies are necessary to practice law.

As we live in a complex and changing world, the demand and role of lawyers has grown and became complicated as well. Big expectations from clients make their practice more difficult as clients do not understand the role they must play as lawyers.

In the Philippines, law practice according to Sanvictores (2014) is a privilege given to a selected few. The practice of law is strictly exclusive to Filipinos. With litigations on the rise, the need for lawyers is increasing, hence law practice is becoming a widespread profession. Since lawyers perform essential functions in the society, their expertise, integrity, credibility and honesty are of paramount importance. Legal luminaries continue to surface but it is an obvious reality that our society today needs lawyers who are honorable practitioners.
Lawyers are said to be the guardians of the law and they have the duty to protect the people and the society within the realms of justice, ethics and law. It is in this regard that law schools prepared their students to this enormous, challenging and complicated work of lawyers. San Beda College Alabang as a law school, commits itself to academic and professional excellence of its graduates by producing Christian lawyers who are learned in the law and who conduct themselves according to Christian principles and to the noblest traditions of the bench and bar. Through Catholic education, the school imparts in their students, the knowledge, values, professional skills as well as mold the character of their students not only to become good lawyers but also to be honorable in their practice.

San Beda College has gained its reputation of producing good lawyers along with other known law schools. Dandal (2014) in her article, “Beyond Class Cards: A Conversation with Dean Sarmiento III and Atty. Rivera”, described what a Bedan lawyer is, according to Dean Ulan Sarmiento. He revealed that Bedan lawyers are Christ-like and humble with philanthropic character geared towards living out the values of Christ such as serving the barrios, defending the indigenous, working for the poor, representing pro bono cases or putting up charity foundation. He also added that law profession should not be used as a means to exploit people but to become beacons of hope for those with no voices and to become the foundation of future that will shape the people.

However, what really makes the Bedan lawyers distinct from other good lawyers remains to be a concern. Thus, an essential task to identify what exactly a Bedan lawyer is becomes necessary. It is along this light that this study is conducted. This is an initial step to find out the typical Bedan lawyer identity as perceived by the students in terms of the following attributes: character and traits, competencies, spirituality and community.

Research Questions
1. What is the demographic profile of the respondents?
2. What is a typical Bedan lawyer as perceived by the students?

Method
The descriptive-survey method was used in the study as it sought to describe the perceptions of law students of what a typical Bedan lawyer is.

Using the Slovin’s formula\(^5\) to determine the sample size with .05 margin of error, 100 students from San Beda College Alabang School of Law were made respondents of this study. A stratified random sampling was used and the composition of the respondents were 17 students from first year, 30 students from second year, 23 students from third year and 30 students from fourth year.

This study made use of a researcher made survey instrument to gather data. The survey instrument was divided into two parts. The first part consists of the demographic information of the students which include age, civil status and sex. The second part is the survey wherein students were asked to rank the given traits and values, competencies and spirituality of what they perceived to be distinct to Bedan lawyers.

\(^5\) Slovin’s formula is used to calculate an appropriate sample size from a population.
The researchers sought the permission of the Rector and the Dean of School of Law of San Beda Alabang prior to the study and before the survey was conducted. The researchers administered the survey instrument to the respondents. Data gathered were tallied, tabulated, collated and analyzed.

Statistical tools used to analyze the data gathered were the following:

For research question number 1, the percentage was used using the formula,
\[
\% = \frac{f}{n} \times 100
\]
Where:
- \(f\) – frequency
- \(n\) – total number of respondents
- 100 – constant

For research question number 2, ranking was used.

Results and Discussion

Demographic Profile of the Respondents

Table 1 presents the demographic profile of the respondents in terms of their sex, age and civil status.

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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

C. Age

<table>
<thead>
<tr>
<th>Age</th>
<th>FIRST</th>
<th>SECOND</th>
<th>THIRD</th>
<th>FOURTH</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>51 and above</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>46-50</td>
<td>1</td>
<td>3.34</td>
<td></td>
<td>1</td>
<td>1.00</td>
</tr>
<tr>
<td>41-45</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>36-40</td>
<td>1</td>
<td>4.35</td>
<td>1</td>
<td>1.00</td>
<td></td>
</tr>
<tr>
<td>31-35</td>
<td>1</td>
<td>4.35</td>
<td>5</td>
<td>16.67</td>
<td>6</td>
</tr>
<tr>
<td>26-30</td>
<td>1</td>
<td>5.88</td>
<td>6</td>
<td>20</td>
<td>50</td>
</tr>
</tbody>
</table>
It can be gleaned from the table that there were more female respondents (60%) than male respondents (40%). Majority of them are single (90%) and only few of them are married (10%). Their ages ranged from 21 years and below, 36-40 and 51 and above were very few (1%). Few of them are ages 31-35 (6%). Some are 26-30 (26%) and most of them are ages 20-25, (65%). Nobody from the respondents was 41-45 years of age.

The respondents in this study were young adults who were mostly female and single.

*Typical Bedan Lawyer*

Competencies, traits and values as well as spirituality are important in the performance of the professional role of lawyers. These set the lawyers apart from other persons of good character.

Table 2 (next page) presents the perception of the student as to the traits and values of a Bedan lawyer.

The table shows that students have varied perceptions when it comes to the traits and values of a Bedan lawyer as shown in the differences in their rankings according to grade level. However, similarities in terms of the first and second rank on this attribute are noted. The first year and fourth year students ranked first “shows honesty and integrity at all times” while the first year and third year students ranked second “does things or commits acts that will gain someone’s trust, confidence and respect of clients.” For the third ranking, students in the different year levels have varied choices. For the first year, it is “serves with compassion,” for the second year, “seeks to understand how law can be harnessed for social change,” for the third year, “works hard regardless of any odds or obstacles that may exist,” and for the fourth year students, “does things or commits acts that will gain someone’s trust, confidence and respect of clients.”

The overall perception of the students in terms of traits and values of a Bedan lawyer based on the three top ranking are: first, “does things or commits acts that will gain someone’s trust, confidence and respect of clients;” second, “shows honesty, reliability and responsibility;” and third, “shows honesty and integrity at all times.”

Traits and values of trustworthiness, respectfulness, honesty, integrity responsibility and reliability are deemed necessary and essential to a good lawyer’s work in their advocacy roles which students perceived to be possessed by Bedan lawyers.

In an article posted by Jones (2009) entitled, “Core Competencies of a Good Lawyer,” honesty/integrity is included in her list. According to her, good lawyers observe ethical conduct, earn trust and maintain confidence, do what is right and not what is expedient, and speaks plainly and truthfully. They possess strong willingness to work hard and long hours to get the job done and have track record of working hard. The practice of law requires hard work. Good lawyers have good emotional intelligence. They exhibit empathy, perspective,
<table>
<thead>
<tr>
<th>Traits and Values</th>
<th>First</th>
<th>Second</th>
<th>Third</th>
<th>Fourth</th>
<th>Overall Mean</th>
<th>Rank Overall Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Benevolent</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. provides pro bono services</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>7</td>
<td>6.82</td>
<td>10</td>
</tr>
<tr>
<td>b. serves with compassion</td>
<td>3</td>
<td>9</td>
<td>7</td>
<td>6</td>
<td>6.04</td>
<td>8</td>
</tr>
<tr>
<td><strong>2. Love for Wisdom and Passion for Truth</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. desires in becoming a self-learner</td>
<td>5</td>
<td>8</td>
<td>9</td>
<td>8</td>
<td>6.42</td>
<td>9</td>
</tr>
<tr>
<td>b. shows honesty and integrity at all times</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>4.77</td>
<td>3</td>
</tr>
<tr>
<td><strong>3. Agent of Social Transformation</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. seeks to understand how law can be harnessed for social change</td>
<td>9</td>
<td>3</td>
<td>8</td>
<td>5</td>
<td>5.67</td>
<td>6</td>
</tr>
<tr>
<td>b. adheres to moral integrity of the individual</td>
<td>4</td>
<td>7</td>
<td>6</td>
<td>2</td>
<td>5.33</td>
<td>5</td>
</tr>
<tr>
<td><strong>4. Trustworthy</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. does things or commits acts that will gain someone’s trust, confidence and respect of clients</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4.47</td>
<td>1</td>
</tr>
<tr>
<td>b. shows honesty, reliability and responsibility</td>
<td>6</td>
<td>4</td>
<td>1</td>
<td>4</td>
<td>4.71</td>
<td>2</td>
</tr>
<tr>
<td><strong>5. Perseverance</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. works hard regardless of any odds or obstacles that may exist</td>
<td>7</td>
<td>2</td>
<td>3</td>
<td>9</td>
<td>5.22</td>
<td>4</td>
</tr>
<tr>
<td>b. firm on getting something done and not giving up</td>
<td>8</td>
<td>6</td>
<td>5</td>
<td>10</td>
<td>5.74</td>
<td>7</td>
</tr>
</tbody>
</table>
understanding and listening skills.

On a practical basis according to Coleman, lawyers have tremendous ethical responsibilities, both to their clients and to society (usually in that order). There are times (such as when a lawyer knows that his/her client is threat to life or property) when he is obligated to go so far as alerting the authorities of the danger. Attorneys are frequent guardians of other people’s lives and property. The law invests them with presumptions of honesty and good faith.

Results of the study conducted by Badali, Care & Broeking (2007) suggested that youth’s perceptions of fairness-related elements of control and non-control were independently related to their evaluations of lawyers. Satisfaction with lawyers were related to more than just the extent to which youth feel they had a direct say in (control over) what went on in the lawyer-client relationship. Indeed, participants’ satisfaction was more closely linked to their perceptions of their lawyer’s objectivity, trustworthiness and respectfulness than to ratings of their own participation in lawyer-client interactions. Young people may feel a degree of dependence on their lawyer for positively shaping the course of proceedings and thus may be concerned with their lawyer’s acceptance and trustworthiness.

Table 3 (next page) presents the perceptions of students as to competencies of a Bedan lawyer.

The data shows that the second year and fourth year students are similar in their ranking in terms of competencies of a Bedan lawyer, particularly on Conversation/Articulation Abilities. They both ranked first the attribute “shows good communication skills” while the first year and second year ranked second the attribute “speaks easily or comfortably in front of the group.” The third rank are the same for first year and third year students which is “shows good communication skills.”

The third year students ranked first and second the Bedan lawyer as Creative and Innovative Leader specifically the attribute, first is thinks of reasonable solutions when problems and unique situations arise and second employs different ways in solving problems.

The overall perception of students in as far as the competencies of a Bedan lawyer are concerned include the following, arranged in the order of their ranking. First, shows good communication skills; second, thinks of reasonable solutions when problems and unique situations arise and; third, employs different ways in solving problems.

For the students, a Bedan lawyer is one who has good communication skills, analytical ability, logical reasoning. He is flexible, adaptable and has sound judgment.

Good lawyers learn quickly, demonstrate ability to quickly and proficiently understand and absorb new information, can think logically on the basis of a set of rules and analyze situations using common sense. They are able to understand, analyze and evaluate arguments and have the capacity to assess situations or circumstances and draw sound conclusions. They adjust quickly to challenging priorities and conditions and cope effectively with complexity and change (Jones, 2009).