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ARTICLES IN THIS ISSUE

Volume XXIX No. 1 of the **JOURNAL OF THE INTEGRATED BAR OF THE PHILIPPINES** begins with four articles, a book review, and the regular digest and summary of selected Supreme Court decisions in the different fields of law.

In the lead article, *Diwalwal Gold Mines and Direct State Intervention: A Test of Wills in the Implementation of the Policy of Control and Supervision over Natural Resources by Government*, **SOLEDAD M. CAGAMPANG-DE CASTRO** writes about small scale mining in a rich tract of mineral land situated in the Agusan-Davao-Surigao Forest Reserve, more popularly known as the "Diwalwal Gold Rush Area." After identifying the socio-economic, environmental and political issues at Diwalwal, the author proceeds to discuss the role of government in regulating the conflicts that have arisen by reason of the mining operations in the area, advocating the policy of direct government intervention whether it be been under its general police power or under the "*jus regalia*" over the nation's natural resources.

REBECCA E. KHAN analyzes in *No More "I LOVE YOUs" (Lessons Learned from the "I LOVE YOU" VIRUS: International Law and Philippine Legislation in Relation to Cybercrime)* the relationship between cyberspace and the law, with a focus on crimes committed on the Internet, now popularly known as "cybercrime." She tackles cybercrime from the perspective of International Criminal Law, particularly on the issue of criminal jurisdiction. Thereafter, she examines and assesses Philippine laws. Describing the I LOVE YOU virus incident as a concrete example of how technology had outpaced Philippines law and international law, the author proposes, firstly, that the Philippines enact a statue that adequately defines all forms of cybercrime and, secondly, that the Philippines enter into multilateral treaties with other states to combat cybercrime.

In the third article, **JOSE MARIA A. OCHAVE** posits the view in *The Double Helix in Chambers: Forensic DNA Evidence in Criminal Investigation and Prosecution* that the Supreme Court has now opened the door wide open to the use of DNA evidence in court, thereby recognizing the immense potential of science, particularly modern biology, in helping it perform its truth-seeking function.

Next, **ROMEO J. CALLEJO, SR.**, Associate Justice of the Supreme Court, reviews *Reforming the Judiciary*, a book written by Artemio V. Panganiban, another member of the High Tribunal.

The final item is a digest or summary of selected Supreme Court decisions covering the period January through March 2002 prepared by **TARCISIO A. DIÑO**, Partner of Villareal Rosacia Diño & Patag. The digest is grouped under the following headings: (a) Civil Law; (b) Commercial Law; (c) Criminal Law; (d) Labor Law; (e) Land Law; (f) Land Reform Law; (g) Legal Ethics; (h) Political Law; (i) Remedial Law; and (j) Taxation.

DIWALWAL GOLD MINES AND DIRECT STATE INTERVENTION: A TEST OF WILLS IN THE IMPLEMENTATION OF THE POLICY OF CONTROL AND SUPERVISION OVER NATURAL RESOURCES BY GOVERNMENT

By Soledad M. Cagampang–De Castro[*]

Diwalwal Gold Rush Area: A Forest Reservation

The Diwalwal Gold Mines is a rich tract of mineral land situated in the Agusan-Davao-Surigao Forest Reserve. It is more popularly known as the "Diwalwal Gold Rush Area." It is located at Mt. Diwata in the municipalities of Monkayo and Cateel within the territorial jurisdiction of the new Province of Compostela Valley (formerly Davao del Norte). Diwalwal has been embroiled in controversy since the mid-80's due to the scramble over gold deposits found within its bowels.[1] It is a well known gold rush area where extensive small scale mining by small-scale miners are being conducted.[2]

The Agusan-Davao-Surigao Forest Reservation was established by Proclamation No. 369 dated February 27, 1931.[3]

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1 *Southeast Mindanao Gold Mining Corp. v. Balite Portal Mining Coop., Hon Cerilles and Prov. Mining Regulatory Board of Davao*, G.R. No. 135190, April 3, 2002.

2 Republic Act (R.A.) No. 7176 (1991).

3 Since 1931, political changes in the Philippines occurred like: the Commonwealth in 1935, the outbreak of World War II in 1941; and the Republic of the Philippines in 1946. With respect to natural resources, various policy changes have likewise occurred. *See* infra notes:

In 1991, the Secretary of the Department of Environment and Natural Resources (DENR) reclassified the portion of the forest reservation that is the Diwalwal gold mining area with an aggregate total area of 1863 hectares as non-forest land and declared it open for small scale mining purposes under DENR Adm. Order No. 66 issued on December 27, 1991.[4]

DENR Adm. Order No. 66, Dec. 27, 1991, by DENR Sec. Fulgencio Factoran, Jr. Areas embraced are within the towns of Monkayo, Compostela, and Nabunturan, in Compostela Valley Province, as described under PCGS 2546, Block Nos. 1 - with an area of 162 hectares within Cogonan, Trento, Agusan del Sur; and an area of 729 hectares within Diwalwal, Monkayo; and Block 5 - with 567 hectares within Bango, Compostela; and Block 9 - with 405 hectares within Inupuan, Nabunturan, all within the Province of Compostela Valley.

Recognition of "Small Scale" Mining as a Legitimate Economic Activity

Early Filipinos engaged in both underground mining of ore which involved the building of tunnels into the bowels of mountains and the sluicing of placer gold deposits in river banks and river beds. Since Pre-Hispanic times, Filipinos have been mining and processing gold as shown in artifacts of gold jewelry and implements that abound in various areas of the country. In the north, particularly in the Mountain Province and Benguet, also known as the Baguio gold area, gold was recovered from

4 DENR Administrative Order No. 66, December 27, 1991, by DENR Sec. Fulgencio Factoran, Jr. Areas embraced are within the towns of Monkayo, Compostela, and Nabunturan, in Compostela Valley Province, as described under PCGS 2546, Block Nos. 1 - with an area of 162 hectares within Cogonan, Trento, Agusan del Sur; and an area of 729 hectares within Diwalwal, Monkayo; and Block 5 - with 567 hectares within Bango. Compostela; and Block 9 - with 405 hectares within Inupuan, Nabunturan, all within the Province of Compostela Valley.

gold panning and underground mining by the Ifugaos, the Ibalois and the Kankaneys. Along the Pacific rim, the known gold areas are: (a) the Paracale gold mines in the Bicol region in south eastern Luzon; (b) the Samar and Leyte area in western Visayas; and (c) the Agusan–Surigao-Davao area in the eastern side of Mindanao in southern Philippines where Diwalwal is located. The gold artifacts found along the banks of the Agusan River which is fed by tributary streams and rivers of the Agusan-Surigao-Davao mountain ranges, show well developed gold craftsmanship among the ancient tribes who lived in northeastern Mindanao. To date, the active gold mines are in this Agusan-Surigao-Davao mining region.

Small scale mining has been a recognized means of livelihood among Filipinos since the ancient times. However, in the Philippines, prevailing statutes, policies, incentives and financing have generally been addressed to the large-scale sector of the mining industry. While small scale mining was an accepted reality it was considered of small economic significance, and it was only in 1984 when Pres. Decree No. 1899, entitled "Establishing Small Scale Mining as a New Dimension in Mining Development" was promulgated by then Pres. Ferdinand Marcos. This law was in effect a recognition of small scale mining as a vital economic activity in view of the existence of small mineral deposits that could be worked profitably at small tonnage requiring minimal capital investments utilizing manual labor *vis-à-vis* the need to generate more employment opportunities to alleviate the living conditions of the rural areas.[5] Subsequently, in 1991, Rep. Act No. 7076, known as the "People's Small Scale Mining Act of 1991," was passed by the Philippine Congress. From then on small scale mining was a recognized legal reality subject of special legislation and regulation.

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5 Whereas Clauses, Presidential Decree (P.D.) No. 1899.

The status of small scale mining as a vital economic activity was elevated under the 1987 Constitution which made the first constitutional pronouncement of policy on small scale mining, thus:[6]

> "Congress may, by law, allow small-scale utilization of natural resources by Filipino citizen, x x x"

Congress enacted on June 27, 1991 Republic Act No. 7076, the "People's Small-Scale Mining Act." This new law implements the above constitutional provision with its declared policy to -

> "promote, develop, protect and rationalize viable small scale mining activities in order to generate more employment opportunities and provide an equitable sharing of the nation's wealth and natural resources, giving due regard to existing rights."

Rep. Act No. 7076 established a People's Small-Scale Mining Program to be implemented by the Secretary of the DENR and created the Provincial Mining Regulatory Board (PMRB) under the DENR Secretary's direct supervision and control. The statute also authorized the PMRB to declare and set aside small-scale mining areas subject to review by the DENR Secretary and award mining contracts to small-scale miners under certain conditions.[7]

Under Pres. Decree No. 1899, "small scale" mining refers to any single unit mining operation having an annual production of not more 50,000 metric tons of ore and satisfying the following requisites:[8]

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6 Art. XII, Section 2, par. 3, 1987 Constitution of the Philippines.

7 R.A. No. 7076, (1991) Sections 2, 4, 5, 9, 24, 25.

8 P.D. 1899 (1984) Sec.1.

> "1. The working is artisanal, either open cast or shallow underground mining, without the use of sophisticated mining equipment.
>
> 2. Minimal investment on infrastructures and processing plant.
>
> 3. Heavy reliance on manual labor.
>
> 4. Owned, managed or controlled by an individual or entity qualified under existing mining laws, rules and regulations.

Under Rep. Act. 7076, "small scale mining" refers to mining activities which rely heavily on manual labor using simple implements and methods and do not use explosives or heavy mining equipment. "Small scale miners" refers to Filipino citizens who, individually or in the company of other Filipino citizens, voluntarily form a cooperative duly licensed by the Department of Environment and Natural Resources (DENR) to engage, under the terms and conditions of a contract, in extraction or removal of minerals or ore-bearing materials and "small scale mining contracts" refers to co-production, joint venture or mineral production sharing agreement between the state and the small scale mining contractor for the small scale utilization of a plot of mineral land.[9]

Lands Open to Small Scale Mining

Under Pres. Decree No. 1899, areas that may be subject of small scale mining operations are:

> (1) existing mining claims whose claim owners may apply for small scale mining permits;

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9 *Ibid.* Sec. 3 (b), (c) , (d).

(2) new mining areas that are not covered by existing mining claims; and

(3) areas covered by existing reservations.[10] Diwalwal appears to fall under the last category, being formerly a part of the1931 Agusan-Surigao-Davao Forest reservation and then removed therefrom and declared open for small scale mining purposes under DENR Adm. Order No. 66 of December 27, 1991.[11]

Under Rep. Act. 7076, priority areas that are open for small scale mining are those already occupied and actively mined by small scale miners before August 1, 1987 where the minerals found therein are technically and commercially suitable for small scale mining activities.[12] Provided that these areas are not considered as active mining areas, *i.e.*, under actual exploration, development, exploitation or commercial production by the claim owner or operator under contract,[13] and the areas are not covered by existing forest rights or reservations and have not been declared as tourist or marine reserves, parks and wildlife reservations, unless their status as such is withdrawn by competent authority.[14]

Other lands which can be open to small scale mining are public lands which are free of any existing rights and those which are not active mining areas; as well as private lands, under certain conditions and parcels of land not exceeding one (1) hectare[15] Ancestral lands, can be declared as people's small scale mining

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10 Sections 2, and 7, P.D. No. 1899.

11 Mines Adm. Order No. MRD-41 Series of 1984, Rules and Regulations Governing the Granting of Small Scale Mining Permits Under Presidential Decree No. 1899.

12 R.A. No. 7076, *supra* note 8, Sec. 5.

13 *Ibid.* Sec. 3 (f).

14 *Ibid.* Sec. 5.

15 *Ibid.* Sec. 6.

area with the prior consent of the cultural communities concerned but the members thereof shall be given priority in small scale mining contracts.[16] It is the Provincial/City Mining Regulatory Board that is given the authority to declare and segregate an area as "People's small scale mining area."[17]

The declaration of Diwalwal as an area open for small scale mining was not made by a Provincial Mining Regulatory Board as cited in the above provisions but it was based on Proclamation No. 369 which gave the DENR Secretary authority to exclude from forest reservations such portions which were no longer forest lands as stated in the "Whereas" clauses of DENR Adm. Order No. 66 of 1991. Prior to its reclassification as a small scale mining area, the original Diwalwal area was a part of the Agusan-Davao-Surigao Forest Reservation declared as such in 1931. Thus, DENR Adm. Order No. 66 appears to be the act of withdrawal of the area from the status as forest reservation by competent authority as referred to in Section 5 of Rep. Act 7076.[18]

The Issue of "Existing and Valid" Rights "Acquired and Existing Prior to or at the time of Declaration as a Reservation"

The declaration of Diwalwal as small scale mining area under DENR Adm. Order. No. 66 is "subject to existing and valid private rights."[19] This is consistent with Section 3 (g) of the "Small Scale

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16 *Ibid.* Sec. 7.

17 *Ibid.* Sec. 24 and 25.

18 "Provided finally That the areas are not covered by existing forest rights reservations and have been declared as tourist or marine reserves, parks and wildlife reservations, "unless their status as such is withdrawn by competent authority." Sec. 5, R.A. No. 7076.

19 Whereas Clause, DENR Adm. Order No. 66,

".. I hereby declare the following areas as non-forest lands and open for small scale mining purposes, *subject to existing and valid private rights…"*

Mining Act of 1991" which defines "existing mining right" as referring to "perfected and subsisting mining claim, lease, license or permit covering a mineralized area prior to its declaration as a people's small scale mining area," and Section 5 of R. A. No. 7942, the Philippine Mining Act of 1995, which provides that small scale mining agreements can cover a maximum of twenty five percent of the area of a mining reservation "subject to valid existing mining quarrying rights."[20] And with respect to other reservations, the right of the government to directly operate or to award a mining contract is subject to the condition that the "right of the lessee of a valid mining contract existing within the reservation at the time of its establishment shall not be prejudiced or impaired."[21]

As defined in the mining act, "existing mining/quarrying right" means a valid and subsisting mining claim or permit or quarry permit or any mining lease contract or agreement covering mineralized area granted/issued under pertinent mining laws. These valid and existing mining rights have varied forms: as patents (under the Philippine Bill of 1902); as mining leases under the Com. Act 137 and Pres. Dec. 463 under the 1935 and 1973 Constitutions; and the more recent production sharing agreements (MPSA) or financial technical assistance agreements (FTAA) under the 1987 Constitution.

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20 R.A. No. 7942, Sec. 5; Sec. 22 DENR Adm. Order No. 23, Aug 15, 1995, Rules and Regs. of R.A. No. 7942, Otherwise known as the "Philippine Mining Act of 1995"; Sec. 12, DENR Adm. Order No. 96-40, Revised Implementing Rules and Regulations of Rep. Act. No. 7942, otherwise known as the "Philippine Mining Act of 1995".

Small scale mining in mineral reservations is under the rules and regulations of the "Mineral Reservations Development Board (MRDB) Adm. Order No. 3 Series of 1984 and MRDB Adm. Order No. 3-A, Series of l987 as amended. Small Scale cooperatives shall have preferential rights for small scale mining contracts in mining reservations.

21 Rep. Act No. 7942, Phil. Mining Act of 1995, Section 6. *"Provided that the right of the lessee of a valid mining contract existing within the reservation at the time of its establishment shall not be prejudiced or impaired."*

In the case of mining rights, the nature of such "existing and valid" mining right "acquired and existing prior to or at the time" of the declaration as a forest reservation in 1931 or as a small-scale mining area in 1991, as the case may be, would depend on whether or not such rights were acquired and existing prior to 1935 or thereafter.[22] Mining rights acquired prior to 1935 could be by absolute ownership and/or by possessory rights. Thus, claim owners of perfected mining claims located pursuant to the Philippine Bill of 1902 , prior to the regalian doctrine as embodied in the 1935 Constitution of the Philippines, were issued indefeasible Torrens title or a mining patent as allowed under the Philippine Bill of 1902. These mining claims are referred to as "patented mineral lands" but those who were not issued patents or titles merely acquired possessory rights over the mineral lands and these are referred to as "patentable mineral lands."[23]

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22 Landmarks of political history of the Philippines:

0 -1521 - Pre-Spanish era, under the rule of various Datus or chieftains of barangays
1521-1898 - Spanish colonial rule under the King/Queen of Spain

1898 - (short lived) First Philippine Republic (Malolos Republic)

1898-1946 - American regime: divided into several phases:

1898-1935 - Pre-Commonwealth - (direct American rule under various Organic Acts of the US Congress like the Philippine Bill of l902, and the Jones Law)

1935-1946 - Commonwealth of the Philippines under the 1935 Constitution

1946 to present - Republic of the Philippines (1935, 1973 and 1987 Constitutions)

See also various mining laws: Phil. Bill of l902 which allowed full title and patents to mineral lands; Com. Act No.146 and Pres. Dec. No. 463 which established the "leasehold system" (absolute ownership over mines and mineral lands being disallowed); and R.A. 7942 which established the system of "mineral production sharing" between the government and the mining claimant/operator. Logging in forest areas used to be covered by timber license agreements (TLA) until a new system of award was established like the forest management agreement (IFMA).

23 The Philippine Bill of 1902: provided for the open and free exploration, occupation and purchase of minerals and the land where they may be found. It declared "all valuable mineral deposits in public lands in the Philippines Islands, both surveyed and unsurveyed x x x to be free and open to exploration, occupation, and purchase, and the land in which they are found, to occupation and purchase, by citizens of the United States, or of said Islands x x x."

After the 1935 Constitution of the Philippines, acquisition of mining rights would be based principally on contract, like mining leases (rather than mining patents or titles) under Com. Act No. 146 and Pres. Decree 463. The leasehold system established under said laws is consistent with the "regalian doctrine" or "*jura regalia*" as adopted under the various constitutions starting with the Commonwealth of the Philippines established in 1935 and the Philippine republic since 1946.[24] Under the *jus regalia* all natural resources of the Philippines, including mineral lands and minerals, are property of the State. However, natural resources[25] such as mineral lands and minerals with respect to which there already was "any existing right, grant, lease or concession at the time of the inauguration of the Commonwealth Government" in 1935 would not be affected.[26]

Like the 1935 and 1973 Constitutions, the 1987 Constitution also adopted the concept of *jura regalia* that all natural resources are owned by the State. But it expressly recognized the importance of the country's natural resources and ushered in the adoption of the constitutional policy of "full control and supervision by the State in the exploration, development and utilization of the country's natural resources." Under the l987 Constitution, the State assumed a more dynamic role in the exploration, development and utilization of the natural resources of the country. The leasehold

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24 *Atok Big Wedge Mining Co. v. Intermediate Appellate Court*, 261 SCRA 546 (Sept. 9, 1996) citing Mendoza, Vicente V., From McKinley's Instruction to the New Constitution, 1978 Edition, p.5.

25 *See* Note 3 *supra*. On November 15, 1935, the Constitution of the Philippine Commonwealth took effect.

26 "any right" includes mining and non-mining rights. These would include valid, existing and unexpired timber license agreements (TLA) or title to land (TCT/OCT). It is however, essential that these rights should be existing and valid prior to the declaration of the reservation and the grant of mining rights over such reservations. Mining rights would include leasehold rights of mining claimants who are proscribed from purchasing the mining claim itself. Mining Leases were granted of 25 years renewable for another 25 years.

system that allowed a 25 year "license, concession or lease" under the 1935 and 1973 Constitutions was abolished.

Article XII, Section 2 of the said Charter explicitly states that the exploration, development and utilization of natural resources shall be "under the full control and supervision of the State." Consonant therewith, the exploration, development and utilization of natural resources may be undertaken directly by the State, or it may opt to enter into co-production, joint venture, or production-sharing agreements, or it may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contribution to the economic growth and general welfare of the country.[27]

Because of this radical policy change in favor of a more active state intervention in the development and utilization of natural resources, it can be expected that such constitutional guarantees like the non- impairment of contracts, and protection of vested rights may give way to police power of the state should the sovereign choose to undertake a more direct participation in the development and utilization of natural resources as demanded by the general welfare of the Filipino people.

An indication of such a trend is demonstrated in the case of *Miners' Association of the Philippines, Inc. v. Factoran*.[28] In said case, the Supreme Court through Justice Romero expounded, thus:

> "The economic policy on the exploration, development and utilization of the country's natural

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27 1987 Philippine Constitution Article XII, Section 2.

28 *Miners' Association of the Philippines, Inc. v. Factoran, Jr.* 240 SCRA 104 (1995); *Carino v. Insular Government*, 212 US 449 (1904); *Valenton v. Marciano*, 3 Phil 537(1904).

> resources under Article XII, Section 2 of the 1987 Constitution could not be any clearer. As enunciated in Article XII, Section 1 of the 1987 Constitution, the exploration, development and utilization of natural resources under the new system mandated in Section 2, is geared towards a 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."

The Court further explained:

> "The exploration, development and utilization of the country's natural resources are matters vital to the public interest and the general welfare of the people. The recognition of the importance of the country's natural resources was expressed as early as the 1934 Constitutional Convention."

The Court cited the observation of the 1986 UP Constitution Project:

> "The 1934 Constitutional Convention recognized the importance of our natural resources not only for its security and national defense. Our natural resources which constitute the exclusive heritage of the Filipino nation, should be preserved for those under the sovereign authority of that nation and for their posterity. This will ensure the country's survival as a viable and sovereign republic."

In balancing interests between the constitutional guarantees against impairment of contracts and police power of the state, the Supreme Court relied on police power of the state. Thus, it stated:

> "Well-settled is the rule, however, that regardless of the reservation clause, mining leases or agreements granted by the State, such as those granted pursuant to Executive Order No. 211 referred to in this petition, are subject to alterations through a reasonable exercise of the police power of the State."
>
> "The prohibition contained in constitutional provisions against impairing the obligation of contracts is not an absolute one and it is not to be read with literal exactness like a mathematical formula. Such provisions are restricted to contracts which respect property, or some object or value, and confer rights which may be asserted in a court of justice, and have no application to statute relating to public subjects within the domain of the general legislative powers of the State, and involving the public rights and public welfare of the entire community affected by it. They do not prevent a proper exercise by the State of its police powers. By enacting regulations reasonably necessary to secure the health, safety, morals, comfort or general welfare of the community, even the contracts may thereby be affected; for such matter can not be placed by contract beyond the power of the State to regulate and control them."
>
> x x x x x x
>
> "The State, in the exercise of its police power in this regard, may not be precluded by the constitutional restriction on non-impairment of contract from altering,

> modifying and amending the mining leases or agreements granted under Presidential Decree No. 463, as amended, pursuant to Executive Order No. 211. Police power, being co-extensive with the necessities of the case and the demands of public interest, extends to all the vital public needs. The passage of Executive Order No. 279 which superseded Executive Order No. 211 provided legal basis for the DENR Secretary to carry into effect the mandate of Article XII, Section 2 of the 1987 Constitution."[29]

The evolution of Philippine policy on natural resources can be discerned from the various provisions starting with Article XIII Sec. 1, of the 1935 Constitution. This provision can be compared with the 1973 Constitutional provision on natural resources which is not so different from the original text of the 1935 Constitution.[30]

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29 *Supra* note 28.

30 Article XIII Sec. 1, of the 1935 Constitution.

Section 1. All agriculture, timber and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to any existing right, grant, lease or concession at the time of the inauguration of the Government established under this Constitution. Natural resources with the exception of public agricultural land, shall not be alienated, and no license, concession, or lease for the exploitation, development, a period exceeding twenty-five years, renewable for another twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases beneficial use may be the measure and the limit of the grant.

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Article XIV, Section 8 of the 1973 Constitution.

"Section 8. All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agricultural, industrial or commercial, residential, and resettlement lands of the public domain, natural resources shall not be alienated, and no license, concession, or lease for the exploration, development, exploitation or utilization of any of the natural resources shall be granted for period exceeding twenty-five years, renewable for not more than twenty-years except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases, beneficial use may be the measure and the limit of the grant."

The policy of direct state control, supervision and management of natural resources extends to: state ownership of natural resources; inalienability of said natural resources; full control and supervision of exploration, development and utilization of natural resources; undertaking of operations either directly or in partnership with private enterprise under co-production, joint venture, or production sharing with qualified persons. The grant to the DENR, a government agency, of the option to directly conduct mining operations in reservations is consistent with this radical change in policy introduced by Article XII, Section 2 of the 1987 Constitution.[31]

Vested Rights v. State Control of natural resources

The matter of vested rights *vis-à-vis* the new constitutional policy on natural resources was distinctly illustrated in a case decided in April of 2002 entitled *Southeastern Mindanao Gold Mining*

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31 Article XII, Section 2 of the 1987 Constitution:

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

xxx xxx xxx

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical sources."

Corp. v. Balite Portal Mining Cooperative, Hon. DENR Sec. Cerilles and Provincial Mining Regulatory Board of Davao.[32] In this case, the petitioner mining company relied on the validity of the Exploration Permit (E.P. No. 133) over 4,491 hectares which included the Diwalwal gold rush area. The Court however ruled that whether or not the petitioner has a vested right under the Exploration Permit is still indefinite and unsettled matter, because (a) it is still disputed in several protest cases filed by small scale miners groups[33] which have not yet been resolved; (b) the continuing validity of EP No. 133 was questioned based on grounds that occurred after the decision in the Apex Mining case,[34] such as that the EP has since then expired and that the EP cannot be assigned to SEM.

With respect to the alleged "vested rights" claimed by petitioner, the same is invariably based on EP No. 133, whose validity is still being disputed in the Consolidated Mines cases. A reading of the appealed MAB decision reveals that the continued efficacy of EP No. 133 is one of the issues raised in said cases, with respondents therein asserting that Marcopper cannot legally assign the permit which purportedly had expired. **In other words,**

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32 *Supra* note 2, G.R. 135190, April 3, 2002.

33 After publication of the MPSA application of SEM, the following filed their oppositions: a) MAC Case No. 004(XI) - JB Management Mining Corporation; b) MAC Case No. 005(XI) - Davao United Miners Cooperative; c) MAC Case No. 006(XI) - Balite Integrated Small Scale Miner's Cooperative; d) MAC Case No. 007(XI) - Monkayo Integrated Small Scale Miner's Association; e) MAC Case No. 008(XI) - Paper Industries Corporation of the Philippines; f) MAC Case No. 009(XI) - Rosendo Villaflor, et al. g) MAC Case No. 010(XI) - Antonio Dacudao; h) MAC Case No. 011(XI) - Atty. Jose T. Amacio; i) MAC Case No. 012(XI) - Puting-Bato Gold Miners Cooperative; j) MAC Case No. 016(XI) - Balite Communal Portal Mining Cooperative; and k) MAC Case No. 97-01(XI) - Romeo Altamera, et al. In the meantime, on March 3, 1995, Republic Act No. 7942, the Philippine Mining Act, was enacted. Pursuant to this statute, the above-enumerated MAC cases were referred to a Regional Panel of Arbitrators (RPA) tasked to resolve disputes involving conflicting mining rights. The RPA subsequently took cognizance of the RED Mines case, which was consolidated with the MAC cases.

34 *Apex Mining Co, Inc. et.al. v. Hon. Cancio C. Garcia et al.*, G.R. 92605, 199 SCRA (1991).

whether or not petitioner actually has a vested right over Diwalwal under EP No. 133 is still an indefinite and unsettled matter. Until a positive pronouncement is made by the appellate court in the Consolidated Mines cases, EP No. 133 cannot be deemed as a source of any conclusive rights that can be impaired by the issuance of MO 97-03.

The Court also emphasized that the decision in the Apex Mining case that was litigated solely between Marcopper and Apex Mining Corporation cannot be deemed binding and conclusive on respondent BCMC and the other mining entities who were not impleaded as parties therein. While SEM may be regarded as Marcopper's successor to EP No. 133 and therefore bound by the judgment rendered in the *Apex Mining* case, the same cannot be said of respondent BCMC and the other oppositor mining firms, neither can the *Apex Mining* case foreclose any question pertaining to the continuing validity of EP No. 133 on grounds which arose after the judgment in said case was promulgated.

The *Apex Mining* case settled the issue of who between Apex and Marcopper validly acquired mining rights over the disputed area by availing of the proper procedural requisites mandated by law, but it certainly did not deal with the question raised by the small scale miners on "whether EP No. 133 had already expired and remained valid *subsequent to its transfer by Marcopper to petitioner.*" Thus, the Court stated:

> "The decision x x x is conclusive only between the parties with respect to the particular issue herein raised and under the set of circumstances herein prevailing. In no case should the decision be considered as a precedent to resolve or settle claims of persons/entities not parties hereto. The Apex decision was not intended to unsettle rights of persons/entities which have been acquired or which

> may have accrued upon reliance on laws passed by appropriate agencies."[35]

The above cited case is significant in that it defined the nature of permits over natural resources issued under the 1987 constitution and pertinent laws, *viz.* - as mere evidences of a privilege granted by the state which may be amended, modified or rescinded when the national interest so requires. These permits do not vest any permanent or irrevocable rights within the non-impairment of contract clause or due process clause in the Bill of Rights of the Constitution.[36] The Court categorically:

> "Incidentally, it must likewise be pointed out that under no circumstances may petitioner's rights under EP No. 133 be regarded as total and absolute. As correctly held by the Court of Appeals in its challenged decision, EP No. 133 merely evidences a privilege granted by the State, which may be amended, modified or rescinded when the national interest so requires. This is necessarily so since the exploration, development and utilization of the country's natural mineral resources are matters impressed with great public interest. Like timber permits, mining exploration permits do not vest in the grantee any permanent or irrevocable right within the purview of the non-impairment of contract and due process clauses of the Constitution, since the State, under its all-encompassing police power, may alter, modify or amend the same, in accordance with the demands of the general welfare."[37]

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35 *Ibid.*

36 *Supra* notes 6 and 31.

37 *Ibid.*

The Socio-economic, environmental and Political issues at Diwalwal

Of the areas covered by Adm. Order No. 66, it is the 729 hectares within the Diwalwal, Monkayo area where significant social, political, environmental and legal problems converge. From 1985 to 1991, thousands of people flocked to Diwalwal to stake their respective claims. The Diwalwal gold rush area had been the site of subsistence small scale mining operations since then. It soon evolved into an intensive medium scale mining operations involving thousands of miners, local entrepreneurs and service providers and financiers that provided logistic support to the Diwalwal mining operators. Small-scale miners have formed a group called Monkayo Integrated Small Scale Miners Association (MISSMA), composed of more than 30,000 members, and have since been actively and vigilantly involved in upholding and the right of small scale miners and have been constantly identified as the initiator of protest actions.

Mining in the Diwalwal area varied from crude to semi-mechanized and mechanized types of mining operations. With the increase in size and volume of the Diwalwal mining operations, corresponding social and environmental problems magnified leading to direct government intervention. Peace and order deteriorated rapidly, with hundreds of people perishing in mine accidents, man-made or otherwise, brought about by unregulated mining activities. Multifarious problems spawned by the gold rush assumed gargantuan proportions, such that finding a "win-win" solution became a veritable needle in a haystack.[38]

This Diwalwal situation is a clear illustration of the need to balance the interests of the many small scale miners, and service providers who are mostly small entrepreneurs, as well as the needs

38 *Ibid.*

of non-miners, such as the farmers and the community at large on the one hand, as against the few capitalists or big business enterprise, on the other.

Note that the 729 hectare Diwalwal area which was carved out of the Agusan-Surigao-Davao Forest Reservation had consistently been declared as open for small scale mining, not only under Adm. Order No. 66 but also under a Mines Adjudication Board (MAB) decision that expressly excluded the 729 hectare area from the coverage of the Mineral Production Sharing Agreement (MPSA) filed by SEM on July 23, 1994, which small scale miners opposed. In 1999, the Provincial Mining Regulatory Board (PMRB) of Compostela Valley declared the 729 hectare land as a people's small-scale mining area. The decision was affirmed by the DENR.[39]

When the legality of Administrative Order 66 of the DENR which included and declared a 729 hectare land as an open area for small-scale mining operations, was questioned, any negative ruling would certainly threaten the livelihood of an estimated 40,000 small-scale miners and their dependents as the contested 729 hectares on Mt. Diwata would become an exclusive mining area of a big mining company known as the Southeast Mindanao Gold Mining Corp. (SEM).

SEM claimed to have "vested rights" over the area on the basis of an exploration permit issued in its favor over 4,491 hectares of land. The mining company acquired the rights to the Exploration Permit No. 133 on February 16, 1994, (while a RED Mines case was pending seeking to nullify the EP and the MPSA application of Marcopper), under an assignment from Marcopper Mining Co. Then Southeast Mindanao Gold Mining Corporation (SEM), applied for an integrated MPSA over the land covered by the permit. In due

39 PHILIPPINE DAILY INQUIRER, Inquirer News Service: Diwalwal series of news items on the following Issue Dates: March 2, 15, 26, 27, 31, (2002); April 1, 3, 5, 26, 27, 30, (2002); and Oct. 1, (2001).

time, the Mines and Geosciences Bureau Regional Office No. XI in Davao City (MGB-XI) accepted and registered the integrated MPSA application of SEM.[40]

During the Estrada administration, when violence in Diwalwal increased, the Mines Adjudication Board (MAB) proposed a "win-win" solution where big mining corporations like JB Management and SEM can co-exist with small-scale miners in the area. Thus, the 729 hectares will be delineated for use of the small-scale miners while the rest of the remaining four thousand (4,000) hectares will go to the mining corporations. The nullification of Adm. Order No. 66 would preclude the "co-existence" between big mining and small scale mining in Diwalwal as only the big mining with the exploration permit and MPSA would be legally accepted.[41]

As if the all encompassing socio-economic, environmental and legal problems at Diwalwal were not enough, another blow that ignited the tinder box at Diwalwal was the Cease and Desist Order (CDO) issued on December, 2001 by Monkayo Mayor Joel Brillantes against the operation of gold processing plants in the area. Although small-scale miners in Mt. Diwalwal got a temporary reprieve after Mayor Joel Brillantes agreed to suspend the implementation of a cease-and-desist order for at least 60 days, the mayor asserted that he was not changing his stand on the closure of the gold processing plants in Diwalwal. He said the plants should be transferred to another area to avert a big disaster. He claimed that the closure order was meant to protect the Naboc River, which serves as water source for the irrigation of rice farms in the lowland areas. However, the miners feared that the transfer of the gold processing plants would exact a heavy toll on their livelihood.[42]

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40 *Supra* note 33.

41 *Supra* note 39.

42 *Ibid*, note 39.

The small scale miners contested the mayor's CDO in the Regional Trial Court of Nabunturan, Compostela Valley, and they sought to have the order declared null and void and to declare illegal the padlocking by Brilliantes of their buildings and factories on Mt. Diwalwal. On March 18, 2002, the court denied their petition. This was then followed by the slaying of the judge that upheld the cease and desist order. After failing to get a court order to counter the closure order, the miners picketed the Pan-Philippine Highway. This triggered an intense peace and order problem in the Diwalwal gold rush area as small-scale miners, their wives and children barricaded the Bincungan Bridge to protest the closure. This bridge connects the cities of Tagum and Davao. They vowed to remain in the area until the government lifts the CDO against gold processing in Diwalwal, Mt. Diwata in Monkayo, Compostela Valley. It required the intervention of key government officials and politicians of the province and the national government to convince the small scale miners to leave the bridge and ease the flow of traffic. In a dialogue presided by Interior Secretary Joey Lina and other top local government officials, Monkayo Mayor Brilliantes agreed to issue the necessary mayor's permit to the small-scale miners. During the closed-door meeting, Brillantes said he would not compromise the future of the Naboc River but was willing to discuss the plight of the miners whose status were declared illegal because they do not have any mining permits.

But there were underlying issues that emerged out of the protest.[43] The mayor's company has reportedly entered into a partnership with Southeast Mining Corp. and Marcopper Mines which holds the Exploration Permit to 4,491 hectares including the 729 hectare Diwalwal gold rush area. The Diwalwal incident also exposed the big-time financiers in the area who merely used

43 *Ibid*. Small scale miners charged that the mayor's order was not really to protect the Naboc River but to protect his interests in JB Mining Corp., a mining firm owned by Mayor Brilliantes, who has allegedly tied up with Southeast Mindanao Mining Corp. to control the 729-hectare Diwalwal mining area.

genuine small-scale miners to continue with their environmentally disastrous mining practices for the past several decades.

The complex social problem at Diwalwal calls for immediate and decisive action on the part of the national government so that the mining activities in Mt. Diwalwal will finally be rationalized and be given to the genuine small-scale miners, with the support of the national government and to the exclusion of the big-time financiers, including the big mining companies which should limit themselves to areas that are not reserved for small scale miners.

The Diwalwal problem has not yet been resolved. On June 28, 2003, Mayor Brilliantes was shot to death in Davao City. Initial police reports point to the disputes on small scale mining at Diwalwal as the reason for his bloody demise.

2002 Government Intervention In Diwalwal:
An Act of Police Power of the State

The 2002 direct government intervention in the Diwalwal gold rush area is a general exercise of police power for the public welfare rather than a simple take over of operations of a natural resource under Article XIII of the Constitution. From the aspect of environmental protection in the face of continuing degradation of the environment and serious health hazard from mercury poisoning, police power can be exercised. Thus, news reports state:

> "Oct. 1, 2002 - ...The warning of widespread mercury pollution, by the way, was made not only by environmental NGOs but also by the toxicology department of the University of the Philippines and the Philippine General Hospital whose team actually went to the areas at risk and examined the people there for mercury poisoning. The DENR better believe

> their findings: fully 36 per cent of the residents of Diwalwal have dangerous levels of mercury in their bodies".[44]

On August 12, 2002, the DENR Secretary issued an Order stopping the Diwalwal small scale mining operations, on the basis of the following Diwalwal problems:

(1) environmental dislocation;
(2) peace and order;
(3) occupational health and safety hazards;
(4) appropriate site and engineered waste and tailings disposal system.

Cited as specific reasons for the DENR takeover order of the Diwalwal mining operations were: (1) gravity of the pollution and siltation resulting from the Diwalwal mining operations resulting in elevated levels of mercury and serious siltation incidents in the area, indicating an emergency situation that needs immediate intervention by government; and the (2) aggravated peace and order problems resulting in the death of 44 miners due to toxic and chemical elements introduced in underground tunnels, blockades and fatal ambuscades. All the above incidents called for immediate action by the national government.[45]

Direct government intervention under abovementioned DENR Order consisted of: (1) Stoppage of mining and mineral processing operations; (2) Prevention of transport of minerals and / or mineral products from the Diwalwal mining area without ore

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44 *Supra* note 39.

45 Order, Aug. 12, 2002, by DENR Sec. Heherson Alvarez; DENR Adm. Order No. 2002-18, Aug. 12, 2002, by DENR Sec. H. Alvarez "Declaring An Emergency Situation in the Diwalwal Gold Rush Area and Providing for Interim Guidelines To Address the Critical Environmental and Social Consequences Therein."

transport permits; (3) Prevention of the transport, storage and/or use of explosives and explosives accessories and chemical substances; (4) Creation and deployment of a technical working group to undertake a technical assessment of the situation and formulate a mine management plan for the sustainable utilization of mineral resources in the area.[46]

The Diwalwal mining operations were generally "unpermitted," *i.e.*, without any government permits, whether local or national. Thus, with the stoppage order pursuant to the DENR Adm. Order No. 2002-18, the local and national government had now the opportunity to enforce all environmental laws and mining permit requirements. Resumption of mining operations would be allowed only upon compliance with all permitting requirements. Considering the number of people involved, and the various groups whose economic interests were affected by the stoppage, it was essential to summon the assistance of police and military agencies as well as the local governments.[47]

In addressing the environmental problems, the DENR undertook several courses of action specifically relating to (a) the relocation of the mineral processing plants and a common tailings disposal system; (b) construction and operation of a tailings dam; (c) regulation of the use of mercury, cyanide and other chemicals for gold processing; health monitoring and assessment activities; (d) environmental assessments; clearances; planning and programs including the establishment of a People's small scale mining protection fund and environmental user's fee; (e) training for mine safety, environmental protection; (f) geodetic and geologic surveys.

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46 *Ibid.*

47 In Re: Deputizing Gen. Hermogenes Ebdane, Jr. Chief PNP and other PNP Officers… To Implement the DENR Stoppage Order and other Instructions/Issuances on the Diwalwal Gold Rush Area, Aug. 16, by DENR Sec. H. Alvarez.

It is noted that these abovementioned DENR Orders do not contain the phrase "subject to valid and existing rights" or "vested rights." The only reference to these concepts is found in Section 7 (b) of DENR Memorandum Order No. 2002-18 that in recognition of possible vested rights in the area, the DENR shall deposit in escrow in a government bank, appropriate royalties for rightful indigenous peoples and mining tenement claimants, in connection with the collection of taxes, fees and royalties due from mining operations and processing.[48] This means that those with "possible vested rights" such as surface owners, and tribes who are owners of ancestral lands can claim and will be paid their respective share in fees or royalties allowed under the pertinent laws but these rights cannot stop the mining and processing activities to be undertaken under DENR authority. They do not prevent a proper exercise by the State of its police powers. By enacting regulations reasonably necessary to secure the health, safety, morals, comfort or general welfare of the community, even the contracts may thereby be affected for such matter can not be placed by contract beyond the power of the State to regulate and control them.[49]

The New Diwalwal Gold Rush Area:
New Problems, New Conflicts

On August 14, 2002, the "Diwalwal Gold Rush Area" was expanded as delineated under DENR Memorandum Order No. 2002-09, to cover an area of 8,100 hectares, a very substantial increase from the original 2,187 hectares under DENR Adm. Order No. 66 of 1991 which was carved out of the 1,927,400 hectares of Agusan-Surigao-Davao Forest Reservation declared in 1931. Adm. Order No. 66 included the controversial 729 hectare area of the Monkayo area which is said to be the core of the Diwalwal gold rush area.

48 DENR Memo Order No. 2002-18, Section 7.

49 *Supra* note 28 *Miners' Association of the Philippines, Inc. v. Factoran, Jr.*

The "Diwalwal Gold Rush Area" now covers 8,100 hectares which is segregated exclusively for mining activities, and sites for mineral processing plants and common tailings disposal system. The result was that vast areas of forest lands which were previously covered by timber licenses and/or IFMA applications were removed as forest areas and became open for mining purposes.

With the declaration under the abovementioned DENR Order, that no Integrated Forest Management Agreements (IFMAs) or conversion into IFMAs or any other forest use instrument will be granted or issued covering the Diwalwal Gold Rush Area as expanded, another serious conflict situation was created. Thus, when PICOP personnel and security forces continued to secure the area and exercise control and authority over what was part of the timber license/concessions (TLA) held by PICOP for so many years, a serious peace and order problem occurred which required the intervention of the police and military authorities.

On its face, this pronouncement against the issuance of TLAs and conversion into IFMAs appears to be consistent with the present policy on the utilization and development of natural resources, which includes forest and timber resources, where further grants or extension of terms of timber licenses (TLAs) are now disallowed. Only management agreements over tree farms, forested or logging areas with the government are now allowed.[50] However, the realities of the situation makes enforcement of this new policy difficult.

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50 DENR Adm. Order No. 97-04: Rules and Regulations Governing the Industrial Forest Management Program.

Sec. 3.10 "*Industrial Forest Management Agreement (IFMA)* is a production sharing agreement entered into by and between the DENR and a qualified applicant, which grants to the latter the right to develop, utilize and manage a specified area, consistent with the principle of sustainable development and in accordance with a comprehensive development and management plan and under which both parties share in its produce."

Notwithstanding the above legal observation, the realities are that prior license holders whose licenses and permits are up for conversion or renewal tend to assert actual control over their established territory asserting alleged rights even as against the State.

Although the abovementioned DENR Order expanding the Diwalwal Gold Rush Area does not expressly mention its being subject to "valid and existing rights, the expected response of affected parties like PICOP, would be to assert a priority" or preferential right over the subject area as a timber license holder prior to such DENR declaration in 2002.

The rulings of the Supreme Court touching on the existence of "vested rights" with respect to licenses / permits for the utilization of natural resources in the cases of Southeast Mindanao Mining Corp. (SEM)[51] and the Miners Association[52] would be relevant. In the SEM case, the Court described the nature of [mining] exploration permits which could very well apply to other types of permits over natural resources, thus these permits can not be regarded as total and absolute as these are merely evidences a privilege granted by the State, which may be amended, modified or rescinded when the national interest so requires. This is necessarily so since the exploration, development and utilization of the country's natural mineral resources are matters impressed with great public interest."[53] It is also understood that these permits should give way to police power of the state. Thus it is stated:

> "Like timber permits, mining exploration permits do not vest in the grantee any permanent or irrevocable right within the purview of the non-impairment of

51 *Supra* notes 6 and 31.

52 *Supra* note 28.

53 *Supra* notes 1 and 32.

> contract and due process clauses of the Constitution, since the State, under its all-encompassing police power, may alter, modify or amend the same, in accordance with the demands of the general welfare."[54]

Thus, if forestry rights are based on a former timber license agreement (TLA) which has expired, and/or is being converted into an industrial forest management agreement, (IFMA) which is still pending approval, there are no vested rights to speak of and the claimed forestry rights are merely inchoate, since there is no permit, or no contract which is duly signed and approved. Former TLA holders who apply for conversion into IFMAs over their timber concessions do not have any preferential right to the grant of IFMAs under existing rules and regulations, as they still have to prove their eligibility before an IFMA can be awarded to them.[55] Thus, the protection under the "vested right" principle or "non-impairment" clause would not be available to this forestry right claimant.[56]

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54 *Supra* notes 1 and 32.

55 *Ibid.* Sec. 13. *Eligibility requirement*s - In addition…. Applicants shall be required to satisfy the following requirements:

13.1 *Environmental Management Record* - The applicant must present proof of its present technical and financial capability to undertake resource protection and conservation. Rehabilitation of degraded areas and similar activities. An applicant with previous experiences in natural resources ventures must have demonstrated an exemplary regard for the environment in its past natural resource use ventures.

13.2 *Community Relations Record* - If an applicant is a current or former holder of TLA and/or any other permit, lease, license or agreements issued by the DENR, the applicant must submit proof of its community relations record. This record may consist of, but is not limited to, proof of its socio-cultural sensitivity, the character of its past relations with local communities, cultural appropriateness and social acceptability of its resource management strategies.

56 *Ibid.* Sec. 8 *Applications for Conversion or Expansion*- All applications for conversion of Timber License Agreements into IFMAs and/or for expansion of IFMA areas shall be deemed as new applications for IFMA and shall be subject to the pertinent requirements and procedures contained in these regulations.

Resumption of Mining Operations In the Diwalwal Gold Rush Area

The state's "*jus regalia*" or "state ownership" as strengthened and expanded under the 1987 Constitution includes the right to undertake "direct utilization and production" of natural resources by the state. And this right to utilize, either directly or through private enterprise under production sharing or profit sharing arrangements in the development and utilization of natural resources relates not only to mineral resources but to the nation's forest and marine resources and other forms of natural resources as well. The matter of direct take over of operations, the wisdom, propriety and feasibility of government undertaking a business venture, in lieu of private enterprise and/or in lieu of private persons in the area, however, deserves more in depth evaluation.[57] In the case of the Diwalwal small scale mining operations involving thousands of small scale miners whose livelihood from subsistence mining is at stake, the matter assumes a different plane that is beyond the legal aspects of the problem.

Indeed, the new role of DENR has been questioned as illustrated in the SEM case[58] relating to Memorandum Order No. 97-03, wherein the mining company sought recovery of its losses corresponding to the value of lost gold ore mined by small scale miners from the Diwalwal area. The mining company SEM asserted that the DENR Secretary and the Provincial Mining Regulatory Board of Davao illegally issued "ore transport permits" (OTPs) that allowed the small-scale mining group, Balite Portal Mining

57 Art. XIII, 1987 Constitution: Thus, the change from the passive "mining lease contracts" to " mineral production sharing agreements" and from the passive "timber license agreements" to "Industrial Forest Management Agreements" where the government gets specific production or profit share rather than simple royalties or rents from the utilization of natural resources.

58 *Supra* note 32.

Cooperative (BCMC), to "illegally" extract and haul 60,000 pesos worth of gold ore per truckload from SEM's mining claims.

The firm claimed that the OTPs were manifestations of Memorandum Order No. 97-03, issued on June 24, 1997 by the DENR Secretary, to settle the Diwalwal disputes under a policy of "direct state utilization." SEM argued that DENR's "direct state utilization policy"— a reference to government's likely brokering of profit-sharing or management sharing agreements on behalf of all contending parties in Diwalwal — "would effectively impair its vested rights under Exploration Permit (EP) No. 33."

The Court confirmed the state's right to directly engage development and exploitation of natural resources. "Direct state utilization" as a policy in resolving the Diwalwal dispute is an option available to the state. Thus, the DENR can order (as it did under DENR Memorandum Order No. 97-03) a *study* of this option to determine its feasibility. The State still had to study prudently and exhaustively the various options available to it in rationalizing the explosive and ever perilous situation in the area, the debilitating adverse effects of mining in the community and at the same time, preserve and enhance the safety of the mining operations and ensure revenues due to the government from the development of the mineral resources and the exploitation thereof.

The government was still in earnest search of better options that would be fair and just to all parties concerned. The direct state utilization of the mineral resources in the area was only one of the options of the State. Before the State will settle on an option, an extensive and intensive study of all the facets of a direct state exploitation was directed by the DENR Secretary. And even if direct state exploitation was opted by the government, the DENR still had to promulgate rules and regulations to implement the same in coordination with the other concerned agencies of the government.

Relying on Article XII, Section 2, of the 1987 Constitution, and Section 4, Chapter II of the Philippine Mining Act of 1995 which states that:

> "Sec. 4. *Ownership of Mineral Resources.* - Mineral Resources are owned by the State and the exploration, development, utilization, and processing thereof shall be under its full control and supervision. **The State may directly undertake such activities or it may enter into mineral agreements with contractors. (Underscoring ours)"**

the Supreme Court categorically concluded that the State may pursue the constitutional policy of full control and supervision of the exploration, development and utilization of the country's natural mineral resources, by either directly undertaking the same or by entering into agreements with qualified entities. Obviously, the State may not be precluded from considering a direct takeover of the mines, if it is the only plausible remedy in sight to the gnawing complexities generated by the gold rush. As implied earlier, the State need be guided only by the demands of public interest in settling for this option, as well as its material and logistic feasibility."[59]

Direct Undertaking of Mining Operations: The Role of the NRDC

The measures taken by the DENR in the Diwalwal Gold Rush Area, which were directly addressed towards the solution of the peace and order, environmental degradation, social unrest, health and safety and the like are not difficult to accept or to justify under the police power of the state as basis for direct government intervention in the Diwalwal Gold Rush Area. But the DENR has gone beyond simple police power with the entry of its corporate

59 *Ibid.*

arm, the National Resource Development Corporation pursuant to Section 5 of DENR Memorandum Order 2002-18.

The impact of this provision on the Diwalwal Gold Rush community and on the mining industry as a whole cannot be underestimated. When fully implemented, the NRDC becomes the key to direct government intervention in the utilization of mineral resources, with government operating a business under a grant of the right to undertake "direct" utilization of natural resources. And this right to utilize, either directly or through the active participation with private enterprise under production sharing or profit sharing arrangements in the development and utilization of natural resources, whether mines and minerals, forest and marine resources and other forms of natural resources.

The Diwalwal Gold Project may well be government's pilot or demonstration project on how to implement the constitutional mandate. The DENR has directed its corporate arm, the NRDC, to undertake the development and utilization activities in the Diwalwal gold rush area, with specific tasks to plan, manage and operationalize various mining related activities in the Diwalwal area, including the development and establishment of a purchasing and marketing mechanism and facilities for all the gold produced from the Diwalwal area.[60]

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60 DENR Memo Order No. 2002-18, August 12, 2002.

(a) set up professionally competent and qualified technical groups, with the technical assistance of the Mines and Geosciences Bureau (MGB);

(b) undertake the necessary planning, management and operationalization of various mining-related activities in the Diwalwal area;

(c) construction and operations of the mill tailings disposal facility;

(d) implement a mine management plan to generate cash flow for the activities in the disposal system;

(e) address the environmental, social and sustainable livelihood for subsistence mine workers;

(f) develop and establish a purchasing and marketing mechanism and facilities to ensure that all the gold produced from the Diwalwal area are sold to the Central Bank;

(g) Initiate environmental clean up of the Diwalwal mining area and the Naboc River;

(h) establish an environmental user's fund and a people's small scale mining protection fund

The NRDC was created under Executive Order No. 786 issued by Pres. Marcos in 1982.[61] The corporation adopted its own By-Laws in 1982 through its first set of Board of Directors.[62] The general management of the NRDC is vested in a Board of Directors of seven members composed of the DENR ("Minister") Secretary as Chairman of the Board, the various cabinet ("ministers") secretaries for: Trade and Industry, Transportation and Communication, Economic Planning, Finance, Development Bank of the Philippines, and the President of NRDC. As stated in its charter, the NRDC on its own or through its subsidiaries, or in joint venture with private sector shall hasten development by promoting and/or undertaking the development and/or use of technologies/systems that complement the utilization of natural resources with its conservation and/or optimize its utilization.[63]

The NRDC has various functions and objectives, of which some are relevant to its role in the Diwalwal Project, such as: (a) ensuring a stable market for natural resources-based products by coordinating the production and marketing activities and/or by engaging in the production and/or local/international marketing of critical natural resource-based products; and (b) promoting investment in natural resources-based industries by providing financial technical and/or management support/assistance.[64]

Among its relevant powers would be the power to "enter into any lawful arrangement for sharing of profits, joint ventures,

61 NRDC Charter, E.O. No. 786 (Pres. Marcos) 1982.

62 Section 2, Executive Order No. 786 (1982).

Original BOD: Teodoro Pena (Minister of Natural Resources); Roberto Ongpin (Minister of Trade & Indusry); Cesar Virata (Minister of Finance); Jose Dans (Minister of Transportation and Communication); Cesar Zalamea (DBP); Vicente Valdepenas (Minister of Economic Planning); Arnold Caoili (President of NRDC)

63 *Ibid.* Sec. 2.

64 Sections 3 (3) & (4).

union interests reciprocal concession or cooperation with any association, partnership, syndicate or entity located in or organized under the laws of any authority in any part of the world as may be necessary to carry out its operations."[65]

Conceptual Framework of Direct Government Natural Resource Development: Diwalwal Style

The socio-economic situation in the Diwalwal Gold Rush Area calls for a special kind of approach to doing business as a natural resource company. On the part of the government acting through the NRDC, backed by the state's police power and power to control, supervise and regulate natural resources, through the DENR, problems relating to mining operations at Diwalwal should have its solutions. The key players in this enterprise are: [1] the small scale miner; [2] the operator; [3] the financier; [4] other service providers; [5] the gold buyer; and [6] the tax collector.

When the contending rights and interests of the various players at Diwalwal are properly adjudicated and/or awarded and enforced, the means of livelihood of thousand of small scale miners will be adequately protected. This will be the start towards the resolution of the socio-economic difficulties of the Diwalwal population that will result in peace and order in the area.

The assured livelihood of small scale miners can be legally established and governed through service contracts rather than through assimilation into the organizational structure of the mining operator, whether it be NRDC directly or an affiliate/subsidiary. Small scale mining will cease to be "unpermitted" economic activity. Proper contractual arrangements and documentations and permits will facilitate the monitoring of ore and gold production; the proper

65 *Ibid.* Section 4 (5).

distribution of respective production or profit sharing and the collection of revenues due to the government from this very substantial gold mining activity.

The NRDC as operator should formulate and implement the overall mining plan from mining to gold production, marketing of gold produced, up to the proper disposal of mining waste. Thus, the multiple objectives of giving continued livelihood to small miners as well as other service providers, assuring protection of the environment, and regular collection of revenues for the government can be readily attained.

The support systems, including the financing needs of the small scale miners should also be met, particularly the sourcing of such financial support and the repayment of financial obligations, otherwise, the old system of financing small scale mining operations which are payable in gold production at controlled prices, much to the disadvantage of the over exploited small scale miner will again prevail.

Service Contracts under production sharing schemes with small miners either as individuals or groups and/or cooperative have been the common mode of employing the small scale miners in the mining of ore and this has proven to be workable. However, the financing of their mining activities should be studied because under these service contracts, the small scale miner is an independent contractor who shall be responsible for the provision of manpower, tools and equipment, power, materials and appropriate ventilation necessary for mining operations, including those for mine safety and health. He also assumes all risks and expenses connected with the mining operations within the contract area , including but not limited to business losses and claims and actions on account of death, sickness or injury to persons caused by the mining operations conducted under the service contract.[66]

66 Standard Provisions (Service Contracts: DENR and Service Contractors [Small Scale Miners]).

The production sharing is 85% (for the small scale miner) and 15% (for the government (DENR) as operator) or at such percentage as may be agreed upon. This takes the form of a "service fee" measured by percentage by weight of the actual ore mined delivered and allocated to the parties in bags of equal weight. The operator (DENR) has the option to buy the gold or the "right of first refusal" to buy the final metal products of the service contractor (small scale miners) but both parties shall sell their final metal products to the Central Bank.

CONCLUDING STATEMENT:

The rule of law is the key against the chaos for which Diwalwal has long been identified with. The decision in the Southeast Mindanao Mining Corp. case is only the start of era of rule of law in Diwalwal, as there are still many cases to be resolved in the administrative level.

The everyday drama that happens at the Diwalwal Gold Rush Area was brought into focus in the year 2002 and continues up to the present. The environmental damage may be irreversible and socio-economic conditions may defy immediate solutions. The problems that surrounds the *dramatis personae* at Diwalwal go beyond what is legal or constitutional for they strike at the core of existence and survival of the vast number of Filipinos who seek to earn a living in the gold rich mountains of Diwalwal. As demonstrated in the measures taken by the DENR to meet the emergency situation at Diwalwal, it takes political weal and determination to establish order in a community in chaos, restore peace in the society wrecked by conflicting claims and divergent interests, to protect the environment degraded by human neglect, human greed and wanton waste of resources. It is in Diwalwal where the wisdom and effectiveness of the policy of direct government intervention whether it be under its general police power or under the

"*jus regalia*" over the nation's natural resources has been aptly demonstrated. It is in Diwalwal where the RULE OF LAW is most urgently needed and it is in allowing the RULE OF LAW to prevail where solutions to its multifarious problems will eventually be found.

NO MORE "ILOVEYOUS"

Lessons Learned from the "ILOVEYOU" Virus: International Law and Philippine Legislation in Relation to Cybercrime

*By Rebecca E. Khan**

I. INTRODUCTION

In the year 2000, a malevolent computer virus crippled information systems worldwide, endangered national security technological infrastructure, paralyzed businesses from Asia to the United States, and resulted in billions of dollars in damage.[1] The "ILOVEYOU" virus was eventually traced to a computer hacker in the Philippines,[2] and the Philippines quickly became the focus of the glaring eyes of the global community. Heeding the international outcry to prosecute the hacker, Philippine officials tried to file charges but ultimately failed due to the lack of a penal statute that defined the hacker's acts as an offense.[3] In the end, the hacker suspected of causing inordinate damage to computer systems

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1 David Ruppe, *"Love Bug" Travels the Globe* (5 May 2000), *available at* http://more.abcnews.go.com/sections/world/DailyNews/lovebug000505_world.html.

2 Associated Press, *Philippine Official Kills Charge in "Love Bug" Case* (17 May 2000), *available at* http://more.abcnews.go.com/sections/tech/DailyNews/virus000517.html.

3 Associated Press, *Charges Dismissed: Philippines Drops Charges in "Love Bug" Virus Case* (21 August 2000), *available at* http://more.abcnews.go.com/sections/tech/DailyNews/lovebug000821.html.

worldwide got off scot-free, and the international community blamed inadequate Philippine legislation for letting him go.[4]

Because of the far-reaching effects of the virus, which had spread itself through e-mail systems throughout the globe, the world finally understood how powerful and pervasive the Internet had become.[5] More importantly, this incident highlighted the widening gap between technology and the law.[6] The law had failed to keep apace with the rapid growth of the Internet and the novel problems it presented.

That the law had yet to catch up with the Internet was true not only for Philippine law, but for international law as well; despite the fact that other countries which had been affected by the virus — such as the United States — had adequate legislation[7] that punished the hacker's acts, those countries were powerless because they had no jurisdiction over the person of the accused.[8] This dilemma emphasizes the fact that crimes committed over the Internet usually partake of a transborder nature, with acts

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4 Shannon C. Sprinkel, *Global Internet Regulation: The Residual Effects of the "ILOVEYOU" Computer Virus and the Draft Convention on Cyber-Crime*, 25 SUFFOLK TRANSNAT'L L. REV. 491, 498 (2002) (discussing the Philippines' lack of a law governing cybercrime).

5 *See generally* the Explanatory Report on the Convention on Cybercrime, *available at* http://conventions.coe.int/Treaty/en/Reports/Html/185.htm

6 *See* Joao Godoy, *Computers and International Criminal Law: High Tech Crimes and Criminals*, 6 NEW ENG. INT'L & COMP. L. ANN. 95, 112 (2000) (discussing how technology is always faster than the ability to produce new legislation).

7 The United States has already enacted several statutes which apply directly to computer crimes, or can be made to apply to such crimes. Following this example, several countries throughout the world have also adopted computer-specific criminal codes that address unauthorized access and manipulation of data, similar to the Computer Fraud and Abuse Act of 1996 in the United States. Michael Hatcher, Jay McDannell and Stacy Ostfeld, *Computer Crimes*, 36 AM. CRIM. L. REV. 397, 401-429 and 436 (1999) (discussing Federal and State codes of the United States, and international approaches to cybercrime).

8 Extradition was not an option, because extradition treaties call for double criminality. *See* discussion *infra* Part V.B.1.b.

commencing in one State but resulting in effects in another State. This indicates that local legislation will never be sufficient to address the problem of Internet crime; crime committed in cyberspace is an international problem which requires international solutions. [9]

The present paper will examine the relationship between cyberspace and the law, with a focus on crimes committed on the Internet, now popularly known as "cybercrime." The discussion will be twofold: first, cybercrime will be tackled from the perspective of International Criminal Law, particularly on the issue of criminal jurisdiction. Second, Philippine laws will be examined and assessed. After this discussion, recommendations shall be made for further legislation and international conventions.

II. A SPACE WITHOUT BORDERS

An understanding of concepts such as the Internet, cyberspace and the World Wide Web is essential before proceeding with a discussion on the legal regime governing them. This portion of the paper will describe these concepts and provide a brief history of the development of the Internet.

The Internet is an international network of interconnected computers that makes it possible for millions of people to communicate with one another in cyberspace and to access vast amounts of information from around the world.[10] Cyberspace, which is a concept distinct from but necessarily related to the Internet, is the electronic or virtual space created by computers

9 Steve Shackelford, *Computer-Related Crime: An International Problem in Need of an International Solution*, 27 TEX. INT'L L. J. 479, 480 (1992) (discussing how countries which have already enacted cybercrime-specific legislation fail to address the international aspects of computer-related crime).

10 *Reno v. American Civil Liberties Union*, 521 U.S. 844, 845 (1997).

connected together in the Internet, in which a user may move and act with the consequences in the real world.[11] Cyberspace, being a virtual space, is not located in any particular geographical location, but can be accessed by anyone, anywhere in the world, with access to the Internet.[12]

The Internet has its roots in ARPANET, a project begun in 1969 by the United States Department of Defense.[13] The ARPANET was designed to enable defense researchers at various sites across the United States to communicate and collaborate.[14] In 1973, ARPANET was connected with an increasing number of other computer networks throughout the United States and other countries; this eventually evolved into the Internet as we know it today.[15]

Around the globe, millions of people are utilizing the Internet for information, research, commercial transactions, and interpersonal correspondence.[16] Individuals can obtain access to the Internet from many different sources. For example, most colleges and universities around the world provide access for their students and faculty; many corporations provide their employees with access through an office network; or individuals can pay for Internet usage by subscribing to an Internet Service Provider or by going to internet cafes.[17]

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11 GERALD R. FERRERA ET AL., CYBERLAW: TEXT AND CASES 414 (2001) [hereinafter CYBERLAW].

12 *Reno v. ACLU*, 521 U.S. at 851.

13 *Id.* at 849.

14 CYBERLAW, *supra* note 11, at 3; *Reno v. ACLU*, 521 U.S. at 850.

15 CYBERLAW, *supra* note 11, at 3.

16 *Id.* at 2.

17 *Reno v. ACLU*, 521 U.S. at 850.

Anyone with access to the Internet may utilize a wide variety of communication and information retrieval methods, such as electronic mail, automatic mailing list services, newsgroups, chat rooms, and the World Wide Web.[18]

The World Wide Web is the best known category of communication over the Internet. It allows users to search for and retrieve information stored in remote computers, as well as to communicate back to designated sites.[19] The Web is comprised of an immeasurable number of documents stored in different computers all over the world. Many of these documents are known as "web pages," each identified by a unique address called a uniform resource locator (URL).[20] Just as any person anywhere in the world can retrieve information from the World Wide Web, any person or organization with a computer connected to the Internet can "publish" or send information over the World Wide Web.[21]

As of the end of the year 2002, research estimated that the total number of Internet users worldwide had reached 490 million.[22]

As the global use of the Internet increases, so does the potential for its abuse. A surge in cybercrime is inevitable, considering how readily available the Internet and computers are for perpetrators of these crimes, and that the Internet provides inexpensive and worldwide communication in seconds, has few barriers and relatively no limitations.[23] These characteristics of the

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18 *Id.* at 851.

19 *Id.* at 852.

20 CYBERLAW, *supra* note 11, at 6.

21 *Reno v. ACLU*, 521 U.S. at 853.

22 Worldwide Internet Population *at* http://www.commerce.net/research/stats/wwstats.html (last visited 8 March 2003).

23 Sara L. Marler, The Convention on Cyber-Crime: Should the United States Ratify?, 37 NEW ENG. L. REV. 183, 187 (2002).

Internet and cyberspace create a hospitable environment for the commission of international computer crimes.[24] To comprehend the novel problems that crimes committed in cyberspace presents, one must grasp the idea that cyberspace is borderless.

As previously stated, cyberspace is not tied to any particular geographical location. It has been said that cyberspace is "everywhere and nowhere."[25] Although this description of cyberspace somewhat partakes of the metaphysical, it is, perplexingly enough, an accurate description. Cyberspace has no geographic or political boundaries; computer systems can be easily and surreptitiously accessed from anywhere in the world.[26] National borders are immaterial when it comes to the commission of cybercrime.[27] A case in point would be the "ILOVEYOU" virus, which originated in the Philippines and spread rapidly through government and computer systems in more than 20 countries, in just a matter of minutes.[28]

Because of the structure of the Internet and cyberspace, it becomes clear that cybercrime will almost always have an international dimension.[29]

III. CYBERCRIME

The term "cybercrime" denotes crime occurring on the Internet or via the Internet,[30] and this will be the definition of

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24 Godoy, *supra* note 6, at 96-97.

25 Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH. L. REV. 69 (1997).

26 Hatcher, et.al., *supra* note 7, at 435.

27 Patricia L. Bellia, *Chasing Bits across Borders*, 2001 U CHI LEGAL F 35, 37 (2001).

28 *Id.*

29 *See generally* Steve Shackelford, *Computer-Related Crime: An International Problem in Need of an International Solution*, 27 TEX. INT'L L. J. 479

30 Marler, *supra* note 23, at 185.

cybercrime for purposes of this paper. The terms "computer crime," and "cybercrime" are regularly interchanged with one another and therefore can have a similar meaning.[31] However, it can be said that "computer crime" is the more general term of the two, because it is broadly defined as "any illegal act that involves a computer, its systems, or its applications,"[32] or "any violations of criminal law that involve a knowledge of computer technology for their perpetration, investigation, or prosecution."[33] A discussion on computer crime in general applies to cybercrime, the only element missing being the utilization of the Internet. For purposes of this paper, the literature on the more general field of computer crimes was tapped, as it is applicable to the discussion on cybercrime in particular.

Computer crime comes in two major categories: first, crimes wherein a computer is the object or target; second, crimes wherein a computer is the subject or tool in their commission.[34]

In crimes wherein a computer is the target, the perpetrator uses the computer to obtain information or to interfere or damage operating systems or programs.[35] Common examples of this type of crime include theft of intellectual property, the introduction of computer viruses and the alteration of data.[36]

In crimes wherein a computer is the tool in the commission of the crime, computers are used to facilitate crimes which are

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31 *Id.*

32 CYBERLAW, *supra* note 11, at 300.

33 Hatcher, et.al., *supra* note 7, at 399.

34 Shackelford, *supra* note 9, at 483; Hatcher, et.al., *supra* note 7, at 401; CYBERLAW, *supra* note 11 at 302-303. A third category is listed by some authors: crimes wherein the computer is used to commit traditional crimes, or in other words, are merely incidental to the crime. The current paper, however, is not going to delve into this category.

35 CYBERLAW, *supra* note 11, at 302.

36 *Id*; Shackelford, *supra* note 9, at 483.

usually a high-tech variation of a traditional criminal offense.[37] Examples of this type of crime include the transmission of pornography and fraudulent e-commerce transactions.[38]

Specific acts of cybercrime come in many forms, and will not be discussed in detail here. For purposes of this paper, a rudimentary listing will suffice. Types of cybercrime can be grouped into three main categories: crimes against natural and juridical persons, crimes against property, and crimes against government.[39]

Crimes against persons include the following: pornography, harassment, stalking, death threats, fraud,[40] gambling, hate crimes,[41] spamming,[42] and the sale of controlled items.[43] Examples of crimes against property are commercial espionage, commercial extortion, hacking,[44] cracking,[45] malware,[46] data manipulation,[47] and software and hardware piracy. Finally, cybercrimes against the government include espionage and terrorism.[48]

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37 CYBERLAW, *supra* at 302.

38 *Id.* at 303.

39 *Id.* at 304-307.

40 Includes credit card fraud and fraudulent e-commerce transactions.

41 The communication of threatening messages to people on the basis of race, color, ethnicity, etc.

42 Sending unsolicited bulk e-mail advertisements. CYBERLAW, *supra* note 11, at 420.

43 *See* CYBERLAW, *supra* note 11, at 304-305.

44 the process of gaining access to computers or sites where no access was intended. CYBERLAW, *supra* note 11 at 416.

45 intentional, malicious hacking. CYBERLAW, *supra* note 11 at 414.

46 any harmful software or hardware, including viruses, worms, logic bombs, etc. CYBERLAW, *supra* note 11 at 417.

47 changing or erasing existing information. CYBERLAW, *supra* note 11 at 414.

48 CYBERLAW, *supra* note 11 at 307.

IV. THE LOVE BUG

In order to give the reader a more concrete picture of how a cybercrime transpires and how it acquires an international dimension, perhaps it would be helpful to provide an illustration of an actual event. As discussed in the introduction, The ILOVEYOU virus brought cybercrime to the forefront of international concerns and put the Philippines and the rest of the world in a legal quandary. This section will discuss the events surrounding the ILOVEYOU virus.

On 4 May 2000, an e-mail message began circulating with the subject line "ILOVEYOU" and the message "kindly check the attached loveletter coming from me."[49] The e-mail contained an attachment that if opened, caused the virus to rapidly proliferate by automatically sending copies to everyone listed in a user's e-mail address book.[50] This overloaded e-mail servers around the world, slowed them down, or stopped them, and prevented other e-mail from being sent.[51] The e-mail first appeared in the Philippines, where it overloaded systems in Philippine banks, universities and e-commerce businesses.[52] The virus quickly traveled the globe — by midday, about 30 percent of British companies' e-mail systems were affected; hours after the virus struck London, it traveled to America, where the virus was said to have hit at least 350,000 files in the United States alone.[53] Within a matter of hours, the virus had rapidly spread to private, commercial, and government computers across Asia, Australia, Europe and North America.[54] The damage caused by the virus was estimated at $10 billion.

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49 Ruppe, *supra* note 1

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

The creation of the virus was eventually traced to Onel de Guzman, a dropout of the AMA Computer College.[55] Trying to find a law that would fit de Guzman's acts, the National Bureau of Investigation filed charges against de Guzman under the Access Device Act[56] that penalizes the illegal use of passwords specifically in credit card and bank transactions. The Philippine Department of Justice, however, dropped all charges on 21 August 2000, because the law could not be made to apply to computer hacking.[57]

Reacting to international criticism on the Philippines' lack of a statute punishing computer crime, then-President Estrada signed the E-Commerce Act[58] into law on 14 June 2000.[59] The Act, which penalizes hacking, could not, however, be applied retroactively to make de Guzman liable. Thus, de Guzman was not prosecuted for his acts.

Throughout this paper, reference will be made to the ILOVEYOU virus incident for purposes of illustration.

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55 Associated Press, *supra* note 2.

56 Rep. Act No. 8484 (1998). Sec. 9 of that Act prohibits, among other acts: producing, using, trafficking in one or more counterfeit access devices; trafficking in one or more unauthorized access devices or access devices fraudulently applied for; using, with intent to defraud, an unauthorized access device; using an access device fraudulently applied for; possessing one or more counterfeit access devices or access devices fraudulently applied for.

57 Associated Press, *supra* note 3; Sprinkel, *supra* note 4, at 492.

58 Rep. Act No. 8792. *See* discussion *infra* Part VI.A.

59 Associated Press, *Philippines Sets New Cyber Law* (15 June 2000) *available at* http://more.abcnews.go.com/sections/tech/DailyNews/virus000615.html.

V. INTERNATIONAL CRIMINAL LAW AND JURISDICTION OVER CYBERCRIME

As discussed earlier, cybercrime almost always has an international dimension, due to the borderless nature of the Internet and the ease by which criminal acts in one State can have effects in another State.

The international element which most cybercrimes possess does not automatically bring cybercrimes within the definition of international crime.[60] Cybercrime is a relatively new type of crime, and to date there has yet to be a form of cybercrime which is universally recognized as criminal.[61] However, even if cybercrimes have not attained the status of international crimes, the transborder nature of cybercrimes does bring these crimes within the ambit of International Criminal Law.

Currently, cybercrime is primarily governed by municipal law. The punishment of cybercrime is dependent on the existence of local legislation punishing acts of cybercrime where those acts are committed.[62] Thus, International Criminal Law for the purposes of this study is International Criminal Law in the meaning of

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60 An international crime is such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 3 (2001), citing Hostages Trial, US Military Tribunal at Nuremberg, 19 February 1948 (1953) 15 Am. Dig. 632 at 636.

61 Take note, however, that certain crimes, such as child pornography are consistently condemned in several States. *See* Godoy, *supra* note 6, at 114. Also, the use of the Internet in the perpetration of the 11 September 2001 terrorist attacks, as well as hacking into U.S. government websites by China have called attention to what may be an emerging crime of cyberterrorism. *See generally* Daniel M. Creekman, *A Helpless America? An Examination of the Legal Options Available to the United States in Response to Varying Types of Cyber-Attacks from China*, 17 AM. U. INT'L L. REV. 641 (2002).

62 Sprinkel, *supra* note 4, at 497 (discussing how some States may criminalize computer-related offenses while others do not, thus impeding efforts to prosecute).

territorial scope of municipal criminal law,[63] or in the sense that a State applies its internal criminal law to events occurring elsewhere but having an impact on that State.[64]

International Criminal Law in this sense looks at a State's jurisdiction over criminal acts. Indeed, the issue of State jurisdiction is very tricky when it comes to the Internet. Internet users are constantly challenging the State's traditional ability to control activities occurring in and beyond its borders.[65]

Jurisdiction refers to the powers a State exercises over persons, property, or events.[66] Jurisdiction comes in three forms: prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction.[67]

A. Prescriptive and Adjudicatory Jurisdiction

Prescriptive jurisdiction is the power of a government to establish and prescribe criminal and regulatory sanctions.[68]

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63 "International Criminal Law" is used in at least six different meanings: International Criminal Law in the meaning of territorial scope of municipal criminal law; International Criminal Law in the meaning of internationally prescribed municipal criminal law; International Criminal Law in the meaning of internationally authorized municipal criminal law; International Criminal Law in the meaning of municipal criminal law common to civilized nations; International Criminal Law in the meaning of international cooperation in the administration of municipal criminal justice; and International Criminal Law in the material sense of the word. For a comprehensive discussion, see George Schwarzenberger, *The Problem of an International Criminal Law*, *in* INTERNATIONAL CRIMINAL LAW 5-14 (Gerhard O. W. Mueller & Edward M. Wise, eds., 1965).

64 WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 208 (3rd Ed., 2000) [hereinafter SLOMANSON].

65 *Id.* at 223.

66 MICHAEL BARTON AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW 109 (7th Ed., 1997) [hereinafter AKEHURST].

67 *Id.*

68 Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 532 (2002).

The legislature of a State has the power to enact laws governing conduct within its borders, and in some cases, even beyond its borders.[69]

Adjudicative jurisdiction refers to the powers of a State's courts to try and decide cases involving the persons, property or events in question.[70]

Four bases of jurisdiction have been invoked by courts to justify the exercise of prescriptive and adjudicative jurisdiction over crimes: the territorial principle, the nationality principle, the protective principle, and the universality principle.[71] These traditional jurisdictional theories, although existing in International Law long before the Information Age, continue to provide the bases for assuming jurisdiction over cybercrime.[72]

Under the territorial principle of jurisdiction, a State's jurisdictional authority is based on the location of the perpetrator's act.[73] A State has jurisdiction over any crime committed in whole or in part within its territory.[74] A crime is committed "in part" within the territory "when any essential constituent element is consummated there."[75]

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69 "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends," *U.S. v. Aluminum Co. of America*, 148 F. 2d 416 (1945) at 443; SLOMANSON, *supra* note 64, at 207.

70 AKEHURST, *supra* note 66, at 109.

71 D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 264-265 (5th Ed., 1998) [hereinafter HARRIS]; AKEHURST, *supra* note 66, at 110-113.

72 SLOMANSON, *supra* note 64, at 223; August, *supra* note 68, at 532.

73 SLOMANSON, *supra* note 64, at 209.

74 Harvard Research in International Law, Art. 3, Draft Convention on Jurisdiction with Respect to Crime, 29 Am. J. Int. L. Supp. 439 (1935) *in* INTERNATIONAL CRIMINAL LAW 41 (Gerhard O. W. Mueller & Edward M. Wise, eds., 1965).

75 HARRIS, *supra* note 71, at 278.

Noting that a State has jurisdiction over a crime which is committed even just *in part* within its territory, it becomes relevant to discuss the two sub-categories of this theory of jurisdiction: the subjective territorial principle and the objective territorial principle.[76] The subjective territorial principle justifies jurisdiction over criminal conduct which commences within a State and is then completed abroad.[77] The objective territorial principle is also known as the "effects doctrine," and jurisdiction is justified when injurious effects, although not the criminal conduct itself, occurred on the territory of a State.[78]

The act of unleashing the ILOVEYOU virus took place in the Philippines, but its damaging effects were felt in many other countries. Some of those countries already had laws which considered the virus creator's acts unlawful.[79] In theory, then, countries which had legislation penalizing the spread of computer viruses and were affected by the ILOVEYOU virus could have invoked the effects doctrine to assume jurisdiction over the criminal act.[80]

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76 AKEHURST, *supra* note 66, at 110; SLOMANSON, *supra* note 64, at 210.

77 SLOMANSON, *supra* note 64, at 210.

78 AKEHURST, *supra* note 66, at 110-111. The effects doctrine gained acceptance in International Law through the decision in the *Case of the S.S. Lotus* (*France v. Turkey*) (1927) P.C.I.J. Reports, Series A, No. 10 *in* HARRIS 267-277. In that case the court had the opportunity to declare: "...it appears to be now universally admitted that, where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction." (*cited in* HARRIS, *supra* note 71, at 278).

79 *See infra* note 7.

80 However, acquiring jurisdiction *over the criminal act* would have been fruitless because those States would not be able to acquire jurisdiction *over the person* of the accused. A country would have to have an extradition treaty with the Philippines in order to acquire jurisdiction over the person of the Love Bug creator. But even then, extradition treaties rely on the concept of "dual criminality," requiring that the offense sought to be punished be an offense punished under the criminal laws of the State where the accused is located and the State requesting extradition. *See, e.g.*, Extradition Treaty with the United States of America (1994), 1994 U.N.T.S. 279, Art. 2(1). Since the Philippines did not then punish the acts of the virus creator, the requirement of dual criminality was not met.

Because the territorial principle of jurisdiction can be invoked whenever any element of a crime occurs within the State claiming jurisdiction, in applying this theory to cybercrime, it is essential to consider every contact a defendant has with the forum territory and not just those which have effects there.[81] This is illustrated in the case of *Crown v. Waddon*, where the defendant, who was in the United Kingdom, posted pornographic materials on a server located in the United States in an attempt to escape liability under a British law which penalizes publication of obscene materials in the United Kingdom.[82] The British court sustained its assumption of jurisdiction by holding that publication had occurred in the United Kingdom because the defendant had transmitted the pornographic materials from his computer in the United Kingdom.[83]

To date, only the territorial principle of jurisdiction has been invoked by courts when dealing with cybercrime.[84]

The nationality principle of jurisdiction is based on the universally accepted rule that a State may regulate the conduct of its own citizens, and may prosecute its nationals for crimes committed anywhere in the world.[85] For example, if the creator of the ILOVEYOU virus was outside Philippine territory at the time he committed his criminal acts, the Philippines could claim jurisdiction over him on the basis of his Philippine nationality.

The protective principle allows a State to punish acts prejudicial to its security, even when they are committed by foreigners abroad.[86] Under this principle, any of the States that had

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81 August, *supra* note 68, at 537.

82 *Id.*; CYBERLAW *supra* note 11, at 344.

83 August, *supra* note 68, at 537; CYBERLAW *supra* note 11, at 344.

84 CYBERLAW, *supra* note 11, at 344; August, *supra* note 68, at 538-543.

85 AKEHURST, *supra* note 66, at 111.

86 *Id.*, at 111-112.

been affected by the ILOVEYOU virus could have claimed jurisdiction over the virus creator, even if he is a Philippine national and he committed his acts in the Philippines.[87]

Under the universality principle, any State can claim jurisdiction over an act that threatens the international community as a whole and which are criminal in all countries.[88] These refer to crimes such as war crimes, piracy, hijacking, and terrorism, all of which are universally condemned.[89] The applicability of this principle to cybercrimes is thus doubtful; cybercrimes are not yet criminalized in most countries, and thus very far from being considered as universally condemned.[90]

B. Enforcement Jurisdiction

Even if adjudicative jurisdiction can be acquired over a cybercrime, enforcement jurisdiction is a whole other matter, the lack of which can render the acquisition of adjudicative jurisdiction nugatory.[91]

Enforcement jurisdiction refers to the power of a State to compel compliance or to punish noncompliance with its laws or regulations.[92] The jurisdiction to enforce denotes the powers of physical interference exercised by the executive branch of

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87 *See supra* note 80.

88 AKEHURST, *supra* note 66, at 112.

89 *Id.*

90 *See supra* note 61.

91 Akehurst points out that that it is essential to differentiate between adjudicative and enforcement jurisdiction, citing for example, the distinction between the right to arrest and the right to try. Akehurst illustrates his point thus: "For instance, if a man commits a murder in England and escapes to France, the English courts have jurisdiction to try him, but the English police cannot enter French territory and arrest him there." AKEHURST, *supra* note 66, at 109.

92 August, *supra* note 68, at 560.

government.[93] It is comprised of two main powers: (1) the power to investigate and apprehend; and (2) the power to carry out a judgment.[94] In relation to judicial action, the first power refers to pre-adjudicatory jurisdiction, and the second is post-adjudicatory jurisdiction.[95]

A State's jurisdiction to enforce is, as a general rule, confined to its territory.[96] This flows from the principle of territorial sovereignty, which dictates that a State may not perform any governmental act in the territory of another State, without the consent or authorization of that State.[97] Without such consent or authorization, attempts to investigate, apprehend, or impose a judgment in another State are a violation of international law.[98]

1. Jurisdiction to Investigate and Apprehend

A State may only exercise its powers to investigate and apprehend within its own territory. The power to investigate necessarily refers to the act of gathering evidence. The power to apprehend obviously pertains to the acquisition of custody over the person of the accused. If the evidence it seeks to obtain or the suspect over whom it wishes to gain custody is found in another State, then it must obtain the authorization of that State to exercise the powers to investigate and apprehend. This authorization is usually embodied in two types of treaties: Mutual Legal Assistance Treaties, and Extradition Treaties.

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93 AKEHURST, *supra* at 109.

94 August, *supra* note 68, at 561.

95 *Id.*

96 *Id.*

97 AKEHURST, *supra* note 66, at 109.

98 August, *supra* note 68, at 561.

a. Gathering Evidence in Another State

An essential part of criminal law is gathering evidence, and when dealing with cybercrime that cuts across borders, gathering evidence becomes extremely complicated.[99] The difficulty in gathering evidence arises not only because another State is involved, but is also due to the different ways a computer may hold and transmit information.[100] Indeed, there are two major problems that law enforcement officials will encounter when gathering evidence of cybercrime: first, much of the evidence will be located across international borders; and second, electronic evidence can easily be lost or destroyed.[101]

In cybercrime cases, a State which is intent on investigating an incident will often find that crucial evidence is located beyond its borders, such as when the data needed is located on an overseas server.[102] In the incident involving the ILOVEYOU virus, for example, the evidence of the virus was located on Philippine servers and computers.[103] Law enforcement officials of the United States thus had to obtain the cooperation of Philippine officials in conducting an investigation.[104]

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99 Godoy, *supra* note 6, at 109 (discussing how the act of gathering evidence in other countries is more complicated in the case of computer crimes).

100 *Id.*

101 Bellia, *supra* note 27, at 55-56.

102 *Id.* at 55.

103 Jim Krane and David Noack, *Love Bug Snarls E-mail Worldwide, Virus Jumps Continents Within Hours* (4 May 2000), *available at* http://www.fas.org/irp/news/2000/05/virus0504pm_01.htm. (discussing how the virus was traced to servers of Philippine Internet service provider Skyinet)

104 Michael A. Vatis, Statement for the Record on the NIPC's International Response to Cyber Attacks and Computer Crime Before the House Committee on Government Affairs, Subcommittee on Government Management, Information and Technology (26 July 2000), *available at* http://www.fbi.gov/congress/congress00/vatis072600.htm. (stating how the United States Federal Bureau of Investigation worked, through the LEGAT in Manila, with the Philippines' National Bureau of Investigation, to identify the perpetrator)

Cooperation in investigations is usually facilitated by a Mutual Legal Assistance Treaty.[105] Such a treaty allows State parties to obtain evidence found in each other's territory.[106] The Philippines has such a treaty with the United States,[107] and the United States was able to avail of the rights granted under the treaty during the investigation into the ILOVEYOU virus incident.[108]

When a Mutual Legal Assistance Treaty is not in force, a State which seeks to obtain evidence in another State can utilize letters rogatory.[109] A letter rogatory is a formal request sent through diplomatic channels to a court in another State for judicial assistance in criminal cases.[110]

b. Extradition

Very often, the perpetrator of a cybercrime will be found in a State other than the country which seeks to prosecute him or her. Using the ILOVEYOU virus incident as a case in point, several

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105 Keith Nicholson, *International Computer Crime: A Global Village Under Siege*, 2 NEW ENG. INT'L & COMP. L. ANN. 195, 205 (1996). (discussing how Mutual Legal Assistance Treaties are one of the best methods for fostering international cooperation in relation to computer abuse)

106 Godoy, *supra* note 6, at 111. A drawback to this method of obtaining evidence is that it is based on convention, and the rights that can be availed of under such a treaty is limited to States which are parties to such treaties.

107 1994 U.N.T.S. 309. The Philippines, however, has yet to avail of this treaty. All the requests for legal assistance have come from the United States, and the benefits of this treaty have thus far been one-sided, the Philippines always being the requested State. *See* Severino H. Gana, Jr., *Extradition and Legal Assistance: The Philippine Experience at* http://www.unafei.or.jp/pdf/57-06.pdf (last visited 18 March 2003).

108 Lynn Burke, *Hey Spyder: Love You, Too* (5 May 2000), *available at* http://www.wired.com/news/technology/0,1282,36139,00.html. (discussing how the Philippines' being a country with whom the United States has a Mutual Legal Assistance Treaty will facilitate the Love Bug investigation)

109 Godoy, *supra* note 6, at 111.

110 *Id.*

affected countries aside from the Philippines wanted to prosecute the virus creator. In view of the fact that cybercriminals will almost always be physically located abroad, extradition becomes one of the most important aspects of international computer law.[111]

Extradition is the surrendering of individuals by one State to another State, in order that they may be tried by the latter for offenses against its laws.[112] Under the Philippine Extradition Law,[113] extradition is "the removal of an accused from the Philippines with the object of placing him at the disposal of foreign authorities to enable the requesting state or government to hold him in connection with any criminal investigation directed against him or the execution of a penalty imposed on him under the penal or criminal law of the requesting state or government."[114]

Extradition, however, is severely limited by two things. First, extradition is based on treaty,[115] and as such, can only be availed of between State parties.[116] Second, extradition treaties usually have a "dual criminality" clause which requires that the offender sought to be extradited committed an offense which is punishable under the laws of both State parties.[117]

The issue of the period when dual criminality must exist was passed upon by the British House of Lords.[118] It was held that

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111 *Id.* at 104 (discussing extradition in relation to computer crimes).

112 AKEHURST, *supra* note 66, at 117.

113 Pres. Decree No. 1069 (1977).

114 *Id.* Sec.2(a).

115 There is no duty to extradite in the absence of a treaty. AKEHURST, *supra* note 66, at 117.

116 Vienna Convention on the Law of Treaties, 23 May 1969, art. 12, 1155 U.N.T.S. 331.

117 *See, e.g.,* Extradition Treaty with the United States of America (1994), 1994 U.N.T.S. 279, Art. 2 (1).

118 Gana, *supra* note 107, citing the case of *Regina v. Bartle and the Commissioner of Police* (the Pinochet extradition appeal case).

dual criminality must exist at the time of the commission of the act and not at the time of the request.[119] This principle has become a source of frustration to law enforcement officials in countries where cybercrime legislation exists, when the laws of the requested State fail to address and punish computer-related offenses.[120] Again, the ILOVEYOU virus incident is a case in point. The Philippines only enacted a law punishing the virus creator's acts one month after the incident; the virus creator's acts not being a crime in the Philippines at the time of commission, the offender could not be extradited to any other country because the dual criminality requirement could not be met.

2. Jurisdiction to Enforce Judgments

A judgment of a court is directly enforceable overseas as long as it is not contrary to local law.[121]

In the case of *Ligue Contre la Racisme et l'Antisemitisme v. Yahoo*, a French trial court rendered judgment against the American company Yahoo, ordering it to remove Nazi memorabilia from its web sites.[122] This French judgment would have been enforceable in the United States had not Yahoo sought a declaratory judgment from a United States court which declared that the French judgment violated Yahoo's constitutional rights to free speech.[123] This case illustrates the point that a court's judgment is enforceable abroad only to the extent that it does not contravene laws of the State where it is sought to be enforced.

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119 *Id.*

120 Nicholson, *supra* note 105 (discussing the difficulties created by the dual criminality principle in relation to computer-related offenses).

121 August, *supra* note 68 at 565.

122 *Id.*

123 *Id.*

VI. PHILIPPINE LAW AND CYBERCRIME

As mentioned earlier, the person responsible for unleashing the ILOVEYOU virus went unpunished because of the lack of a penal statute in Philippine law which defined his acts as a criminal offense. For such inadequate legislation, the Philippines was heavily criticized by the international community. Reacting to this criticism, the Philippines has responded by taking legislative and procedural measures to fill the gap between law and technology. This section will examine and evaluate these measures. Since one of the major concerns that emerged after the ILOVEYOU virus incident was the existence of a statute defining the offense, particular attention will be devoted here to the sections in the statute and bills to be discussed which deal with the definition of offenses.

A. The Electronic Commerce Act of 2000

The Electronic Commerce Act[124] was signed into law on 14 June 2000, or just a little over a month after the Love Bug was unleashed unto the world. That this law was signed by then-President Joseph Estrada in such a proximate amount of time to the hullabaloo over the ILOVEYOU virus indicates the pressure Philippine legislators felt from worldwide criticism.[125] However, although this law was passed during the pendency of the investigation against the virus creator Onel de Guzman, the law could not apply retroactively to punish his acts.[126]

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124 Rep. Act No. 8792 (2000).

125 Associated Press, *Philippines Sets New Cyber Law* (15 June 2000), *available at* http://more.abcnews.go.com/sections/tech/DailyNews/virus000615.html.

126 CIVIL CODE, Art. 4.

The Electronic Commerce Act was obviously not primarily intended to be a penal statute. The title of the Act — Electronic *Commerce* — already bears that out, as does the fact that the statute was patterned after the UNCITRAL Model Law on Electronic Commerce.[127] This model law, prepared by the United Nations Commission on International Trade Law (UNCITRAL), was meant to be a pattern for State legislation that would facilitate trade in the age of electronic commerce.[128]

Indeed, the penal provisions in this statute are merely incidental.[129] The section which defines prohibited acts is tucked away in the catch-all portion of the statute labeled "Final Provisions." Section 33 of the Electronic Commerce Act penalizes the following acts:

> a) Hacking or cracking which refers to unauthorized access into or interference in a computer system/ server or information and communication system; or any access in order to corrupt, alter, steal, or destroy using a computer or other similar information and communication devices, without the knowledge and consent of the owner of the computer or information and communications system, including the introduction of computer viruses and the like, resulting in the corruption, destruction, alteration, theft

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127 VICENTE B. AMADOR, THE E-COMMERCE ACT AND OTHER LAWS @ CYBERSPACE 9 (2002).

128 *Id.* at 9-10.

129 Section 3 of R.A. 8792 sets forth the objective of the Act: "This Act aims to facilitate domestic and international dealings, transactions, arrangements, agreements, contracts and exchanges and storage of information through the utilization of electronic, optical and similar medium, mode, instrumentality and technology to recognize the authenticity and reliability of electronic documents related to such activities and to promote the universal use of electronic transactions in the government and by the general public." The primary focus is clearly on trade, not the prevention of crime, which is just incidental to the objective of the statute.

> or loss of electronic data messages or electronic document [...];
>
> b) Piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunication networks, such as, but not limited to, the internet, in a manner that infringes intellectual property rights [...];
>
> c) Violations of the Consumer Act or Republic Act No. 7394 and other relevant or pertinent laws through transactions covered by or using electronic data messages or electronic documents [...];
>
> d) Other violations of the provisions of this Act [...].

This provision provides a rudimentary listing of cybercrimes and is wide enough in scope to cover the most common cybercrimes. Most importantly, it penalizes the introduction of viruses, which is what the creator of the Love Bug could have been charged with, had this law already been in force at the time he unleashed the virus. Paragraph (a) penalizes hacking, cracking, malware and data manipulation.[130] Paragraph (b) penalizes piracy and other violations of intellectual property rights. Paragraph (c) can be interpreted to penalize computer fraud, although this is not too clear-cut. It will be noted that the list of penalized acts here

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130 *See* discussion on cybercrimes, *infra* Part III.

are confined to crimes against *property*, which is corollary to the fact that this section is part of a statute governing commerce.

However, cybercrimes affect more than property. As discussed earlier, cybercrimes can also be directed against persons and the government,[131] or even public order. While, arguably, other cybercrimes not covered by the Electronic Commerce Act can be punished by other laws such as the Revised Penal Code[132] or special laws,[133] it is entirely possible that the definitions contained in these antiquated penal laws have been left behind by technological innovations, which put the harmful acts beyond the scope of the law. Whether or not these laws will be adequate to govern these new crimes will be put to the test when an incident of cybercrime occurs. A clear example is the ILOVEYOU virus, as already discussed, where Philippine laws failed to measure up.

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131 *See* discussion *infra* Part III.

132 Although it has yet to be tested, online pornography, for example, could be punished under Art. 201 of the Revised Penal Code, which imposes a penalty on: (1) Those who shall publicly expound or proclaim doctrines openly contrary to public morals; (2) (a) The authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same; (b) Those who, in theaters, fairs, cinematographs or any other place, exhibit indecent or immoral plays, scenes, acts or shows, it being understood that the obscene literature or indecent or immoral plays, scenes, acts or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic in and use of prohibited drugs; and (5) are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees and edicts; (3) Those who shall sell, give away or exhibit films, prints, engravings, sculptures or literature which are offensive to morals. While clearly, online activities were not contemplated in this provision, if these activities are committed online, then the element of public display or publication can be said to have taken place.

133 For example, illegal gambling is governed by Presidential Decrees Nos. 449, 483 and 1602, as amended by Letter of Instructions No. 816. These laws could, conceivably, be made to apply to online gambling, if the prohibited acts under these statutes are committed via the Internet.

To date, the Electronic Commerce Act is the only statute in force that applies to cybercrimes. The penal provision in the Electronic Commerce Act is basic, and there is much to be refined and improved upon. Answering this need are several pending bills in Congress, which shall be discussed next.

B. Senate Bill No. 2025

Senate Bill No. 2025 was introduced by Senator Ramon Magsaysay, Jr. in the year 2000, soon after the Love Bug fiasco. The bill is entitled "An Act Providing Protection Against Computer Fraud and Abuses and Other Cyber-Related Fraudulent Activities, Providing Penalties Therefor and for Other Purposes."

The bill was prompted by the ILOVEYOU virus, and this is made clear in the explanatory note penned by Senator Magsaysay: "The need for a special law addressing the concerns of computer owners, cyber users and the entire consumer sector as a whole heightened with the occurrence very recently of the so-called "I LOVE YOU messages or "lovebug" computer virus."[134] The bill seeks to punish computer fraud,[135] computer forgery,[136] damage

134 Explanatory note, S.B. 2025.

135 Defined as "the input, alteration, erasure or suppression of computer data or computer programs, or other interferences in the course of data processing, that influences the result of data processing thereby causing economic or possessory loss of property of another person with the intent of procuring an unlawful economic gain for himself or for another person." S.B. 2025, Sec. 3.1.

136 Defined as "the input, alteration, erasure or suppression of computer data or computer programs, or other interference in the course of data processing, in a manner or under such conditions, as prescribed by national law, that would constitute the offense of forgery if it had been committed with respect to a traditional object of such an offense." S.B. 2025, Sec. 3.2.

to computer data or computer programs,[137] computer sabotage,[138] unauthorized access,[139] and unauthorized interception.[140] The bill also contains a lengthy provision punishing specific forms of unauthorized access to computers, such as access to computers of the national government, financial institutions, or medical facilities.[141]

Most of the crimes defined under the bill deal with crimes affecting national government computers. Accordingly, the bill also seeks to confer authority to the National Security Council, in addition to the other government agencies concerned, to investigate offenses defined in the bill, particularly if the violation committed affects the national security of the country.[142] This can be considered an unnecessary provision because acts which affect the national security of the country are already within the authority of the National Security Council.

C. House Bill No. 1310

House Bill No. 1310 was authored by Representative Nanette Castelo Daza, and is practically identical to Senate Bill No. 2025. House Bill No. 1310 is entitled "An Act Providing Protection Against Computer Fraud, Abuses and Other Cyber-Related

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137 Defined as "the erasure, alteration, damaging, deterioration or suppression of computer data or computer programs without right." S.B. 2025, Sec. 3.3.

138 Defined as "the input, alteration, erasure or suppression of computer data or computer programs, or interference with computer systems, with the intent to hinder the functioning of a computer or of a telecommunications system." S.B. 2025, Sec. 3.4.

139 Defined as "the access without right to a computer system or network by infringing security measures." S.B. 2025, Sec. 3.5.

140 Defined as "the interception, made without right and by technical means, of communications to, from and within a computer system or network." S.B. 2025, Sec. 3.6.

141 S.B. 2025, Sec. 3.7.

142 *Id.* Sec. 5.

Fraudulent Activities, Providing Penalties Therefor, and for Other Purposes." The punishable acts under this bill are identical to those defined in Senate Bill No. 2025, with the addition that this bill also punishes whoever "introduces immoral doctrines, obscene publications and exhibitions, and indecent shows in cyberspace."[143] Just like Senate Bill No. 2025, House Bill No. 1310 also accords authority to the National Security Council to conduct investigation on computer-related crimes *vis-à-vis* its effects on national security.[144]

D. House Bill No. 1908

Penned by Representative Ma. Victoria L. Locsin,[145] House Bill No. 1908 is entitled "An Act Defining Computer Crimes, Providing Penalties Therefor, and for Other Purposes." In its explanatory note, the bill highlights the need for legislation specific to computer crimes, and also points to the Love Bug as its impetus: "The creator of the virus was traced locally. However, local and foreign law enforcement officials could only wring their hands in frustration and despair when it was discovered that no law could be properly applied to charge the perpetrator in court."[146]

One of the salient features of this bill is its comprehensive definition of terms. Among the terms defined in the bill are "computer virus" and "damage." "Computer virus" is defined as a computer program copied to or installed on a computer, computer network, computer program, computer software, or computer

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143 H.B. 1310, Sec. 3.7, par. (g).

144 *Id.* Sec. 5.

145 Note, however, that Cong. Locsin was unseated by Eufrocinio Codilla, Sr. following a unanimous decision of the Supreme Court on 10 December 2002 (*Codilla v. Locsin*, G.R. 150605).

146 Explanatory Note, H.B. 1908

system without the informed consent of the owner of the computer, computer network, computer program, computer software, or computer system that may replicate itself and that causes unauthorized activities within or by the computer, computer network, computer program, computer software, or computer system.[147] "Damage" takes on an extensive definition in this bill:

"Damage" refers to any impairment to the integrity or availability of data, a program, a system, or information that:

1) Causes loss aggregating to not less than ten thousand pesos in value to one or more persons, natural or juridical, during any one year period;

2) Modifies, impairs, or potentially modifies or impairs, the medical examination, diagnosis, treatment, or case of one or more persons;

3) Causes physical injury to any person; or

4) Threatens public health and/or safety.

Proceeding from the definitions, the bill then goes on to enumerate a comprehensive list of offenses. The bill enumerates several prohibited acts, including access to government and private computers and the information therein, trafficking of passwords, and variants of computer-assisted fraud.[148]

A significant portion of the section on prohibited acts is devoted to the distribution of computer viruses. This may be reflective of the Love Bug's impact on this piece of legislation. However, instead of simply penalizing the mere act of intentionally

147 H.B. 1908, Sec. 3(g).

148 *Id.* Sec. 4.

unleashing a computer virus, the bill sets forth particular requirements of damage before the act of unleashing a virus can be punished.[149] The verbosity of that particular section could result in loopholes in the law, if it is passed.

E. House Bill No. 3241

Representative Eric D. Singson is the author of House Bill No. 3241. The explanatory note of this bill, as in the other bills, also points to the Love Bug and its impact on international perception of the Philippines, saying, "cyberspace users became wary of receiving information from the Philippines through the Internet for fear of computer viruses." The bill is entitled "An Act Preventing and Penalizing Computer Fraud, Abuses and Other Cyber-Related Fraudulent Activities, and Creating for the Purpose the Cyber-Crime Investigation and Coordinating Center, Prescribing its Powers and Functions, and Appropriating Funds Therefor." It has a comprehensive list of prohibited activities, which seem to consolidate all the offenses listed in House Bills Nos. 1310 and 1908. With just slight variations in wording, House Bill No. 3241 seeks to punish the acts also sought to be punished in the two previously-discussed House Bills.

The innovative feature, however, of House Bill No. 3241 is its proposal to create a Cyber-Crime Investigation and Coordinating Center, a special body under the control and supervision of the Office of the President, tasked to combat cyber-related fraudulent activities and to investigate, coordinate, collate and synergize efforts of all law enforcement agencies in combating cybercrimes.[150]

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149 *See* H.B. 1908, Sec. 4(h[1-4]).

150 H.B. 3241, Sec. 4.

The proposal to create a special body to deal with cybercrimes is perhaps a recognition of the highly technical nature of such crimes and the need for additional expertise on the part of the officials dealing with their investigation and prosecution.

F. House Bill No. 4083

"An Act to Prevent and Penalize Computer Crimes" is the short and succinct title of House Bill No. 4083. Authored by Representative Amado T. Espino, Jr., the explanatory note also points out that the Love Bug virus "prompted the cyber world to hate the Philippines and consider it as a haven for cyber-terrorists and unscrupulous computer maniacs."[151] Equally succinct as its title is the list of prohibited acts under the proposed law. The bill seeks to punish: any person who without authorization shall hack, transmit, encode or introduce any program, code, command or virus to any computer and as a result of such conduct cause damage, destruction or alteration to any data, program or information stored therein;[152] any person who without authorization shall hack, transmit, encode or introduce any program, code, command or virus to any government computer and as a result of such conduct cause damage, destruction or alteration to any data, program or information stored therein;[153] any person who shall break any code, decoder, key, password or any security measure designed to prevent or secure a computer from unauthorized access;[154] Any person who shall pass any code, decoder, key, password or any security measure designed to access a protected or secured computer which is obtained by him/ her by reason of his/her position;[155] any person who shall hack or exceeds

151 Explanatory Note, H.B. 4083.

152 H.B. 4083, Art. 4, Sec. 1.

153 *Id.* Art. 4, Sec. 2.

154 *Id.* Art. 4, Sec. 3.

155 *Id.* Art. 4, Sec. 4.

authorized access to a computer and thereby obtain restricted, confidential, or exclusive program, information or data therein;[156] any person who shall use electronic mail to further criminal activities;[157] and any person who shall post, publish, introduce, or advertise pornographic materials or immoral business or activities in the internet.[158]

The other bills previously discussed had very lengthy lists and descriptions of prohibited activities, sometimes resulting in redundancy. Instead of going into excessive detail as the other bills have done, House Bill No. 4083 simply defines seven punishable acts which can be made applicable to cybercrimes commonly encountered.

This bill, just like House Bill No. 3241, also proposes the creation of a special body to deal with cybercrime, to be called the Anti-Cyber Crime Task Force.[159] The bill proposes that this task force be jointly organized and its members appointed by the National Computer Center and the National Bureau of Investigation.[160]

G. Procedural Laws

Currently, electronic evidence is excluded from criminal proceedings. The Supreme Court has already promulgated Rules on Electronic Evidence, and these rules took effect on 1 August 2001.[161] These rules govern the admissibility of electronic

156 *Id.* Art. 4, Sec. 5.

157 *Id.* Art. 4, Sec. 6.

158 *Id.* Art. 4, Sec. 7.

159 *Id.* Art. 5.

160 *Id.*

161 RULES ON ELECTRONIC EVIDENCE, Rule 12, Sec. 2.

documents,[162] electronic signatures,[163] as well as audio, photographic, video and ephemeral evidence.[164] However, these rules provide that they "shall apply to all civil actions and proceedings, as well as quasi-judicial and administrative cases,"[165] thereby impliedly excluding criminal proceedings from its coverage.

By limiting the application of the Rules on Electronic Evidence to civil actions and quasi-judicial and administrative cases, the Supreme Court reveals its hesitancy to allow the immediate use of electronic evidence in criminal actions, opting instead to give the courts, lawyers and litigants more time to familiarize themselves with the use of electronic evidence.[166] This apprehensive attitude toward the immediate application of these novel rules may be borne by the fact that criminal proceedings necessarily involve the life and liberty of the persons accused, and should thus be treated with extreme caution.

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162 *See* RULES ON ELECTRONIC EVIDENCE, Rules 3, 5, 7. Rule 2, Sec. 1(h) defines "electronic document" as information or the representation of information, data, figures, symbols or other modes of written expression, described or however represented, by which a right is established or an obligation extinguished, or by which a fact may be proved and affirmed, which is received, recorded, transmitted, stored, processed, retrieved or produced electronically. It includes digitally signed documents and any print-out or output, readable by sight or other means, which accurately reflects the electronic data message or electronic document.

163 *See* RULES ON ELECTRONIC EVIDENCE, Rule 6. Rule 2, Sec. 1(j) defines "electronic signature" as any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedure employed or adopted by a person and executed or adopted by such person with the intention of authenticating, signing or approving an electronic data message or electronic document. For purposes of these Rules, an electronic signature includes digital signatures.

164 *See* RULES ON ELECTRONIC EVIDENCE, Rule 11. "Ephemeral electronic communication" refers to telephone conversations, text messages, chatroom sessions, streaming audio, streaming video, and other electronic forms of communication the evidence of which is not recorded or retained. Rule 2, Sec. 1(k).

165 RULES ON ELECTRONIC EVIDENCE, Rule 1, Sec. 2.

166 AMADOR, *supra* note 127, at 530.

It must be pointed out, however, that the exclusion of electronic evidence in criminal proceedings could lead to unacceptable results and incongruity.[167]

The exclusion by the Supreme Court of criminal proceedings from the coverage of the Rules on Electronic Evidence appears to be incongruent to the intentions of legislators in passing the Electronic Commerce Act, which took effect a year earlier than the Rules on Electronic Evidence did. Particularly, there is incongruence with respect to the admissibility of electronic evidence.[168]

Regarding the admissibility of electronic evidence, the Electronic Commerce Act provides that "in any legal proceedings, nothing in the application of the rules on evidence shall deny the admissibility of an electronic data message or electronic document in evidence on the sole ground that it is in electronic form."[169] The Electronic Commerce Act, by using the phrase "in any legal proceeding" indicates no intention on the part of the legislature to distinguish between civil and criminal proceedings. That criminal proceedings were also contemplated is necessarily inferred from the inclusion of penal provisions in the Electronic Commerce Act.[170]

The Rules on Electronic Evidence, however, provide that an electronic document is admissible if it is authenticated in the

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167 *Id.*

168 Note, however, that section 5(5) of Article VIII of the Constitution gives the Supreme Court the power to promulgate rules concerning pleading, practice, and procedure in all courts. This makes it appear that Congress no longer has the power to repeal, alter or supplement the rules on pleading, practice and procedure promulgated by the Supreme Court. JOSE Y. FERIA, 1997 RULES OF CIVIL PROCEDURE 1 (2000). Thus, the promulgated Rules on Electronic Evidence would prevail over the rules on admissibility contained in the Electronic Commerce Act, an act of the legislature.

169 Rep. Act No. 8792, Sec. 12.

170 *Id.* Sec. 33.

manner prescribed by those Rules.[171] The Rules, however, do not apply to criminal proceedings.

A gap, therefore, exists between the existing penal law on cybercrimes and the means by which their commission can be proven. Cybercrimes and other crimes committed by means of a computer will necessarily involve electronic evidence, or data stored in computers. But even if a law already exists to punish cybercrimes, the electronic trail created by criminals who commit such crimes cannot be used in the criminal action filed against them.[172] The lack of procedural rules to govern electronic evidence in criminal proceedings, therefore, may prove fatal to a prosecution for the offenses defined by the Electronic Commerce Act.

VII. RECOMMENDATIONS

The ILOVEYOU virus incident illustrated the need for two things in controlling cybercrime: local legislation and international cooperation.[173] This section will discuss features of a proposed new cybercrime-specific statute, and factors to consider in the drafting of a treaty.

A. The Proposed Cybercrime Prevention Act

A policy-making body of the government has taken it upon itself to draft a comprehensive bill aimed at the prevention of cybercrime. The Information Technology and Electronic Commerce

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171 RULES ON ELECTRONIC EVIDENCE, Rule 3, Sec. 2.

172 AMADOR, *supra* note 127, at 529.

173 Shackelford, *supra* note 9, at 503 (discussing how it is apparent that to successfully combat computer-related crime, not only must countries enact legislation, but they must also foster international cooperation).

Council (ITECC)[174] drafted the "Cybercrime Prevention Act of 2002,"[175] by consolidating the bills pending in Congress discussed earlier.[176] However, this draft has not yet been finalized by ITECC, and no sponsors in Congress have yet been sought for the proposed bill.[177]

The proposed bill is entitled "An Act Defining Cybercrime, Providing for Prevention, Suppression and Imposition of Penalties Thereof and For Other Purposes." The salient features of this bill include a comprehensive definition of terms,[178] a thorough listing of prohibited acts,[179] and the creation of a special administrative body to deal with cybercrime.[180] These features were culled from the bills pending in Congress. However, this draft bill goes a step beyond the pending bills by including provisions on issues that have not been addressed by those bills; these issues include search

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174 ITECC is chaired by the President of the Philippines and is the country's highest policy-making body with respect to information technology. It was created by then-President Estrada in the year 2000 through E.O. 264 which merged the National Information Technology Council and the Electronic Commerce Promotion Council to form ITECC. In 2001, President Macapagal-Arroyo transferred the chairmanship of ITECC to the President, through E.O. 18, which also expanded, enhanced, and accelerated ITECC's policy-implementation capabilities and decision-making processes. ITECC General Information, *at* http://www.itecc.gov.ph (last visited 10 March 2003).

175 *hereinafter* referred to as ITECC Draft Bill. The full text of the ITECC Draft Bill is at http://cybercrime.inmyhouse.net/docs/draft.pdf (last visited 10 March 2003).

176 Background Information on the Proposed Cybercrime Prevention Act of 2002, *at* http://cybercrime.inmyhouse.net (last visited 10 March 2003).

177 *Id.*

178 ITECC Draft Bill, Sec. 3. The bill defines the following terms: access, alteration, computer, computer data, computer program, computer system, cybercrime, damage, database, deletion, distribution, interception, making available of, network, non-public transmission, offering, procuring data or material, protected works, service provider, subscriber information, suppression of computer data, by technical means, traffic data, without right.

179 *Id.*, Secs. 11-16.

180 *Id.*, Sec. 4.

and seizure,[181] the preservation and disclosure of computer data,[182] and jurisdiction.[183]

Chapter III of the draft bill, entitled "Prohibited Acts," is devoted to the definition of offenses. The sections of the ITECC draft bill which defines prohibited acts read as follows:

> "SECTION 11. The following acts shall be punishable under this Act:
> 11.1. Illegal Access. — The access to the whole or any part of a computer system or network, without right, or by infringing security measures, with intent to obtain computer data or program, or in the pursuit of a dishonest intent, and causing damage to another.
> 11.2. Illegal Interception.— The interception made by technical means, without right, of any non-public transmission of computer data to, from, or within a computer system, including electromagnetic emissions from a computer system carrying such computer data, to pursue a dishonest or fraudulent intent.
> 11.3. Data interference. — The intentional damaging, deletion, deterioration, alteration or suppression of computer data, without right.
> 11.4. System Interference. — The intentional and unauthorized hindering or interference with the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or program.
> 11.5. Misuse of Devices. — The following acts shall constitute misuse of devices:

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181 *Id.*, Sec. 10.

182 *Id.*, Sec. 19.

183 *Id.*, Sec. 25.

a. The production, sale, procurement for use, import, distribution or otherwise making available of (i) a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offenses under Sections 11.1 to 11.4 hereof, or (ii) a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed.

b. The possession of an item referred to in paragraphs a (i) or (ii) above with intent to use said devices for the purpose of committing any of the offenses under Sections 11.1 to 11.4 hereof. Provided, however, that no criminal liability shall attach (i) when the production, sale, procurement, importation, distribution or otherwise making available of, or possession referred to in paragraph [a] above is for the authorized testing or protection of a computer system, program or network for a limited period.

11.6. Computer Forgery. —The input, alteration, erasure, or suppression of any computer data or computer program, or interference with the computer system, resulting in the corruption or adulteration of the data or program with the intent to give the same a semblance of authenticity, regardless of whether or not the data or program is directly readable and intelligible, for some fraudulent or dishonest purpose. The act of knowingly using computer data, which are the products of computer forgery, as defined herein, for the purpose of perpetuating a fraudulent or dishonest design and causing serious damage thereby, shall likewise be punishable under this Section.

11.7. Computer Fraud.—The intentional and unauthorized input, alteration, erasure or suppression of computer data or programs, or interference in the functioning of a computer system, with the intent of

> procuring an economic benefit for oneself or for another person or for the perpetuation of a fraudulent or dishonest activity.
>
> SECTION 12. Offenses related to Pornography. Any person guilty of the following acts is likewise punishable under this Act:
> a. Producing pornography for the purpose of distribution through a computer system or network;
> b. Offering or making available pornography through a computer system or network; or
> c. Distributing or transmitting pornography through a computer system or network.
> SECTION 13. Infringement of Intellectual Property Rights. —Any person who, without the knowledge or consent of the owner thereof, shall willfully copy, reproduce, disseminate, distribute, or make available online any protected works as defined herein by means of a computer system, to gain commercial advantage for his or another person's benefit shall, in addition to the penalty provided for under existing intellectual property laws, also be punishable under this Act."

Although several offenses are listed, it can be seen that they fall into three main categories: computer-specific crimes, pornography and intellectual property rights infringement. The offenses listed under Section 11—illegal access, illegal interception, data interference, system interference, misuse of devices, computer forgery, and computer fraud—are all offenses in which the computer is the object or target of the crime.[184] These offenses did not exist before the age of computers and have heretofore not been defined by the criminal laws of the Philippines.

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184 *See* discussion *infra* Part III.

The discussion earlier in this paper on the bills pending in Congress reveals that legislators are all agog about viruses, consistently citing the ILOVEYOU virus in the explanatory note of the bills, and making sure that the act of unleashing viruses is specifically prohibited under the bills' section on punishable offenses. A curious thing about the listing of prohibited acts in the ITECC draft bill is that the word "virus" does not appear anywhere.

But this does not mean that the problem of viruses is not addressed. The people in ITECC who drafted this bill are probably a lot more tech-savvy than the staff of congressmen and senators, and realized that the word "virus" does not have to appear in order to be punished. Instead of giving in to the media hysteria over the ILOVEYOU virus and making it the anchor point of the bill as the bills pending in Congress have done, the ITECC draft bill defines acts which are broad enough to encompass a whole host of computer-related crime.

Again taking the ILOVEYOU virus as an example, had this draft bill been the law in force at the time, then the virus creator could have been charged under *any* of the following prohibited acts as defined in the bill: illegal access, illegal interception, data interference, or system interference. This is because the unleashing of the virus resulted in all these acts.

The offenses of pornography and intellectual property rights infringement under Sections 12 and 13, respectively, of the draft bill are offenses which have the computer merely as a tool in the commission of the offense. While the draft bill tailors the definition of these offenses specifically to crimes committed online, the prosecution of these crimes could already be accomplished through existing laws.[185]

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185 REVISED PENAL CODE, Art. 201; INTELLECTUAL PROPERTY CODE. *See* notes 132-133.

The draft bill also seeks to punish conspiracy to commit cybercrime,[186] as well as accomplices in the commission of cybercrime,[187] and attempted cybercrime.[188] This feature is not found in the bills pending in Congress, where sections defining punishable acts are limited to the offenses committed.

ITECC, itself being a specialized government body, realized the importance of having a special body with technical expertise devoted to combating cybercrimes. Like two of the bills pending in Congress, the ITECC draft bill proposes the creation of a special body, called the Cybercrime Investigation and Coordinating Council, or CICC.[189]

The draft bill proposes that the CICC have the following powers and functions:

> "a. To prepare and implement appropriate and effective measures to prevent and suppress cybercrimes;
>
> b. To conduct intelligence and counter-intelligence operations to identify and prosecute person(s) and / or entities, including but not limited to private or government-owned corporations, government officials and employees, cybercrime syndicates and their cohorts engaged in cybercrimes and related activities.

186 ITECC Draft Bill, Sec. 14.

187 *Id.*, Sec. 15.

188 *Id.*, Sec. 16.

189 *Id.*, Sec. 4.

c. To effect searches and seizures in accordance with law, and to cause and / or implement the procedure for the arrest, investigation and prosecution of persons engaged in cybercrimes;

d. To refer the case(s) at hand, as the CICC may deem proper and necessary, to the Department of Justice, or any other appropriate law enforcement agencies for investigation or prosecution, as the case may be;

e. To follow up the progress of on-going investigation and prosecution of cases taken cognizance by the CICC;

f. To formulate and implement plans and programs for international cooperation on intelligence and investigations relative to cybercrime prevention, suppression and prosecution;

g. To coordinate the support and participation of the business sector, local government units and non-government organizations in the cybercrime prevention program and other related projects and undertakings of the CICC;

h. To recommend the enactment of appropriate cybercrime laws and issuances; and

i. To perform such other functions and duties necessary for the proper implementation of this Act."[190]

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190 *Id.*, Sec. 6.

The ITECC draft bill goes a step beyond the mere creation of this special body with the usual powers and functions as listed above, but also grants the CICC the powers of search and seizure. The draft bill allows the CICC, pursuant to a warrant, to: secure a computer system or part of it or a computer-data storage medium; make and retain a copy of those computer data secured; maintain the integrity of the relevant stored computer data; and render inaccessible or remove those computer data in the accessed computer system.[191]

Another salient feature of this draft bill is the proposal for the creation of a "Cybercrime Police Force."[192] Under the draft bill, the CICC is mandated to recommend the enactment of a law creating such a police force, wherein members would undergo a special training course in computer technology.[193] However, the creation of a separate cybercrime police force has been criticized for violating the constitutional mandate of having "*one* police force"[194] and for being unnecessary.[195]

An important provision on jurisdiction is included in the ITECC draft bill, jurisdiction being an issue neglected by the six pending bills. The draft bill provides:

> "The proper courts in the Philippines shall have jurisdiction over any violation of the provisions of this Act committed within the territory of the Philippines. In case any of the offenses herein defined is committed outside the territorial limits of the

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191 *Id.*, Sec. 10.

192 *Id.*, Sec. 24.

193 *Id.*

194 CONST. Art. XVI, Sec. 6.

195 Erwin Lemuel G. Oliva, *Separate Cybercrime Police Force Not Needed* (26 January 2003), *available at* http://www.inq7.net/inf/2003/jan/27/inf_3-1.htm.

> Philippines, by Philippine citizens, singly or in confederation with other nationals, and by such commission any damage is caused to a computer system or network in the Philippines, or to a natural or juridical person who, at the time of the commission of the offense, is in the Philippines, the proper courts in the Philippines shall likewise have jurisdiction."[196]

Although this provision simply reflects jurisdictional principles already recognized in international law,[197] namely the territorial and nationality principles, spelling it out in the statute precludes any objection to the jurisdiction of Philippine courts.

As discussed earlier, the penal provisions under the Electronic Commerce Act insufficiently address the different forms of cybercrime. The six bills pending in Congress are an improvement upon the penal provisions of the Electronic Commerce Act. However, in their zeal to punish the creation of viruses and other cybercrimes, coupled with a limited understanding of the technological aspects of the crimes involved, the bills tend to be too wordy and have a tendency to over-define prohibited acts, opening the possibility for the exploitation of loopholes in the law.

The ITECC draft bill, on the other hand, is a refinement and improvement of the six bills pending in Congress, and could be the piece of legislation that is needed in order to close the gap between technology and the law.

The ITECC draft bill, therefore, would be adequate substantive law if passed. However, as pointed out earlier, the lack of *procedural* rules to govern electronic evidence in criminal

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196 ITECC Draft Bill, Sec. 25.

197 *See* discussion *infra* Part V.

proceedings, may prove fatal to a prosecution for the offenses defined by substantive laws. The Rules on Electronic Evidence currently do not apply to criminal proceedings.[198] Once a substantive law governing cybercrimes is in place, then procedural rules on evidence must also be adopted, or else the substantive law could be rendered nugatory.

B. The Need for a Treaty

Because of the transborder nature of cybercrime,[199] it becomes apparent that local legislation must be complemented by international cooperation in the form of a convention.[200]

As discussed earlier, cybercrime presents the problem of acquiring jurisdiction over the offense, jurisdiction over the person of the accused, and evidence necessary for prosecution of the offense. An international treaty could eliminate the procedural and jurisdictional obstacles that prevent the prosecution of perpetrators of cybercrime.[201] A treaty is necessary because problems such as safe havens, sovereignty, and inadequate bilateral treaties of extradition arise when one State penalizes cybercrime and another country does not,[202] as illustrated by the ILOVEYOU virus incident.

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198 *See* discussion *infra* Part VI.G.

199 *See* discussion *infra* Part III.

200 Shackelford, *supra* note 9, at 503.

201 Marler, *supra* note 23, at 206 and 219. (discussing only through means of a treaty can countries eliminate jurisdictional problems and work better together when investigating and collecting evidence to use against cyber-criminals); Sprinkel, *supra* note 4, at 511 (discussing how a multinational treaty diminishes jurisdictional boundaries).

202 Sprinkel, *supra* note 4, at 498.

With these difficulties in mind, a treaty governing cybercrime should have two goals: standardizing domestic statutes and facilitating cooperative enforcement efforts.[203] Standardizing domestic statutes addresses the problem of acquisition of jurisdiction over the offense, by ensuring that cybercrimes are penalized. Facilitating cooperative enforcement efforts addresses the problem of acquisition of jurisdiction over the person of the accused, and the acquisition of evidence.

This second goal can be met by including provisions in the treaty mandating four key elements: consistent extradition of criminals, cooperation in the retention of witnesses and evidence, recognition and enforcement of criminal judgments issued by a particular nation's court, and a combined effort between each nation's law enforcement and prosecutorial organizations.[204]

A treaty, because of its binding nature between States, is the only way to ensure international cooperation.[205]

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203 Hatcher, et al., *supra* note 7, at 439.

204 *Id*.; Eric J. Bakewell, Michelle Koldaro and Jennifer M. Tija, *Computer Crimes*, 38 AM. CRIM. L. REV. 481, 523-24 (2001).

205 One possible alternative is for the Philippines to accede to a treaty currently open for accession: the Council of Europe has already come up with a Convention on Cybercrime (E.T.S. No. 185; Budapest, 23 November 2001). This Convention is the first international treaty dealing with cybercrime. Although the treaty has not yet entered into force (entry into force requires five ratifications, and to date there have only been two), the Convention has been signed by 34 states. It is open even to States which are not members of the Council of Europe; Canada, Japan, South Africa and the United States have signed the treaty. The Convention aims to harmonize the domestic criminal substantive law involving cybercrime, provide for domestic criminal procedural law powers necessary for the investigation and prosecution of such offenses, and set up a fast and effective regime of international co-operation. The Convention contains four chapters: (I) Use of terms; (II) Measures to be taken at domestic level - substantive law and procedural law; (III) International co-operation; (IV) Final clauses. *See* note 5, *infra*.

VIII. SUMMARY AND CONCLUSION

Cybercrime has evolved as a new species of crime that defies existing law and legal mechanisms. The ILOVEYOU virus incident was a concrete example of how technology had outpaced Philippine law and international law. In order for the Philippines to avoid such incidents in the future, the Philippines must enact a statute that adequately defines all forms of cybercrimes. However, the enactment of a law is not enough. In order to make this substantive law effective, Rules on Electronic Evidence applicable to criminal proceedings must also be adopted. Furthermore, in order to protect its interests with respect to cybercrime originating abroad, as well as to fulfill international obligations to suppress cybercrime locally, the Philippines should consider entering into multilateral treaties with other States to combat cybercrime.

THE DOUBLE HELIX IN CHAMBERS: FORENSIC DNA EVIDENCE IN CRIMINAL INVESTIGATION AND PROSECUTION

*By Jose Maria A. Ochave**

"Eventually, as the appropriate case comes, courts should not hesitate to rule on the admissibility of DNA evidence. For it was said that courts should apply the results of science when competently obtained in aid of situations presented since to reject said result is to deny progress."

- Quisumbing, J. in *Tijing, et al. v. Court of Appeals*[1]

It was an *obiter dictum* in a fairly simple case that took only nine pages to decide.[2] But it is perhaps one of the most significant

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1 G.R. No. 125901, promulgated March 8, 2001, at 8.

2 The *Tijing* Court reviewed the decision of the Court of Appeals in a *habeas corpus* case initiated by the Spouses Edgardo and Bienvenida Tijing against private respondent Angelita Diamante for the recovery of their son Edgardo, Jr. The Supreme Court ruled in favor of the petitioners on several grounds, but primarily on the strength of testimonial evidence proving that private respondent could not have possibly sired the child because she had previously undergone ligation and her husband was sterile because of an accident. The court also took note of the strong similarities in the physical features of Bienvenida and Edgardo, Jr. and the unusual circumstances surrounding the delayed filing of the alleged birth certificate of the child by the private respondent. The facts on which the decision was anchored were plain and unequivocal. Hence, the significance of the case is more for its *obiter dictum*, the full text of which is as follows:

> "Parentage will still be resolved using conventional methods unless we adopt the modern and scientific ways available. Fortunately, we now have the facility and expertise in using DNA test for identification and parentage testing. The University of the Philippines Natural Science Research Institute (UP-NSRI) DNA Analysis Laboratory has now the capability to conduct DNA typing using short tandem repeat (STR) analysis. The analysis is based on the fact that the DNA of a child/person has two (2) copies, one copy from the mother and the other from the father. The DNA from the mother, the alleged father and child are analyzed to establish parentage. Of course, being a novel scientific technique, the DNA test as evidence is still open to challenge. Eventually, as the appropriate case comes, courts should not hesitate to rule on the admissibility of DNA evidence. For it was said that courts should apply the results of science when competently obtained in aid of situations presented since to reject said result is to deny progress. Though it is not necessary in this case to resort to DNA testing, in the future it would be useful to all concerned in the prompt resolution of parentage and identity issues."

obiter dicta in Philippine legal history. In *Tijing*, the Supreme Court expressed its willingness to open the judicial door to modern biology; it was only waiting for the "appropriate case" to come along.

The wait did not take long. On May 9, 2002, the door swung open. Curiously, it was not a straightforward case of filiation that ushered the use of new modern biology in the court.[3] In *People v. Vallejo*[4], the court *en banc* found the accused guilty of rape with homicide and affirmed the decision of the trial court imposing upon him the penalty of death. It was also the first time that the Supreme Court admitted and relied upon DNA evidence. The National Bureau of Investigation took buccal swabs and hair samples from the accused and vaginal swabs from the victim during her autopsy. The NBI forensic chemist found that the vaginal swabs from the victim contained the DNA profiles of both accused and victim. The court admitted the DNA evidence as corroborative evidence, which together with the other evidence, pointed to the guilt of the accused. *Vallejo* was a quantum leap from *Tijing.* Not only was forensic DNA evidence admitted, but it was used to decide a criminal case where, as the following discussion will show, its use is more susceptible to legal challenge.

This paper is an introduction to the legal issues surrounding the forensic use of DNA evidence in criminal cases. It is divided into three parts. The first part explains what DNA is and why it is useful in criminal investigation and prosecution. Part 2 discusses the different types of DNA tests and identifies their respective uses and limitations. The final part raises and addresses major legal issues in the use of DNA evidence. It also discusses problems

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3 There is a bit of irony here. DNA evidence, which has served to acquit many death penalty inmates in other jurisdictions, has in its first use in the Philippines resulted in the affirmation of a death penalty sentence.

4 G.R. No. 144656, promulgated on 9 May 2002 [hereafter *Vallejo.*].

in post-conviction DNA testing, although no solutions are offered as they are best addressed in another paper. The article concludes with an optimistic, although cautionary, note on the use of DNA evidence in the criminal courtroom.

I. WHAT IS DNA?

DNA, or deoxyribonucleic acid, is a long molecule found in all living cells. It is made up of two strands twisted around each other in a helical staircase and contains information coding for cellular structure, organization and function.[5] It may be found either in the nucleus or mitochondria of the human cell.

The DNA in the human nucleus is *unique* (except in the case of identical twins and bone marrow transplant recipients) because it is the product of sexual reproduction and thus is the resulting combination of half of the DNA of a person's mother and half of his father's. It is also *identical* throughout a person's body, whether it is found in his blood, saliva, skin cells, bone and even hair roots. Every cell in the human body is the result of cellular division, thus every cell contains the same set of DNA as the original cell. The DNA is likewise *stable*. It does not change over time so samples that were collected years ago may be used to compare with samples that were obtained only recently.[6] Because of these properties, nuclear DNA has become a useful identifier of persons.

The other type of DNA, mitochondrial DNA, is equally useful in identifying persons. It is, however, different from nuclear

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5 U.S. Department of Energy Human Genome Program, "Genomics and Its Impact on Medicine and Society: A 2001 Primer", *US Department of Energy Online; available at* http://www.ornl.gov, accessed on 25 June 2002.

6 National Commission on the Future of DNA Evidence, National Institute of Justice, U.S. Department of Justice, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999), at 21 [hereafter 1999 NIJ Report].

DNA as it passes from mother to child unchanged by sexual reproduction.[7] Hence, the DNA in the mitochondria of our cells all come from our respective mothers, with no contribution from our fathers. Our mitochondrial DNA and those of our siblings are identical, having all come from our mother.

In comparing human DNA molecules for forensic purposes, one need not analyze the entire DNA molecule. About 99.9% of the DNA is common to all people. Hence, comparison is limited to the 0.1% of the human DNA that is sufficiently variable to be unique to each individual.[8] This variable DNA, also called the "non-coding" or "junk DNA," plays no direct role in the development of our characteristics, but the entire framework for using DNA as an identification tool relies upon them. In essence, the various types of DNA tests compare the small set of features of non-coding DNA called "DNA profiles," which can be represented as an ordered series of numbers thus allowing for automated analyses. There are several profiling kits now available commercially. *Profiler Plus*®, for example, is used in Australian forensic laboratories. It analyzes nine points in the human DNA where short sequences of proteins are repeated a variable number of times.[9] The Federal Bureau of Investigation has chosen a profiling kit which has 13 specific loci to serve as standard for its DNA database. The DNA

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7 Gans, Jeremy and Gregor Urbas. "DNA Identification in the Criminal Justice System" in TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE (Canberra: Australian Institute of Criminology), May 2002, at 1-2 [hereafter Gans]. The *Tijing* Court was imprecise when it failed to specify nuclear DNA when it explained that "the DNA of a child/person has two (2) copies, one copy from the mother and the other from the father." As discussed above, the mitochondrial DNA only comes from the mother. A fascinating account of how mitochondrial DNA has been used to trace the ancestry of 95% of the current European population to only seven women can be found in Sykes, Bryan. THE SEVEN DAUGHTERS OF EVE (London: Corgi Books), 2001.

8 De Foore, David. "Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted", 33 TEX. L. REV. 491 (2002), at 494.

9 Gans, *supra* 8, at 2.

Analysis Laboratory at the U.P. National Sciences Research Institute (UP-NSRI) uses seven such markers for paternity testing.[10]

II. TYPES OF DNA TESTS

When a crime is committed, evidence sample is collected by the crime scene investigators from the body of the victim for traces of DNA coming from the suspect. The evidence sample is then matched with a reference sample taken from the suspect and the victim[11] or found in a criminal database. The purpose of the DNA test is to determine the existence of an association, or a match, between the evidence sample and the reference sample.[12]

There are several types of DNA tests available, but all follow the same basic steps:

> "The general procedures include: (1) the isolation of the DNA from an evidence sample containing DNA of unknown origin and, generally at a later time, the isolation of DNA from a sample (*e.g.*, blood) from a known individual; (2) the processing of the DNA so that test results may be obtained; (3) the determination of the DNA test results (or types), from a specific region of the DNA; and (4) the comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is excluded as (is not) the source of the DNA or is included as a possible source of the DNA."[13]

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10 De Ungria, Maria Corazon, *et al.* "The Philippine Genetic Database of Short Tandem Repeats (STR) in DNA-based Paternity Testing", 131 PHIL. J. OF SCIENCE 1 (2002).

11 *Vallejo, supra* note 5, at 17.

12 *Id.*, at 18, citing Inman, Keith and Norah Rudin, AN INTRODUCTION TO FORENSIC DNA ANALYSIS (1997).

13 1999 NIJ Report, *supra* note 7, at 21.

The type of DNA test used is important lest accuracy and reliability be compromised. The original forensic applications of DNA analysis used a technology called Restriction Fragment Length Polymorphism (RFLP) developed by Sir Alec Jeffreys and first reported in 1985. It uses a special class of enzymes called "restriction enzymes" to cut human DNA into smaller fragments which are then visualized as banding patterns unique to each individual.[14] However, this type of test requires a large quantity of DNA and the samples must not have been degraded by environmental factors such as dirt or mold.[15]

A number of other tests have been developed since then. These newer DNA analysis techniques enable laboratories to develop biological evidence that are so minute as to be invisible to the naked eye, such as skin cells left on objects that an individual has touched.[16]

Using the Polymerase Chain Reaction (PCR) technique, a laboratory can replicate exact copies of the DNA contained in a biological sample without affecting the original sample. Unlike RFLP analysis which requires biological samples the size of the Philippine peso, PCR can be used to reproduce millions of the DNA contained in a few skin cells. And because PCR requires only a minute quantity of the sample, it can also be used by laboratories to analyze highly degraded biological evidence for

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14 De Ungria, Maria Corazon A., "Forensic DNA Analysis in Criminal and Civil Cases" (manuscript) [hereafter De Ungria Manuscript].

15 National Commission on the Future of DNA Evidence, National Institute of Justice, U.S. Department of Justice, USING DNA TO SOLVE COLD CASES: A SPECIAL REPORT (2002), at 5 [hereafter 2002 NIJ Report]. RFLP, however, continues to be useful in paternity testing where the quantity and quality of the biological samples are not a problem. It has been widely used and accepted in U.S. courts with about 300 appellate rulings on it as of 1999. 1999 NIJ Report, *supra* note 7, at 26.

16 2002 NIJ Report, *supra* note 16, at 5.

the DNA they contain.[17] PCR testing was first applied in a criminal case in the United States in 1986. Since then it has become one of the most widely used techniques in crime laboratories around the world.

One of the most common PCR-based technique is the Short Tandem Repeat (STR) technology. It evaluates specific regions in the DNA. The variable nature of the STR regions (usually the non-coding regions) that are analyzed for forensic testing enables the laboratory to differentiate one DNA profile from another. For example, the likelihood that any two individuals, except identical twins and bone marrow transplant recipients, will have the same 13-loci DNA profile could be as high as 1 in a billion or even greater.[18] In the Philippines, PCR-based STR technology is used by the DNA laboratories of the National Bureau of Investigation, St. Luke's Medical Center and UP-NSRI in routine DNA testing. These institutions prefer it over other methods due "the extensive genetic variability of STR markers, [its] high success rate in generating DNA profiles with small quantities of DNA, the availability of standard kits and protocols and the relative ease in DNA analysis."[19]

Old remains and biological evidence which lack nucleated cells such as hair shafts, bones and teeth or those which have been so degraded are not amenable to either RFLP or PCR testing. They may, however, yield results using Mitochondrial DNA (mtDNA) analysis. This method uses the DNA found in the mitochondria instead of those in the nucleus. It is particularly useful in missing-persons or unidentified-remains investigations where there is a

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17 *Id.*, at 6. However, because PCR technique is highly sensitive, care must be taken so as not to contaminate the evidence sample as any contaminating DNA will likewise be replicated. Contamination issue are therefore relevant in PCR but not as much in RFLP. *Id.*

18 *Id.*

19 De Ungria Manuscript, *supra* note 15, at 2.

maternal relative present who can provide the reference sample. As explained earlier, mitochondrial DNA is passed on solely from mother to child. Hence, all maternal relatives of a person (*e.g.*, the mother or maternal grandmother of a person) have identical mitochondrial DNA and this fact is used in the identification process.[20]

One of the most recent types of DNA testing is the Y-chromosome analysis. Genetic markers have now been identified on the Y chromosome thus making it possible to target only the male fraction of a biological sample. This technique is valuable in cases where there are multiple male contributors in a biological evidence sample. Y-chromosome testing may eventually eliminate the need for laboratories to extract and separate semen and vagina cells from, say vaginal swabs, prior to analysis.[21]

DNA tests may yield three possible results:[22]

1. *Inclusion* – This happens when the results from the reference sample from a known individual are all consistent with or are all present in the results from the unknown evidence sample. The analyst then proceeds to determine the statistical significance of the similarity. This is done with reference to a population database that can help provide statistical frequencies regarding the rarity of a particular set of genetic information observed in the evidence sample and for a known individual in various population groups.[23] False positives (*i.e.*, a falsely accused individual is identified as a source of the evidence sample) can happen, particularly if the test system used tests at only one or a few loci of the DNA.

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20 2002 NIJ Report, *supra* note 16, at 7.

21 *Id.*

22 *Vallejo*, *supra* note 5, at 18.

23 1999 NIJ Report, *supra* note 7, at 28.

2. *Exclusion* – The samples are different and therefore must have originated from different sources. This happens when the results obtained from the reference sample are not all present in the results from the evidence sample.[24] The *Vallejo* Court noted that a conclusion of exclusion is "absolute and requires no further analysis or discussion."[25]

3. *Inconclusive* – Results are interpreted to be inconclusive when, based on the DNA test, it is not possible to be sure whether the evidence and reference samples have similar DNA types. This may be due to several reasons like degradation or contamination of the samples, limited amount of suitable evidence sample, or where evidence sample may have been adequate in quantity and quality but there are no available reference samples for comparison. The analysis will then have to be repeated, in its entirety or portions thereof, using the same or different samples.

In the United States, where DNA evidence is used most extensively, as of June 26, 2003, 131 persons have been exonerated by the use of DNA tests.[26] However, it is important to note that DNA-testing is a two-edged sword, it can also confirm the guilt of the accused, the *Vallejo* case being a good example.

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24 *Id.*, at 29.

25 *Vallejo*, *supra* note 5, at 18.

26 The Innocence Project, *available at* www.innocenceproject.org, accessed on 27 June 2003. The most well-known initiative in the use of DNA tests to exonerate unjustly convicted persons is the Innocence Project. It was founded by Barry Scheck and Peter Neufeld and operates out of the Benjamin N. Cardozo School of Law at Yeshiva University in New York City. Law school students do most of the legal work under the supervision of their professors. The irony is that Scheck and Neufeld, both defense lawyers, started as anti-DNA test lawyers, insisting that DNA evidence was not reliable and should therefore not be allowed in court. Now, they champion the reliability of DNA fingerprinting evidence, using it to exonerate people who have been falsely convicted. Fridell, Ron. DNA FINGERPRINTING: THE ULTIMATE IDENTITY (New York: Franklin Watts), 2001, at 57.

III. LEGAL AND POLICY ISSUES

A. In the Use of DNA Evidence in Criminal Prosecution

In *Vallejo,* the Court outlined the standards that should be applied in determining the admissibility and probative value of DNA evidence:

> "In assessing the probative value of DNA evidence, therefore, courts should consider, among other things, the following data: how the samples were collected, how they were handled, the possibility of contamination of the samples, the procedure followed in analyzing the samples, whether the proper standards and procedures were followed in conducting the tests, and the qualification of the analyst who conducted the test.[27]

The reliability of forensic DNA evidence relies heavily on the proper collection and handling of biological samples from the crime scene. Improper handling, storage and preservation resulting in contamination can render the biological samples inutile. The common sources of false positive reactions are contaminations from human handlers, such as bystanders at the crime scene, investigators, medico-legal examiners, forensic analysts, evidence custodian and even lawyers. This is why the *Vallejo* court emphasized the need to establish the chain of custody of the biological sample. Meticulous documentation is required if proper chain of custody is to be established. The documentation should list the identities and extent of handling of all personnel who had access to the biological sample, from the crime scene to the court.[28]

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27 *Vallejo, supra* note 5, at 18.

28 De Ungria Manuscript, *supra* note 15, at 7. It should be noted, however, that false positive reactions do not occur because of non-human sources of contamination like animals, bacteria, soil, plant and water. *Id.*

In a filiation trial, it is easy to establish the chain of custody, especially if biological samples were taken from the parties at the DNA laboratory itself. Alas, the same cannot be said yet of samples taken from crime scenes in the Philippines. Unless investigators and similar personnel are aggressively trained on the proper collection and handling of biological samples and adequately incented to comply with chain-of-custody standards, the use of DNA evidence in Philippine criminal investigation will be severely limited.[29]

The *Vallejo* court also emphasized the need for proper standards and procedures in conducting the DNA tests and the qualification of the analysts. Although current DNA laboratories in the country continue to upgrade their test standards and procedures to conform with those of the more established laboratories abroad, there is as yet no laboratory or analyst certification program in place. Hence, the trial courts will have to be more discerning in evaluating the qualifications and competence of DNA laboratories and analysts.

Before DNA evidence became widely accepted in U.S. courts, it had to hurdle a number of legal issues. It is reasonable to expect the same issues to be raised as the use of DNA evidence tries to establish a foothold in Philippine courts. The most significant issues raised relate to unreasonable search and seizure, equal protection and self-incrimination.

The most frequently raised argument is that obtaining a DNA sample and using the genetic information derived from it constitutes unreasonable search and seizure. In traditional search

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29 The absence of biological samples for DNA tests is a problem for inmates that are currently in Death Row. The UP DNA Analysis Laboratory reports that of the 58 cases, involving 67 Death Row inmates, that they reviewed in the first quarter of 2002, samples for only two cases still exist. *Id.*

and seizure analysis, probable cause is required when the government wishes to intrude below the surface of the skin or into an area where there is expectation of privacy. Hence, a warrant is typically required where bodily intrusion is involved.[30] However, the U.S. Supreme Court admits exceptions to this rule by balancing the degree of intrusion upon an individual's privacy against the government interest at stake.[31] In *Schmerber v. State of California*[32], the Court held that it was reasonable under the search & seizure clause to take blood involuntarily from a suspected drunk driver at the emergency room of a hospital. In *Winston v. Lee*[33], the Court categorically declared that "blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity"[34]. These two cases have been used in the U.S. to argue that extracting blood samples from suspects for purposes of DNA testing does not constitute unreasonable search & seizure.[35] There is reason to expect that a similar analysis may be made in the Philippines. In an *obiter dictum* in *Guazon v. De Villa*[36], the Court quoted with favor the declaration in *Breithaupt v. Abram*[37] that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician

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30 Rothstein, Mark A. and Sandra Carnahan, "Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks", 67 BROOKLYN L.R. 127 (2001), at 135 [hereafter Rothstein].

31 *Id.*, at 138.

32 384 U.S. 757 (1966).

33 470 U.S. 753 (1985).

34 *Id.*

35 Rothstein, *supra* note 31, at 141. (Rothstein and Carnahan, however, are critical of these decisions. They particularly deride one state court which found, "without analysis", that only minimal bodily intrusion was required where a DNA saliva sample was obtained by rubbing the inside of the cheeks with a sponge on a toothbrush-like handle for approximately fifteen seconds.).

36 181 SCRA 623 (1990) (prohibition with injunction to prohibit police from conducting saturation drives in Metro Manila) [hereafter Guazon Case].

37 352 U.S. 432 (1957).

... [T]he absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right."[38] The right of the individual to be protected from such an invasion of his body is considered as "far outweighed by the value of its deterrent effect on the evil sought to be avoided by the police action."[39]

In the U.S., state laws require that DNA samples be taken only from certain classes of offenders, such as those convicted of sex crimes and murder. A number of defendants have argued that this violates the constitutional precept that no state shall deny any person within its jurisdiction the equal protection of the laws. State courts have held that since the classification of "sex offender" or "murderer" is based on the nature of the offense and not on a suspect class like race, these challenges to DNA statutes should be reviewed using the "rational basis" test. Under this test, the statute is presumed valid if the classification is rationally related to a legitimate interest. The courts have invariably found a rational relationship between the government's classification of certain offenders and its objective to investigate and prosecute similar classes of unsolved and future crimes. Hence, unequal protection challenges have consistently been rejected.[40] Given the prohibitive cost of DNA tests and the limited resources of the Philippine government, it is reasonable to expect that the initial mandatory DNA tests will be required only of certain serious offenses and the equal protection argument will be raised. It remains to be seen if the Supreme Court would arrive at the same conclusion as U.S. state courts.

Finally, it is argued that obtaining DNA samples from suspects is a violation of the constitutional right against self-

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38 Guazon Case, *supra* note 37, at 634.

39 *Id.*

40 Rothstein, *supra* note at 146-147.

incrimination, or the right of the accused not to testify against himself or to provide the State with testimonial evidence or evidence of a communicative nature. Since U.S. jurisprudence is replete with cases holding that the privilege against self-incrimination does not protect the accused against compulsion to produce blood or urine, state courts have consistently held that the DNA contained in one's blood or saliva is non-testimonial, and thus the privilege against self-incrimination is not violated. In the Philippine, one will unavoidably have to contend with the constitutional prohibition against compelling a person to be a witness against himself.[41]

B. In Post-Conviction DNA Testing

The DNA Forensic Laboratory bewails its inability to gain access to biological samples in the only two of the 58 cases Death Row cases that it reviewed where such samples are still available.[42] The absence of any statute or judicial guidelines for DNA testing after a case had become final and executory has stymied efforts to use DNA evidence to ensure that no person is imposed the death penalty for a crime he never committed. There is no statute, jurisprudence or provision in the Rules of Court expressly allowing a convicted person access to biological evidence after his case has been affirmed with finality by the Supreme Court.

There are a number of reasons behind the reluctance of courts to reopen a case after a decision has become final and executory. Among these are:

1. The strong presumption that the verdict is correct because the accused was found guilty by

41 1987 Constitution, Art. III, Sec. 17.

42 De Ungria Manuscript, *supra* note 15, at 10.

an impartial judge after a trial with full constitutional protections;

2. The need for finality;

3. The recognition that the likelihood of more accurate determinations of guilt or innocence diminishes over time as memories fade, witnesses disappear, and the opportunity for perjury increases; and

4. The need to conserve judicial resources by not opening the floodgates to meritless and costly claims.[43]

However, with DNA evidence, the first and third reasons lose their appeal. The number of vacated convictions after DNA tests were introduced in the U.S. weakens the argument that existing constitutional protections are sufficient. Likewise, DNA evidence, unlike memory, does not weaken over time; thus, severely weakening the third reason as well. As to the second and fourth reasons, they will have to be balanced with the desire of the court to perform its truth-seeking function.

In any case, it may be worth looking again at U.S. practice for a glimpse of some of the issues that any statute or guidelines on post-conviction DNA testing may have to grapple with. These are summarized below:[44]

1. *Is there a constitutional right to DNA testing?* In *Brady v. Maryland*,[45] the U.S. Supreme Court held that a defendant has a constitutional right at or before trial to be informed of

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43 1999 NIJ report, *supra* note 7, at 9.

44 *See* 1999 NIJ Report, *supra* note 7.

45 373 U.S. 83 (1963).

exculpatory evidence in the hands of the State. Art. III, Sec. 14(2) of the Philippine Constitution arguably provides a similar right when it declares that "in all criminal prosecutions, the accused shall enjoy the right... to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf."

In *Arizona v. Youngblood,*[46] the petitioner argued that his conviction should be overturned because the State before trial had destroyed rectal swabs containing sperm which could have demonstrated his innocence if subjected to serological testing. The Court refused to vacate the conviction without proof that the swabs were destroyed in bad faith, but failed to rule on whether petitioner would be entitled to testing if the swabs now existed. However, there are some state court decisions holding that DNA testing is such a potentially powerful tool to demonstrate innocence that procedural bars should give way. For example, in *State v. Thomas,*[47] the court declared thus:

> "Under these circumstances, consideration of fundamental fairness demands that the [DNA] testing of this now 7-year-old rape kit material be done now .... Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed. That failure is even more tragic when an innocent person is sentence to a prison term.... We regard it as ... important to rectify that failure .... There is a possibility, if not probability, that DNA testing now can put to rest the question of defendant's guilt.... We would rather [permit the testing] than sit by while a

46 488 U.S. 51 (1988).

47 586 A.2d 250 (1991).

> [possibly] innocent man...languishes in prison while the true offender stalks his next victim."[48] (emphasis supplied)

2. *What kind of showing must the petitioner make to be afforded access to DNA testing?* In New York, the newly discovered evidence must be "of such a character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant. Other States require that the newly-discovered evidence should provide "conclusive proof" that there would have been a different verdict.[49] The Philippine Revised Rules of Criminal Procedure allows new trial if there is "new and material evidence [that] has been discovered which the accused could not with reasonable diligence have discovered and produced at the trial and which if introduced and admitted would probably change the judgment."[50] However, the current problem faced by DNA evidence advocates is how to show that the DNA from the biological samples would "probably change the judgment if the petitioner cannot even have access to the relevant biological samples.[51]

3. *Is an indigent petitioner entitled to have the Government pay for post-conviction DNA Testing?* DNA testing is expensive and beyond the reach of indigent petitioners. In *Little v. Streater,*[52] the U.S. Supreme Court held that an indigent inmate who was being sued in a paternity action had a right, under the due process and equal protection clauses, to funding for blood grouping tests because "[un]like other evidence that may be susceptible to varying

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48 *Id.*, at 253-254, *cited in* 1999 NIJ Report, *supra* note 7, at 12.

49 1999 NIJ Report, *supra* note 7, at 14.

50 Rule 121, Sec. 2(b).

51 In some instances, biological samples cannot be located, not stored, and the slides used to contain them were washed for re-used. De Ungria Manuscript, *supra* note 15, at 12.

52 452 U.S. 1 (1981).

interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute."[53] This case is significant because it recognizes: (i) the constitutional importance of a technological advance that can alter fact determinations; and (ii) the right of an indigent inmate to avail himself of the benefits of such a technological advance. However, even in the U.S., the application of this decision to post-conviction cases for DNA testing is still difficult since it goes against the interest of the State to preserve the "finality of judgments."[54] The same difficulty may be faced by any post-conviction applicant in the Philippines.

IV. CONCLUSION

With *Tijing*, and later *Vallejo*, the Supreme Court has opened the door wide open to the use of DNA evidence in court. However, as the foregoing discussion shows, its wider application in criminal cases is still saddled with legal, administrative and policy issues that still have to be addressed, perhaps in a statute or in guidelines that the Court itself will have to issue. One thing is clear, however, the court has come of age and recognized the immense potential of science, particularly modern biology, in helping it perform its truth-seeking function – a truly welcome development, albeit one that we should approach with caution lest junk science finds its way into the courtroom.

53 *Id.*, at 14.

54 1999 NIJ Report, *supra* note 7, at 18-19.

THE RIGHT OF LEGAL REDEMPTION OF THE BORROWER UNDER THE SPECIAL PURPOSE VEHICLE (SPV) ACT OF 2002

*By Arturo M. De Castro**

The Special Purpose Vehicle (SPV) Act of 2002 (Republic Act 9182) seeks to implement the declared policies of the State, *inter alia*, "to encourage private sector investments in non-performing assets," "to help in the rehabilitation of distressed businesses" and "to improve the liquidity of the financial system which can be harnessed to proper economic growth."[1]

To enhance these policies, the SPVs established under this law which acquire or invest in non-performing assets are granted tax exemptions and fee privileges. The transfer of non-performing assets from the financial institution to an SPV, and from the SPV to a third party or *dacion en pago* by the borrower or by a third party in favor of a Financial Institution or in favor of an SPV is exempt from (i) documentary stamp tax, (ii) capital gains tax on transfer of lands and other assets treated as capital assets, (iii) creditable withholding income tax imposed on the transfer of land and or building treated as ordinary asset, and (iv) value added tax, and is subject only to 50% of the applicable mortgage registration and transfer fees, 50% of the filing fees for any foreclosure initiated by the SPV in relation to any Non-Performing Asset acquired from a Financial Institution, and 50% of the land registration fees.[2]

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1 Section 2, R.A. 9182.

2 Section 15, R.A. 9182.

This article will focus on the specific issue whether the Borrower has the right of first refusal or pre-emption or legal right of redemption with respect to transactions between the SPV and the Financial Institution (FI) involving the collaterals of the Borrower.

It is useful both to the SPVs and third party investors in the Non-Performing Assets (NPAs) and the Borrowers to clarify their respective rights and obligations in respect of the transactions envisioned under the SPV Act. On the part of the SPV and the third party investors in the Non-Performing Assets, it may not be attractive to buy or acquire non-performing assets or credit under pending litigation with the Borrower if the latter has the legal right of redemption that may be exercised by paying the transfer price plus the cost of money from the sale up to the time of redemption. On the part of the Borrowers, it is better if they are aware of their legal and equitable right of redemption to enable them to protect their interest by seasonable exercise of such legal or equitable right.

Under Republic Act No. 9182, and "The Implementing Rules and Regulations of the Special Purpose Vehicle (SPV) Act of 2002", which became effective on April 9, 2003, Financial Institutions (FIs) with Non-Performing Loans (NPLs) whose principal and / or interest has remained unpaid for at least 180 days after it has become past due, or any event of default under the loan agreement has occurred, may opt to transfer the NPLs to an SPV. Before the transfer may take effect, the FI is required to give prior written notice to the Borrowers of the NPLs and all persons holding prior encumbrances upon the assets mortgaged or pledged, granting the Borrowers a period of not more than 90 days from notice "to restructure or renegotiate the loan under such terms and conditions as may be agreed upon by the Borrower and the FIs concerned."[3] After the sale or transfer of the NPLs, the transferring FI shall inform the

3 Section 12 (a), R.A. 9182.

borrower in writing at the last known address of the fact of the sale or transfer of the NPLs.[4]

No Right of First Refusal

The law does not give the Borrower the right of first refusal. The required notice gives the Borrower only the right to restructure or re-negotiate the loan as may be mutually agreed upon with the FI concerned. After the lapse of the period in the notice without any mutual agreement reached for the restructuring or settlement, the FI may sell or transfer the NPLs to an SPV without having to re-offer the terms of the sale or transfer to the SPV even when these terms agreed with the SPV are better than the terms previously offered to the Borrower.

The Legal Right of Redemption

The SPV Act of 2002 requires that the transferring FI shall inform the Borrower in writing at the last known address of the fact of the sale or the transfer of the NPLs.[5] This is necessary for the effective substitution of creditor. Under the SPV Law, the SPV assumes all the rights and obligations of the transferring FI.[6]

Has the Borrower the legal right of redemption?

It is humbly submitted that the Borrower has the right of legal redemption by paying the SPV the transfer price plus the cost of money up to the time of redemption (interest on the transfer price) and the judicial costs in case of sale or transfer of NPLs

4 Section 12 ©, R.A. 9182.

5 *Ibid.*

6 Section 14, R.A. 9182.

under litigation, which may be exercised within 30 days from the date the SPV demands payment from the Borrower, for the following indubitable reasons:

1) The Civil Code provides for the legal right of redemption in case of sale or transfer of credit or other incorporeal right under litigation, as follows:

> Art. 1634. When a credit or other incorporeal right in litigation is sold, the debtor shall have a right to extinguish it by reimbursing the assignee for the price the latter paid therefor, the judicial costs incurred by him, and the interest on the price from the day on which the same was paid.
>
> A credit or other incorporeal right shall be considered in litigation from the time the complaint concerning the same is answered.
>
> The debtor may exercise his right within thirty days from the date the assignee demands payment from him (1535).

2) The SPV Act of 2002 does not specifically provide for the legal right of redemption, which may mislead people to believe that such right of legal redemption is not granted to the Borrower. But neither does the law preclude such right of the Borrower.

3) The general provision of Art. 1634 of the Civil Code on sale of credit or other incorporeal right under litigation is applicable to the transactions under the SPV Act of 2002, although the latter is a special law, because the SPV Act itself specifically provides

that in the transfer of the NPLs, "the provisions… on assignment of credits under the New Civil Code shall apply."[7]

The language of Art. 1634 of the Civil Code requires that the transaction must be an assignment or sale of a credit in litigation and there must be a pending suit at the moment of the sale or transfer wherein the complaint had been filed and already answered prior to the sale of the credit.

I believe that the above requirements are open to constitutional challenge for being discriminatory to Borrowers whose credit is not yet the subject of litigation. I do not see any substantial distinctions to justify a drastically different treatment between NPLs not yet in litigation and NPLs under litigation with the answer to the complaint already filed at the time of transfer or sale to the SPV.

To enforce the artificial requirement granting the legal right of redemption only to borrowers whose credit is under litigation would encourage the rush of litigation by Borrower solely to qualify for the legal right of redemption. This is against the public policy against unnecessary lawsuits. Besides, this artificial distinction would frustrate the philosophy and equitable rationale behind the legal right of redemption to prevent unjust enrichment on the part of the assignee or Buyer of the credit and to protect the Borrower by allowing him to pay only the amount which the creditor is willing to accept for the credit in order to promote the policy of the law "to help in the rehabilitation of distressed businesses."

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7 Section 13, R.A. 9182.

CONCLUSION

The Borrower of NPLs and all persons holding prior encumbrances upon the assets mortgaged or pledged have the legal right of redemption with respect to the NPLs transferred by the FI to an SPV under the Special Purpose Vehicle (SPV) Act. This legal right of redemption may be exercised by paying the transfer price plus the cost of money up to the date of redemption and the costs of suit within 30 days from the time the SPV demands payment from the Borrower.

In order to avoid collusion between the FI and the SPV, it is better if the Borrower is involved in the negotiations between the FI and the SPV on the acquisition of the NPLs. In this way, if a tripartite agreement is reached, the NPLs are amicably settled among all the parties.

BOOK REVIEW

REFORMING THE JUDICIARY

*A Book Review By Romeo J. Callejo, Sr.**

Reform. Does the term not suggest that something is the matter, or worse, that things are really bad? This was the reason that for some time, there were misgivings about naming the project "judicial reform." Institutions after all are loathe to admit that they are in need of reform. But when one of the leading members of the High Court of the land itself, boldly entitles his latest book "Reforming the Judiciary," then reform might not be so bad a name after all.

One book a year and no cases left undecided. This is Mr. Justice Artemio V. Panganiban's unsurpassed record. It is also the best summation of judicial reform. Why should a justice of the Supreme Court endeavor to write one book a year? The author provides the most convincing answer. In *Chapter 4*, which is given the heading "Prerequisites for a Successful Reform Program," he writes: "Early on, however, we realized that the key to developing a sound reform program was the ability to distinguish fact from perception. Thus, we also conducted perception surveys that provided an impression of how judges, court personnel and external stakeholders viewed the gravity of the problems. From such surveys we likewise gauge the level of public confidence in the existing judicial system. Accordingly, we were able to ground the reform program on a realistic assessment of the facts that would make our project goals more viable and consequently enhance the public image of the judiciary." Establishing lines of communication between the courts and their stakeholders, both internal and

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* Associate Justice, Supreme Court.

external (and who, in this Republic, is not a stakeholder in the judiciary?) and keeping the lines open – this is what this book is all about. This is the tremendous service it does. Because one who sits on the Supreme Court itself reaches out to the public and through its pages gives them a feel of the rhythm of the Court's heart, the book bridges what would otherwise be a yawning abyss between Olympus and dwelling-place of citizens.

A good part of the book is given to the "Action Program for Judicial Reform." It is a commitment of which Mr. Justice Panganiban can rightly be called a "founding father." Not only is he a member of the Committee that oversees the fruition of the program. He has also been its spokesperson. In his presentation during the round table discussion on Philippine Judicial Reform held in Ottawa, Canada, on June 19, 2002, he summarized in ten points the dimensions of the reform program to which the Philippine judiciary has dedicated itself. Consistent with the philosophical tack he has always taken, the author examines the presuppositions and prerequisites of judicial reform with characteristic incisiveness.

If in last year's book, Mr. Justice Panganiban had a chapter on "E-values for Lawyers," this year he makes the very pointed and necessary assertion that "Good Governance Begins with Ethics." He identifies four "ins": integrity, independence, intelligence and industry. These, for him, are the constituents of an ethical disposition, and the beginning of all good governance. While the Supreme Court has been unrelenting and severe in dealing with judges' misdeeds, it has always preferred a more positive approach: leading by example, and teaching by precept. This section of Justice Panganiban's book is one such attempt to remind judges what is expected of them. As importantly, however, it also informs the public the standards judges go by, for it is important that citizens realize that judges' decisions and orders are crafted not principally to please, nor to win applause and approval, but to apply the law,

and to do justice as the law dictates. As a department chair of Criminal Law in the Philippine Judicial Academy, I was informed that once, Mr. Justice Panganiban clearly told the representatives of agencies that had offered assistance to judicial reform that while the Supreme Court could only welcome assistance, it would nevertheless do so discriminatingly, zealously guarding its independence.

One of Mr. Justice Panganiban's earlier books was simply titled "Transparency." He returns to the theme in *Chapter 7* of the present book, and fittingly so, for it is to the passion for transparency that the author's one-book-a-year commitment may be ascribed. There can hardly be anything more helpful to the cause of transparency than keeping the public informed of the workings of the court, of its achievements, of the challenges that face it and yes, even of its disappointments. Very interestingly, in this chapter, Justice Panganiban advances the thesis that transparency insofar as adjudication is concerned is the key to the acceptability of judgments by the public. This is a point of utmost importance. For members of the Bench, one's popular acceptability is not the crucial criterion. It is rather the result of transparency in the fair and impartial disposition of cases.

Many of the succeeding chapters are given to important cases decided by the Supreme Court with the author as *ponente.* Particularly interesting to the public will be Justice Panganiban's first-person account of the historic events leading to the assumption to the Presidency of the Republic by President Gloria Macapagal-Arroyo. As one reads his account, one cannot but share in the tension of the hour – and realize what a crucial as well as delicate role the Supreme Court played. No one who has completed the chapter will be left unconvinced that "statesmanship" and patriotism of the highest order characterized the Court's deportment in that determinative moment of Philippine history.

Justice Panganiban *separate concurring opinion* on the constitutionality of the plunder law has clarified the law – not only for the *dramatis personae* in the plunder case of former President Estrada which is still *sub judice* but for all professors and students of law in the future. Besides sweeping aside the "void-for-vagueness" assault on the law, the separate concurring opinion clarifies the meaning of key terms, uncovers the legislative intendment, and provides useful doctrinal guides for future judicial application.

The coconut levy issue was one that called for urgent resolution – and for some time, many faulted the court for tarrying in its judgment, hardly appreciating the complexity of legal issues raised. The Court at last ruled, with the author as *ponente.* The Court would not be rushed into a categorical characterization of the funds – for that was a matter that called for more reflection. However, it would neither shirk from its duty of resolving a pressing controversy. Who was to vote the UCPB shares? The Court, speaking through Mr. Justice Panganiban, ruled that the government should be allowed to continue voting the shares, since these were purchased from funds that were *prima facie* public in character. The decision made progress over earlier decisions that would go no farther than state that they were "impressed" or "affected" with public character. This time, it characterized them as *prima facie* public in character. Without second guessing what the Court might eventually hold on the matter, it is a matter of judicial tradition that absent very compelling reasons to abandon this characterization, this will eventually be how matters will be made to stand.

The Greek word for reform is *metanoia* – but this means not just changing one's mind. It means, above all, changing one's heart. Justice Panganiban chose as the opening passage of his book a quotation from the Gospels exhorting to conversion. Conversion is the order of the day – not because the Court has

betrayed the trust the Republic has reposed on it, but because it dedicates itself to the unrelenting, unhesitating self-examination and self-scrutiny that will allow it to be worthy of the trust the public has and ought to have in it, the confidence that has merited for it accolades not only here (witness the "Filipino of the Year 2001" recognition which Justice Panganiban reflects on) but also abroad. It has set its sights on re-engineering itself, on focusing its attention and its resources on the goals of independence, credibility, and competence – shoving aside every other adventitious and even tangential consideration to dwell on the "heart of the matter." Reform and conversion – these after all are matters of the heart.

SUBJECT GUIDE AND DIGESTS SUPREME COURT DECISIONS

(January to March 2002)

Prepared By Tarcisio A. Diño*

Civil Law

Commercial Law

Criminal Law

Labor Law

Land Law

Land Reform Law

Political Law

Remedial Law

Taxation

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* Partner, Villareal Rosacia Diño & Patag; A.B., LL.B., University of the Philippines.

CIVIL LAW

PERSONS

CIVIL PERSONALITY

Capacity to Act. A person is not incapacitated to contract merely because of advanced years or by reason of physical infirmities - unless such age or infirmities impair his/her mental faculties as to prevent him/her from properly, intelligently, and fairly protecting his/her property rights. *(Mendezona v. Ozamiz, G.R. No. 143370, 6 February 2002).*

MARRIAGE

Conjugal Partnership Property. Under the Family Code, the disposition of a conjugal property by the husband as administrator in appropriate cases requires the written consent of the wife; otherwise, the disposition is void. Court authorization under Article 124 (The Family Code) is only resorted to in cases where the spouse who does not give consent is incapacitated. In this case, the petitioner failed to allege and prove that respondent wife was incapacitated to give her consent to the contracts. *(Jader-Manalo v. Camaisa, G.R. No. 147978, 23 January 2002).*

PATERNITY AND FILIATION

Legitimate Children. (a) Presumption of Legitimacy. Under the New Civil Code, a child born and conceived during a valid marriage is presumed to be legitimate. The presumption , however, is not conclusive and may be overthrown by evidence to the contrary. *(Liyao v. Tanhoti-Liyao, G.R. No. 138961, 7 March 2002).*

(b) Impugnation of Legitimacy. [i] The fact that Corazon had been living separately from her husband at the time petitioner was conceived and born is of no moment. While physical impossibility for the husband to have sexual intercourse with his wife is one of the grounds for impugning the legitimacy of a child, the grounds for impugning the legitimacy of a child in Article 255 of the New Civil Code may only be invoked by the husband or, in proper cases, his heirs under the conditions set forth under Article 262 of the same code. Impugning the legitimacy of the child is a strictly personal right of the husband or, in exceptional cases, his heirs for the simple reason that he is the one directly confronted with the scandal and ridicule which the infidelity of his wife produces and he should be the one to decide whether to conceal that infidelity or expose it in view of the moral and economic interest involved. Outside of these cases, none can impugn the legitimacy of a child. Hence, the acts of the undisputed children of Corazon with her husband in testifying for herein petitioner did not amount to impugnation of the legitimacy of the latter. There is nothing on the records to indicate that the husband had already passed away at the time of the birth of the petitioner or at the time of the initiation of this proceedings. Notably, the case at bar was initiated by petitioner himself through his mother, Corazon, and not through the aforementioned children. It is *settled that the legitimacy of the child can be impugned only in a direct action brought for that purpose, by the proper parties and within the period limited by law*. *(id.*)

Illegitimate Children. (a) Compulsory Recognition. The present petition initiated by Corazon, mother and guardian *ad litem* of petitioner (then a minor), to compel recognition of petitioner by respondents (heirs of the late William, allegedly the paramour of Corazon) as the illegitimate son of the late William - cannot prosper. A child born within a valid marriage is presumed legitimate even though the mother may have declared against its legitimacy or may have been sentenced as an adulteress. Petitioner cannot be allowed to maintain his present petition and subvert the

clear mandate of the law that only the husband or, in exceptional circumstances, his heirs, could impugn the legitimacy of a child born in a valid and subsisting marriage. The child himself cannot choose his own filiation. If the husband (presumed to be the father) does not impugn the legitimacy of the child, then the status of the child is fixed, and the latter cannot choose to be the child of his mother's alleged paramour. On the other hand, if the presumption of legitimacy is overthrown, the child cannot elect the paternity of the husband who successfully defeated the presumption. (*id.*)

(b) Period for Filing the Action. Article 285 of the New Civil Code provides that the action for the recognition may be brought only during the lifetime of the presumed parent/s, subject to two (2) exceptions provided therein. One of these exceptions is "if the father or mother died during the minority of the child, in which case the latter may file the action before the expiration of four years from the attainment of his majority." The two exceptions above have been omitted by Articles 172, 173 and 175 of the Family Code. Under the new law, an action for the recognition of an illegitimate child must be brought within the lifetime of the alleged parent. Nonetheless, the Family Code provides the caveat that rights that have already vested prior to its enactment should not be prejudiced or impaired. Hence, illegitimate children who were still minors at the time the Family Code took effect (3 August 1988) and whose putative parent died during their minority are given the right to seek recognition for a period of up to four years from attaining majority age. *(Bernabe v. Alejo, G.R. No. 140500, 21 January 2002).* The words "natural children" in Article 285 have been clarified to include minors even if their parents were disqualified from marrying each other; and spurious children. (*id.*)

PARENTAL AUTHORITY

Custody of Child. Temporary Custody. The paramount criterion is the welfare and well-being of the child in arriving at the decision as to whom custody of the minor should be given. In the case at bar, the appellate court did not err in allowing the father to have temporary custody of her daughter who, pending the termination of proceedings for guardianship, should not be wrenched off from her familiar surroundings and thrust into a strange environment away from the people and places to which she had apparently formed an attachment. In this case, it appears that the child was in the custody of her father and paternal grandparents when the temporary custody issue was raised in court. *(Tonog v. CA, G.R. No. 122906, 7 February 2002).*

Special Parental Authority. Under Article 218 of the Family Code, the following shall have special parental authority over a minor child while under their supervision, instruction or custody: (1) the school, its administrators and teachers; or (2) the individual, entity or institution engaged in child care. This special parental authority and responsibility applies to all authorized activities, whether inside or outside the premises of the school, entity or institution – such as field trips, excursions and other affairs of the pupils and students outside the school premises, whenever authorized by the school or its teachers. Under Article 219 of the Family Code, if the person under custody is a minor, those exercising special parental authority are principally and solidarily liable for damages caused by the acts or omissions of the unemancipated minor while under their supervision, instruction, or custody. In this case, however, petitioner school was not held liable for death indemnity, moral damages and attorneys fees as the proximate cause of the accident was not attributable to the minor in its custody. *(St. Mary's Academy v. Carpitanos, G.R. No. 143363, 6 February 2002).*

OWNERSHIP

Recovery of Property. (Article 433, New Civil Code). The true owner must resort to judicial process for the recovery of property. The term "judicial process" could mean no less than an ejectment suit or reinvindicatory action in which the ownership claims of the contending parties may be properly heard and adjudicated. *(PNB v. CA, G.R. No. 135219, 17 January 2002).*

DIFFERENT MODES OF ACQUIRING OWNERSHIP

DONATION

Donation *Inter Vivos.* The express irrevocability of the donation in this case is the distinctive standard that identifies that document as a donation *inter vivos.* The other provisions therein which seemingly make the donation *mortis causa* do not go against the irrevocable character of the subject donation. The provisions which state that the donation will only take effect upon the death of the donor and that there is a prohibition to alienate, encumber, dispose of or sell the donated property, should be harmonized with its express irrevocability. Said statements have been construed only to mean that after the donor's death, the donation will take effect so as to make the donees the absolute owners of the donated property, free from all liens and encumbrances. Another indication that the donation is *inter vivos* is the acceptance clause. Acceptance is a requirement for donations *inter vivos. (Austria-Magat v. CA, G.R. No. 106755, 1 February 2002).*

Revocation of Donation. The act of selling the subject property to the petitioner herein cannot be considered as a valid act of revocation of the deed of donation for the reason that an action to revoke the donation must be filed pursuant to Article 764 of the New Civil Code. The rule that there can be automatic

revocation without a court action does not apply to the case at bar as there is no provision in the subject deed of donation for automatic revocation in the event of non-compliance with any of the conditions set forth therein. (*id.*)

OBLIGATIONS AND CONTRACTS

OBLIGATIONS

NATURE AND EFFECT

Fortuitous Event. Article 1174 of the New Civil Code states that no person shall be responsible for a fortuitous event that could not be foreseen or, though foreseen, was inevitable. *(Mindex Resources Development v. Morillo, G.R. No. 138123, 12 March 2002; The Philippine American General Insurance Co., Inc.,v. Mgg Marine Services, G.R. No. 135645, 8 March 2002).* To constitute a fortuitous event, the following elements must concur: [i] the cause of the unforeseen and unexpected occurrence or of the failure of the debtor to comply with obligations must be independent of human will; [ii] it must be impossible to foresee the event that constitutes the *caso fortuito* or, if it can be foreseen, it must be impossible to avoid; [iii] the occurrence must be such as to render it impossible for the debtor to fulfill obligations in a normal manner; and [iv] the obligor must be free from any participation in the aggravation of the injury or loss. (*id.*)

DIFFERENT KINDS OF OBLIGATIONS

PURE AND CONDITIONAL OBLIGATIONS

Rescission. Article 1191 of the New Civil Code. Among the issues discussed: (a) Reciprocal Obligations. (b) No Third Persons Involved. (c) Material Breach. (d) Restoration of the Parties to *Status Quo Ante*. *(Ong Yong v. Tiu, G.R. No. 144476, 1 February 2002).*

OBLIGATIONS WITH A PENAL CLAUSE

Penalty Clause. Reasonableness of penalty charge. *(Ligutan v. CA, G.R. No. 138677, 12 February 2002).*

EXTINGUISHMENT OF OBLIGATIONS

Novation. Loan obligation is not extinguished by a subsequent execution of a mortgage to secure its payment. *(Ligutan v. CA, G.R. No. 138677, 12 February 2002).*

CONTRACTS

Voidable Contracts. Under Articles 1330 and 1390 of the New Civil Code, the following contracts are voidable: (1) Those where one of the parties is incapable of giving consent to a contract; (2) Those where the consent is vitiated by mistake, violence, intimidation, undue influence or fraud. *(Katipunan v. Katipunan, G.R. No. 132415, 30 January 2002).*

(a) Undue Influence. It appears in this case that respondent signed the deed without the remotest idea of what it was and that undue influence was exerted on him. Said respondent was illiterate and had a mental age of a six-year old child. The documents he purportedly signed were all in English and there is no showing that the said contracts were read and / or explained nor translated in a language he understood. (*id.*)

(b) Fraud. Sale of subject house which is not safely habitable. *(Jumalon v. CA, G. R. No. 127767, 30 January 2002).*

Void Contracts. (a) An absolutely simulated contract of sale is void *ab initio* and transfers no right of ownership. *(Cruz v. Bancom*

Finance Corporation, G.R. No. 147788, 19 March 2002). (b) Sale of real property by parties who have not been authorized by the owner to sell. *(AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R. No. 111448, 16 January 2002).*

TRUSTS

Implied Trusts. (a) Mateo and Josue were officers of the association that was formed by the tenants of a building for the acquisition of the property, including subject "Apartment Unit," of which the Genguyons had been the tenants for 24 years. The facts and evidence on record conclusively show that Mateo surreptitiously purchased the Apartment Unit from the original owners, and that the Genguyons were not aware of his secret machinations to acquire the property for himself. Mateo did not inform the Genguyons of the sale to him. It was Barretto (one of the original owners) who wrote the Genguyons telling them that the Apartment Unit had been sold to Mateo and that they had six (6) months within which to vacate the premises. Mateo abused the confidence and trust that the Genguyons bestowed on him. Josue, fully aware of the questionable circumstances attending Mateo's acquisition, in turn purchased the said property from Mateo. The Genguyons had no inkling that Mateo or Josue were even interested to buy the Apartment Unit. They trusted Mateo and then Josue to negotiate, among others, for the acquisition of the Apartment Unit in behalf of the Genguyons. They never suspected that Mateo and Josue would appropriate for themselves the Apartment Unit. When sued by the Genguyons, Josue denied that a constructive trust was created as he did not commit any fraud. Held: Constructive trusts do not only arise out of fraud or duress, but also from abuse of confidence, in order to satisfy the demands of justice. Mateo and Josue are barred from acquiring for their own benefit the Apartment Unit. They have to respect the preferential right of the Genguyons over the Apartment Unit. *(Arlegui v. CA, G.R. No. 126437, 6 March 2002).*

(b) When the Genguyons filed the action for reconveyance, they were in possession of the subject property. The Court has held that the 10-year prescription period applies only when the plaintiff or the person enforcing the trust is not in possession of the property. If a person claiming to be the owner thereof is in actual possession of the property, the right to seek reconveyance, which in effect seeks to quiet title to the property, does not prescribe. Even though the Genguyons filed the action for reconveyance after the case for ejectment against them was instituted, the same was not rendered stale or improper. (*id.*)

(c) The Genguyons were awarded damages (whether compensatory or nominal) in the amount of P35,000.00, inclusive of attorneys fees, based on Article 19, 21, 2221 and 2222 of the New Civil Code. (*id.*)

SALES

Contract to Sell. *(Insular Life Assurance Company, Ltd. v. Young, G.R. No. 140964, 16 January 2002).*

Dacion En Pago. *(Philippine Lawin Bus, Co., v. CA, G.R. No. 130972, 23 January 2002).*

Right of Repurchase. In *pacto de retro* sale. *(Abilla v. Gobonseng, G.R. No. 146651, 17 January 2002).*

LEASE

Term of Lease. Extension. (a) A stipulation in a lease contract stating that its five-year term is subject to "an option to renew" shall be interpreted to be reciprocal in character. Unless the language shows an intent to allow the lessee to exercise it

unilaterally, such option shall be deemed to benefit *both* the lessor and the lessee who must *both* consent to the extension or renewal, as well as to its specific terms and conditions. In the instant case, there was nothing in the aforesaid stipulation or in the actuation of the parties that showed that they intended an automatic renewal or extension of the term of the contract. *(LL and Company Development and Agro-Industrial Corporation v. Huang, G.R. No. 142378, 7 March 2002).* (b) The extension of a lease contract must be made before its term expires - not after. Upon the lapse of the stipulated period, courts cannot belatedly extend or make a new lease for the parties, even on the basis of equity. (*id.*)

Grounds for Judicial Ejectment. Rental Reform Act of 2002. Article 1673 of the New Civil Code. (a) Nonpayment of Rent. Respondents justify their nonpayment of rent on the ground that petitioners refused to accept their payments. Article 1256 of the New Civil Code, however, provides that "if the creditor to whom tender of payment has been made refuses without just cause to accept it, the debtor shall be released from responsibility by the consignation of the thing or sum." (b) Mere subsequent payment of rentals by the lessee and the receipt thereof by the lessor does not, absent any other circumstance that may dictate a contrary conclusion, legitimize the unlawful character of the possession. The lessor may still pursue the demand for ejectment. (c) As to the contention that it is not fair to eject respondents from the premises after only five years, considering the value of the improvements they introduced therein, suffice it to say that they did so with the knowledge of the risk - the contract had plainly provided for a five-year lease period. (*id.*).

Increase in Rentals. Suspension of Payment. In this case, petitioner could not unilaterally increase the rental. Hence, upon refusal of petitioner to accept rentals from the respondents at the old rate, the respondents should have deposited such rentals with a bank or the judicial authorities. But they failed. Article 1658 of

the New Civil Code provides only two instances in which the lessee may suspend payment of rent: (1) the lessor fails to make the necessary repairs or (2) the lessor fails to maintain the lessee in peaceful and adequate enjoyment of the property leased. None of these is present in the case at bar. (*id.*).

Lessee's Obligations. Articles 1667 and 1665 of the New Civil Code. The lessee is responsible for the deterioration or loss of the thing leased, unless he proves that it took place without his fault. *(Mindex Resources Development v. Morillo, G.R. No. 138123, 12 March 2002).*

Damages in Illegal Detainer. Refer to "rents" or "the reasonable compensation for the use and occupation of the premises," or "fair rental value of the property." Temperate, actual, moral and exemplary damages are not recoverable in such cases. *(Herrera v. Bollos, G. R. No. 138258, 18 January 2002).*

WORK AND LABOR

CONTRACT FOR A PIECE OF WORK

Video Taping. Wedding Celebration. Breach of contgract. *(Herbosa v. CA, G. R. No. 119086, 25 January 2002).* The exercise of due care in the selection and supervision of employees – not a defense in *culpa contractual*, such as in this case. *(Herbosa v. CA, G.R. No. 119086, 25 January 2002).*

COMMON CARRIERS

Definition. The New Civil Code (Article 1732) definition of "common carriers" makes no distinction between: [i] one whose *principal* business activity is the carrying of persons or goods or both, and one who does such carrying only as an *ancillary* activity;

[ii] person or enterprise offering transportation service on a *regular or scheduled basis* and one offering such service on an *occasional, episodic or unscheduled basis;* (c) a carrier offering its services to the "*general public,*" *i.e.,* the general community or population, and one who offers services or solicits business only from a narrow *segment* of the general population. *(Calvo v. UCPB General Insurance Co., Inc., G.R. No. 148496, 19 March 2002).*

Extraordinary Diligence. Common carriers, from the nature of their business and for reasons of public policy, are mandated to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them. As a general rule, common carriers are presumed to have been at fault or negligent if the goods transported by them are lost, destroyed, or if the same deteriorated. *(The Philippine American General Insurance Co., Inc., v. Mgg Marine Services, G.R. No. 135645, 8 March 2002; Herbosa v. CA, G. R. No. 119086, 25 January 2002).* In this case, petitioner accepted the cargo without exception despite the apparent defects in some of the container vans. Hence, for failure of petitioner to prove that she exercised extraordinary diligence in the carriage of goods in this case or that she is exempt from liability, the presumption of negligence as provided under Art. 1735 holds. *(Calvo v. UCPB General Insurance Co., Inc., G.R. No. 148496, 19 March 2002).* However, this presumption of fault or negligence does not arise in the cases enumerated under Article 1734 of the New Civil Code. *(Mindex Resources Development v. Morillo, G.R. No. 138123, 12 March 2002; The Philippine American General Insurance Co., Inc., v. Mgg Marine Services, G.R. No. 135645, 8 March 2002).*

LOAN

Real Contract. It is perfected only upon the delivery of the object of the contract. *(BPI Investment Corporation v. CA, G.R. No. 133632, 15 February 2002).*

AGENCY

General Agency. A general power permits the agent to do all acts for which the law does not require a special power. *(Dominion Insurance Corporation v. CA, G. R. No. 129919, 6 February 2002).*

Special Power of Attorney. Article 1878 of the New Civil Code enumerates the instances when a special power of attorney is required, such as: "(1) To make such payments as are not usually considered as acts of administration; xxx (15) Any other act of strict dominion." The payment or settlement of insurance claims is not an act of administration. (*id.*). "(7) To loan or borrow money, unless the latter act be urgent and indispensable for the preservation of the things which are under administration; x x x (12) To create or convey real rights over immovable property; x x x." *(Adriano v. Pangilinan, G.R. No. 137471, 16 January 2002).* Thus, the Court held: [i] In a sale of a parcel of land or any interest therein made through an agent, a special power of attorney is essential. *(Pineda v. CA, G.R. No. 127094, 6 February 2002).* [ii] Cruz had no written authority from the board of directors of respondent corporation (owner of lot) to sell or negotiate the sale of the lot, much less to appoint other persons for the same purpose. Such lack of authority precludes him from conferring any authority to Polintan involving the subject realty. Necessarily, neither could Polintan authorize Felicisima. Clearly, the collective acts of respondent Cruz, Polintan and Felicisma cannot bind respondent corporation in the purported contract of sale. *(AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R.No. 111448, 16 January 2002).*

Violation of Principal's Instruction by Agent. Respondent deviated from the instructions of his principal by paying and settling insurance claims which were not within his authority. Nonetheless, he was allowed to be reimbursed of what he paid to the extent that it benefited his principal, in light of Articles 1918 and 1236 of the New Civil Code. *(Dominion Insurance Corporation v. CA, G.R. No. 129919, 6 February 2002).*

SURETYSHIP

Continuing Surety. Here, the extensions of the terms for paying the loans did not release the surety. *(Tañedo v. Allied Banking Corporation, G.R. No. 136603, 18 January 2002; Lee v. CA, G.R. No. 117913, 1 February 2002).*

MORTGAGE

Essential Requisites. Only the absolute owner of the property can constitute a valid mortgage on it. *(Cruz v. Bancom Finance Corporation, G.R. No. 147788, 19 March 2002).* (a) Mortgage by Non-Owner. Doctrine of Comparative Negligence. In the present case, the mortgagee (who is engaged in the business of lending money secured by real estate mortgage), could have easily avoided the loss by simply exercising due diligence to ascertain the identity of the impostor who claimed to be the registered owner of the property mortgaged. *(Adriano v. Pangilinan, G.R. No. 137471, 16 January 2002).*

Not Innocent Mortgagee for Value. (*id.*).

Equitable Mortgage. *(Magdalena Blancia v. Vda. de Calauor, G.R. No. 138251, 29 January 2002).*

Extrajudicial Foreclosure of Mortgage. Act 3135, as amended, entitled *" An Act to Regulate the Sale of Property Under Special Powers Inserted in or Annexed to Real Estate Mortgages. (Casano v. Magat, A.M. No. P-02-1539, 24 January 2002).*

PLEDGE

Notice of Auction Sale. Article 2112 of the New Civil Code does not prohibit the sending of a single notice of sale to the

debtor and pledgor informing of the scheduled public auction sale and a second public auction sale on the following day, in the event that the pledged shares are not sold on the first auction. *(Insular Life Assurance Company, Ltd. v. Young, G.R. No. 140964, 16 January 2002).*

DAMAGES

Actual or Compensatory Damages. Must be proved, and cannot be presumed. *(Country Bankers Insurance Corporation v. Lianga Bay and Community Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January 2002; Herbosa v. CA, G. R. No. 119086, 25 January 2002; Mindex Resources Development v. Morillo, G.R. No. 138123, 12 March 2002).* Aggrieved party is obliged to minimize damages resulting from the act or omission in question. *(Lim v. CA, G.R. No. 125817, 16 January 2003).*

Attorney's Fees. Award of attorney's fees is the exception rather than the rule and counsel's fees are not to be awarded every time a party wins a suit. It cannot be granted simply because one was compelled to sue to protect and enforce one's right. The power of the court to award attorney's fees under Article 2208 of the New Civil Code demands factual, legal, and equitable justification which must be explicitly state in the body of the decision and not only in the dispositive portion thereof. In the absence of stipulation, a winning party may be awarded attorney's fees only in case the plaintiff's action or defendant's stand is so untenable as to amount to gross and evident bad faith. The grant must be proven by facts; it cannot depend on mere speculation or conjecture. *(Mindex Resources Development v. Morillo, G.R. No. 138123, 12 March 2002; BPI Investment Corporation v. CA, G.R. No. 133632, 15 February 2002; AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R.No. 111448, 16 January 2002; Insular Life Assurance Company, Ltd. v. Young, G.R. No. 140964, 16 January 2002; Quirino v. Diaz, G. R. No. 137305,*

17 January 2002). Bearing in mind that the rate of attorney's fees has been agreed to by the parties and intended to answer not only for litigation expenses but also for collection efforts as well, the Court, like the appellate court, deems the award of attorney's fees equivalent to 10% of the total amount of indebtedness to be reasonable. *(Ligutan v. CA, G.R. No. 138677, 12 February 2002).*

Litigation Expenses. *(Country Bankers Insurance Corporation v. Lianga Bay and Community Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January 2002).* The only "costs" that a winning party may recover are those prescribed in Rule 142 of the Revised Rules of Court (1964 Revision). The provisions thereof bind all lower courts, including the CA, the Sandiganbayan, the CTA, the RTC and the MTC. No court may award costs in excess of the sums specified therein. In this case, the RTC's award of "costs of suit" in the amount of THIRTY-ONE MILLION PESOS (P31,000,000.00) against the GSIS was declared to be patently absurd and void. *(GSIS v. Bengson Commercial Buildings, Inc., G.R. No. 137448, 31 January 2002).*

Interest Rate. Guidelines on the application of the proper interest rates. *(Country Bankers Insurance Corporation v. Lianga Bay and Community Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January 2002; Solidbank Corporation v. CA, G.R. No. 138131, 12 March 2002; Lim v. CA, G.R. No. 125817, 16 January 2003).*

Moral Damages. *(BPI Investment Corporation v. CA, G.R. No. 133632, 15 February 2002; AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R. No. 111448, 16 January 2002; Insular Life Assurance Company, Ltd. v. Young, G.R. No. 140964, 16 January 2002).*

Exemplary Damages. *(BPI Investment Corporation v. CA, G.R. No. 133632, 15 February 2002; AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R. No. 111448, 16 January 2002; Country Bankers Insurance Corporation v. Lianga Bay and Community*

Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January 2002; Herbosa v. CA, G.R. No. 119086, 25 January 2002; AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R. No. 111448, 16 January 2002).

Nominal Damages. *(BPI Investment Corporation v. CA, G.R. No. 133632, 15 February 2002).*

COMMERCIAL LAW

CORPORATION LAW

Corporate Powers. Exercised by the Board of Directors (Section 23 of the Corporation Code). Thus, contracts or acts of a corporation must be made either by the board of directors or by a corporate agent duly authorized by the board. Absent such valid delegation / authorization, the declarations of an individual director relating to the affairs of the corporation, but not in the course of, or connected with, the performance of authorized duties of such director, are held not binding on the corporation. *(AF Realty & Development, Inc. v. Dieselman Freight Services, Co., G.R. No. 111448, 16 January 2002).*

Officers. An "office" has been defined as a creation of the charter of a corporation, while an "officer," as a person elected by the directors or stockholders. On the other hand, an "employee" occupies no office and is generally employed not by action of the directors and stockholders but by the managing officer of the corporation who also determines the compensation to be paid to such employee. (a) As petitioner's appointment as comptroller required the approval and formal action of the IBC's Board of Directors to become valid, then petitioner is a corporate officer whose dismissal may be the subject of a controversy cognizable by the SEC under Section 5(c) of P.D. 902-A, which includes controversies involving both election and appointment of corporate directors, trustees, officers, and managers. Had petitioner been an ordinary employee, such board action would not have been required. *(Nacpil v. International Broadcasting Corporation, G.R. No. 144767, 21 March 2002).* (b) That the position of comptroller is not expressly mentioned among the officers of the IBC in its By-Laws is of no moment, because the IBC Board of Directors is empowered

under the IBC By-Laws and Section 25 of the Corporation Code to appoint such other officers as it may deem necessary. (c) As to petitioner's argument that the nature of his functions is recommendatory thereby making him a mere managerial officer, the Court has previously held that the relationship of a person to a corporation, whether as officer or agent or employee, is not determined by the nature of the services performed but instead by the incidents of the relationship as they actually exist. (d) It is likewise of no consequence that petitioner's complaint for illegal dismissal includes money claims, for such claims are actually part of the perquisites of his position in, and therefore linked with his relations with, the corporation. The inclusion of such money claims does not convert the issue into a simple labor problem. Clearly, the issues raised by petitioner against the IBC are matters that come within the area of corporate affairs and management and constitute a corporate controversy in contemplation of the Corporation Code. (e) Under Section 5.2 of the Securities Regulation Code (R.A. No. 8799), which was signed into law on 19 July 2000, the SEC's jurisdiction over all cases enumerated in Section 5 of P.D. 902-A has been transferred to the RTC. *(Nacpil v. International Broadcasting Corporation, G.R. No. 144767, 21 March 2002).*

Powers of Officers. A perusal of the By-Laws of MICO shows that the power to borrow money for the company and issue mortgages, bonds, deeds of trust and negotiable instruments or securities secured by mortgages or pledges of property belonging to the company may be delegated by its Board of Directors to any of its standing committee, officer or agent. Hence, PBCom had every right to rely on the Certification issued by MICO's corporate secretary that Chua Siok Suy was duly authorized to borrow money and obtain credit facilities in behalf of MICO from PBCom. *(Lee v. CA, G.R. NO. 117913, 1 February 2002).*

TRADEMARKS

Supplemental Register. *(Kho v. CA, G.R. No. 115758, 19 March 2002).*

Infringement. Remedies. *(Sambar v. Levi Strauss & Co., G.R. No. 132604, 6 March 2002).*

INSURANCE

Health Care Insurance. Insurable interest. Every person has an insurable interest in the life and health of himself, of his spouse and of his children. (a) Health care agreement is in the nature of non-life insurance, which is primarily a contract of indemnity. Once the member incurs hospital, medical or any other expense arising from sickness, injury or other stipulated contingency, the health care provider must pay for the same to the extent agreed upon under the contract. (b) Concealment. (c) Rescission of Policy. (d) Beneficiary. Petitioner alleges that respondent was not the legal wife of the deceased member, considering that at the time of their marriage, the deceased was previously married to another woman who was still alive. Held: The health care agreement is in the nature of a contract of indemnity. Hence, payment should be made to the party who incurred the expenses. It is not controverted that respondent paid all the hospital and medical expenses. She is therefore entitled to reimbursement. The records adequately prove the expenses incurred by respondent for the deceased's hospitalization, medication and the professional fees of the attending physicians. *(Philamcare Health Systems, Inc.v. CA, G.R. No. 125678, 18 March 2002).*

PUBLIC UTILITY

Certificate of Public Convenience. Certificate of Registration of Motor Vehicle. *Kabit* System. In this case, a passenger jeepney covered by a certificate of public convenience was sold by its owner to a buyer who continued to operate it under the same certificate of public convenience under the so-called *kabit* system. In the course of business, the vehicle met an accident through the fault of another vehicle. Held: The new owner of the passenger jeepney may sue for damages against the erring vehicle. *(Lim v. CA, G.R. No. 125817, 16 January 2003).*

Manila Electric Company (MERALCO). Differential Billings. Allegedly for unregistered consumption of electricity resulting from the tampering of Meralco's electric meter. *(MERALCO v. Macro Textile Mills Corporation, G.R. No. 126243, 18 January 2002).*

BANKS

Letters of Credit *(Lee v. CA, G.R. NO. 117913, 1 February 2002).*

Trust Receipts (*id.*).

Certificate of Deposit. A bank acts at its peril when it pays deposits evidenced by a certificate of deposit, without its production and surrender after proper indorsement. In this case, the certificates of deposit were clearly marked payable to "bearer." Petitioner should not have paid respondent's husband or any third party without requiring the surrender of the certificates of deposit. Petitioner claims that it did not demand the surrender of the subject certificates of deposit since respondent's husband was one of the bank's senior managers. Long after respondent's husband had allegedly been paid respondent's deposit and before his retirement from service, petitioner never required him to deliver the

certificates of deposit in question. Moreover, the accommodation given to respondent's husband was made in violation of the bank's policies and procedures. Thus, petitioner bank failed to exercise that degree of diligence required by the nature of its business. *(Far East Bank and Trust Company v. Querimit, G.R. No. 148582, 16 January 2002).*

Forged Check. Bank negligence in allowing encashment of. *(Westmont Bank v. Ong, G.R. No. 132560, 30 January 2002).*

NEGOTIABLE INSTRUMENTS LAW

Forgery. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. (Section 23). In the case at bar, since the signature of the payee, was forged to make it appear that he had made an indorsement in favor of the forger, such signature should be deemed as inoperative and ineffectual. Petitioner, as the collecting bank, grossly erred in making payment by virtue of said forged signature. The payee, herein respondent, should therefore be allowed to recover from the collecting bank. (*id.*).

CRIMINAL LAW

REVISED PENAL CODE (RPC)

FELONIES AND CIRCUMSTANCES WHICH AFFECT CRIMINAL LIABILITY

CONSUMMATED, FRUSTRATED AND ATTEMPTED FELONIES

Attempted. Petitioner stabbed the victim twice on the chest, which is indicative of an intent to kill. Believing that the victim was dying, petitioner left. However, there is no evidence that the wounds sustained by the victim were fatal enough as to cause death. Circumstances which qualify criminal responsibility cannot rest on mere conjectures, no matter how reasonable or probable, but must be based on facts of unquestionable existence. The uncertainty on the nature of the wounds warrants the appreciation of a lesser gravity of the crime committed as this is in accordance with the fundamental principle in Criminal Law that all doubts should be resolved in favor of the accused. Even if the victim was wounded but the injury was not fatal and could not cause his death, the crime would only be attempted. *(Paddayuman v. People, G.R. No. 120344, 23 January 2002).* Attempted murder. *(People v. Costales, G.R. No. 141154-56, 15 January 2002).*

Frustrated. Appellant's intent to kill is reflected by the weapon he used; and the nature and position of the wounds inflicted on the victim ("thru and thru laceration of the gall bladder, stomach and the jejunum") as a result of the stabbing by appellant. Were it not for timely medical attention, Cura would have died from said wounds. *(People v. Salva, G.R. No. 132351, 10 January 2002).*

CONSPIRACY AS A MEANS OF COMMITTING FELONY

Conspiracy - Exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. The conduct of the accused before, during, and after the commission of the crime may be considered to show an extant conspiracy. For conspiracy to exist, it is not essential that there be an agreement for an appreciable period prior to the commission of the crime; it is sufficient that at the time of its commission, the accused had the same purpose and were united in its execution. Illustrative cases: (a) The assailants' encounter with the victim along Legaspi Street was purely coincidental. This notwithstanding, at the time of the attack, the accused Jocel and Remwel manifested their common purpose to kill the victim by getting on his jeep almost at the same time and stabbing him simultaneously on the chest and getting off the jeep almost at the same time. Then the two assailants ran away from the crime scene. Jocel called Remwel back and after briefly conversing, they ran together towards the Divine Jesus Memorial Park. *(People v. Bejo, G.R. No. 138454, 13 February 2002).* (b) The physical evidence on record shows that two weapons (a bolo and a knife) were used, the wounds on the victims were inflicted by stabbing and hacking and negate the defense that only one of the accused would use both the bolo and the knife alternatively or successively. *(People v. Manlasing, G.R. Nos. 131736-37, 11 March 2002).* (c) Surrounding and in a concerted fashion assaulting the unarmed victim proved that appellants had intentionally and voluntarily acted together for the realization of a common criminal intent to kill the victim. *(People v. Asuela, G.R. Nos. 140393-94, 4 February 2002).* (d) The three malefactors, all wearing ski masks and sporting weapons, arrived together at the house of Director Rosas. While one was threatening Rosas, the other was intimidating Gabilo and the third was pointing his weapon on Norman. After getting the money and valuables of Gabilo and Rosas, all three went downstairs together, two of them dragging Gabilo with them. Upon the instruction of accused Nerio,

accused Batocan stabbed Gabilo. The three malefactors finally left together in the same car, with Nerio driving. *(People v. Suela, G.R. No. 133570-71, 15 January 2002).* (e) The three (3) accused-appellants acted in concert to perpetrate the ghastly incident. Catian and Calunod dealt the fatal blows while Sumalpong watched in stolid silence, with nary a whimper of protest even when his two (2) companions smashed their deadly weapons into the body of their defenseless victim. Not content with his inaction, Sumalpong then carelessly slung the body of their fallen victim over his shoulder and walked away to an undisclosed location. *(People v. Catian, G.R. No. 139693, 24 January 2002).* (f) It exists where the participants performed specific acts with such closeness and coordination as unmistakably to indicate a common purpose or design in bringing about the crime, such as, where one of the accused-appellants held the arms of the victim enabling the other accused to stab the victim. *(People v. Campomanes, G.R. No. 132568, 6 February 2002).* (g) Prosecution witness Luna was present at the scene of the crime, he being one of the victims. He stated that during the election campaign trails on May 13, 1984, the group of Pacificador, escorted by the accused-appellants overtook their Tamaraw several times, and the latter pointed their guns against them, making it very apparent that accused-appellants were tailing the group of Luna. Ultimately, accused-appellants perpetrated their unlawful design against the group of Luna when they strategically positioned themselves at the southern end of the single-lane Pangpang Bridge in Sibalom, Antique, parked their vehicle near the foot of the bridge, making sure that the group of Luna would not be able to pass through and took cover in the nearby canal and waited for the arrival of their prey. The simultaneous acts of leaving, waiting for their victims to come out, tailing and firing at them continuously at close range, and escaping from the crime scene clearly establish a conspiracy among the malefactors. *(People v. Pacificador, G.R. No. 126515, 6 February 2002).* (h) Present in the following cases: Rape and Acts of Lasciviousness. *(People v. Dy, G.R. Nos. 115236-37, 29 January 2002),* Kidnapping for Ransom.

(People v. Bacungay, G.R. No. 125017, 12 March 2002). Special complex crime of Robbery with Homicide. *(People v. Dinamling, G.R. No. 134605, 12 March 2002).* Illegal Recruitment by a Syndicate. *(People v. Hernandez, G.R. Nos. 141221-36, 7 March 2002).* But was not established in this case of Acts of Lasciviousness. *(People v. Castillo, G.R. No. 131200, 15 February 2002).*

JUSTIFYING CIRCUMSTANCES

Self-defense. Elements not established. (1) Unlawful Aggression on the part of the Deceased. What merely transpired before petitioner's gun went off was a heated exchange of words between the protagonists, which does not amount to unlawful aggression. Unlawful aggression presupposes an actual, sudden, and unexpected attack, or imminent danger thereof. The person defending himself must have been attacked with actual physical force or with actual use of weapon. Unlawful aggression is a condition *sine qua non* for the justifying circumstance of self-defense. In this case, all that the deceased did immediately before he was shot was shout expletives and slap petitioner's hand when the latter pointed it to his face. These acts, while offensive, did not warrant petitioner's act of drawing and firing his gun. *(Tangan v. CA, G.R. No. 105830, 15 January 2002).* Even assuming that there was an altercation for the possession of the cameras and that the Vinculados clenched their fists in anger, with Miguel saying *"A ganoon ba. Kung gusto mo Mayor ay sasapakin kita,"* the same is not unlawful aggression. Unlawful aggression refers to an attack that has actually broken out or materialized or at the very least is clearly imminent: it cannot consist in oral threats or a merely threatening stance or posture. *(People v. Galvez, G.R. No. 130397, 17 January 2002).*

(2) Reasonable Necessity of the Means Employed to Prevent or Repel the Aggression. The nature and number of wounds suffered by the Vinculados likewise negate any claim of self-defense. Levi's mandible was literally hanging from his face as a result of a bullet wound. He was rendered blind in one eye due to another bullet wound and absorbed two more bullets on the chest and shoulder. On the other hand, Alvin died due to four gunshot wounds, all on his back. They demonstrate a determined effort to kill the victim and not self-defense. (*id.*).

(3) Lack of Sufficient Provocation on the Part of the Defending Person.

Moreover, accused-appellant left his victim and did not even bother to report the matter to the proper authorities. All told, the plea of self-defense cannot be justifiably entertained where it is not only uncorroborated by any separate competent evidence but also extremely doubtful in itself. (*id.*). By claiming self-defense, petitioner assumes the *onus* to establish his plea with certainty by credible, clear and convincing evidence; otherwise, conviction will follow from his admission that he killed the victim. *(Paddayuman v. People, G.R. No. 120344, 23 January 2002; People v. Quening, G,R. No. 132167, 8 January 2002; People v. Pacificador, G.R. No. 126515, 6 February 2002).*

Defense of Relative. Not established. The weapon used and the grave wounds inflicted on the victims negate the reasonableness of appellant's action, taken allegedly in defense of his brothers. Appellant's testimony on record is unconvincing, confused, and evasive. Like self-defense, defense of relatives must be proved positively and convincingly. *(People v. Salva, G.R. No. 132351, 10 January 2002).*

Defense of Stranger. Not established. The presence of a large number of wounds on the victim negates self-defense and indicates a determined effort to kill the victim. *(People v. Saure, G.R. No. 135848, 12 March 2002).* Finally, accused-appellant's acts of fleeing and hiding in Sorsogon immediately after the shooting are indicative of his guilt. *(People v. Galvez, G.R. No. 130397, 17 January 2002).*

MITIGATING CIRCUMSTANCES

Incomplete Self-defense. Privileged Mitigating. Unlawful aggression is a condition *sine qua non* for self-defense, whether complete or incomplete. It appears that the deceased did not commit any unlawful aggression towards accused-appellant. On the contrary, it was accused-appellant who was the aggressor when he shot the deceased who was unarmed and raising his hands. A person defending himself has no more right to attack an aggressor when the unlawful aggression has ceased. In the instant case, accused-appellant was not justified in attacking the deceased as the latter had his hands raised and was no longer poised to attack accused-appellant's father at the time he was shot. Furthermore, the acts of the deceased immediately prior to the shooting did not constitute unlawful aggression. *(People v. Adlawan, G.R. No. 131839, 30 January 2002).*

Minority. Privileged Mitigating. (a) Established. At the time of the commission of the crime, Gutierez was seventeen years, seven months and three days old; thus, minority was correctly appreciated in his favor. *(People v. Gutierrez, G.R. No. 142905, 18 March 2002).* The claim of the accused that he was seventeen years old when the crime was committed will be upheld by the court even without any proof to corroborate his testimony, especially so when coupled by the fact that the prosecution failed to present contradictory evidence thereto. Therefore, the penalty to be

imposed on accused-appellant should be lowered by one degree. *(People v. Monteron, G.R. No. 130709, 6 March 2002; Reyes v. CA, G.R. No. 127703, 18 January 2002).* (b) Not appreciated. Being already 19 years old when he committed the crime, accused-appellant is not entitled to the privileged mitigating circumstance. *(People v. Gutierrez, G.R. No. 142905, 18 March 2002)*

Sufficient Provocation. Must be proportionate to the gravity of the retaliatory act. In this case, the victim merely shouted at the appellant and asked him to leave. Stabbing her to death could hardly be proportionate in gravity to her act of shouting, no matter how loud. *(People v. Lab-eo, G. R. No. 133438, 16 January 2002)*

Passion or Obfuscation. Requisites: (1) There be an act, both unlawful and sufficient, to produce such a condition of mind; and (2) Said act which produced the obfuscation was not far removed from the commission of the crime by a considerable length of time during which the perpetrator might recover his equanimity. In the case at bar, accused-appellant thought his father, whose face was bloodied and lying unconscious on the ground, was dead. Surely, such a scenario is sufficient to trigger an uncontrollable burst of legitimate passion. His act, therefore, of shooting the deceased, right after learning that the latter was the one who harmed his father, satisfies the requisite of this mitigating circumstance. *(People v. Adlawan, G.R. No. 131839, 30 January 2002).* However, where: the victim did not do anything unlawful in asking the appellant to leave, there is an absolute lack of proof that the appellant was utterly humiliated by the victim's utterance, nor was it shown that the victim made that remark in an insulting and repugnant manner – such utterance is not the stimulus required by jurisprudence to be so overwhelming as to overcome reason and self-restraint on the part of the accused. *(People v. Lab-eo, G.R. No. 133438, 16 January 2002)*

Voluntary Confession. Mitigating, if done before the prosecution presents its evidence. *(People v. Callos, G.R. No. 133478, 16 January 2002).*

Voluntary Surrender. To be considered as a mitigating circumstance, the following requisites must be present: (1) The offender has not been actually arrested; (2) The offender surrendered himself to a person in authority or to the latter's agent; and (3) The surrender was voluntary. For a surrender to be voluntary, it must be spontaneous and show the intent of the accused to submit himself unconditionally to the authorities, either: [i] because he acknowledges his guilt; or [ii] because he wishes to save them the trouble and expense incidental to his search and capture. *(People v. Boquila, G.R. No. 136145, 8 March 2002).*

(a) Appreciated: [i] in favor of appellant who testified that after the hacking incident, he went to the house of the *kagawad* who brought him to the Municipal Building of Aroroy to admit to the killing, albeit in self-defense. *(People v. Quening, G,R. No. 132167, 8 January 2002).* [ii] where shortly after the incident, the appellant went to the municipal hall and surrendered to the authorities. *(People v. Lab-eo, G. R. No. 133438, 16 January 2002)*; [iii] Three (3) days after the death of the victim, accused-appellant read in the local newspaper that the victim had six children. This bothered his conscience, prompting him to go to the police and admit his guilt. *(People v. Boquila, G.R. No. 136145, 8 March 2002).*

(b) Not appreciated: [i] The conduct of the accused and not his intention alone, after the commission of the offense, determines the spontaneity of the surrender. The surrender is not spontaneous where it took accused-appellant more than three years from the issuance of the warrant of arrest before he finally decided to surrender. *(People v. Adlawan, G.R. No. 131839, 30 January 2002).* [ii] The accused testified that he voluntarily surrendered not because he acknowledged his guilt but because there was a threat made

by the person whom he alleged to be the real assailant. *(People v. Cortezano, G.R. No. 140732, 29 January 2002).* [iii] After the killings, the accused went into hiding and only surrendered after the police were tipped on his whereabouts and sent a team to arrest him. *(People v. Manlasing, G.R. Nos. 131736-37, 11 March 2002).* [iv] The surrender was made too late in a place too distant from the crime site as well as the place of residence of the accused. *(People v. Costales, G.R. No. 141154-56, 15 January 2002).*

AGGRAVATING CIRCUMSTANCES

In General. Four kinds: (a) Generic - those that can generally apply to all crimes; (b) Specific - those that apply only to particular crimes; (c) Qualifying - those that change the nature of the crime; and (d) Inherent - those that must of necessity accompany the commission of the crime. Except for scoffing at the victim's corpse, all the qualifying circumstances enumerated in Article 248 of the RPC (Murder) are also aggravating circumstances because they are likewise found in Article 14 of the same Code, enumerating the aggravating circumstances. *(People v. Lab-eo, G.R. No. 133438, 16 January 2002).* While a non-alleged but proven aggravating circumstance cannot be used to increase the penalty, nonetheless it can be the source of civil awards. *(People v. Suela, G.R. No. 133570-71, 15 January 2002).*

Taking Advantage of Public Position. To be aggravating, the public officer must use the influence, prestige or ascendancy which his office gives him as a means by which he realizes his purpose. In this case, there was no showing that accused-appellant took advantage of his being a policeman to shoot Jelord or that he used his "influence, prestige or ascendancy" in killing the victim. Accused-appellant could have shot Jelord even without being a policeman. *(People v. Villamor, G.R. No. 141908-09, 15 January 2002).*

Dwelling. Aggravating in rape. The kitchen where Marita was dragged by appellant is her "dwelling," albeit the same does not belong to her. The "dwelling" contemplated in Article 14(3) of the RPC does not necessarily mean that the victim owns the place where he lives or dwells. Be he a lessee, a boarder, or a bedspacer, the place is his home. That the crime was consummated in the nearby house is also immaterial. Marita was forcibly taken by appellant from her dwelling house (kitchen) and then raped nearby. *(People v. de la Torre, G.R. No. 98431, 15 January 2002).* Aggravating in homicide. *(People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).* **Disregard of Age or Sex.** Killing of a woman is not attended by this aggravating circumstance if the offender did not manifest any specific insult or disrespect towards the offended party's sex. In the case at bar, there is absolutely no showing that accused-appellant deliberately intended to offend or insult the victim. However, even if disrespect or disregard of age or sex were not appreciated, the four circumstances enumerated in Article 14, paragraph 3 of the RPC, as amended, can be considered *singly* or *together*. (*id.*).

Nighttime. Becomes an aggravating circumstance when: (1) it was specially sought by the offender; or (2) it was taken advantage of by him; or (3) it facilitated the commission of the crime by insuring the offender's immunity from capture. Although the crime was committed at 7 o'clock in the evening, no evidence was presented showing that nighttime was especially sought by the offenders to consummate the crime or to facilitate its commission. *(People v. Conde, G.R. No. 134483, 16 January 2002; People v. Moreno, G.R. No. 140033, 25 January 2002).* Not aggravating in these cases: [i]. The darkness of the night was not purposely sought by the offenders to facilitate the commission of the crime nor to ensure its execution with impunity. *(People v. Boquila, G.R. No. 136145, 8 March 2002).* [ii] Absorbed by treachery. *(People v. Costales, G.R. No. 141154-56, 15 January 2002).*

Evident Premeditation. Elements: (1) the time when the offender determined to commit the crime; (2) an act manifestly indicating that the culprit had clung to his determination; and (3) a sufficient lapse of time between the determination and the execution to allow the accused to reflect upon the consequences of his act. The elements of evident premeditation must be established with equal certainty and clarity as the criminal act itself before it can be appreciated as a qualifying circumstance. (a) Such elements were established in these cases. *(People v. Pacificador, G.R. No. 126515, 6 February 2002; People v. Manlasing, G.R. Nos. 131736-37, 11 March 2002).* (b) Not established in these cases: *(People v. Panabang, G.R. No. 137514-15, 16 January 2002; People v. Catian, G.R. No. 139693, 24 January 2002; People v. Alba, G.R. No. 130523, 29 January 2002; People v. Costales, G.R. No. 141154-56, 15 January 2002; People v. Ciron, G.R. No. 139409, 18 March 2002).*

Craft. Disguise, though established, cannot be appreciated in this case of robbery with homicide, as the same was not alleged in the information. In this case, absorbed in treachery. *(People v. Lab-eo, G. R. No. 133438, 16 January 2002).*

Abuse of Superrior Strength. *(People v. Asuela, G.R. Nos. 140393-94, 4 February 2002; People v. Bejo, G.R. No. 138454, 13 February 2002; People v. Hermo, G.R. No. 135026, 15 February 2002; People v. Matignas, G.R. No. 126146, 12 March 2002).* That there were two killers as against one victim did not of itself establish abuse of superior strength. *(People v. Abejuela, G.R. No. 134484, 30 January 2002).*

Treachery. There is treachery when the offender commits any of the crimes against persons: (1) employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make; and (2) deliberately or consciously adopted the means of execution. (Article 14,

paragraph 16, RPC). The essence of treachery is that the attack is deliberate and without warning, done in a swift and unexpected manner, affording the hapless, unarmed and unsuspecting victim no chance to resist or escape. *(People v. Lab-eo, G. R. No. 133438, 16 January 2002).* It must be clearly shown that the method of assault adopted by the aggressor was deliberately chosen to accomplish the crime without risk to the aggressor. *(People v. Bejo, G.R. No. 138454, 13 February 2002; People v. Catian, G.R. No. 139693, 24 January 2002).* The law stresses the manner of performance or accomplishment of the crime than any other factor. *(People v. Bagano, G.R. No. 139531, 31 January 2002; People v. Coscos, G.R. No. 132321, 21 January 2002; People v. Abejuela, G.R. No. 134484, 30 January 2002).*

(a) Treachery was established in the following cases: [i] The accused-appellant fired the first shot at the deceased who was unarmed and had his hands raised. The first shot hit the deceased who fell to the ground. While the deceased was already lying helpless on the ground, the accused-appellant turned the head of the deceased to have a better a better shot at it. Then, he fired the second shot. *(People v. Adlawan, G.R. No. 131839, 30 January 2002).*

[ii] Accused-appellant and Welinido approached the victim from behind and assaulted him without any provocation whatsoever. No altercation preceded the incident and there was nothing to warn the victim of any impending attack on his person, which would put him on guard against accused-appellant's offensive. Although the victim sensed that he was being tailed by accused-appellant and he was able to turn around and see his attackers, the suddenness of the assault and the immediate infliction of four consecutive stab wounds ensured that he would not be able to retaliate or defend himself. *(People v. Abejuela, G.R. No. 134484, 30 January 2002).*

[iii] The accused and the victim had been drinking gin for two hours. There was no altercation. When the victim stood up

and asked permission to leave, the four accused, without warning, carried out their sinister plan. Raul held the hands of the victim and looked back at Ronnie, ostensibly as a signal of sort, after which, the latter immediately stood up and stabbed the victim. This was followed by another stab by Elenito and a hack by appellant Romeo. *(People v. Cantuba, G.R. No. 126022, 12 March 2002).*

[iv] Crisanto and Bernie were holding both hands of the victim, while Gerry and Jackson were beating him with a piece of wood on the different parts of his body. The victim was unarmed and defenseless. *(People v. Cuenca, G.R. No. 143819, 29 January 2002).*

[v] The accused-appellant, stealthily and without warning, rushed towards the victim from behind and stabbed him in the chest. The victim, who was then seated, was not aware of any impending danger. Although there had been prior verbal altercation, the victim had reasons to believe that the matter had already been settled. Considering the multitude of persons who participated in the benefit dance, the victim was totally devoid of any suspicion that the accused-appellant, who was not a resident of Barangay Basak, would perform such a dastardly act. When the victim was trying to run away, the accused-appellant even pursued him and stabbed him repeatedly while trying to defend himself. *(People v. Saure, G.R. No. 135848, 12 March 2002).*

[vi] The manner by which accused-appellants positioned themselves prior to the ambush demonstrated treachery. Not only were they armed with high-powered guns and greater in number than the group of Luna; they took advantage of the stillness of the night and took cover at the nearby canal where they could not be seen, ensuring their own safety in case the group of Luna acted in retaliation and fired back. The treacherous manner by which accused-appellants perpetrated the crime was shown not only by the sudden and unexpected attack upon the unsuspecting victims

but also by the deliberate manner in which the attack was perpetrated. *(People v. Pacificador, G.R. No. 126515, 6 February 2002).*

[vii] In a sitting position with arms restrained by one of the accused, the victim becomes a helpless and defenseless object of the attack. It is immaterial that the victim initially grappled with Campomanes and was even able to hit the latter with the camera. Crucial is the moment when Rosita came with a bladed weapon, and with the victim in a sitting position with his arms raised and held by Campomanes, said victim was repeatedly stabbed by Rosita. *(People v. Campomanes, G.R. No. 132568, 6 February 2002).*

[ix] The victim was on his way home. He was expecting to be greeted by his family, when the appellant suddenly emerged from a bamboo enclosure. Appellant, who was at that time already holding a gun, positioned himself at the back of the victim. From there, he promptly fired at him from behind. While he uttered the words, "*Eto ang hinahanap mo, Bong!*" at the same time firing at the victim, that barely warned the latter nor gave him ample period to put up even a semblance of defense. In fact, the only reaction the victim was able to make was to try to turn his face towards the direction where he heard the voice come from. *(People v. Ponsaran, G.R. Nos. 139616-17, 6 February 2002).*

[x] The victim was on his motorcycle leaving Casa Blanca and turning right to Narciso St. in the early morning of July 8 when he was suddenly shot from behind by accused-appellant. The bullet entered the victim's body at the right lumbar area, almost at the back of the victim. *(People v. Norrudin, G.R. No. 129053, 25 January 2002).*

[xi] The victim was merrily drinking with companions and without the slightest inkling of the fate that would befall him. The accused surreptitiously positioned himself at the back of the victim, aimed his gun, and without any warning, shot the latter at close range. *(People v. Panabang, G.R. No. 137514-15, 16 January 2002).*

[xii] It would appear that accused-appellant already had an ax to grind when he went to the house of the victim, and he already had a gun with him. The victim was not even facing accused-appellant when he was shot, suddenly and unexpectedly. *(People v. Coscos, G.R. No. 132321, 21 January 2002).*

[xiii] That the wife of the victim, and most probably so, the victim himself, noticed that accused-appellant was carrying a knife, does not negate treachery. There was no previous animosity between the victim and accused-appellant. The victim's failure to deliver the goods to accused-appellant's house was no reason for the victim to expect an assault from the accused appellant. The victim's wife testified that though she saw the knife carried by accused-appellant, she did not warn her husband because it never crossed her mind that he would stab him as her husband was already old. That the victim's injury was frontal does not preclude the finding of treachery. The victim was unarmed and in a stooping position (hence unable to defend himself) as he was about to give the goods to accused-appellant when the latter delivered the fatal blow. *(People v. Orpilla, G.R. No. 118073, 25 January 2002).*

[xiv] When the victim was attacked, he was on board the boat while his assailant was on the shore. The attack was so sudden and unexpected that it rendered the victim unable and unprepared to defend himself. *(People v. Cortezano, G.R. No. 140732, 29 January 2002).*

[xv] Appellant and Aniag, both armed with a .38 caliber gun, unexpectedly fired two shots behind the victim and John who were playing darts. Both were unarmed. Apparently caught by surprise, the victim barely ran 3 to 4 meters away from the appellant, but he fell when hit by the latter's third shot. As the victim slumped helplessly on the street, appellant went near him and, at close range, fired several more shots, hitting his head and the back of his body. To ensure the attack by appellant without risk to himself,

Aniag had his gun pointed at the victim, ready to shoot, if necessary. Appellant contends that there can be no treachery because the first two shots did not hit the victim and John and were fired to warn the victim of the impending danger. The Court was not persuaded. Nowhere in the records can it be deduced that the first two shots were clearly warning shots. What is certain is, after these shots were fired, the victim ran away but appellant shot him again, hitting his back which caused him to fall. Even assuming that the first two shots were warning shots, treachery was still appreciated as the execution of the attack made it impossible for the victim to defend himself or to retaliate. *(People v. Samson, G.R. No. 124666, 15 February 2002).*

[xvi] Appellants were allowed inside the house of the couple Marjin and Jorja. They were even given supper after which the elderly couple went upstairs to their bedroom. Appellants remained downstairs and continued watching television. The victims in extending their hospitality to their tenants had neither hint nor suspicion of the fate that Mario had in store for them. When Mario lured Magin to the phone, the latter was unaware he would be attacked. The attack on Jorja then was also without warning and was treacherous. *(People v. Manlasing, G.R. Nos. 131736-37, 11 March 2002).*

[xvii] The accused-appellant suddenly embraced the victim giving his co-accused-appellant full opportunity to stab their victim on his left chest. *(People v. Bagano, G.R. No. 139531, 31 January 2002).*

[xviii] The unsuspecting victims in the jeep driven by Lorenzo were taken by surprise and had no means to defend themselves. They were simply on their way to attend a hearing in another town in Pangasinan and had no inkling that such a gruesome attack would befall them at the break of dawn. *(People v. Gutierrez, G.R. No. 137610-11, 6 February 2002).*

[xix] The accused-appellant stabbed the victim three times at the back when the latter was already wounded and about to fall to the ground. Clearly, the victim was in no position to defend himself and repel the attack of accused-appellant. *(People v. Ciron, G.R. No. 139409, 18 March 2002).*

[xx] What is decisive is that the execution of the attack made it impossible for the victim to defend himself or to retaliate. Here, accused-appellant evidently timed his attack with the sudden blast of music. The shot was a complete surprise to the victim, rendering him utterly defenseless at the time of the assault. The alleged animosity between the victim and accused-appellant, as well as their encounter which preceded the shooting incident, will not preclude the finding of treachery. *(People v. Sebastian, G.R. No. 131734, 7 March 2002).*

[xxi] The Accused-appellant suddenly attacked from behind and stabbed the deceased on the back. The deceased and his companions could not have been aware of the impending attack. They had no reason to expect any violent incident since, as testified to by Roderick (companion of the deceased), he knew of no misunderstanding between accused-appellant and the deceased. The deceased was in no position to defend himself from the attack, since he was drunk and unable to run. In fact, the victim instantly fell to the ground after the first blow on his back. Thereafter, accused-appellant took the victim by his shirt and stabbed him several times while he lay on the ground. *(People v. Alilin, G.R. No. 134379, 21 March 2002).*

[xxii] While seemingly the slaying of Lopito was the consequence of a chance encounter, the manner in which it was perpetrated was treacherous. The fatal attack on him was so swift and unexpected, and without the slightest provocation on his part. He had no inkling that he would be killed for what was apparently a minor traffic accident. An unexpected attack under circumstances

which render the victim unable and unprepared to defend himself by reason of the suddenness and severity of the attack, thus insuring the execution of the crime without risk to the accused-appellants, constitutes *alevosia*. The fact that the victim may have been forewarned of his peril when he was punched by accused-appellant España will not diminish the suddenness of the attack. *(People v. Gutierrez, G.R. No. 142905, 18 March 2002).*

[xxiii] Accused-appellant and his confederate swiftly and unexpectedly barged into the Marcelo residence in the middle of the night, shot Miguel Marcelo to death as well as his wife Crispina who almost lost her life, and sprayed a substance which temporarily blinded the other occupants of the house. *(People v. Costales, G.R. No. 141154-56, 15 January 2002).*

[xxiv] Treachery was also shown where a totally unsuspecting Jelord held onto his brother Jerry on board their motorcycle on their way home blissfully unaware of the onrushing peril behind them. The victim and his brother were fired upon at their back. *(People v. Villamor, G.R. No. 141908-09, 15 January 2002).*

(b) Treachery - Not Established. [i] Where treachery is alleged, the manner of attack must be proven. Without any particulars as to the manner in which the aggression commenced or how the act that resulted in the victim's death unfolded, treachery cannot be appreciated. It is not sufficient that the victim was unarmed and that the means employed by the malefactor brought about the desired result. The prosecution must prove that appellant deliberately and consciously adopted such means, method or manner of attack as would deprive the victim of an opportunity for self-defense or retaliation. In this case, the prosecution's principal witness testified that he did not actually see the commencement of the attack. In fact, he himself declared that the commotion had begun outside the establishment he was in. *(People v. De Leon, G.R. No. 144052, 6 March 2002).*

[ii] Witness Rabino said he did not see how the incident commenced, his testimony could not be utilized to support the allegation of treachery. The fatal wounds found at the back of the deceased do not, by themselves, indicate treachery. In the absence of other details that would confirm that indeed appellant deliberately adopted the means employed to kill the deceased, treachery cannot be appreciated. Treachery cannot be presumed and must be proved by clear and convincing evidence or as conclusively as the killing itself. *(People v. Quening, G,R. No. 132167, 8 January 2002).*

[iii] True, appellant stabbed Milanes at the back while Ferdinand encircled his arm in a tight grip around the victim's neck. But Milanes was together with an armed policeman and other passengers. There were also on-lookers. The incident happened at past 7 o'clock A.M., during a traffic jam. The presence of the policeman albeit in civilian attire and his companions who came to Milanes' rescue shows that the victim was not completely helpless. Neither is there sufficient evidence to establish that appellant consciously adopted the mode of attack. It also appears that, the day before the incident, the appellant and the victim had a heated argument. *(People v. Salva, G.R. No. 132351, 10 January 2002).*

[iv] The mere suddenness of an attack does not automatically mean treachery. It appears that the meeting between the accused-appellant's group and the victim was obviously a casual encounter. The impulsive stabbing followed a brief heated argument between the group and Bacuta regarding the latter's driving. While the attack may have been sudden, the circumstances show that the casual, brief, and tension-filled encounter did not afford the accused-appellant an opportunity to plan and deliberately adopt the method of assault as to accomplish the crime without risk to himself. He simply used whatever weapon he had on hand. *(People v. Bejo, G.R. No. 138454, 13 February 2002).*

[iv] Treachery must be proven as indubitably as the killing itself and it cannot be deduced from mere presumption or sheer speculation. In the case at bar, the prosecution failed to present any proof as to the manner the attack commenced or how the act which resulted in the victim's death unfolded. The evidence presented by the prosecution only proved the events after the attack had happened. Hence, treachery cannot be appreciated. *(People v. Bulan, G.R. No. 133224, 25 January 2002).* Since nobody witnessed the actual shooting, there could be no proof whatsoever of treachery. *(People v. Manlasing, G.R. Nos. 131736-37, 11 March 2002).*

[v] There is no treachery where the attack was preceded by a quarrel and a heated discussion, as in this case. Here, also, there is no ample evidence that would show that accused-appellant deliberately or consciously adopted the means or method in stabbing the victim. *(People v. Lumintigar, G.R. No. 132557, 15 January 2002).*

(c) Treachery absorbs abuse of superior strength. *(People v. Manlasing, G.R. Nos. 131736-37, 11 March 2002; People v. Lab-eo, G.R. No. 133438, 16 January 2002).*

(d) Treachery can only be considered as a qualifying circumstance that would affect the nature of the crime and not as a generic aggravating circumstance that would raise the penalty to death. *(People v. Bagano, G.R. No. 139531, 31 January 2002).*

Cruelty. Ignominy. To be appreciated, there must be proof that the accused delighted in making their victim suffer slowly and gradually, causing him unnecessary physical and moral pain in the consummation of the criminal act. That accused-appellants burned the body of the deceased is not sufficient to show that means were employed which added ignominy to the natural effects of the act. Nor may cruelty as found by the trial court be sustained because there is no showing that the victim was burned while he was still alive. *(People v. Catian, G.R. No. 139693, 24 January 2002).*

Band. Whenever more than three armed malefactors shall have acted together in the commission of an offense, it shall be deemed to have been committed by a band. Aggravating in this case for robbery with homicide warranting the imposition of the death penalty. *(People v. Dinamling, G.R. No. 134605, 12 March 2002).*

ALTERNATIVE CIRCUMSTANCES

Relationship. Aggravating in the crimes of rape under Article 335 and acts of lasciviousness under Article 336, RPC. *(People v. Caiñgat, G.R. No. 137963, 6 February 2002).*

PERSONS CRIMINALLY IIABLE

Accomplices. Lariba and Rogel merely guarded the house for the purpose of either helping the other accused-appellants in facilitating the successful denouement to the crime or repelling any attempt to rescue the kidnap victim, as shown by the availability of arms and ammunition to them. They thus cooperated in the execution of the offense by previous or simultaneous acts by means of which they aided or facilitated the execution of the crime but without any indispensable act for its accomplishment. It appears that Lariba and Rogel had knowledge that Valler and Garcia kidnapped Atty. Tioleco for the purpose of extorting ransom and their cooperation to pursue such crime. But these facts, without more, do not make them co-conspirators since knowledge of, and participation in, the criminal act are also inherent elements of an accomplice. The crime could have been accomplished even without the participation of Lariba and Rogel. The victim had been rendered immobile by Valler and Garcia before the latter established contacts with Mrs. Tioleco and demanded ransom. The participation of Lariba and Rogel was thus hardly indispensable. *(People v. Garcia, G.R. No. 133489 & 143970, 15 January 2002).*

PENALTIES IN GENERAL

Penalties that may be Imposed. (a) The Sandiganbayan found petitioner guilty of violation of Section 3602, in relation to Section 3601 of the Tariff and Customs Code of the Philippines in Criminal Case No. 16773. However, the Sandiganbayan stated it had reason to believe the accused Remigio was liable under the final paragraph of Section 3407 of the same code. Actually, petitioner was charged with violation of Section 3602, in relation to Section 3601, not Section 3407 of the same Code. Section 3407 did not exist in 1988 (when the alleged offense was committed). It was only introduced in 1993 with the enactment of R.A. No. 7651 on June 4, 1993. The law is settled that no statute, decree, ordinance, rule or regulation shall be given retrospective effect unless expressly so provided, or favorable to the accused. An accused cannot be convicted of an offense, unless it is charged in the complaint or information. *(Remigio v. Sandiganbayan, G.R. Nos. 145422-23, 18 January 2002).*

(b) Section 11 of R.A. 7659 (took effect 31 December 1993), which amended Article 335 of the RPC, is not applicable to this crime of rape that was committed sometime in December 1993 and not by the end of December 1993. In respect to rape committed on 6 November 1997, R.A. 8353 (the law expanding the definition of the crime of Rape and reclassifying the same as a crime against persons) applies. *(People v. Flores, G.R. Nos. 134488-89, 25 January 2002).* At the time the alleged rape was committed in 1994, the existing law on rape had not yet been modified to include insertion of any instrument or foreign object into the genital or anal orifice of another person. Said amendment provided by R.A. No. 8353, entitled "The Anti-Rape Law of 1997," became effective only on 22 October 1997. *(People v. Matignas, G.R. No. 126146, 12 March 2002).*

Retroactive Effect of Penal Laws. Procedural Law Favorable to the Accused. Given retroactive effect even as the crime was

committed and the decision of the trial court rendered before the New Rules of Criminal Procedure was promulgated. Thus, *disguise* could not be appreciated to increase the penalty to death as it was not alleged in the information. *(People v. Suela, G.R. No. 133570-71, 15 January 2002).*

Complex Crime. As the multiple murder and frustrated murder resulted from the firing of several shots against the eight (8) victims, the crimes are not complex. Article 48 of the RPC is not applicable. *(People v. Pacificador, G.R. No. 126515, 6 February 2002).*

CIVIL LIABILITY

Civil Indemnity. In the nature of actual or compensatory damages. The award is mandatory for each count, upon the finding of the commission of the crime, without need of further proof of damages. Guidelines:

(a) Increased to P125,000.00 in Rape with Homicide. *(People v. Felixminia G.R. No. 125333, 20 March 2002).* Originally, set at P100,000.00 in *People vs. Tahop. (People v. Tablon, G.R. No. 137280, 13 March 2002).*

(b) P75,000.00 in Qualified Rape (effectively qualified by any of the circumstances under which the death penalty is mandated by law). *(People v. Rodavia, G.R. Nos. 133008-24, 6 February 2002; People v. Marcellana, G.R. No. 137401-03, 6 February 2002; People v. Daganio, G.R. No. 137385, 23 January 2002; People v. Callos, G.R. No. 133478, 16 January 2002; People v. Escaño, G.R. Nos. 140218-23, 13 February 2002; People v. Abaño, G.R. No. 142728, 23 January 2002).* (c) P50,000.00 in Rape where the death penalty is not decreed. *(People v. de la Torre, G.R. No. 98431, 15 January 2002; People v. Esuela, G.R. Nos. 138720-21, 19 March 2002; People v. Valindo, G.R. No. 140027, 18 March 2002; People v. Palaña, G.R. No. 124053, 20 March 2002;*

People v. Hermanes, G.R. No. 139416, 12 March 2002; People v. Escaño, G.R. Nos. 140218-23, 13 February 2002; People v. Esureña, G.R. No. 142727, 23 January 2002; People v. Parcia, G.R. No. 141136, 28 January 2002; People v. Tagud, G.R. No. 140733, 30 January 2002; People v. Velasquez, G.R. Nos. 142561-62, 15 February 2002).

(c) P75,000.00 in Robbery with Homicide. *(People v. Dinamling, G.R. No. 134605, 12 March 2002).*

(d) P50,000.00 in Murder. *(People v. Catian, G.R. No. 139693, 24 January 2002; People v. Samson, G.R. No. 124666, 15 February 2002; People v. Gutierrez, G.R. No. 142905, 18 March 2002).*

(e) P50,000.00 in Homicide. *(People v. Rama, G.R. No. 144386, 23 January 2002; People v. Peña, G.R. No. 133964, 13 February 2002; People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).*

Moral Damages. In addition to civil indemnity. Also awarded automatically, or mandatorily, without need of further proof other than the commission of the crime. The award of moral damages is not intended to punish the accused but to compensate for the mental anguish, serious anxiety, and moral shock suffered by the victim or his/her family as the proximate result of the wrongful act. The award is not meant to enrich the victim at the expense of the accused. *(People v. Dy, G.R. Nos. 115236-37, 29 January 2002).* Guidelines:

(a) P50,000.00 in Rape with Homicide. *(People v. Felixminia G.R. No. 125333, 20 March 2002; People v. Tablon, G.R. No. 137280, 13 March 2002).*

(b) ₱200,000.00 in Kidnapping for Ransom *(People v. Garcia, G.R. No. 133489 & 143970, 15 January 2002).*

(a) P50,000.00 in Rape, whether Qualified or not. *(People v. Valindo, G.R. No. 140027, 18 March 2002; People v. Esuela, G.R. Nos. 138720-21, 19 March 2002). (People v. de la Torre, G.R. No. 98431, 15 January 2002; People v. Hermanes, G.R. No. 139416, 12 March 2002; People v. Marcellana, G.R. No. 137401-03, 6 February 2002; People v. Esureña, G.R. No. 142727, 23 January 2002 People v. Quezada, G.R. Nos. 135557-58, 30 January 2002; People v. Parcia, G.R. No. 141136, 28 January 2002; People v. Rodriguez, G.R. No. 133984, 30 January 2002; People v. Tagud, G.R. No. 140733, 30 January 2002; People v. Velasquez, G.R. Nos. 142561-62, 15 February 2002; People v. Rodriguez, G.R. No. 138987, 6 February 2002; People v. Rodavia, G.R. Nos. 133008-24, 6 February 2002; People v. Escaño, G.R. Nos. 140218-23, 13 February 2002; People v. Valindo, G.R. No. 140027, 18 March 2002; People v. Esuela, G.R. Nos. 138720-21, 19 March 2002).* The fact that the complainant has suffered the scars of mental, physical and psychological trauma which constitute the basis for moral damages is too obvious to still require the recital thereof at the trial by the victim, since the Court itself even assumes and acknowledges such agony on her part as a gauge of her credibility. *(People v. Daganio, G.R. No. 137385, 23 January 2002).*

(b) P50,000.00 in Robbery with Homicide. *(People v. Dinamling, G.R. No. 134605, 12 March 2002).*

(c) P50,000.00 in Murder. *(People v. Alilin, G.R. No. 134379. March 21, 2002; People v. Gutierrez, G.R. No. 142905, 18 March 2002; People v. Abaño, G.R. No. 142728, 23 January 2002People v. Samson, G.R. No. 124666, 15 February 2002; People v. Catian, G.R. No. 139693, 24 January 2002; People v. Lab-eo, G. R. No. 133438, 16 January 2002; People v. Orpilla, G.R. No. 118073, 25 January 2002; People v. Alilin, G.R. No. 134379. March 21, 2002; People v. Gutierrez, G.R. No. 142905, 18 March 2002).*

(d) P50,000.00 in Homicide. *(People v. Cortezano, G.R. No. 140732, 29 January 2002).* Award of P500,000.00 was reduced to

P50,000.00 *(People v. Panabang, G.R. No. 137514-15, 16 January 2002; People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).* The unlawful killing of a person, which may either be murder or homicide, entitles the heirs of the deceased to moral damages, without need of independent proof other than the fact of death of the victim. This is so because the law presumes that the death of the victim naturally causes mental anguish, serious anxiety, and wounded feelings to his bereaved family. *(People v. Ciron, G.R. No. 139409, 18 March 2002).*

Exemplary Damages. In addition to civil indemnity and moral damages. (a) P25,000.00 in incestuous rape. *(People v. Esureña, G.R. No. 142727, 23 January 2002; People v. Daganio, G.R. No. 137385, 23 January 2002; People v. Rodriguez, G.R. No. 133984, 30 January 2002; People v. Tagud, G.R. No. 140733, 30 January 2002; People v. Rodriguez, G.R. No. 138987, 6 February 2002; People v. Rodavia, G.R. Nos. 133008-24, 6 February 2002).(People v. Escaño, G.R. Nos. 140218-23, 13 February 2002).* (b) P25,000.00 in rape committed by use of deadly weapon and the presence of the aggravating circumstance of dwelling, both of which indicate the criminal perversity of the appellant. *(People v. de la Torre, G.R. No. 98431, 15 January 2002).* (c) P25,000 in Murder. *(People v. Samson, G.R. No. 124666, 15 February 2002).* The attendance of treachery in the killing of the victim justifies the award of P20,000.00 exemplary damages. *(People v. Panabang, G.R. No. 137514-15, 16 January 2002).* (d) P50,000.00 in homicide. The attendance of the aggravating circumstances of dwelling and disregard of sex, justified the award. *(People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).* (e) P10,000 each to the surviving spouse and the heirs of the victim of robbery with homicide. *(People v. Dinamling, G.R. No. 134605, 12 March 2002).*

Actual Damages. To seek recovery of actual damages, it is necessary to prove the actual amount of loss with a reasonable degree of certainty, premised upon competent proof and on the best evidence obtainable by the injured party. *(People v. Taboga,*

G.R. Nos. 144086-87, 6 February 2002; People v. Dinamling, G.R. No. 134605, 12 March 2002). The Court can only grant such amount for expenses if proper receipts support them. *(People v. Yatco, G.R. No. 138388, 19 March 2002).* The same cannot be based on the allegation of a witness without any tangible document to support such a claim. Anent the award of actual damages, the same was the subject of stipulation between the parties. Hence, the award of P21,125.00 as actual damages was affirmed. *(People v. Alilin, G.R. No. 134379, March 21, 2002).* Award of actual damages was disallowed for failure of the prosecution to present receipts in support thereof or reduced to the extent only that they were duly supported by receipts. *(People v. Catian, G.R. No. 139693, 24 January 2002; People v. Orpilla, G.R. No. 118073, 25 January 2002; People v. Dy, G.R. Nos. 115236-37, 29 January 2002; People v. Cuenca, G.R. No. 143819, 29 January 2002).*

Temperate Damages. In lieu of actual damages, P10,000.00, by way of temperate damages, was awarded to the heirs of the victim since they were able to prove pecuniary loss, only that there was no competent proof as to the amount thereof. *(People v. Orpilla, G.R. No. 118073, 25 January 2002; People v. Adlawan, G.R. No. 131839, 30 January 2002).*

Loss of Earning Capacity. In addition to civil indemnity and moral damages, actual damages for loss of net earning capacity of the victim of a crime involving loss of human life is awarded, computed on the basis of the following formula:

Net Earning Capacity (X) = Life Expectancy x Gross Annual Income - Living Expenses
(50% of Gross Annual Income)
where life expectancy = 2/3 x (80 - [age of deceased]);
and
Gross Annual Income = Monthly Earnings x number of months (12)

(People v. Orpilla, G.R. No. 118073, 25 January 2002; People v. Cortezano, G.R. No. 140732, 29 January 2002; People v. Adlawan, G.R. No. 131839, 30 January 2002; People v. Yatco, G.R. No. 138388, 19 March 2002; People v. Ciron, G.R. No. 139409, 18 March 2002). The new ruling in *People v. Panabang* (16 January 2002) now precludes any award for loss of earning capacity without adequate proof. The bare testimony of the brother of the deceased that at the time of his death he was earning ₱250.00 daily as carpenter is not sufficient proof. *(People v. Cuenca, G.R. No. 143819, 29 January 2002).* Earlier, in *People v. Verde*, the testimony of the victim's wife was deemed sufficient to establish the basis for the grant of award for the loss of earning capacity to the heirs of the deceased despite the absence of documentary evidence to substantiate such claim. (*id.*) Subsequent to *People v. Cuenca*, the Court ruled that the testimony of the wife of the deceased that her husband, a 42-year old farmer at the time of his death, had an average harvest of twice a year from their 2-hectare rice farm and a net gain of P50,000.00 in six months - is sufficient to establish a basis from which the Court can make a fair and reasonable estimate of damages for the loss of earning capacity. *(People v. Ciron, G.R. No. 139409, 18 March 2002).*

Civil Liability in Rape. The accused must recognize the child (offspring of the rape committed in December 1993) as his natural son and give him reasonable support. *(People v. Flores, G.R. Nos. 134488-89, 25 January 2002).*

SPECIFIC CRIMES

CRIMES AGAINST PERSONS

RAPE

Qualified Rape Punishable by Death.

(A) Under Section 11 of RA No. 7659 ("Heinous Crime Law" or "Death Penalty Law," which took effect on 31 December 1993),

as amended by R.A. No. 8353 ("Anti-Rape Law," which took effect on 22 October 1997), the imposition of the death penalty in rape cases becomes mandatory: (1) when the offended party is under eighteen (18) years of age ("Minority") and (2) the offender is a parent, ascendant, step-parent, guardian, or relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim ("Relationship"). To be properly appreciated, the qualifying circumstances of Minority and Relationship must be specifically alleged and proved. *(People v. Esureña, G.R. No. 142727, 23 January 2002; People v. Abaño, G.R. No. 142728, 23 January 2002; People v. Valindo, G.R. No. 140027, 18 March 2002).*

(a) Specific Allegation. (1) Minority. An Information merely stating that appellant had carnal knowledge of his *minor* daughter, without stating the actual age of the latter, does not meet the requirement. Much less, an information that did not allege Minority at all. *(People v. Hermanes, G.R. No. 139416, 12 March 2002; People v. Cristobal, G.R. No. 144161, 12 March 2002).* (2) Relationship. Failure to allege Relationship. *(People v. Rodriguez, G.R. No. 138987, 6 February 2002).* An allegation that accused-appellant is the uncle of private complainants is not also sufficient. It is necessary to specifically allege that such relationshipby affinity or consanguinity is *within the third civil degree. (People v. Velasquez, G.R. Nos. 142561-62, 15 February 2002).* (**Editor's Note**: *People v. Aquino, G.R. Nos. 144340-42, 6 August 2002* ruled that the Information which reads, "x x x the accused, being the *uncle* of the 5-year old Charlaine," passes the test of sufficiency of the allegation and clearly forewarns the accused that the circumstances of Minority and Relationship attended the commission of the crime).

(b) Clearly Proved. (1) Minority. When the victim is ten (10) years old or below, judicial notice of Minority may be taken. Hence, there is no more need for the prosecution to present the certificate of live birth or other equally acceptable official document to prove

the victim's age. *(People v. Valindo, G.R. No. 140027, 18 March 2002; People v. Abaño, G.R. No. 142728, 23 January 2002).* When the alleged age of the victim at the time of the sexual assault is between 13 and 18 years, neither her bare testimony nor that of her mother would suffice to prove her age and consequently qualify the crime to justify the imposition of the death penalty. This is because in this era of modernism and rapid growth, the victim's mere physical appearance is not enough to gauge her exact age. *(People v. Quezada, G.R. Nos. 135557-58, 30 January 2002; People v. Rodriguez, G.R. No. 133984, 30 January 2002).* The birth certificate of the victim or, in lieu thereof, any other documentary evidence that can help establish the age of the victim should be presented. In the case at bar, no evidence was presented to show the victim's age, save for her own testimony. While the testimony of a person as to her age, although hearsay, is admissible as evidence of family tradition, it cannot be considered proof beyond reasonable doubt of Minority. *(People v. Esureña, G.R. No. 142727, 23 January 2002).* Not clearly established due to conflicting evidence. *(People v. Rodriguez, G.R. No. 138987, 6 February 2002; People v. Quezada, G.R. Nos. 135557-58, 30 January 2002; People v. Silvano, G.R. Nos. 141105-11, 8 March 2002).*

(2) Relationship. The bare statement in passing of the victim that appellant "is an uncle," without any corroborating testimonial or documentary evidence to clearly establish that relationship, would be insufficient. *(People v. Capili, G.R. No. 142747, 12 March 2002).* The Relationship of "stepfather" and "stepdaughter" alleged in the information was not established as the appellant and the victim's mother were only common-law spouses *(People v. Esuela, G.R. Nos. 138720-21, 19 March 2002)*; or where the prosecution failed to prove that appellant and the victim's mother were married. *(People v. Valindo, G.R. No. 140027, 18 March 2002; People v. Silvano, G.R. Nos. 141105-11, 8 March 2002).*

(c) When either one of the said circumstances of Minority and Relationship is omitted or lacking, that which is pleaded in

the information and proven by the evidence, may be considered as a generic aggravating circumstance. *(People v. Escaño, G.R. Nos. 140218-23, 13 February 2002).*

(b) Rape committed in full view of the spouse, parent, any of the children or other relatives within the third civil degree of consanguinity of the victim. The circumstance "committed in full view of the spouse, parent, any of the children or other relatives within the third civil degree of consanguinity" is a qualifying circumstance. Although proved, it was not alleged in the Information. As such, it cannot be appreciated to warrant the imposition of the death penalty. *(People v. Esureña, G.R. No. 142727, 23 January 2002).*

(c) Rape Victim is Below Seven (7) Years Old. (Section 335, No. 3 of the RPC, as amended by RA 7659). *(People v. Felixminia G.R. No. 125333, 20 March 2002).* Article 266-B (5) of the RPC, imposes the death penalty when the victim is a child below seven (7) years old. The allegation in the information specifically stating that "xxx *the victim xxx is only seven years old"* ruled out the application of this specific provision that can justify the imposition of the capital punishment. *(People v. Baring, G.R. No. 137933, 28 January 2002).*

(d) Rape with Homicide. Special Complex Crime (Article 335 of the RPC, as amended by RA No. 7659). When by reason or on the occasion of the rape, a homicide is committed, the penalty shall be death. *(People v. Tablon, G.R. No. 137280, 13 March 2002).*

Statutory Rape. The crime is committed by one who has carnal knowledge of a woman under twelve years of age. *(People v. Palaña, G.R. No. 124053, 20 March 2002; People v. Somodio, G.R. Nos. 134139-40, 15 February 2002).* When the victim is under twelve years old, carnal knowledge alone is rape. *(People v. Abaño, G.R. No. 142728, 23 January 2002).* Duresss or threat is immaterial. *(People v. Palaña, G.R. No. 124053, 20 March 2002; People v. Somodio, G.R. Nos.*

134139-40, 15 February 2002). But, in this case, the accused-appellant was nor convicted of statutory rape, even as the prosecution proved that the victim was only 11 years old at the time the crime was committed, because the information explicitly alleged that the complainant was a "12-year old minor." *(People v. Estopito, G.R. No. 136144, 15 January 2002).*

Rape. (1) Element of force, threat or intimidation - explained. *(People v. Moreno, G.R. No. 140033, 25 January 2002; People v. Rodriguez, G.R. No. 133984, 30 January 2002; People v. Ollama, G.R. No. 133185, 6 February 2002).* (a) Gang rape - not established due to insufficient evidence to show that appellants employed force and intimidation, as averred in the information. *(People v. Castillo, G.R. No. 131200, 15 February 2002).* (b) Under Article 335 of the RPC, whenever the crime of rape is committed with the use of a deadly weapon, the penalty shall be *reclusion perpetua* to death. The informations in the aforesaid cases alleged that in the commission of the rapes, accused-appellant was "armed with a *balisong*" or "armed with a knife." Considering the presence in these cases of the aggravating circumstance of Minority, the proper penalty is death. *(People v. Escaño, G.R. Nos. 140218-23, 13 February 2002).* However, in this case, a reading of the information discloses no allegation that the rape was committed with the use of a deadly weapon. The circumstance "armed with a bladed weapon" alleged in the information refers to the robbery. Hence, it cannot serve to qualify the crime of rape. *(People v. Moreno, G.R. No. 140033, 25 January 2002).* (c) "Sweetheart theory" totally unavailing. Marita is a married woman with five children in her care. To embroil her into such kind of amorous relationship, strong and convincing evidence is necessary to prove the same. In those cases where the defense of consensual relationship was sustained, evidence like love notes, mementos and witnesses attesting to a consensual relationship were presented. *(People v. de la Torre, G.R. No. 98431, 15 January 2002).* (d) Victim was drugged, *(People v. Dy, G.R. Nos. 115236-37, 29 January 2002).*

(2) Element of Carnal Knowledge. Rupture of the hymen is not essential nor is it an element of rape. Absence of hymenal lacerations is also not an *indicia* that rape has not been committed. *(People v. Gilbero, G.R. No. 142005, 23 January 2002).* "Slightest Penetration," explained. Decisions finding a case for rape even if the attacker's penis merely touched the external portions of the female genitalia were made in the context of the existence of an erectile penis capable of full penetration. The element of carnal knowledge does not establish itself by presumptions but always the burden lies with the State to prove this act positively and actually. *(People v. Quare, G.R. Nos. 140729-30, 15 February 2002; People v. Caiñgat, G.R. No. 137963, 6 February 2002).*

Anti-Rape Law of 1997. Appellant, by forcing the victim to lie face down and inserting his penis into her anus, committed rape under Article 266-A of the RPC, as amended by R.A. No. 8353 (the Anti-Rape Law of 1997). *(People v. Perez, G.R. No. 141647-51, 6 March 2002).*

Attempted Rape. *(People v. Quare, G.R. Nos. 140729-30, 15 February 2002).*

Murder is defined as the unlawful killing of any person when qualified by any of the circumstances listed under Article 248 of the RPC, among which is *alevosia*. *(People v. Gutierrez, G.R. No. 142905, 18 March 2002; People v. Lab-eo, G. R. No. 133438. 16 January 2002).*

Homicide. *(People v. Salva, G.R. No. 132351, 10 January 2002; People v. Quening, G,R. No. 132167, 8 January 2002; People v. Lumintigar, G.R. No. 132557, 15 January 2002; People v. Gutierrez, G.R. No. 142905, 18 March 2002).*

Slight Physical Injuries. *(People v. Asuela, G.R. Nos. 140393-94, 4 February 2002).*

CRIMES AGAINST PERSONAL LIBERTY

Kidnapping for Ransom and Serious Illegal Detention. There is no quantum of merit in the contention that kidnapping for ransom is committed only when the victim is released as a result of the payment of ransom. The gist of the crime is "not the forcible or secret confinement, imprisonment, inveiglement, or kidnapping without lawful authority, but x x x the felonious act of so doing with intent to hold for a ransom the person so kidnapped, confined, imprisoned, inveigled, etc." Once intent is present, as in the case at bar, kidnapping for ransom is already committed. Jurisprudence is replete with cases wherein botched ransom payments and effective recovery of the victim did not deter a finding of culpability for kidnapping for ransom. The death penalty was imposed on Valler and Garcia as mandated by Art. 267 of the RPC, as amended by RA 7659. *(People v. Garcia, G.R. No. 133489 & 143970, 15 January 2002).*

CRIMES AGAINST PROPERTY

Robbery. Violence or intimidation against persons - not established. *(People v. Suela, G.R. No. 133570-71, 15 January 2002).*

Theft. The constitutive element of violence or intimidation against persons in robbery was not present at the time of the snatching of the shoulder bag of the victim. The force or intimidation exerted by the accused against the victim was for a reason foreign to the fact of the taking of the bag, as it was for the purpose of accomplishing his lustful desire. Accused-appellant may thus be held liable for simple theft only, in addition to the crime of rape. *(People v. Moreno, G.R. No. 140033, 25 January 2002).*

Estafa. With Unfaithfulness or Abuse of Confidence. Article 315, (1) [b], RPC. Established in this case: [i] Accused received the

jewelry for the purpose of selling the same under an express obligation to remit to complainant the proceeds thereof or to return those she is unable to sell, thereby creating a fiduciary relationship between them; [ii] Accused misappropriated the jewelry as shown by the fact that she failed to return the same or the proceeds thereof despite demand; and [iii] the misappropriation prejudiced the private complainant. Defense of novation of the criminal liability – rejected. *(Ocampo-Paule v. CA, G.R. No. 145872, 4 February 2002).*

Estafa and Violation of the Bouncing Checks Law. Article 315 (2) [d], RPC, as amended by RA No. 4885. BP Blg. 22. *(People v. Flores, G.R. Nos. 146921-22, 31 January 2002).*

CRIMES AGAINST CHASTITY

Qualified Seduction. Charged with rape, the accused cannot be convicted of qualified seduction under the same information. Rape and qualified seduction are not identical offenses. While the two felonies have one common element, which is carnal knowledge of a woman, they significantly vary in all other respects. *(People v. Marcellana, G.R. Nos. 137401-03, 6 February 2002).*

Acts of Lasciviousness (Article 336, RPC). Elements: (1) that the offender commits any act of lasciviousness or lewdness; (2) that it is done [i] by using force or intimidation or [ii] when the offended party is deprived of reason or otherwise unconscious, or [iii] when the offended party is under 12 years of age; and (3) that the offended party is another person of either sex. Although the information was for qualified rape, accused-appellant can be convicted of acts of lasciviousness because the crime of acts of lasciviousness is included in rape. *(People v. Caiñgat, G.R. No. 137963, 6 February 2002).* However, the above rule did not apply to this case where the crime of rape and acts of lasciviousness were committed by two different persons acting in conspiracy. The rule

applied here is, there being conspiracy, the crime committed by one conspirator is added to the crime committed by his co-conspirator and vice-versa. *(People v. Dy, G.R. Nos. 115236-37, 29 January 2002).*

SPECIAL COMPLEX CRIMES

Robbery with Homicide. (a) Elements: (1) the taking of personal property with violence or intimidation against persons; (2) that the property taken belongs to another; (3) the taking was done with *animo lucrandi*; and (4) on the occasion of robbery or by reason thereof, homicide was committed. *(People v. Cariño, G.R. No. 141737, 20 March 2002).* In proving the case, it is necessary that the robbery itself be established conclusively as any other essential element of the crime. In this case, it appears that, apart from the sack of rice, necklace with pendant, three rings, vial of perfume and cash which were recovered within the vicinity of the burned house, *no one saw accused-appellant actually asporting these items, much less has it been satisfactorily shown that robbery was the main purpose of the culprit in perpetrating the crimes.* Accused-appellant was convicted of the special complex crime because, according to the lower court, "[w]ith the recovery of the various items in or about the vicinity of the burned house, including cash money, the [c]ourt is *convinced* that robbery was the main purpose of the culprit and that the killing was merely incidental thereto." This is a glaring error because it practically convicted the accused-appellant of the crime charged on the basis of an *assumption*. Absent any evidence that the accused indeed robbed the victim, the special complex crime of robbery with homicide cannot stand. *(People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).* In another case, there was nothing in the evidence on record that would show that the victim had a wristwatch and that accused-appellant took said watch on the fateful night, as alleged in the information. In his extrajudicial confession, accused-appellant merely narrated that he announced

a hold-up and thereafter he and the victim grappled for the gun. As they struggled, accused-appellant squeezed the trigger, thus shooting the victim. Accused-appellant then hurriedly got off the taxicab, leaving his gun behind. There was no mention about the taking of the wristwatch. As the prosecution failed to prove the robbery, accused-appellant should only be convicted for homicide. *(People v. Boquila, G.R. No. 136145, 8 March 2002).*

(b) Regardless of the number of homicides committed, the crime should still be denominated as robbery with homicide. The number of persons killed is immaterial and does not increase the penalty prescribed by Article 294 of the RPC. Stated differently, the homicides or murders and physical injuries, irrespective of their numbers, committed on the occasion or by reason of the robbery are merged in the composite crime of robbery with homicide. The trial court's denomination of the offense as "robbery with double homicide" is erroneous. *(People v. Dinamling, G.R. No. 134605, 12 March 2002).*

(c) Whenever homicide has been committed as a consequence or on the occasion of the robbery, all those who took part as principals in the robbery will also be held guilty as principals of the special complex crime of robbery with homicide, although they did not actually take part in the homicide, unless it appears that they endeavored to prevent the homicide. (*id.*).

(d) Where a complex crime is charged and the evidence fails to support the charge as to one of the component offenses, the accused can be convicted only of the offense proved. *(People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).* Where the evidence does not conclusively prove the robbery, the killing of the victim would be classified either as a simple homicide or murder, depending upon the absence or presence of any qualifying circumstance. *(People v. Boquila, G.R. No. 136145, 8 March 2002).*

Robbery with Rape. Article 293 (2) and Article 294 of the RPC. To be liable for such crime, the offender must have the intent to take the personal property of another under circumstances that make the taking one of robbery and such intent must precede the rape. If the original plan was to commit rape, but the accused after committing the rape also committed robbery when the opportunity presented itself, the robbery should be viewed as a separate and distinct crime. In this case, the accused-appellant committed two separate offenses of rape and theft - not the special complex crime of robbery with rape. *(People v. Moreno, G.R. No. 140033, 25 January 2002).*

Rape with Homicide. *See* **Rape**.

OTHER PENAL LAWS

Anti-Piracy and Anti-Highway Robbery Law of 1974 (P.D. No. 532) *(People v. Langalen, G.R. No. 139670, 21 January 2002).*

BOUNCING CHECKS LAW (B.P. 22)

While the gravamen of violation of B.P. 22 is the issuance of worthless checks that are dishonored upon their presentment for payment, penal laws should not be applied mechanically. The application of the law must be consistent with the purpose of and reason for the law. When the reason for the law ceases, the law ceases. In this case, where it appears that the creditor had collected already more than a sufficient amount to cover the value of the checks for payment of rentals, *via* auction sale, holding the debtor's president to answer for a criminal offense under B.P. 22 two years after said collection and before the informations were filed, is no longer tenable nor justified. *(Griffith v. CA, G.R. No. 129764, 12 March 2002).* Committed together with estafa. *See* ESTAFA.

Illegal Possession of Firearm. Although the prosecution duly established that the crime of illegal possession of firearm under P.D. 1866 was committed, R.A. 8294 (took effect 7 July 1997) amended the decree and now considers the use of unlicensed firearm merely as a special aggravating circumstance in murder and homicide, and not as a separate offense. Still, the above circumstance was not appreciated in this case of murder and frustrated murder, as the same was not alleged in the information. *(People v. Costales, G.R. No. 141154-56, 15 January 2002).*

The Dangerous Drugs Act of 1972, as amended. *(People v. Rodriguez, G.R. No. 144399, 20 March 2002; People v. Aspiras, G.R. No. 138382-84, 12 February 2002; People v. Bongalon, G.R. No. 125025, 23 January 2002).*

LABOR CODE OF THE PHILIPPINES

Illegal Recruitment in Large Scale. (Article 38 of the Labor Code). Elements: (1) the offender has no valid license or authority required by law to enable him / her to lawfully engage in recruitment and placement of workers; (2) he or she undertakes either any activity within the meaning of "recruitment and placement" defined under Article 13 (b), or any prohibited practices enumerated under Article 34 of the Labor Code; (3) the offender commits said acts against three or more persons, individually or as a group. The accused-appellants could not be convicted for illegal recruitment committed in large scale based on several informations filed by only one complainant. When the Labor Code speaks of illegal recruitment committed against three (3) or more persons, individually or as a group, it must be understood as referring to the number of complainants in each case who are complainants therein. In other words, a conviction for large scale illegal recruitment must be based on a finding in each case of illegal recruitment of three or more persons whether individually or as a

group. Article 13 (b) of the Labor Code defines recruitment and placement as "x x x any act of canvassing, enlisting, contracting, transporting, utilizing, hiring, or procuring workers, and includes referrals, contract services, *promising* or advertising for employment, locally or abroad, *whether for profit or not*: x x x". Consequently, even in the absence of money given as consideration for accused-appellant's "services", she would still be considered as having engaged in recruitment activities, since it was sufficiently demonstrated that she promised overseas employment to private complainants. *(People v. Dionisio, G.R. No. 130170, 29 January 2002).* In another case, "recruitment and placement" was not sufficiently established. Section 36, Rule 130 of the Rules of Court states that a witness can testify only to those facts which he knows of his personal knowledge. He is not permitted to testify as to a conclusion of law. The testimony of the prosecution witnesses that appellants "brought" them to Manila does not necessarily mean that they were "transported" in the context of Article 13 (b) for it could be that, based on the defense's account, appellants merely accompanied Rogelio's family to Manila. If two inculpatory facts are capable of two different interpretations, that which would favor the accused should be adopted. Again, the term "recruit" is a conclusion of law. The prosecution failed to elicit from Loreta how appellants "recruited" Luther. *(People v. Segun, G.R. No. 119076, 25 March 2002).*

(b) **Illegal Recruitment Committed by a Syndicate.** Elements: (1) carried out by a group of three or more persons; (2) conspiring and / or confederating with one another in carrying out any unlawful or illegal transaction, enterprise or scheme defined under the first paragraph of Article 38 of the Labor Code. It has been shown that Karl, Yolanda and Francisco conspired with each other in convincing private complainants to apply for overseas job and giving them the guaranty that they would be hired as domestic helpers in Italy although they were not licensed to do so. *(People v. Hernandez, G.R. Nos. 141221-36, 7 March 2002).*

Illegal Recruitment and Estafa. A person who is convicted of illegal recruitment may, in addition, be convicted of estafa under Article 315 (2) of the RPC provided the elements of estafa are present. (*id.*).

LABOR LAW

CONDITIONS OF EMPLOYMENT

Holidays. Regular Muslim Holiday Pay. Muslim holidays are provided under Articles 169 and 170, Title I, Book V, of P.D. No. 1083, otherwise known as the Code of Muslim Personal Laws. *(San Miguel Corporation v. CA, G.R. No. 146775, 30 January 2002).*

COLLECTIVE BARGAINING

Collective Bargaining Agreement (CBA). CBA refers to the negotiated contract between a legitimate labor organization and the employer concerning wages, hours of work and all other terms and conditions of employment in a bargaining unit, including mandatory provisions for grievances and arbitration machineries. As in all other contracts, there must be clear indications that the parties reached a meeting of the minds. Considering that the parties failed to reach an agreement regarding certain items of the CBA, they still have the duty to negotiate a new collective bargaining agreement in good faith, pursuant to the applicable provisions of the Labor Code. *(University of the Immaculate Concepcion, Inc. v. Secretary of Labor And Employment, G. R. No. 146291, 23 January 2002).*

PAL-PALEA Agreement. (a) 10-Year Suspension of CBA. The assailed PAL-PALEA agreement was the result of voluntary collective bargaining negotiations undertaken in light of the severe financial situation faced by the employer, with the peculiar and unique intention of not merely promoting industrial peace at PAL, but preventing the latter's closure. There is no conflict between said agreement and Article 253-A of the Labor Code. Article 253-A has a two-fold purpose. One is to promote industrial stability and

predictability. Inasmuch as the agreement sought to promote industrial peace at PAL during its rehabilitation, said agreement satisfies the first purpose of Article 253-A. The other is to assign specific timetables wherein negotiations become a matter of right and requirement. Nothing in Article 253-A prohibits the parties from waiving or suspending the mandatory timetables and agreeing on the remedies to enforce the same. In the instant case, it was PALEA, as the exclusive bargaining agent of PAL's ground employees, that voluntarily entered into the CBA with PAL. It was also PALEA that voluntarily opted for the 10-year suspension of the CBA. Either case was the union's exercise of its right to collective bargaining. The right to free collective bargaining, after all, includes the right to suspend it. (b) The acts of public respondents in sanctioning the 10-year suspension of the PAL-PALEA CBA did not contravene the "protection to labor" policy of the Constitution. The agreement afforded full protection to labor; promoted the shared responsibility between workers and employers; and the exercised *voluntary* modes in settling disputes, including conciliation to foster industrial peace." (c) The 10-year suspension of the CBA under the PAL-PALEA agreement did not make PALEA a company union for said period, amounting to unfair labor practice, in violation of Article 253-A of the Labor Code. The relevant provisions of the agreement, taken together, clearly show the intent of the parties to maintain "union security" during the period of the suspension of the CBA. Its objective is to assure the continued existence of PALEA during the said period. It is consistent with the State policy to promote unionism to enable workers to negotiate with management on an even playing field and with more persuasiveness than if they were to individually and separately bargain with the employer. (d) The agreement does not violate the five-year representation limit mandated by Article 253-A. Under said article, the representation limit for the exclusive bargaining agent applies only when there is an extant CBA in full force and effect. In the instant case, the parties agreed to suspend the CBA and put in abeyance the limit on the representation period.

The PAL-PALEA agreement dated September 27, 1998, is a valid exercise of the freedom to contract. Under the principle of inviolability of contracts guaranteed by the Constitution, the contract must be upheld. *(Rivera v. Hon. Espiritu, G.R. No. 135547, 23 January 2002).*

Inter-Union Conflict. Unfair Labor Practices of Labor Organizations. Right of local union to disaffiliate from its mother federation – recognized. There is nothing shown in the records nor is it claimed by the federation that the local union was expressly forbidden to disaffiliate from the federation nor were there any conditions imposed for a valid breakaway. As such, the pendency of an election protest involving both the mother federation and the local union did not constitute a bar to a valid disaffiliation. Neither was it disputed by the federation that 92.5% of the total union membership supported the claim of disaffiliation and had in fact disauthorized the federation from instituting any complaint in their behalf. It was entirely reasonable then for the employer company to enter into a collective bargaining agreement with the local union that, having validly severed itself from the federation, has affiliated anew with another federation. The mere act of disaffiliation did not divest the local union of its own personality; neither did it give the federation the license to act independently of the local union. Recreant to its mission, the federation cannot simply ignore the demands of the local chapter and decide for its welfare. The federation might have forgotten that as an agent it could only act in representation, of and in accordance with the interests, of the local union. The complaint then for unfair labor practice lodged by the federation against the company employer and the local union and their respective officers, having been filed by a party which has no legal personality to institute the complaint, should have been dismissed at the first instance for failure to state a cause of action. *(Philippine Skylanders, Inc. v. NLRC, G.R. No. 127374, 31 January 2002).*

LABOR RELATIONS

NATIONAL LABOR RELATIONS COMMISSION

Labor Arbiters. The Labor Arbiter had no jurisdiction over the case for illegal dismissal and non-payment of benefits filed by an officer of a corporation. Under P.D. 902-A (The Revised Securities Act), the law in force when the complaint for illegal dismissal was instituted by petitioner in 1997, "controversies in the election or appointment of directors, trustees, officers, or managers of corporations, partnerships or associations" fall under the exclusive jurisdiction of the SEC. *(Nacpil v. International Broadcasting Corporation, G.R. No. 144767, 21 March 2002).*

ANTI-SEXUAL HARASSMENT ACT OF 1995 (R.A. 7877)

Sexual Harassment. Work, Education or Training-Related (Secs. 3 and 7). Petitioner would not have been able to take undue liberalities on the person of Juliet had it not been for his high position in the City Health Office of Cagayan de Oro City. *(Jacutin v. People, G.R. No. 140604, 6 March 2002).*

LAND LAW

Forest Land. The Government claimed that at the time of filing of the land registration case and of rendition of the decision on June 15, 1967, the subject land was classified as timberland under LC Project No. 15-B of San Narciso, Quezon, as shown in BF Map No. LC-1180; hence, inalienable and not subject to registration. Under the Regalian doctrine, all lands of the public domain belong to the State, and the State is the source of any asserted right to ownership in land and charged with the conservation of such patrimony. This same doctrine also states that all lands not otherwise appearing to be clearly within private ownership are presumed to belong to the State. To overcome such presumption, incontrovertible evidence must be shown by the applicant that the land subject of the application is alienable or disposable. In the case at bar, there was no evidence showing that the land has been reclassified as disposable or alienable. Before any land may be declassified from the forest group and converted into alienable or disposable land for agricultural or other purposes, there must be a positive act from the government. Even rules on the confirmation of imperfect titles do not apply unless and until the land classified as forest land is released in an official proclamation to that effect so that it may form part of the disposable agricultural lands of the public domain. Declassification of forest land is an express and positive act of Government. It cannot be presumed. Neither should it be ignored nor deemed waived. *(Pagkatipunan v. CA, G.R. No. 129682, 21 March 2002).*

The classification of forest land, or any land for that matter, is descriptive of its legal nature or status, and does not have to be descriptive of what the land actually looks like. A forested area classified as forest land of the public domain does not lose such classification simply because loggers or settlers may have stripped it of its forest cover. Moreover, the original text of Section 48 (b),

Chapter VIII of the Public Land Act, which took effect on December 1, 1936, expressly provided that only agricultural land of the public domain are subject to acquisitive prescription. (*id.*).

Petitioners' contention that the Government is now barred from questioning the validity of the certificate of title issued to them, considering that it took the Government almost eighteen (18) years to assail the same - is erroneous. It is a basic precept that prescription does not run against the State. The lengthy occupation of the disputed land by petitioners cannot be counted in their favor, as it remained part of the patrimonial property of the State, which property, is inalienable and indisposable. (*id.*)

In light of the foregoing, the CA did not err when it set aside the June 15, 1967 decision of the court *a quo* and ordered that the subject lot be reverted back to the public domain. Since the land in question is unregistrable, the land registration court did not acquire jurisdiction over the same. Any proceedings had or judgment rendered therein is void and is not entitled to the respect accorded to a valid judgment. (*id.*)

PROPERTY REGISTRATION DECREE (P.D. NO. 1529)

Reopening and Review of Decree of Registration (Article 32). A person deprived of land or any estate or interest therein by adjudication or confirmation of title obtained by actual fraud may seek the reopening and review of a decree of registration. The Torrens System is intended to guarantee the integrity and conclusiveness of the certificate of registration but it cannot be used for the perpetuation of fraud against the real owner of the registered land. *(Francisco v. CA, G.R. No. 130768, 21 March 2002).*

LAND REGISTRATION ACT (ACT NO. 496)

Buyer in Good Faith. As a general rule, every person dealing with registered land may safely rely on the correctness of the certificate of title and is no longer required to look behind the certificate in order to determine the actual owner. (Section 39). However, this rule is subject to the right of a person deprived of land through fraud to bring an action for reconveyance; provided, the rights of innocent purchasers for value and in good faith are not prejudiced. An *innocent purchaser for value* or any equivalent phrase shall be deemed under Section 38 to include an innocent lessee, mortgagee or any other encumbrancer for value. *(Cruz v. Bancom Finance Corporation, G.R. No. 147788, 19 March 2002).*

Reconstitution of Torrens Certificates. Presupposes the loss or destruction of the original copy of the certificate of title on file with the Register of Deeds. In such a case, the procedure prescribed under R.A. No. 26 would have to be observed. *(Rexlon Realty Group, Inc.v. CA, G.R. No. 128412, 15 March 2002).*

Replacement of Lost Duplicate Certificate. In this case, what was sought was the issuance of another owner's duplicate copy of the certificates of title under the provisions of Section 109 of PD No. 1529. In a petition for the issuance of a new owner's duplicate copy of a certificate of title in lieu of one allegedly lost, the RTC, acting only as a land registration court, has no jurisdiction to pass upon the question of actual ownership of the land covered by the lost owner's duplicate copy of the certificate of title. *(Rexlon Realty Group, Inc.v. CA, G.R. No. 128412, 15 March 2002).* Private respondent misrepresented that the owner's duplicate copy of the certificate of title was lost when, in fact, it was not. The misrepresentation in this case, though not constituting extrinsic fraud, is still an evidence of absence of jurisdiction. If the owner's duplicate copy of a certificate of title has not been lost but is in fact in the possession of another person, the replacement title is void and the court

rendering the decision did not acquire jurisdiction. Consequently, the decision may be attacked any time. (*id.*).

LAND REFORM LAW

Agricultural Tenancy. Essential requisites: (1) the parties are the landowner and the tenant; (2) the subject is agricultural land; (3) there is consent; (4) the purpose is agricultural production; (5) there is personal cultivation; and (6) there is sharing of harvests. All these requisites must concur in order to create a tenancy relationship between the parties. The absence of one does not make an occupant of a parcel of land, or a cultivator thereof, or a planter thereon, a *de jure* tenant. Unless a person has established his status as a *de jure* tenant, he is not entitled to security of tenure nor is he covered by the Land Reform Program of the government under existing tenancy laws. With the landowners' admission that petitioners were tenants on the subject landholding, the element of "sharing harvest" is assumed as a factual element in that admission. *(Heirs of Jose Juanite v. CA, G. R. No. 138016, 30 January 2002).*

Agricultural Lessee's Right of Redemption. Arcega, *et al*. "are deemed the cultivators-owners of their respective land-holdings" under R.A. 3844, as amended, from the time the Land Bank Certification dated January 15, 1982 was presented to the RTC on January 20, 1982; and that the said Certification "is equivalent to a consignation or tender of payment in court." Thus, the subsequent cancellation by the LBP of its earlier Certification cannot affect the right already acquired by Arcega, *et al*. as such agricultural lessees. *(Heirs of Jose Juanite v. CA, G. R. No. 138016, 30 January 2002; Spouses Mallari v. Arcega, G.R. No. 106615, 20 March 2002).*

Voluntary Offer to Sell. Applicable rules and procedures. Under DAR Administrative Order No. 3, Series of 1989, it is not necessary that the voluntary offeror of the lot be the registered owner thereof. However, private respondent failed to show that the DAR accepted and approved his offer to sell, without which,

private respondent cannot safely presume that his voluntary offer to sell was accepted by the DAR. *(GSIS v. CA, G.R. No. 128118, 15 February 2002).*

LEGAL ETHICS

LAWYERS

Duty to Society. (a) Respondent did not exercise the good faith required of a lawyer in handling the legal affairs of his client. It is evident from the records that he tried to coerce the complainant to comply with his letter-demand by threatening to file various charges against the latter. When the complainant did not heed his warning, he made good his threat and filed a string of criminal and administrative cases against the complainant. Respondent's action is malicious as the cases he instituted against the complainant did not have any bearing or connection to the cause of his client. Clearly, the respondent violated the proscription in Canon 19, 9.01 of the Code of Professional Responsibility. *(Ong v. Atty. Unto, Adm. Case No. 2417, 6 February 2002).*

(b) In the case at bar, respondent violated his solemn oath as a lawyer not to engage in unlawful, dishonest or deceitful conduct. He maintained that the signature of the donor was genuine despite the finding of experts to the contrary. He also tried to make a mockery of the legal profession by advancing the flimsy excuse that, as a Notary Public, his failure to submit a copy of the document to the Clerk of Court was his secretary's fault. There is also a showing that respondent harassed the occupants of the property subject of the donation. He asked MERALCO to disconnect its services to the property, threatening law suits if his demands were not heeded. He also posted security guards to intimidate the occupants of the property. Clearly, respondent's acts caused dishonor to the legal profession. A notary who acknowledged a document that was a forgery destroys the integrity and dignity of the legal profession. He does not deserve to continue as a member of the bar. *(Alitagtag v. Atty. Garcia, A. C. No. 4738, 6 February 2002).*

Duty to Client. Neglect of legal matter entrusted to counsel. Deceiving his client that he had already filed the petition in the annulment case when in fact, the petition was only filed on a later date. For his neglect in handling the case, he promised to return half of the amount that was paid to him but he never did. Such misconduct clearly betrays the confidence reposed in him by his client. *(Reyes v. Javier, A.C. No. 5574, 1 February 2002).*

JUDGES

Gross Inefficiency. Undue Delay in Rendering Decision. Lower courts are mandated by Article VIII, Section 15 (1) of the Constitution to resolve or decide cases within three (3) months after they have been submitted for decision. An extension of the period may be granted by the Court upon request of the judge concerned on account of heavy caseload or for other reasonable excuse. Without an extension granted by the Court, a delay in the disposition of cases is tantamount to gross inefficiency on the part of the judge. *(Arap v. Judge Mustafa, A.M. No. SCC-01-7, 12 March 2002).*

Gross Ignorance of the Law. Observance of the law is required of every judge. When the law is sufficiently basic, a judge owes it to his office to simply apply it; anything less than that is either deliberate disregard thereof or gross ignorance of the law. *(De Guzman, Jr. v. Sison, A.M. No. RTJ-01-1629, 26 March 2001).*

Sanctioning Dishonesty and Defying Directive of the Court. A judge is supposed to set the example for court personnel under his administrative supervision to follow. He cannot expect to be effective in his judicial and administrative duties if he himself acts contrary to the law and the established rules and orders of the Supreme Court. Respondent judge's conduct in giving a court employee the protective mantle to falsify her official time records,

the penalty for which is dismissal from the service, and signing the same, merits no less than the penalty of dismissal. Moreover, respondent judge's *Memorandum* authorizing respondent employee's further stay in Baguio City was issued in direct contravention of an official action and directive from the Court Administrator through whom the Supreme Court exercises administrative supervision over all lower courts and personnel thereof. *(The Court Administrator v. Abdullahi, A.M. No. P-02-1560, 20 March 2002).*

Improperiety. (a) Presence in Gambling Casinos or Cockpits. Judges of inferior courts are enjoined from playing or being present in gambling casinos and/or going to cockpits and placing bets in cockfights. The fact that the cockpits where respondent used to go were licensed and the cockfights were conducted on authorized days will not absolve him. Verily, it is plainly despicable to see a judge inside a cockpit and more so, to see him bet therein. Mixing with the crowd of cockfighting enthusiasts and bettors is unbecoming a judge and undoubtedly impairs the respect due him. Ultimately, the Judiciary itself suffers therefrom because a judge is a visible representation of the Judiciary. Most often, the public mind does not separate the judge from the Judiciary. *(City Government Of Tagbilaran v. Judge Hontanosas, A.M. No. MTJ-98-1169, 29 January 2002).* (b) The judge's use of physical violence against a colleague reveals a marked lack of judicial temperament and self-restraint, traits not only desirable but indispensable for every judge to possess; besides the basic equipment of learning in the law. Such behavior puts the judiciary into disrepute. By fighting within court premises, the parties have failed, not only to observe the proper decorum expected of members of the judiciary, they have failed to promote public confidence in the integrity and impartiality of the judiciary. *(Judge Alumbres v. Judge Caoibes, Jr., A.M. No. RTJ-99-1431, 23 January 2002).*

Inhibition in Criminal Cases. *(City Government of Tagbilaran v. Judge Hontanosas, A.M. No. MTJ-98-1169, 29 January 2002).*

In-chambers Session. *(Balderama v. Judge Alagar, A.M. No. RTJ-99-1449, 18 January 2002).*

Administrative Cases Against Judges. Section 3, Rule 17 of the Rules of Court provides that if the plaintiff fails to comply with any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion, and the dismissal shall have the effect of an adjudication on the merits, unless otherwise provided by the court. The Court has applied this rule in an administrative case against a judge where the complainant failed to appear and present evidence despite notice. The Court would like to put to task complainants who file administrative cases against members of the bench and later desist from pursuing them to their conclusion. Judges should be protected from frivolous complaints for they erode the administration of justice. *(Vistan v. Judge Angeles, A.M. No. RTJ-02-1672, 30 January 2002).*

POLITICAL LAW

CONSTITUTIONAL LAW

BILL OF RIGHTS

Freedom from Unreasonable Searches and Seizures.

Warrantless Search and Seizure. (A) Search of Moving Vehicle. A warrantless search of a moving vehicle is justified on the ground that it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. Searches without warrant of automobiles is also allowed for the purpose of preventing violations of smuggling or immigration laws, provided such searches are made at borders or constructive borders like checkpoints near the boundary lines of the State. The mere mobility of these vehicles, however, does not give the police officers unlimited discretion to conduct indiscriminate searches without warrants if made within the interior of the territory and in the absence of probable cause. *(Caballes v. CA, G.R. No. 136292, 15 January 2002).*

(1) "Stop-and-Search" at military or police checkpoints has been declared to be not illegal per se, for as long as it is warranted by the exigencies of public order and conducted in a way least intrusive to motorists. A checkpoint may either be a mere routine inspection or it may involve an extensive search. (a) Routine inspections are not regarded as violative of an individual's right against unreasonable search. The search which is normally permissible in this instance is limited to the following: [i] Where the officer merely draws aside the curtain of a vacant vehicle which is parked on the public fair grounds; [ii] Simply looks into a vehicle; [iii] Flashes a light therein without opening the car's doors;

[iv] where the occupants are not subjected to a physical or body search; [vi] where the inspection of the vehicles is limited to a visual search or visual inspection; and [vi] where the routine check is conducted in a fixed area. In this case, the police officers did not merely conduct a visual search or visual inspection of herein petitioner's vehicle. They had to reach inside the vehicle, lift the kakawati leaves and look inside the sacks before they were able to see the cable wires. It cannot be considered a simple routine check. (*id.*). (b) Extensive Search. On the other hand, when a vehicle is stopped and subjected to an extensive search, such a warrantless search would be constitutionally permissible only if the officers conducting the search have reasonable or probable cause to believe, before the search, that either the motorist is a law-offender or they will find the instrumentality or evidence pertaining to a crime in the vehicle to be searched. Cases of justified search of this kind cited. In the case at bar, the vehicle of the petitioner was flagged down because the police officers who were on routine patrol became suspicious when they saw that the back of the vehicle was covered with kakawati leaves which, according to them, was unusual and uncommon. That the vehicle looked suspicious simply because it is not common for such to be covered with kakawati leaves does not constitute "probable cause" as would justify the conduct of a search without a warrant. In addition, the police authorities do not claim to have received any confidential report or tipped information that petitioner was carrying stolen cable wires in his vehicle which could otherwise have sustained their suspicion. Jurisprudence is replete with cases where tipped information has become a sufficient probable cause to effect a warrantless search and seizure. Unfortunately, none exists in this case. (*id.*)

(B) "Plain View Doctrine." An object is in plain view if it is plainly exposed to sight. Where the object seized was inside a closed package, the object itself is not in plain view and therefore cannot be seized without a warrant. However, if the package proclaims its contents, whether by its distinctive configuration, its

transparency, or if its contents are obvious to an observer, then the contents are in plain view and may be seized. From the records of this case, the cable wires were not exposed to sight because they were placed in sacks and covered with leaves. The articles were neither transparent nor immediately apparent to the police authorities. They had no clue as to what was hidden underneath the leaves and branches. As a matter of fact, they had to ask petitioner what was loaded in his vehicle. In such a case, it has been held that the object is not in plain view which could have justified mere seizure of the articles without further search. (*id.*) A search incident to a lawful arrest - is limited to the person of one arrested and the premises within his immediate control. Under the "plain view doctrine," unlawful objects within the plain view of an officer who has the right to be in the position to have that view are subject to seizure. Requisites for validity: (a) Prior valid intrusion based on a valid warrantless arrest in which the police are legally present in the pursuit of their official duties; (b) The evidence was inadvertently discovered by the police who had the right to be where they were; (c) The evidence must be immediately apparent; and (d) "plain view" justifies mere seizure of evidence without further search. Here the prosecution failed to show whether or not the plastic bag was transparent that would prove beyond reasonable doubt that the "plain view" of such plastic bag would readily disclose that its contents are marijuana. *(People v. Aspiras, G.R. No. 138382-84, 12 February 2002).*

(c) Consented Search. The constitutional immunity against unreasonable searches and seizures is a personal right which may be waived. The consent must be voluntary in order to validate an otherwise illegal detention and search, *i.e.*, the consent is unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion. Consent to a search is not to be lightly inferred, but must be shown by clear and convincing evidence. The question whether a consent to a search was in fact voluntary is a question of fact to be determined from the totality of all the

circumstances. Relevant to this determination are the following characteristics of the person giving consent and the environment in which consent is given: [i] the age of the defendant; [ii] whether he was in a public or secluded location; [iii] whether he objected to the search or passively looked on; [iv] the education and intelligence of the defendant; [v] the presence of coercive police procedures; [vi] the defendant's belief that no incriminating evidence will be found; [vii] the nature of the police questioning; [viii] the environment in which the questioning took place; and [ix] the possibly vulnerable subjective state of the person consenting. It is the State which has the burden of proving, by clear and positive testimony, that the necessary consent was obtained and that it was freely and voluntarily given. In case of consented searches or waiver of the constitutional guarantee against obtrusive searches, it is essential that: (1) the right exists; (2) the person involved had knowledge, either actual or constructive, of the existence of such right; and (3) the said person had an actual intention to relinquish the right. Here, evidence is lacking that the petitioner intentionally surrendered his right against unreasonable searches. The statements of the police officers were not asking for his consent; they were declaring to him that they will look inside his vehicle. It is doubtful whether permission was actually requested and granted. Neither can petitioner's passive submission be construed as an implied acquiescence to the warrantless search. The accused is not to be presumed to have waived the unlawful search conducted simply because he failed to object. *(Caballes v. CA, G.R. No. 136292, 15 January 2002).*

Freedom of Association. Includes the freedom *not* to associate. Private respondents cannot be compelled to become members of the SCHA (homeowners' association) by the simple expedient of including them in its Articles of Incorporation and By-laws, without their express or implied consent. To band themselves together as an association of lot owners in a subdivision project, the lot owners must agree, directly or indirectly, to become

members of the association. Membership in a homeowners' association may be acquired in various ways - often through deeds of sale, Torrens certificates or other forms of evidence of property ownership. In the present case, however, other than the said Articles of Incorporation and By-laws, there is no showing that private respondents agreed to be SCHA members. *(Sta. Clara Homeowners' Association v. Spouses Gaston, G.R. No. 141961, 23 January 2002).*

Right to Speedy Disposition of Cases. Is deemed violated only when the proceedings is attended by vexatious, capricious, and oppressive delays; or when unjustified postponements of the trial are asked for and secured, or when without cause or unjustifiable motive, a long period of time is allowed to elapse without the party having his case tried. *(Ty-Dazo v. Sandiganbayan, G.R. No. 143885-86, 21 January 2002).*

RIGHTS OF THE ACCUSED

(1) **Right to Counsel During Custodial Investigation.** Section 12, Article III of the 1987 Constitution embodies the mandatory protection afforded a person under custodial investigation for the commission of a crime and the duty of the State to enforce such mandate. (a) The right refers to "competent and independent counsel," - not the mere presence of a lawyer beside the accused. An effective and vigilant counsel necessarily and logically requires that the lawyer be present and able to advise and assist his client from the time the confessant answers the first question asked by the investigating officer until the signing of the extrajudicial confession. The lawyer should ascertain that the confession is made voluntarily and that the person under investigation fully understands the nature and the consequence of his extrajudicial confession in relation to his constitutional rights. The modifier *competent and independent* stresses the need to accord the accused,

under the uniquely stressful conditions of a custodial investigation, an informed judgment on the choices explained to him by a diligent and capable lawyer. *(People v. Suela, G.R. No. 133570-71, 15 January 2002).* [i] Edgardo's extrajudicial confession to the police authorities was obtained in violation of his constitutional rights. This appellant did not finish first year high school. The lawyer given to said accused interviewed him (before the latter gave his confession) for only around "five minutes." After this initial interview, said lawyer just listened nonchalantly to the questions propounded by the police and to the answers given by Edgardo. Counsel was not even sure that he had explained to appellant the consequences of his extrajudicial confession. Furthermore, the said lawyer's attention was divided while attending the custodial investigation, as he was also looking over another paper work on his desk. Where the prosecution failed to discharge the State's burden of proving with clear and convincing evidence that the accused had enjoyed effective and vigilant counsel before he extrajudicially admitted his guilt, the extrajudicial confession cannot be given any probative value. (*id.*). [ii] The appellant allegedly confessed in Leyte that the stolen *Citizen* wristwatch had been given to his girlfriend. When he rendered this confession, he did not execute any written waiver of his right to remain silent or of his right to counsel. Any admission wrung from the accused in violation of his constitutional rights is inadmissible in evidence against him. Therefore, his alleged statement as to the location of the wristwatch is inadmissible. (*id.*).

(b) The mantle of protection covers the period from the time a person is taken into custody for investigation of his possible participation in the commission of a crime or from the time he is singled out as a suspect in the commission of a crime although not yet in custody and up to the termination of the custodial investigation. [i] The counsel of choice of the accused must be present and must be able to advise and assist his client from the time he answers the first question until the time he signs the extra-judicial confession. *(People v. Felixminia G.R. No. 125333,*

20 March 2002). [ii] While the appellant was assisted by a lawyer when he reduced his extrajudicial confession into writing and signed it, the said lawyer's testimony shows that the custodial investigation started without his presence. Admissions obtained during custodial investigations without the benefit of counsel although later reduced to writing and signed in the presence of counsel are still flawed under the Constitution. *(People v. Matignas, G.R. No. 126146, 12 March 2002).*

Right to Be Presumed Innocent *(People v. Escordial, G.R. No. 138934-35, 16 January 2002).*

Right Against Double Jeopardy. Judgment of acquittal in criminal proceedings is final and unappealable whether it happens at the trial court level or before the CA. This means that a review of alleged errors in the said judgment arising from misappreciation of facts and the evidence adduced cannot be made without trampling upon the right of the accused against double jeopardy. *(Yuchengco v. CA, G.R. No 139768, 7 February 2002).*

POLITICAL LAW

EXECUTIVE DEPARTMENT

Secretary of the Department of Environment and Natural Resources (DENR). Under the Revised Forestry Code of the Philippines, particularly Section 68-A, the Secretary of DENR or a duly authorized representative has exclusive authority to order the confiscation in favor of the government of the vehicles used in the commission of offenses punishable by the said Code. DENR promulgated Administrative Order (AO) No. 54-93, amending Department Administrative Order (DAO) No. 59-90 providing the guidelines for the confiscation, forfeiture and disposition of conveyances used in violation of forestry laws, rules and

regulations. On the other hand, under Section 68 of the same code, the transportation, movement or conveyance of forest products without legal documents is penalized and the criminal case is within the jurisdiction of the RTC. The guilt or the innocence of the accused in the criminal case is immaterial to the confiscation of the vehicle under Section 68-A which involves a different matter cognizable by the DENR Secretary. Hence, the RTC cannot order the release of the confiscated vehicle on the ground that the accused in the criminal case penalized by Section 68 was acquitted. *(DENR v. Daraman, G.R. No. 125797, 15 February 2002).*

GOVERNMENT OWNED OR CONTROLLED CORPORATIONS

Water Districts. The members of the board of directors of water districts are not entitled to receive benefits and allowances in excess of those allowed by P.D. 198 (as amended by P.D. 768 and P.D. 1479) and the guidelines of the Local Water Utilities Administration (LWUA) and other applicable law. R.A. 6758, otherwise known as the Salary Standardization Law, does not apply to water districts nor refer to the compensation of its board of directors who do not receive salaries but *per diems* for their compensation. The right to compensation of members of the board of directors of water districts is limited to *per diems. (Baybay Water District v. COA, G.R. Nos. 147248-49, 23 January 2002).*

ADMINISTRATIVE AGENCIES

National Telecommunications Commission (NTC). Nature of Office and Functions. Issuance of provisional franchise. *(Republic v. Express Telecommunications Co., Inc., G.R. No. 147096, 15 January 2002; Bayan Telecommunications, Inc. v. Express Telecommunications Co., Inc., G.R. No. 147210, 15 January 2002).*

JUDICIAL DEPARTMENT

Heirarchy of Courts. A lower court cannot reverse or set aside decisions or orders of a superior court, especially of the Supreme Court, for to do so will negate the principle of hierarchy of courts and nullify the essence of review. A final judgment, albeit erroneous, is binding on the whole world. Thus, it is the duty of the lower courts to obey the decisions of the Supreme Court and render obeisance to its status as the apex of the hierarchy of courts. A becoming modesty of inferior courts demands conscious realization of the position that they occupy in the interrelation and operation of the integrated judicial system of the nation. There is only one Supreme Court from whose decisions all other courts should take their bearings. Respondent RTC, and for this matter, all lower courts, ought to be reminded that a final and executory decision or order can no longer be disturbed or reopened no matter how erroneous it may be. *(Rivera v. Hon. Espiritu, G.R. No. 135547, 23 January 2002; Spouses Mallari v. Arcega, G.R. No. 106615, 20 March 2002).*

Decisions. The Philippine Constitution mandates that no decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based. This vital requirement is not only demanded from the courts; quasi-judicial bodies are similarly required to give basis for all their decisions, rulings or judgments pursuant to the Administrative Code whose roots may also be traced to the Constitutional mandate. A decision need not be a complete recital of the evidence presented. So long as the factual and legal bases are clearly and distinctly set forth supporting the conclusions drawn therefrom, the decision arrived at is valid. Nonetheless, in order to effectively buttress the judgment arrived at, it is imperative that a decision should not be simply limited to the dispositive portion but must state the nature of the case, summarize the facts with references to the record, and contain a statement of the applicable laws and jurisprudence and

the tribunal's assessments and conclusions on the case. This practice would better enable a court to make an appropriate consideration of whether the dispositive portion of the judgment sought to be enforced is consistent with the findings of facts and conclusions of law made by the tribunal that rendered the decision. *(People v. Baring, G.R. No. 137933, 28 January 2002).*

(b) Petitioner should bear in mind that the Decision, although penned by a member of the Court, is a decision of the whole Court. Hence, any attack on the integrity of the *ponente*, or any member of the Court for that matter, is an attack on the entire Court. More importantly, petitioner fails to establish with concrete proof his imputations of bias. Petitioner and his counsel should be admonished for making such baseless and unsubstantiated accusations of bias against the Court. *(Tangan v. CA, G.R. No. 105830, 15 January 2002).*

(c) The efficacy of a decision is not necessarily impaired by the fact that its writer only took over from a colleague who had earlier presided at the trial. *(People v. Yatco, G.R. No. 138388, 19 March 2002).*

(d) *Obiter Dictum* – defined as an opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it. It is a remark made or opinion expressed by a judge in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent. An adjudication on any point within the issues presented by the case cannot be considered as *obiter dictum*, and this rule applies to all pertinent questions, although only incidentally involved, which are presented and decided in the regular course of the consideration of the case and led to the final conclusion, and to any statement as

to matter on which the decision is predicated. *(Villanueva v. CA, G.R. No. 142947, 19 March 2002).*

CONSTITUTIONAL COMMISSIONS

CIVIL SERVICE COMMISSION

Career Executive Service (CES). Petitioner was appointed in a permanent capacity to the position of Executive Director II of the TRB in 1992. At that time, said position was excluded from the coverage of the CES, so petitioner was able to occupy said position although she was not a career service executive officer (CESO). The subsequent inclusion of her position under the CES, however, did not automatically qualify her for the said position as she lacked the required eligibility. At most, the permanent status accorded to her appointment would only allow her to occupy said position until the appointing authority would replace her with someone who has the required eligibility therefor. *(Dimayuga v. Benedicto, G.R. No. 144153, 16 January 2002).* Security of tenure in the CES is acquire with respect to rank, *and not to position*. The guaranty of security of tenure to members of the CES does not extend to the particular positions to which they may be appointed (a concept which is applicable only to first and second-level employees in the civil service) but to the rank to which they are appointed by the President. Then too, the cases on unconsented transfer invoked by private respondent find no application in the present case. Private respondent's appointment is merely temporary; hence, he could be transferred or reassigned to other positions without violating his right to security of tenure. *(id.; Dr. Osea v. Dr. Malaya, G.R. No. 139821, 30 January 2002).*

***Parens Patriae. Patria Potestas.* Applied in the Civil Service.** Is a government employee who has been arrested and detained for a non-bailable offense and for which she was

suspended for her inability to report for work until the termination of the case still required to file a formal application for leave of absence to protect her security of tenure and be entitled to return to work upon her acquittal. Did her absence from office for more than one (1) year automatically justify the City Government, her employer, to drop her from the rolls, without prior notice to her, even as she had been placed under suspension from employment until the termination of her case, which finally resulted in her acquittal for lack of evidence? When the issues were finally elevated to the Court, it resolved them with a view to do justice to the worker. Paternal power should consist or be exercised with affection, not in atrocity. The following concepts were discussed and resolved: Absent Without Leave. Automatic Leave of Absence. Civil Service Commission Authority to Interpret its Own Rules. Suspension. Dropping from the Rolls. Backwages. Abandonment. Due Process. Legal Effects of Void Acts. Presumption of Regularity of Performance of Duties. Employment and its Value to the Worker. The Court also applied: [i] the idea of suspended employer-employee relationship widely accepted in labor law to account for situations wherein laborers would have no work to perform for causes not attributable to them; and [ii] the rule that a government official or employee who had been illegally dismissed and whose reinstatement had later been ordered is considered as not having left his office, so that he is entitled to all the rights and privileges that should accrue to him by virtue of the office that he held. *(Makati City v. Civil Service Commission, G.R. No. 131392, 6 February 2002).* In a separate opinion Justice Vitug said the award of back salaries should be reduced to five years conformably with the pronouncement of the Court in a long line of cases. (*id.*).

THE COMMISSION ON ELECTIONS (COMELEC)

Election Returns. Discrepancies. Correction of Manifest Errors. Exclusions of. *(O'Hara v. COMELEC, G.R. Nos. 148941-42, 12 March 2002).*

Pre-proclamation Controversies. May be filed directly with the COMELEC. Authority to annul any canvass and proclamation illegally made. (*id.*).

Failure of Elections. *(Datu Ampatuan v. COMELEC, G.R. No. 149803, 31 January 2002).*

THE COMMISSION ON AUDIT (COA)

Power to Examine and Audit. (a) Under Section 2 (1), Article IX-D of the Constitution, the power of COA to examine and audit is non-exclusive. On the other hand, under Section 2 (2) of the same Article of the Constitution, COA's authority to define the scope of its audit, promulgate auditing rules and regulations, and disallow unnecessary expenditures is exclusive. The framers of the Constitution were fully aware of the need to allow independent private audit of certain government agencies in addition to the COA audit, as when there is a private investment in a government-controlled corporation, or when a government corporation is privatized or publicly listed, or as in the case at bar when the government borrows money from abroad. In these instances the government enters the marketplace and competes with the rest of the world in attracting investments or loans. To succeed, the government must abide with the reasonable business practices of the marketplace. Otherwise, no investor or creditor will do business with the government, frustrating government efforts to attract investments or secure loans that may be critical to stimulate moribund industries or resuscitate a badly shattered national economy as in the case at bar. *(DBP v. COA, G.R. No. 88435, 16 January 2002).* (b) The power of the COA to examine and audit government agencies, while non-exclusive, cannot be taken away from the COA. (Section 3, Article IX-D of the Constitution). The mere fact that private auditors may audit government agencies does not divest the COA of its power to examine and audit the

same government agencies. The COA is neither by-passed nor ignored since even with a private audit, the COA will still conduct its usual examination and audit, and its findings and conclusions will still bind government agencies and their officials. As the constitutionally mandated auditor of all government agencies, the COA's findings and conclusions necessarily prevail over those of private auditors, at least insofar as government agencies and officials are concerned. Section 8 of P.D. No. 2029 on the hiring of private auditors also discussed. (*id.*). (c) Government Auditing Code of the Philippines (P.D. No. 1445, Sections 26, 31 and 32) does not prohibit the hiring of private auditors by government agencies. Thus, Section 26 must be applied in harmony with Section 58 of the General Banking Law of 2000 (R.A. No. 8791) which authorizes unequivocally the Monetary Board to require banks to hire independent auditors and Sections 25 and 28 of the New Central Bank Act (R.A. No. 7653), which authorize expressly the Monetary Board to conduct periodic or special examination of all banks. (*id.*). COA properly disallowed the accelerated implementation of the Salary Standardization Law in the National Electrification Administration. *(National Electrification Administration v. COA, G.R. No. 143481, 15 February 2002).*

LOCAL GOVERNMENT

Tax Ordinances and Revenue Measures. Procedure for Approval and Effectivity. The periods stated in Section 187 of the Local Government Code of 1991 for questioning the constitutionality or validity of tax ordinances or revenue measures are mandatory. Posting in lieu of publiction. (Section 188). *(Hagonoy Market Vendor Association v. Hagonoy, G.R. No. 137621, 6 February 2002).*

Local Elective Officials. Term of Office. To apply the disqualification under Section 8, Article X of the Constitution, two (2) conditions must concur: (1) that the official concerned has been

elected for three consecutive terms in the same local government post, and (2) that he has fully served three consecutive terms. Under Section 43 (b) of the Local Government Code of 1991, the term limit for elective local officials must be taken to refer to the *right to be elected* as well as *the right to serve in the same elective position*. Consequently, it is not enough that an individual has *served* three consecutive terms in an elective local office, he must also have been *elected* to the same position for the same number of times before the disqualification can apply. Voluntary renunciation of a term does not cancel the renounced term in the computation of the three term limit; conversely, involuntary severance from office for any length of time short of the full term provided by law amounts to an interruption of continuity of service. *(Adormeo v. COMELEC, G.R. No. 147927, 4 February 2002).*

ACCOUNTABILITY OF PUBLIC OFFICERS

THE OMBUDSMAN

No Authority to Directly Remove or Dismiss Government Officials or Empoyees. Under Section 13, subparagraph (3), of Article XI of the 1987 Constitution, the Ombudsman can only "recommend" the removal of the public official or employee found to be at fault, to the public official concerned. The Ombudsman has no authority to directly dismiss the petitioner from the government service, more particularly, from his position in the BID. *(Tapiador v. Office Of The Ombudsman, G.R. No. 129124, 15 March 2002).*

Investigative Powers. The power to investigate and to prosecute granted by law to the Ombudsman is plenary and unqualified. It pertains to any act or omission of any public officer or employee when such act or omission appears to be illegal, unjust, improper or inefficient. The law does not make a distinction

between cases cognizable by the Sandiganbayan and those cognizable by regular courts. The clause "any illegal act or omission of any public official" is broad enough to embrace any crime committed by a public officer or employee. Moreover, the jurisdiction of the Office of the Ombudsman should not be equated with the limited authority of the Special Prosecutor under Section 11 of R.A. 6770. The Office of the Special Prosecutor is merely a component of the Office of the Ombudsman and may only act under the supervision and control and upon authority of the Ombudsman. Its power to conduct preliminary investigation and to prosecute is limited to criminal cases within the jurisdiction of the Sandiganbayan. Hence, in this case, the Ombudsman has authority to investigate and prosecute the criminal cases against respondents in the RTC, even as this authority is not exclusive and is shared with the regular prosecutors. *(Ombudsman v. Enoc, G.R. Nos. 145957-68, 25 January 2002).*

URBAN LAND REFORM AND HOUSING

The Urban Land Reform Law (P.D. No. 1517). Right of First Refusal. The right of first refusal applies only to tenants who have resided for ten (10) years or more on the leased land declared as within the Urban Land Reform Zone, and who have built their homes on that land. It does not apply to apartment dwellers. P.D. No. 2016, which amended P.D. No. 1517, did not extend its benefits to apartment dwellers. The said law grants the right of first refusal only to legitimate tenants who have built their homes on the land they are leasing. *(Arlegui v. CA, G.R. No. 126437, 6 March 2002).*

Housing and Land Use Regulatory Board (HLURB). Homeowners' Association. Originally, administrative supervision over homeowners' associations was vested by law in the Securities and Exchange Commission (SEC). Pursuant to Executive Order (EO) No. 535, however, the Home Insurance and Guaranty

Corporation (HIGC) assumed the regulatory and adjudicative functions of the SEC over homeowners' associations. The powers and responsibilities vested in the HIGC with respect to homeowners' associations were later transferred to the HLURB pursuant to R.A. 8763. *(Sta. Clara Homeowners' Association v. Spouses Gaston, G.R. No. 141961, 23 January 2002).* HIGC exercises limited jurisdiction over homeowners' disputes. The law confines its authority to controversies that arise from any of the following intra-corporate relations: (1) between and among members of the association; (2) between any and / or all of them and the association of which they are members; and (3) between the association and the State insofar as the controversy concerns its right to exist as a corporate entity. The Complaint here is for damages. It does not assert membership in the SCHA as its basis. Rather, it is based on an alleged violation of the alleged right of access through the subdivision and on the alleged embarrassment and humiliation suffered by the plaintiffs. (*id.*).

NATIONAL ECONOMY AND PATRIMONY

Bangko Sentral ng Pilipinas. Central Bank's constitutional power of "supervision" over banks under Section 20, Article XII of the Constitution includes the power to examine and audit banks. Thus, COA and the Central Bank have concurrent jurisdiction under the Constitution to examine and audit government banks. The *Bangko Sentral ng Pilipinas*, which succeeded the Central Bank, retained under the 1987 Constitution and the General Banking Law of 2000 (R.A. No. 8791) the same constitutional and statutory power the Central Bank had under the Freedom Constitution and the General Banking Act (RA No. 337) with respect to the independent audit of banks. *(DBP v. COA, G.R. No. 88435, 16 January 2002).*

SEQUESTRATION

Sandiganbayan. Has full authority to decide on all incidents in the ill-gotten wealth case, including the propriety of the writs of sequestration issued by the Presidential Commission on Good Government. *(Republic v. Sandiganbayan, G.R. No. 135789, 31 January 2002).*

ADMINISTRATIVE LAW

Dishonesty, Gross Misconduct and Falsification of Official Document. Falsification of Daily Time Records (DTRs). Dishonesty under Rule XIV, Sec. 23, of the *Omnibus Rules of the Civil Service* is punishable by dismissal on commission of the first offense. *(The Court Administrator v. Abdullahi, A.M. No. P-02-1560, 20 March 2002).*

Death of Respondent. The charges against respondent Antonio were referred to Judge Parazo for investigation, report and recommendation, and thereafter, to the Office of the Court Administrator for evaluation, report and recommendation. Respondent was able to answer the complaint and substantiate his defenses. While the administrative case was pending, respondent died. His heirs moved for the dismissal of the case against him and to facilitate the release of whatever benefits may have accrued to him during his twenty years in the service. The Court resolved the case notwithstanding and imposed the appropriate administrative sanctions. *(Office of the Court Administrator v. Atty. Saguyod, A.M. Nos. P-96-1229-30, 25 March 2002).*

PUBLIC OFFICERS

Clerk of Court *(The Court Administrator v. Abdullahi, A.M. No. P-02-1560, 20 March 2002).*

Sheriffs. Deputy Sheriffs. *(Talion v. Ayupan, A.M. No. P-01-1529, 23 January 2002; DBP v. Nequinto, A.M. No. MTJ-01-1376, 23 January 2002).*

REMEDIAL LAW

CIVIL PROCEDURE

ORDINARY CIVIL ACTIONS

CAUSE OF ACTION

Nowhere in the allegations does it appear that relief is sought against petitioner. Respondent's causes of action were all against her husband, such as for judicial appointment of respondent as administratrix of the conjugal partnership or absolute community property; accounting by the husband of the conjugal partnership; forfeiture of husband's share in co-owned property acquired during his illicit relationship with petitioner and the dissolution of the conjugal partnership of gains between respondent and her husband; forfeiture of husband's share; support which cannot be demanded from a stranger; and moral damages. *(Relucio v. Lopez, G.R. No. 138497, 16 January 2002)*

PARTIES

Real Party in Interest. If petitioner is not a real party in interest, she cannot be an indispensable party. *(Relucio v. Lopez, G.R. No. 138497, 16 January 2002)*

Necessary Party. (*id.*)

PLEADINGS

Period for Filing. As early as 23 January 1993, the Court has issued an order directing court offices closed on Saturdays so that

when the last day for filing of a pleading falls on a Saturday, the same should be done on the following Monday, provided the latter is not a holiday. *(Herbosa v. CA, G.R. No. 119086, 25 January 2002).*

MOTION TO DISMISS

Grounds. Forum-shopping. *(GSIS v. Bengson Commercial Buildings, Inc., G.R. No. 137448, 31 January 2002; Yupangco Cotton Mills, Inc. v. CA, G.R. No. 126322, 16 January 2002).* Extant when a party repetitively avails himself of several judicial remedies in different venues, simultaneously or successively, all substantially founded on the same transactions, essential facts and circumstances, all raising substantially the same issues and involving exactly the same parties. In the case at bar, the remedy of the respondents is to file an appeal within the reglementary period after the issuance of the MTC decision. However, insofar as assailing the MTC's order of execution, the respondents' appeal thereof would be too slow and inadequate to prevent the injurious effect of respondents' imminent dispossession of the property. Thus, respondents' filing of a petition for certiorari to assail the MTC's order for immediate execution of its decision is proper. However, respondents' petition for certiorari was not limited for said purpose as they likewise assailed the main decision of the MTC in the same petition. This is improper as appeal is still their appropriate remedy under the former Rules of Court (Section 1, Rule 40 — Appeal from Inferior Courts to CFI). What compounded the matter is that the respondents had already a pending notice of appeal with the MTC to assail its decision in the forcible entry case. Clearly, by also assailing the decision of the MTC in the forcible entry case in their subsequent petition for certiorari, respondents are guilty of forum-shopping which carries the sanction of dismissal of both the petition for *certiorari* and the appeal filed by the respondents with the RTC. *(Candido v. Camacho, G.R. No. 136751, 15 January 2002).*

Res Judicata. *(Serrano v. CA, G.R. No. 122930, 6 February 2002).*

INTERVENTION

Time to Intervene. At any time before the rendition of judgment. At the execution stage of the decision, it is not appropriate for petitioner to intervene. *(Boncodin v. CA, G. R. No. 130757, 18 January 2002).*

ADMISSION BY ADVERSE PARTY

Written Request for Admission (Section 1, Rule 26 of the Rules of Court). Addressed to a party's counsel - may be answered by said counsel in behalf of his client. *(Lañada v. CA, G.R. No. 102390, 1 February 2002).*

NEW TRIAL

Newly Discovered Evidence. *(Mendezona v. Ozamiz, G.R. No. 143370, 6 February 2002; Serrano v. CA, G.R. No. 122930, 6 February 2002).*

RELIEF FROM JUDGMENT

Petitioners should not suffer the consequences of their counsel's negligence. It necessarily follows then that petitioner's period to file the petition for relief should be counted from their actual notice of the order, which was sometime in April 1999. The petition for relief filed on May 27, 1999 was well within the sixty day period prescribed in Rule 38, Section 3 of the 1997 Rules of

Civil Procedure. The instant case involves the possible loss of property without due process of law. More particularly, petitioners stand to lose their land without being allowed to defend their title from the adverse claims of private respondents. Hence, in the interest of substantial justice, the reopening of the case is ordered to allow defendants, petitioners herein, an opportunity to present evidence in their behalf. *(Salazar v. CA, G.R. No. 142920, 6 February 2002; GSIS v. Bengson Commercial Buildings, Inc., G.R. No. 137448, 31 January 2002).*

EXECUTION, SATISFACTION AND EFFECT OF JUDGMENT

Writ of Execution. Must conform substantially to every essential particular of the judgment promulgated. Execution that is not in harmony with the judgment is bereft of validity. It must conform, more particularly, to that ordained or decreed in the dispositive portion of the decision. In the case at bar, the dispositive portion of the decision subject of the assailed order and writ of execution specifically limited the liability of private respondent and did not include the payment of interest. Hence, the writ of execution of the decision cannot modify the same by ordering private respondent to pay interest. *(Solidbank Corporation v. CA, G.R. No. 138131, 12 March 2002).*

Execution Pending Appeal or Discretionary Execution. As a general rule, the execution of a judgment should not be had until and unless the judgment has become final and executory, *i.e.*, the period of appeal has lapsed without an appeal having been taken; or appeal having been taken, the appeal has been resolved and the records of the case have been returned to the court of origin, in which event, execution "shall issue as a matter of right." Execution pending appeal in accordance with Section 2 of Rule 39 of the Rules of Court is, therefore, the exception. The requisites for the grant of a motion for execution pending appeal are: (a) there must

be a motion by the prevailing party with notice to the adverse party; (b) there must be a good reason for execution pending appeal; and (c) the good reason must be stated in a special order. Such requisites must be strictly construed. Thus, anent the requisite that there must be good reason justifying the execution of the judgment pending appeal, such good reason must constitute superior circumstances demanding urgency which will outweigh the injury or damage should the losing party secure a reversal of the judgment. What may constitute good reasons is addressed to the sound discretion of the court. *(Fortune Guarantee and Insurance Corporation v. CA, G.R. No. 110701, 12 March 2002).* In this case, the finding of respondent judge and affirmed by the CA; that good reasons existed to justify execution pending appeal of a decision involving an electric cooperative was sustained by the Court. (*id.*). In another case, superior or urgent circumstance to warrant discretionary execution was not shown. The mere putting up of a bond is not sufficient reason to justify the plea for execution pending appeal. *(Bañez v. Bañez, G.R. No. 133628, 23 January 2002).*

Writ of Possession. (Rule 39, Section 33, Revised Rules of Court). The obligation of a court to issue an *ex-parte* writ of possession in favor of the purchaser in an extrajudicial foreclosure sale ceases to be ministerial once it appears that there is a third party in possession of the property who is claiming a right adverse to that of the debtor/mortgagor. As such, a third person in possession of an extrajudicially foreclosed realty, who claims a right superior to that of the original mortgagor, may not be dispossessed on the strength of a mere *ex-parte* possessory writ, since to do so would be tantamount to his summary ejectment in violation of the basic tenets of due process. In the same vein, respondents are not obliged to prove their ownership of the foreclosed lot in the *ex-parte* proceedings conducted below. The trial court has no jurisdiction to determine who between the parties is entitled to ownership and possession of the foreclosed lot. Likewise, registration of the lot in petitioner's name does not

automatically entitle the latter to possession thereof. Petitioner must resort to the appropriate judicial process for recovery of the property and cannot simply invoke its title in an *ex-parte* proceeding to justify the ouster of respondents. *(PNB v. CA, G.R. No. 135219, 17 January 2002).*

Proceedings when Property Claimed by Third Person. A third party whose property has been levied upon by a sheriff to enforce a decision against a judgment debtor is afforded with several alternative remedies to protect its interests: (a) File a third party claim with the sheriff (of the Labor Arbiter in this case) and (b) If the third party claim is denied, the third party may appeal the denial (to the NLRC in this case). Such alternative remedies may be availed of cumulatively and the third party is not precluded from availing himself of the other alternative remedies in the event he fails in the remedy first availed of. Even if a third party claim is denied, a third party may still file the proper action with a competent court to recover ownership of the property illegally seized by the sheriff. This finds support in Section 17 (now 16), Rule 39, of the Revised Rules of Court. Thus, a third-party claimant may also avail of the remedy known as "terceria" by serving on the officer making the levy an affidavit of his title and a copy thereof upon the judgment creditor. The officer shall not be bound to keep the property, unless such judgment creditor or his agent, on demand of the officer, indemnifies the officer against such claim by a bond in a sum not greater than the value of the property levied on. An action for damages may be brought against the sheriff within one hundred twenty (120) days from the filing of the bond. The aforesaid remedies are nevertheless without prejudice to any "proper action" that a third-party claimant may deem suitable to vindicate his claim to the property. Such "proper action" is, obviously, entirely distinct from that explicitly prescribed in Section 17 of Rule 39 and would have for its object the recovery of ownership or possession of the property seized by the sheriff, as well as damages resulting from the allegedly wrongful seizure

and detention thereof despite the third-party claim; and it may be brought against the sheriff and such other parties as may be alleged to have colluded with him in the supposedly wrongful execution proceedings, such as the judgment creditor himself. *(Yupangco Cotton Mills, Inc. v. CA, G.R. No. 126322, 16 January 2002).*

Garnishment. Forced Intervenor. Garnishment consists in the citation of some stranger to the litigation, who is a debtor to one of the parties to the action. By this means, such debtor stranger becomes a forced intervenor; and the court, having acquired jurisdiction over his person by means of citation, requires him to pay his debt, not to his former creditor, but to the new creditor, who is creditor in the main litigation. It is merely a case of involuntary novation by the substitution of one creditor for another. There is no need for the institution of a separate action under Rule 39, Section 43, which contemplates a situation where the person allegedly holding property of (or indebted to) the judgment debtor claims an adverse interest in the property (or denies the debt). In this case, petitioner expressly admits its obligation to PNEI. *(PNB Madecor v. R&R Metal Casting and Fabricating, Inc., G.R. No. 132245, 2 January 2002).*

Effect of Judgments. *Res Judicata.* *(MERALCO v. Philippine Consumers Foundation, Inc., G.R. No. 101783, 23 January 2002).*

PROCEDURE IN THE COURT OF APPEALS (CA)

Execution of Judgment. No Discretionary Execution. The CA has no authority to issue immediate execution pending appeal of its own decision. Discretionary execution under Rule 39, Section 2(a) of the Revised Rules of Court, as amended, applies to a judgment or final order of the trial court. On the other hand, Section 11 of Rule 51 expressly provides that the judgment of the CA shall be remanded to the lower court for execution ten (10)

days after entry of judgment, unless notice is given that the decision would be appealed to the Supreme Court. By requiring the remand of the records to the lower court after the entry of judgment, the rules completely cut off any authority of the CA to directly undertake the execution of the final judgment, much less the authority to order its execution pending its finality. *(Heirs of the Late Justice Jose B. L. Reyes v. Justices Demetria, etc., A. M. No. CA-01-32, 23 January 2002; Insular Life Assurance Company, Ltd. v. Young, G.R. No. 140964, 16 January 2002).*

PETITION FOR REVIEW

The proper remedy of a party aggrieved by a decision of the CA is a petition for review under Rule 45 which is not similar to a petition for certiorari under Rule 65 both of the Rules of Court. As provided in Rule 45 of the Rules of Court, decisions, final orders or resolutions of the CA in any case, *i.e.*, regardless of the nature of the action or proceedings involved, may be appealed to the Supreme Court by filing a petition for review, which would be but a continuation of the appellate process over the original case. On the other hand, a special civil action under Rule 65 is an independent action based on the specific grounds therein provided and, as a general rule, cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that under Rule 45. Accordingly, when a party adopts an improper remedy, as in this case, his petition may be dismissed outright. *(Fortune Guarantee and Insurance Corporation v. CA, G.R. No. 110701, 12 March 2002).* Petitioner's failure to attach certified true copies of the assailed Resolution of the Secretary of Justice was sufficiently explained. *(Hagonoy Market Vendor Association v. Hagonoy, G.R. No. 137621. February 6, 2002).*

ANNULMENT OF JUDGMENT OF THE RTC

Extrinsic Fraud - contemplates a situation where a litigant commits acts outside of the trial of the case, "the effect of which prevents a party from having a trial, a real contest, or from presenting all of his case to the court, or where it operates upon matters pertaining, not to the judgment itself, but to the manner in which it was procured so that there is not a fair submission of the controversy." The overriding consideration is that the fraudulent scheme of the prevailing litigant prevented a party from having his day in court. *(Rexlon Realty Group, Inc.v. CA, G.R. No. 128412, 15 March 2002).*

PROVISIONAL REMEDIES

Temporary Restraining Order. Regularity of its issuance by the CA (former Special Third Division). *(Heirs of the Late Justice Jose B. L. Reyes v. Justices Demetria, etc., A. M. No. CA-01-32, 23 January 2002).*

Preliminary Injunction. *(Kho v. CA, G.R. No. 115758, 19 March 2002).*

SPECIAL CIVIL ACTIONS

FORCIBLE ENTRY AND UNLAWFUL DETAINER

Illegal Detainer. (a) Distinguished from Forcible Entry. In forcible entry, the plaintiff has prior possession of the property and he is deprived thereof by the defendant through force, intimidation, threat, strategy or stealth. In an unlawful detainer, the defendant unlawfully withholds possession of the property after the expiration or termination of his right thereto under any

contract, express or implied; hence, prior physical possession is not required. In this case, although the phrase "*unlawfully withholding*" was not actually used by petitioner in her complaint, the allegations therein nonetheless amount to an unlawful withholding of the subject property by private respondents because they continuously refused to vacate the premises even after petitioner's counsel had already sent them notices to that effect. *(Barba v. CA, G.R. No. 126638, 6 February 2002).* (b) In the case at bar, the MTC dismissed the case for lack of jurisdiction but, on appeal, the RTC reversed the dismissal and rendered judgment ejecting the defendants from the parcel of land involved and condemning them to pay damages and attorney's fees. This is not correct. In case of reversal of orders dismissing a case without trial or lack of jurisdiction. the case shall be remanded to the MTC for further proceedings. (Sec. 8 Rule 40, 1997, Rules of Civil Procedure). The RTC, in reversing an appealed case dismissing the action, cannot decree the eviction of the defendants and award damages. A court cannot take judicial notice of a factual matter in controversy. The court may take judicial notice of matters of public knowledge, or which are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions. Before taking such judicial notice, the court must "allow the parties to be heard thereon." There can be no judicial notice on the rental value of the premises in question without supporting evidence. *(Herrera v. Bollos, G. R. No. 138258, 18 January 2002).*

CERTIORARI

Certiorari. *(Metropolitan Manila Development Authority v. Jancom Environmental Corporation, G.R. No. 147465, 30 January 2002).*

CONTEMPT

Indirect Contempt. *(Guillen v. Judge Cañon, A.M. No. MTJ-01-1381, 14 January 2002).*

SPECIAL PROCEEDINGS

ESCHEATS

Interested Party – in escheats proceedings. *(Republic v. CA, G.R. No. 143483, 31 January 2002).*

CRIMINAL PROCEDURE

PROSECUTION OF OFFENSES

Information. Where the Crime Charged is Punishable by Death. An information for a crime punishable with the supreme penalty of death must adhere to a higher standard in complying with the requirements of the law and the Rules of Court. The qualifying circumstance must be alleged with more particularity to alert the accused that his life hangs in the balance because of the special circumstance that raises the crime to a higher category. Thus, when the victim's minority qualifies the crime of rape, the exact age of the victim must be specifically alleged in the Information to warrant the imposition of the death penalty. *(People v. Tagud, G.R. No. 140733, 30 January 2002).*

Amendment of Information or Complaint. Amendment of a criminal charge sheet depends much on the time when the change is requested. (a) If before arraignment, it is a matter of right; no leave of court is necessary and the prosecution is free to do so even in matters of substance and in form. (b) An amendment sought after the accused had already been arraigned can only be made by

a prior leave and at the discretion of the court, only as to matters of form - when the same can be done without prejudice to the rights of the accused. In other words, even if the amendment is only as to matter of form, one other criterion must accompany it for its admission, which is, that it should not be prejudicial to the accused. In essence, matters of substance refer to the recital of facts constituting the offense charged and determinative of the jurisdiction of the court. All other matters are merely of form. *(Villanueva v. CA, G.R. No. 142947, 19 March 2002).*

ARRAIGNMENT

Plea of Guilty to Capital Offense. Section 3, Rule 116 of the Revised Rules of Criminal Procedure. *(People v. Pastor, G.R. No. 140208, 12 March 2002).* Searching Inquiry. *(People v. Rodriguez, G.R. No. 133984, 30 January 2002).*

BAIL

Petition for Bail. Duties of judges in case a petition for bail is filed: (1) In all cases, whether bail is a matter of right or discretion, notify the prosecutor of the hearing of the application for bail or require him to submit his recommendation; (2) Where bail is a matter of discretion, conduct a hearing of the application for bail, regardless of whether or not the prosecution refuses to present evidence to show that the guilt of the accused is strong for the purpose of enabling the court to exercise its sound discretion; (3) Decide whether the guilt of the accused is strong, based on the summary of evidence of the prosecution; and (4) If the guilt of the accused is not strong, discharge the accused upon the approval of the bail bond. Otherwise the bail should be denied. *(Te v. Judge Perez, A.M. No. MTJ-00-1286, 21 January 2002).* In this case, the trial court scheduled several hearing dates for the petition for bail. The

prosecution asked for a reasonable opportunity to present evidence. However, the trial court denied postponement, ostensibly to give the accused a speedy trial. Instead, the trial court proceeded to hear the evidence for the defense, despite vigorous objection from the prosecution. In granting the petition for bail without giving the prosecution adequate opportunity to adduce evidence, the trial court acted with grave abuse of discretion. *(People v. Antona, G.R. No. 137681, 31 January 2002).*

ARREST

Warrant of Arrest. The 1987 Constitution requires the judge to determine probable cause "personally," making it the exclusive and personal responsibility of the issuing judge to satisfy himself of the existence of probable cause. The determination of probable cause by the prosecutor is for a purpose different from that which is to be made by the judge. Whether there is reasonable ground to believe that the accused is guilty of the offense charged and should be held for trial is what the prosecutor passes upon. The judge, on the other hand, determines whether a warrant of arrest should be issued against the accused, *i.e.,* whether there is a necessity for placing him under immediate custody in order not to frustrate the ends of justice. Since their objectives are different, the judge cannot rely solely on the report of the prosecutor in finding probable cause to justify the issuance of a warrant of arrest. A judge fails in this constitutionally mandated duty if he relies merely on the certification or report of the investigating officer. In the case at bar, the fact that the respondent Judge ordered the re-investigation of the case does not in any way make him liable for ignorance of the law. *(Cruz v. Judge Areola, A.M. No. RTJ-01-1642, 6 March 2002).*

Arrest Without Warrant; When Lawful. (a) Accused-appellants were arrested *in flagrante delicto* under Section 5(a) of

Rule 113. *(People v. Rodriguez, G.R. No. 144399, 20 March 2002).* (b) An offense has just been committed and the arresting officer or person hasprobable cause to believe based on "personal knowledge" of facts or circumstances that the person to be arrested has committed it (Section 5 (b) of Rule 113). The arrest in this instance must be based upon "probable cause," which means "an actual belief or reasonable grounds of suspicion." In these cases, the crime took place in December 1996 but accused-appellant was arrested only a week after the occurrence of the crime. As the arresting officers were not present when the crime was committed, they could not have "personal knowledge of the facts and circumstances of the commission of the crime" so as to be justified in the belief that accused-appellant was guilty of the crime. The arresting officers had no reason for not securing a warrant. *(People v. Escordial, G.R. Nos. 138934-35, 16 January 2002).*

TRIAL

Discharge of Accused to be a State Witness. Rule 119, Section 9 (now Section 17) of the Rules of Court expressly requires the presentation of evidence in support of the prosecution's prayer for the discharge of an accused to be a state witness. *(Merciales v. CA, G.R. No. 124171, 18 March 2002).*

APPEAL

Appeal. (a) Throws the whole case open for review and it becomes the duty of the Court to correct any error in the appealed judgment, whether it is made the subject of an assignment of error or not. *(People v. Lab-eo, G. R. No. 133438, 16 January 16, 2002; (People v. Salva, G.R. No. 132351, 10 January 2002).* (b) Dismissed as to accused-appellant who escaped from the detention cell, pursuant to Rule 124, Section 8 of the Rules of Court. *(People v. Matignas, G.R. No. 126146, 12 March 2002).*

EVIDENCE

PRESENTATION OF EVIDENCE

OBJECT EVIDENCE

Physical Evidence. Revolver and its mechanism. Belies petitioner's version of the incident as an accidental shooting. A revolver is not prone to accidental firing. It will not fire unless uncocked, then considerable pressure applied on the trigger to fire the revolver. Physical evidence is a mute but eloquent manifestation of truth. Regarded as evidence of the highest order. *(Tangan v. CA, G.R. No. 105830, 15 January 2002).*

TESTIMONIAL EVIDENCE

Witnesses. Child Witness. Rule on Examination of a Child Witness. Section 22. Corroboration. Corroboration shall not be required of a testimony of a child. His testimony, if credible by itself, shall be sufficient to support a finding of fact, conclusion, or judgment subject to the standard proof required in criminal and non-criminal cases. Forensic examination of a child victim of rape. *(People v. Baring, G.R. No. 137933, 28 January 2002).*

Hearsay Rule. A witness can testify only to those facts which he knows of his personal knowledge, which means those facts which are derived from his perception. Consequently, a witness may not testify as to what he merely learned from others either because he was told or read or heard the same. Such testimony is considered hearsay and may not be received as proof of the truth of what he has learned. Such is the hearsay rule which applies not only to oral testimony or statements but also to written evidence as well. *(Country Bankers Insurance Corporation v. Lianga Bay and Community Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January*

2002). The Sworn Statements of Jose and Ernesto are inadmissible in evidence for being hearsay, inasmuch as they did not take the witness stand and could not therefore be cross-examined. *(Country Bankers Insurance Corporation v. Lianga Bay and Community Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January 2002).*

EXCEPTIONS TO THE HEARSAY RULE

Dying Declaration and Part of the *Res Gestae.* *(People v. Peña, G.R. No. 133964, 13 February 2002; People v. Cortezano, G.R. No. 140732, 29 January 2002).* Dying declaration – not established. *(People v. Marquina, G.R. No. 130213, 31 January 2002).*

Independent Relevant Statement. No error was committed by the trial court in admitting the respective testimonies of Dorothy and Kit that Maritess told them that accused-appellant had fired a warning shot in the early morning of July 8, 1995, since the same were offered not to establish the truth of Maritess' statement, but only to show that Maritess uttered the same. *(People v. Norrudin, G.R. No. 129053, 25 January 2002).*

Entries in Official Records. *(Country Bankers Insurance Corporation v. Lianga Bay and Community Multi-Purpose Cooperative, Inc., G.R. No. 136914, 25 January 2002).*

PRESENTATION OF EVIDENCE

EXAMINATION OF WITNESSES

Impeachment of Adverse Party's Witness. Previous extrajudicial statements cannot be employed to impeach the credibility of a witness unless his attention is first directed to the discrepancies, and he must then be given an opportunity to explain

them. It is only when the witness cannot give a reasonable explanation that he shall be deemed impeached. *(People v. Cortezano, G.R. No. 140732, 29 January 2002).*

AUTHENTICATION AND PROOF OF DOCUMENTS

Ancient Document. *Escritura de Compra y Venta* is admissible even if not translated from its Spanish text because it was not objected to and is an ancient document. *(Lubos v. Galupo, G.R. No. 139136, 16 January 2002).*

WEIGHT AND SUFFICIENCY OF EVIDENCE

Circumstantial Evidence. *(People v. Baniega, G.R. No. 139578, 15 February 2002; People v. Matignas, G.R. No. 126146, 12 March 2002; People v. Dinamling, G.R. No. 134605, 12 March 2002).*

Extrajudicial Confession. (a) Requisites for Admissibility. The confession must be: (1) voluntary; (2) made with the assistance of a competent and independent counsel, preferably of the confessant's choice; (3) express; and (4) in writing. *(People v. Porio, G.R. No. 117202, 13 February 2002; People v. Matignas, G.R. No. 126146, 12 March 2002; People v. Tablon, G.R. No. 137280, 13 March 2002).*

(b) Extrajudicial Confession given by accused to radio announcer. Valid in this case. *(People v. Taboga, G.R. Nos. 144086-87, 6 February 2002).* Also, Batocan's confession to Rosas, who is not a police officer, is admissible in evidence. The Rules state that "the declaration of an accused acknowledging his guilt of the offense charged, or of any offense necessarily included therein, may be given in evidence against him." Batocan's verbal declarations are not covered by Sections 12 (1) and (3) of Article III of the Constitution, because they were not extracted while he was

under custodial investigation. *(People v. Suela, G.R. No. 133570-71, 15 January 2002).*

(c) Affidavit of Desistance. Not given credence. *(People v. Somodio, G.R. No. 134139-40, 15 February 2002).*

TAXATION

NATIONAL INTERNAL REVENUE CODE

DOCUMENTARY STAMP TAX

On Life Insurance Policies. "Junior Estate Builder Policy" with an "automatic increase clause" which already formed part of the insurance contract when originally executed. It is clear from Section 173 that the payment of documentary stamp taxes is done at the time the act is done or transaction had and the tax base for the computation of documentary stamp taxes under Section 183 is the amount fixed in the policy. Logically, the amount fixed in the policy is the figure written on its face and whatever increases will take effect in the future by reason of the "automatic increase clause," without the need of another contract. Thus, the amount insured by the policy at the time of its issuance necessarily included the additional sum covered by the automatic increase clause because it was already determinable at the time the transaction was entered into and formed part of the policy. The deficiency of documentary stamp tax imposed on private respondent is definitely not on the amount of the original insurance coverage, but on the increase of the amount insured upon the effectivity of the "Junior Estate Builder Policy." *(Commissioner of Internal Revenue v. Lincoln Philippine Life Insurance Company, Inc., G.R. No. 119176, 19 March 2002).*

LOCAL TAXATION

Real Property Tax. Tax Assessment Notices. The September 3, 1986 and October 31, 1989 notices do not contain the essential information that a notice of assessment must specify, namely, the value of a specific property or proportion thereof which is being

taxed, discovery, listing, classification and appraisal of the property subject to taxation. In fact, the tenor of the notices bespeaks an intention to collect unpaid taxes, thus the reminder to the taxpayer that the failure to pay the taxes shall authorize the government to auction off the properties subject to taxes. The last paragraph of the said notices that informs the taxpayer that in case payment has already been made, the notices may be disregarded is an indication that it is in fact a notice of collection. Whether or not a tax assessment had been made and sent to the petitioner prior to the collection of back taxes by respondent Municipal Treasurer is of vital importance in determining the applicability of Section 64 of the Real Property Tax Code, inasmuch as payment under protest is required only when there has in fact been a tax assessment, the validity of which is being questioned. Concomitantly, the doctrine of exhaustion of administrative remedies finds no application where no tax assessment has been made. *(MERALCO v. Barlis, G.R. No. 114231, 1 February 2002).*

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