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IBP Journal accepts papers dealing with legal issues and developments as well as socio-economic and political issues with legal dimensions. Only manuscripts accompanied by a soft copy, including an abstract and curriculum vitae of the author, shall be considered. Papers are published through a peer-review process undertaken by the Board of Editors.

The articles published in IBP Journal do not necessarily represent the views of the Board of Editors. The articles are representative of the views of the author/s alone and the author/s are responsible for the views expressed therein.

EDITOR'S NOTE

The greatest hindrance to the advancement of society has consistently been the fear caused by the unknown. A lot of times, it is not the lack of incentive or the inequitable distribution of resources that prevents success, but the hesitation that comes with leaving comfort and gambling on reassessment. To stand by the difficult choices made in the past is commendable, but it is equally so to venture into the unknown in search of a higher calling.

Volume 47, Issue 3 of the IBP Journal is an earnest effort towards discerning what practices are in desperate need of an overhaul and what innovations in legislation can best equip the Philippines to adapt and flourish in the modern age.

In *Connecting Links: COVID-19 and Pharmaceutical and Medical Industry Supply Chains*, Ma. Sophia Editha Cruz-Abrenica, Renson Louise Yu, and Camille Mendoza sets records straight as to the importation of pharmaceutical and medical products and advocates why the Philippines must actively set up alternative internal and external suppliers of pharmaceutical and medical products in light of disruptions in the supply chain.

In *Doxxing: An Attack On Privacy—A Proposed Cybercrime For The Unauthorized Disclosure Of Non-Public Personal Information*, Charles Janzen C. Chua identifies the significant gap in Philippine law regarding revenge or harassment induced revelations of otherwise non-public or personal information and proposes measures to fill the same.

In *Forensic Evidence: A Scientific Tool to Propagate Injustice*, Cyrus I. Restauro cautions the normalized reliance on forensic evidence especially in light of the tampering of scientific process results, and eventually the ends of justice, caused by subjectivity-influenced external factors.

In *The Juridical Treatment of Unborn Children in Philippine Law: Harmonizing Articles 40-41 of the Civil Code of the Philippines with Article II, Section 12 of the 1987 Constitution*, Cristina A. Montes juxtaposes the Civil Code with the Philippine Constitution in hopes of answering the question, "Is the unborn child a person under Philippine law?"

The journey to a more competent and solution-driven Philippines begins with a single step and it is with great hope that these articles are eventually looked back on as significant precursors to a Philippine legal system that had adapted when it needed to and had changed lives when it was given the opportunity to.

CONNECTING LINKS: COVID-19 AND PHARMACEUTICAL AND MEDICAL INDUSTRY SUPPLY CHAINS

Ma. Sophia Editha Cruz-Abrenica, Renson Louise Yu and Camille Mendoza

Abstract

The importation of pharmaceutical and medical products including raw materials and ingredients from multiple countries has its advantages and disadvantages. Notwithstanding the advantages, the concentration of imports from a few countries poses the increased risk of disrupting the supply chain when factors beyond our control limit the trade of pharmaceutical and medical products. Experience during the early days of the COVID-19 pandemic has shown that the concentration of imports from one or two countries affects the supply chain of pharmaceutical and medical products in the country. In addition to measures assisting the local pharmaceutical industries, the Philippines must actively set up alternative internal and external suppliers of pharmaceutical and medical products to avoid further supply chain shortages in the country.

I. THE FIRST ORDER

On 08 March 2020, the President of the Philippines issued Proclamation No. 922, Series of 2020, declaring a State of Public Health Emergency throughout the Philippines due to COVID-19. With aims to curtail and eliminate the threat brought about by COVID-19, the Proclamation enjoins all government agencies and Local Government Units to render full assistance and cooperation, as well as mobilize the

necessary resources to undertake proper responses and prompt measures.[1]

The Bayanihan to Heal as One Act ("*Bayanihan Act*") was subsequently enacted whereby a national policy was declared to, among others, contain or mitigate the transmission of COVID-19, undertake measures to prevent the overburdening of the healthcare system, and immediately and amply provide healthcare, including medical tests and treatments, to COVID-19 patients, persons under investigation (PUIs), or persons under monitoring (PUMs).[2]

Pursuant to the Bayanihan Act, the exigency of the situation merited the exemption of the following goods from government procurement laws:

- *Personal protective equipment ("PPE");*
- *laboratory equipment and reagents;*
- *medical equipment and supplies;*
- *testing kits;*
- *various medicines and disinfectants; and*
- *such other supplies or equipment as may be determined by the Department of Health ("DOH") and other relevant government agencies*

II. THE COVID-19 PANDEMIC HAS EXPOSED WEAKNESSES IN THE PHILIPPINES' (AND THE REST OF THE WORLD'S) PHARMACEUTICAL AND MEDICAL SUPPLY CHAINS

[1] Proclamation No. 922 (2020).
[2] Rep. Act No. 11469 (2020), sec. 3.

Especially at the start of the outbreak, the Philippines faced a shortage of medical goods and supplies necessary to respond to the crisis. A shortage of masks and other PPE was reported by rural health units and provincial hospitals in remote areas in the Philippines.[3] Metro Manila's private hospitals faced a shortage of health workers and medical supplies.[4] Reports from various hospitals indicated that the PPE supplies coming from the DOH was not enough and that supplies from private donors were still necessary.[5] On 19 February 2020, the Department of Trade and Industry ("*DTI")* Secretary said in an interview that the DTI is scouting for suppliers in an effort to reduce the shortage of face masks in the country.[6]

As of 09 June 2020, the maximum capacity reported for all COVID-19 testing laboratories in the Philippines was more than 42,000 tests per day. However, due to the lack of other testing equipment and supplies materials in the testing process, the Philippines was reported to have conducted an

[3] World Health Organization, *Coronavirus Disease (COVID-19) Situation Report 35 Philippines*, 26 May 2020, https://www.who.int/docs/default-source/wpro-documents/countries/philippines/emergencies/covid-19/who-phl-sitrep-35-covid-19_26may2020.pdf?sfvrsn=8dbf4d2b_2 (last visited 19 February 2021).

[4] Davinci Maru, *As coronavirus rages, Metro Manila private hospitals face shortage of staff, medical supplies*, 3 April 2020, https://news.abs-cbn.com/news/04/03/20/as-coronavirus-rages-metro-manila-private-hospitals-face-shortage-of-staff-medical-supplies.

[5] Gabriel Pabico Lalu, *Group decries DOH's lack of plan to protect health workers amid quarantine extension*, 24 April 2020, https://newsinfo.inquirer.net/1264309/group-decries-dohs-lack-of-strategy-to-protect-health-workers-amid-quarantine-extension.

[6] Manila Bulletin, *DTI Looks for Face Mask Suppliers to Reduce Shortage*, 19 February 2020, https://mb.com.ph/2020/02/19/dti-looks-for-face-mask-suppliers-to-reduce-shortage/.

average of only 10,090 tests per day from 02 to 08 June 2020.[7]

In response to the pandemic, eighty (80) countries and customs territories have restricted the export of protective equipment.[8] Although the World Trade Organization generally prohibits restrictions on export, it allows members to do so temporarily in order to prevent or mitigate critical local shortages of essential goods.[9]

Decline in trade, whether due to trade restrictions imposed by other countries or other causes incidental to the COVID-19 pandemic, has affected the import of pharmaceutical and medical products in the Philippines. In April 2020, the total imported goods in the Philippines dropped at an annual rate of 65.3 percent, its highest annual decline in about a decade.[10] The decline of imported goods was due to a decrease in importation of major commodities, including imported pharmaceutical and medical products and the import value for PPE and medical supplies dropped at an annual rate of 11.4 percent with an import value of USD 15.5 million.[11]

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[7] Report to the Congressional Oversight Committee, par. II, 22 June 2020, https://www.officialgazette.gov.ph/downloads/2020/06jun/20200622-Report-to-the-Joint-Congressional Oversight-Committee.pdf.

[8] CGTN, *COVID-19 Global Roundup: 80 countries limiting exports of facemasks,* 24 April 2020, https://news.cgtn.com/news/2020-04-24/COVID-19-Global-Roundup-80-countries-limiting-exports-of-face-masks-PWJoYOVNAI/index.html.

[9] World Trade Organization, *Export Prohibitions and Restrictions,* 23 April 2020, https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

[10] Philippine Statistics Authority, *Highlights of the Philippine Export and Import Statistics May 2020,* 10 July 2020, https://psa.gov.ph/content/highlights-philippine-export-and-import-statistics-may-2020-preliminary.

[11] *Id.*

Export declines, due to restrictions imposed by other countries or incidental to other causes such as logistics problems due to occurrence of pandemics, decreased production, or local utilization of goods essential in the export of pharmaceutical and medical products, pose a risk for the drug manufacturing industry in the Philippines. This is mainly due to the dependence on imported raw materials and chemicals by drug manufacturers in the Philippines.[12] It is notable that China and India, countries that produce their own raw materials, have competitively priced pharmaceutical and medical goods.[13]

To put all this in proper perspective, a 2011 study by the Philippine Institute for Development Studies (PIDS) stated that the Philippines is among the largest pharmaceutical markets in the ASEAN region, next only to Indonesia and Thailand.[14]

The heavy reliance of the Philippines on the importation of raw materials and chemicals for drug manufacturing and the concentration of drug manufacturing to only a select few companies partly explain why drugs in the Philippines are more expensive compared to other countries in Asia and other countries of similar economic

[12] Ateneo de Manila University Institute of Philippine Culture, *The Prices People Have to Pay for Medicines in the Philippines*, page 10, http://www.genericsking.com/uploads/2/6/2/5/2625420/the_prices_people_have_to_pay_for_medicines_in_the_philippines.pdf (last visited 19 February 2021).

[13] Philippine Board of Investments, *The Philippine Pharmaceutical Industry,* 27 March 2017, http://www.boi.gov.ph/wp-content/uploads/2018/02/Pharmaceutical-March-27-2017.pdf.

[14] Philippine Board of Investments, *The Philippine Pharmaceutical Industry,* 27 March 2017, http://www.boi.gov.ph/wp-content/uploads/2018/02/Pharmaceutical-March-27-2017.pdf; Philippines May. 2011, https://dirp4.pids.gov.ph/ris/dps/pidsdps1111.pdf.

status.[15] Over the years, the Philippine government has enacted laws and implemented policies that could improve market competition of medicines, such as the Generics Act of 1988, the Parallel Drug Importation Program, and the Universally Accessible Cheaper and Quality Medicines Act of 2008.

Republic Act No. 6675 or the *Generics Act of 1988 ("R.A. 6675"*) required and ensured "the production of an adequate supply, distribution, use and acceptance of drugs and medicines identified by their generic names".[16] Pursuant to R.A. 6675, the production of generic drugs was required to "promote, encourage and require the use of generic terminology in the importation, manufacture, distribution, marketing, advertising and promotion, prescription and dispensing of drugs".[17] Section 10 of R.A. 6675 gave the Department of Health authority "to import raw materials of which there is a shortage ***for the use of Filipino-owned or controlled drug establishments*** to be marketed and sold exclusively under generic nomenclature" [*Emphasis supplied*]. It also allowed the President to authorize the importation of raw materials tax and duty-free, and for the Secretary of Health to "ensure that the imported raw materials are allocated fairly and efficiently ***among Filipino-owned or controlled drug establishments***" [*Emphasis supplied*].

In 2000, the DOH initiated the Parallel Drug Importation Program which made certain drugs available at prices around 60% lower.[18] Parallel importation refers to a

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[15] Oscar F. Picazo, *Medicines Still Beyond Reach of Many,* 21 July 2012, https://opinion.inquirer.net/33107/medicines-still-beyond-reach-of-many.

[16] Philippine Board of Investments, *The Philippine Pharmaceutical Industry,* 27 March 2017, http://www.boi.gov.ph/wp-content/uploads/2018/02/Pharmaceutical-March-27-2017.pdf.

[17] Rep. Act No. 6675 (1988), sec. 2.

[18] National Economic Development Authority, *Universally Accessible Cheaper and Quality Medicines Act of 2008: Bringing Cheaper Medicines*

situation where the government or a private entity brings into the country a patented drug produced in another country, even without the consent of the patent holder, as long as (i) it has been introduced in the Philippines by the patent holder, or (ii) it has been introduced anywhere in the world by the patent owner.[19] Parallel importation is based on the principle of exhaustion which provides that "once patent holders, or any party authorized by him, have sold a patented product, they cannot prohibit the subsequent resale of that product since their rights in respect of that market have been exhausted by the act of selling the product".[20] Hence, drugs produced by innovator companies may be imported into the Philippines from countries that sell these drugs at a cheaper price, thereby influencing drug distributors and drug manufacturers in the Philippines to lower the price of medicines sold in the country.[21]

Republic Act No. 9502 or the *Universally Accessible Cheaper and Quality Medicines Act of 2008 ("R.A. 9502")* empowered the Secretary of the DOH to implement "measures that the government may avail of to effectively reduce the cost of drugs and medicines" including, but not limited to, competitive bidding, price volume negotiations, and other appropriate mechanisms that influence supply,

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to Filipinos, 30 June 2008, http://www.genericsking.com/uploads/2/6/2/5/2625420/bringing_cheaper_medicines_to_filipinos_neda.pdf.

[19] Department of Health, *What is Parallel Importation*, https://doh.gov.ph/?q=faqs/What-is-parallel-importation-and-how-does-it-bring-down-the-prices-of-medicines#:~:text=Parallel%20importation%20 (Sec.,b. (last visited 22 February 2021).

[20] Department of Health, *The Philippines Medicines Policy: Strategic Directions on Access to Medicines for Filipinos 2011-2016. Health Sectors Reform Agenda Monographs,*http://caro.doh.gov.ph/wp-content/uploads/2015/11/Philippine-Medicines-Policy-2011.pdf (last visited 22 February 2021).

[21] *Id.*

demand and expenditures on drugs and medicines.[22] In particular, the following measures are required to be adopted by government agencies:

1. *"All government agencies, including local government units, shall ensure transparency on the procurement of the drugs and medicines, including the prices and inventory,*
2. *All government agencies, including local government units, shall procure their drugs and medicines requirement from suppliers which are registered with the Department of Health,*
3. *A common procurement ordering facility shall be established by the DOH to ensure economies of scale, when appropriate,*
4. *A common essential drug list requirement of all government agencies, including local government units, based on the PNDF current edition shall be prepared by the DOH for purposes of undertaking competitive pooled procurement and price volume negotiation, and*
5. *Consignment procedures shall comply with DOH rules and regulations.*"[23]

Pursuant to R.A. 9502, Philippine International Trading Corporation Pharma Inc. ("*PPI*") was established as a common facility for pooled procurement that can be accessed by government entities and other facilities undertaking government programs. Under the Implementing Rules and Regulations ("*IRR*") of R.A. 9502, all government agencies must procure drugs and medicines centrally through the PPI. Private parties may also opt to avail of PPI's facility for procurement, sourcing and marketing of quality essential and cheaper medicines through drug importations and

[22] Rep. Act No. 9502, par. C (2) sec. 19, chap. 3.
[23] Joint DOH-DTI-IPO-BFAD Administrative Order No. 2008-01, rule 38, chap. VII.

sourcing of medicines from reputable suppliers, thereby ensuring wider distribution of these medicines.[24]

Moreover, drugs and medicines must be registered with the Bureau of Food and Drugs ("*BFAD*"; now the Food and Drugs Authority, "FDA") before they can be imported, and only drugs and medicines in the latest edition of the Philippine National Drug Formulary[25] *("PNDF"*) can be procured by government agencies or reimbursed by Philhealth.[26]

The foregoing measures have all been put into place to increase access by the Philippine consumer to quality medicines at affordable prices. It must be noted that the allowance of importation of raw materials, of which there is a shortage, for the use of Filipino-owned or controlled drug establishments; parallel drug importation; application of general cost-reducing measures and pooled procurement all help to increase accessibility and lower costs of pharmaceuticals for the benefit of consumers.

However, it is still undeniable that the costs of pharmaceutical and medical goods are most of the time still beyond reach of the ordinary consumer, especially when juxtaposed with realities such as a pandemic and concomitant economic instability. The question that comes to fore is: Is that all we can do? Have we done the best we can to make pharmaceutical and medical supplies affordable

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[24] Joint DOH-DTI-IPO-BFAD Administrative Order No. 2008-01, sec. 1 to 2, rule 16, chap. III.

[25] Department of Health, *The Philippine National Formulary,* https://www.doh.gov.ph/faqs/What-is-Philippine-National-Drug-Formulary PNDF#:~:text=The%20Philippine%20National%20Drug%20Formulary,accessible%2C%20efficacious%2C%20safe%20and%20affordable (last visited 22 February 2021).

[26] Implementing Rules and Regulations of Rep. Act No. 9502 (2008), sec. 3, Rule 6, Chapter I and Rule 36, Chapter VII.

and available to the common Filipino? Further, in view of the COVID-19 pandemic, are we in the correct track to address sudden spikes in demand while our foreign sources of pharmaceutical and medical supplies restrict their exports?

III. NATIONALIZATION OF THE PHARMACEUTICAL AND MEDICAL SUPPLIES INDUSTRIES IS CURRENTLY NOT A FEASIBLE OPTION

On one end of the spectrum, the knee-jerk answer to the question of how pharmaceutical and medical supplies may be brought within reach of the ordinary Filipino is through nationalization of these industries. However, we must first examine if nationalization is indeed a feasible option for the Philippines under the current circumstances.

Nationalization can mean two different things. First, it can pertain to the act of placing private corporations or industries under the control of the state. For purposes of this discussion, however, nationalization means the restriction of foreign ownership in particular industries. The most common reasons why states impose measures of nationalization are for purposes of asserting sovereignty and promoting national development.[27]

IV. THERE ARE NO FOREIGN EQUITY RESTRICTIONS ON THE PHILIPPINE PHARMACEUTICAL AND MEDICAL SUPPLIES INDUSTRY

[27] Martin Khor, *The need to regulate foreign investment,* https://twn.my/title/mai1-cn.htm.

In the Philippines, the restrictions on foreign ownership can be found in no less than the 1987 Philippine Constitution ("Constitution"), among others. Under the Constitution, mass media, the practice of professions (save in cases prescribed by law), and the utilization of marine resources are strictly reserved for Filipinos.[28] For the advertising industry, the Constitution allows only up to 30% of foreign equity.[29] The Constitution also allows for up to 40% of foreign equity in the exploration, development, and utilization of natural resources, ownership of private lands, operation of public utilities, and educational institutions (subject to exceptions).[30]

In order to encourage foreign direct investments, the Philippine government enacted Republic Act No. 11647, amending Republic Act No. 7042 otherwise known as the "Foreign Investments Act of 1991" ("FIA"). Under the FIA, there shall be no foreign ownership restrictions in export enterprises and domestic market enterprises, except in areas included in the negative list.[31] The negative list is a list of particular industries wherein foreign ownership is either absolutely restricted, or only allowed up to a certain amount.

As of this writing, the most recent negative list is Executive Order No. 65 series of 2018 or the "11th Regular Foreign Investment Negative List" ("11th Negative List"). Section 1 of the 11th Negative List provides that "*only investment areas and/or activities listed in the attached Eleventh Regular Foreign Investment Negative List shall be reserved for Philippine nationals, subject to the exceptions and conditions indicated therein.*"[32] Some of the industries or

[28] CONST.
[29] *Id.*
[30] *Id.*
[31] Rep. Act No. 7042 (1991), sec. 6.
[32] Exec. Order No. 65 (2018), sec.1.

activities included in the 11th Negative List are: mass media, ownership of cockpits, manufacture of firecrackers, private recruitment, and ownership of condominium units.

In line with its objective of encouraging foreign investments, the Philippine government also enacted liberalization laws which specifically allow for and/or provide the guidelines of foreign ownership in certain industries. Among these liberalization laws or issuances is Republic Act No. 11595 which amended Republic Act 8762 or the "Retail Trade Liberalization Act of 2000". Under the new law, the paid-up capital requirement for foreign-owned enterprises was reduced to at least PHP 25 million (or approximately USD 500,000) as compared to the previous $2.5 Million USD.[33]

Nevertheless, it does not mean that the policy on the nationalization of the pharmaceutical or medical supplies industry will not change. In other words, there may come a time when the Philippine government will nationalize such industry.

The advantages of the nationalization of the pharmaceutical or medical supplies industry are: First, it could result into cheaper and more accessible medicine in the long run. Nationalizing the industry would encourage the local drug industry to be self-reliant. As a result, the costs of importing active ingredients and technology, which drives the prices of medicine higher, will be minimized, if not eliminated. Second, limiting foreign ownership facilitates local learning and it forces foreign investors to share technologies and profits with local partners.[34] If fully foreign-

[33] Rep. Act No. 11595 (2021), sec. 5(a).
[34] Stephen Thomsen, *Maximising the benefits of foreign direct investment,* 11 March 2019, https://oecdonthelevel.com/2019/03/11/maximising-the-benefits-of-foreign-direct-investment/.

owned companies desire to engage in business in the Philippines, they will be forced to form strategic partnerships with local individuals or entities. Third, a self-reliant local drug industry will result in a faster and cheaper supply of "emergency" products.

Vietnam, for instance, is one of the countries which currently seeks to nationalize its pharmaceutical/medical supplies industry. The Vietnamese government's support for its pharmaceutical industry has been steadfast even before the COVID-19 pandemic. As a result, their local firms were able to immediately develop their own COVID-19 test kits. It is notable that a COVID-19 test kit was developed by Vietnamese scientists within one (1) month from report of the pandemic.[35]

V. NATIONALIZING THE PHILIPPINE PHARMACEUTICAL AND MEDICAL SUPPLIES INDUSTRY CARRIES ITS OWN DISADVANTAGES

While there may be advantages in the nationalization of the pharmaceutical industry, it also has its disadvantages. First, because US and European companies control over 70% share of the Philippine pharmaceutical market,[36] creating foreign equity restrictions will greatly reduce access to drugs in the country, thereby working against the goal of greater accessibility. Another disadvantage is that nationalization could also reduce the quality of drugs in the country. One reason for this is that nationalization will result in reduction

[35] Ngoc Thuy, *Vietnam pushes for medicine self-sufficiency post Covid-19: Fitch Solutions,* 03 June 2020, http://hanoitimes.vn/vietnam-pushes-for-medicine-self-sufficiency-post-covid-19-fitch-solutions-312399.html.
[36] Pacific Bridge Medical, *Philippines Drug Market Update 2017,* 14 July 2017, https://www.pacificbridgemedical.com/publication/philippines-drug-market-update-2017/.

of competition in the market.[37] In Vietnam, where the pharmaceutical industry is largely nationalized, local drug companies are mainly specializing in production of common drugs. They are less keen on investing in research and development to enhance the quality of drugs, which requires a high level of cost, knowledge, and technology.[38] Based on the foregoing, complete or large-scale nationalization of the Philippine pharmaceutical industry may not be beneficial at this point in our national development given our current resources.

On the other hand, amid COVID-19, the response of the Japanese government is to restrict the influence of foreign companies over medical-related technology and production facilities.[39] It fears that "if foreign capital, particularly from China, buys up Japanese manufacturers of ventilators and other advanced medical apparatuses, it will become difficult to sufficiently monitor domestic production and exports of such products, the stable supply of which is essential to national security."[40] The current circumstances in the Philippines, however, are not the same as those in Japan. Japan is a highly developed country with more than enough capability to supply their own drugs and medical supplies. Japan has invested much through the years in research and development in their pharmaceutical and medical-related

[37] *Id.*
[38] Antonio Angelino, Do Ta Khanh, Nguyen An Ha, Tuan Pham, *Pharmaceutical Industry in Vietnam: Sluggish Sector in a Growing Market*, August 2017, https://www.researchgate.net/publication/319347476_Pharmaceutical_Industry_in_Vietnam_Sluggish_Sector_in_a_Growing_Market.
[39] Nikkei Asia, *Japan to block foreign investment in medicine amid coronavirus*, 22 April 2020, https://asia.nikkei.com/Politics/Japan-to-block-foreign-investment-in-medicine-amid-coronavirus.
[40] The Japan Times, *Japan to include medical sector in stricter curbs on foreign investment*, 23 April 2020, https://www.japantimes.co.jp/news/2020/04/23/business/economy-business/japan-medical-sector-foreign-investment/#.XvBga9IzaJB.

industries. In sudden outbreaks such as COVID-19, there is simply not enough time, resources and expertise for local firms in the Philippines to develop their own drugs and medical equipment.

For a developing country like the Philippines, it is difficult to impose strict foreign equity restrictions on the pharmaceutical industry because "*the pharmaceutical sector is a high-tech industry in which the main drivers of product competitiveness are linked to research and development activity, technological endowments, utilization of modern manufacturing processes, manufacturing process automation and total quality management system.*"[41] Therefore, rather than protecting Filipinos by shutting out foreign pharmaceutical companies, nationalization at this point could actually place the Filipinos in jeopardy by denying them access to quality drugs and medical supplies. During crisis situations, such as pandemics, importation should be encouraged to a degree which meets the demand under the circumstances. In such emergency situations, a limited scope of "nationalization" could be done with regard to encouraging local production of raw or component materials that are already being produced locally, but it will need government financing assistance to expand the local manufacturers' capability to produce such products.

[41] Antonio Angelino, Do Ta Khanh, Nguyen An Ha, Tuan Pham, *Pharmaceutical Industry in Vietnam: Sluggish Sector in a Growing Market*, August 2017, https://www.researchgate.net/publication/319347476_Pharmaceutical_Industry_in_Vietnam_Sluggish_Sector_in_a_Growing_Market.

VI. A SIGNIFICANT INVESTMENT IN TIME, RESOURCES AND DEVELOPMENT OF EXPERTISE AND MANPOWER IS NEEDED FOR THE NATIONALIZATION OF THE PHILIPPINE PHARMACEUTICAL AND MEDICAL SUPPLIES INDUSTRY TO BE A VIABLE OPTION

Further, allowing foreign direct investments (FDIs) could result in the "*establishment of productive linkages and spillovers*" of new technology, knowledge, and skills between domestic and foreign firms.[42] This would then allow local firms to learn from foreign firms, which would open up the possibility of nationalization in the long run. However, for now, complete or even large-scale nationalization of pharmaceutical and medical-related industries is not yet a viable option. With significant investment in time and resources and development of expertise and manpower, though, the Philippines may arrive at the point where such nationalization will be a feasible route.

VII. SHOULD THE PHILIPPINES BROADEN AND DIVERSIFY ITS SOURCES OF PHARMACEUTICAL AND MEDICAL SUPPLIES?

The Philippines imports around 95% of materials for drug manufacturing—proving that the drug manufacturing industry in the Philippines is still wholly dependent on imported raw materials and chemicals, and is dependent on products discovered and developed in another country.[43] In 2016, the top five countries from which Philippines imported

[42] *Id.*
[43] Institute of Philippine Culture, Ateneo de Manila University, *The Prices People Have to Pay for Medicines in the Philippines*, http://www.genericsking.com/uploads/2/6/2/5/2625420/the_prices_people_have_to_pay_for_medicines_in_the_philippines.pdf.

its pharmaceutical products were India, France, Germany, Indonesia, and Switzerland.[44] Only a few local raw materials are available in the country for the production of pharmaceutical or medicinal products such as herbal raw materials, sugar and alcohol.[45]

Broadening or diversification of sources in the pharmaceutical and medical supplies industry may be one of the solutions in order to avoid supply shortages, and to improve market competition of medicines and related goods in the county. Supply chain diversification is defined as "a manufacturing business terminology used to describe the act of increasing choices for when to order what supplies from whom to bring products to the market".[46]

VIII. DIVERSIFICATION OF SOURCES OF PHARMACEUTICAL AND MEDICAL SUPPLIES COULD MITIGATE SCARCITY CAUSED BY TRADE LIMITATIONS AND RESTRICTIONS

For pharmaceutical and medical-related goods, the concept includes sourcing medicines and raw materials from different countries instead of concentrating imports from only one or two countries, such as China and India, the two largest global producers of active pharmaceutical ingredients

[44] Philippine Board of Investments, *The Philippine Pharmaceutical Industry*, http://www.boi.gov.ph/wp-content/uploads/2018/02/Pharmaceutical-March-27-2017.pdf.

[45] Philippine Board of Investments, *The Philippine Pharmaceutical Industry*, http://www.boi.gov.ph/wp-content/uploads/2018/02/Pharmaceutical-March-27-2017.pdf.

[46] OECD, *Glossary of Statistical Terms,* http://dictionary.sensagent.com/Supply%20chain%20diversification/en-en/.

(APIs) and generics.[47] Availability of pharmaceutical and medical-related goods could be a life-or-death proposition both for the patients as well as the health workers, as we have witnessed during the COVID-19 pandemic. The strategy of importation of pharmaceutical supplies and medical-related goods from multiple sources and from various countries will lessen the concentration of production in only a few sources, broaden and diversify the sources of goods and raw materials and minimize the disruption of the supply chain of pharmaceutical and medical products, ultimately resulting in a stable supply of pharmaceutical and medical-related goods in the country. Having alternative suppliers of pharmaceutical and medical products will decrease the risk of supply chain shortages caused by circumstances beyond our control such as delays in production and transport logistics and trade restrictions.

The increase in importation of pharmaceutical products shows that there is an increasing demand in the market which the local manufacturers have yet to supply. The importation of pharmaceutical and medical products and supplies from multiple countries will minimize the risk of market vulnerabilities caused by the sudden limitations, prohibitions and restrictions in trade imposed by other countries and/or shortages of supply in other countries. Hence, if one country for whatever reason halts exportation of a certain medical product, then the purchasing country like the Philippines can source the same product from another country among its list of current suppliers. In contrast, if most of the supplies of pharmaceutical and medical products are dependent on only a few countries, then there is a great risk of disruption in the supply chain of

[47] Hannah Balfour, *COVID-19 update: coronavirus and the pharmaceutical supply chain*, 01 April 2020, https://www.europeanpharmaceuticalreview.com/article/116145/covid-19-update-coronavirus-and-the-pharmaceutical-supply-chain/.

pharmaceutical and medical products should the exporting country decide or be constrained to limit its production or export of these products.

For example, when the coronavirus outbreak started in China, a handful of nations were afraid that China was going to slow down or even stop their exportation of certain medicines. Experts thought that China would "keep its domestically produced medicines at home and stockpile them to secure access for its citizens before seeing to the needs of other nations".[48] Although this predicted scenario did not occur, the fear that a catastrophic event may stop the production and supply of medicine is too much of a risk to depend on one country for necessary medicines and supplies. There were also fears of shortages of common pharmaceuticals after India, the world's biggest supplier of generic drugs, has restricted exports of active pharmaceutical ingredients and medicines produced by their country.[49]

Setting up alternative supplies of pharmaceutical and medical products also distribute the risks of logistics delays caused by external factors, such as a decrease in capacity of air shipments that different countries have experienced due to COVID-19.

[48] Rory Horner, *The World Needs Pharmaceuticals from China and India to beat Coronavirus*, 25 May 2020, https://theconversation.com/the-world-needs-pharmaceuticals-from-china-and-india-to-beat-coronavirus-138388.
[49] BBC News, *Coronavirus: Drug shortage fears as India limits exports*, 04 March 2020, https://www.bbc.com/news/business-51731719.

IX. DIVERSIFICATION OF SOURCES CALL US TO LOOK BEYOND THE USUAL COST-EFFICIENCY CALCULATIONS

Common procurement methods value cost-savings and efficiency when evaluating potential suppliers of products or raw materials. Usually, considerations such as economies of scale and more expensive delivery and logistics from multiple locations would preclude sourcing smaller amounts from various suppliers if the same quality could be sourced at a lesser cost from a supplier with the lowest bid. In order to save on costs, "you have to create these unbelievably efficient and narrow supply chains that have no redundancy and no resiliency".[50] Further, the speed at which the raw material supplies come in to determine the rate of local production and, hence, efficiency of production and delivery by the supplier is a paramount consideration. However, from the vantage point that availability of lifesaving pharmaceutical and medical supplies are determinative of life-or-death situations during circumstances such as pandemics, we should do well to look beyond the usual cost and efficiency calculations and cultivate broad and diverse sources for our supply chains.

The importation of pharmaceutical and medical products including raw materials and ingredients from multiple countries has its advantages and disadvantages. Notwithstanding the advantages, the concentration of imports from a few countries poses the great risk of disrupting the supply chain when factors beyond our control limit the trade of pharmaceutical and medical products. "Companies will be wary of putting all their eggs in one

[50] Deborah Abrams Kaplan, *How medical supply chains can diversify beyond COVID-19*, 15 April 2020, https://www.supplychaindive.com/news/coronavirus-health-pharma-medical-cost-diversify/576021/.

basket, so we expect that products will be sourced from numerous suppliers as opposed to one or two, which is currently the norm".[51]

The pandemic has affected many industries across the globe, and it has shown that the concentration of imports from one or two countries affects the supply chain of pharmaceutical and medical products in the country. Hence, the Philippines must consider having alternative suppliers of pharmaceutical and medical products and impose sufficient safeguard measures in their importation to avoid further supply chain shortages in the country. After all, it would be to everyone's advantage if we are able to connect more than just a few links in our supply chains.

[51] Craig Dummett, *South Africa: Diversification the new normal in supply chains post Covid-19*, 27 April 2020, https://globalcompliancenews.com/south-africa-diversification-new-normal-supply-chains-post-covid-19-19042020.

DOXXING: AN ATTACK ON PRIVACY—A PROPOSED CYBERCRIME FOR THE UNAUTHORIZED DISCLOSURE OF NON-PUBLIC PERSONAL INFORMATION

Charles Janzen C. Chua

I. INTRODUCTION

Imagine being a teenager having anonymously uploaded a "*Tiktok"* video containing an insensitive comment intended as an "edgy" joke, and having someone take offense; find out who you are, where you live and where you go to school; sharing these details to that person's "*Instagram*" follower; and informing your entire high school administration about it because this person was supposedly holding you accountable for the joke.

Imagine being one of the suspects in the death of a friend at a party with no formal charges brought against you and you gain overnight infamy because someone created an online profile of you showing your full name, family relations, current employment, work history and other information in the guise of it being treated as "news".

Imagine being a teacher who made opinions in lectures that were unpopular and not well-received, and your personal address and contact information is made public online, thus allowing for you to receive dead animals in your mailbox and death threats on the phone, for your home and car to be vandalized, and for someone to be stalking you.

Imagine being a female game developer who has criticized male counterparts and the gaming industry in general for being anti-female, and having your personal email, phone number and home address posted online with

death and rape threats being made on your social media accounts and through your mobile and email, thus causing you to fear for your, and your family's safety and to flee your home in the middle of the night.

Unfortunately, however, the above-given scenarios are not imaginary and are very much real life cautionary tales of "*doxxing"*. But what exactly is "*doxxing"*? "*Doxxing*" (also spelled as "*doxing*"), although of unspecified origins, possibly dates back to 2001 with links to activities of the hacker group known as "*Anonymous"*, and is most likely derived from the shorthand term "*dox*" that popularly refers to "document" or "to document" especially in technology industries.[1] Thus, the act of "dropping dox" meant the revelation of otherwise non-public or personal information with potential damaging effect.

"*Doxxing"* is an act that may be considered a revenge or harassment tactic (already treated as a harm by itself) which provides an otherwise unavailable opportunity for further harm upon a victim through other accompanying acts such as "cyber exploitation", "swatting", "cyber-bullying", "cyber-stalking", "revenge porn", etc. that may be committed by the original "*doxer"* (the person who performed the act of "*doxxing"*) or by third parties. Accompanying acts may also include death and rape threats, stalking, harassment, physical violence and the like. Overall, the victim experiences harm that may include any or all of the following: anxiety, sleepless nights, damaged reputation, arrests or searches by law enforcement, reasonable fear, mental and physical stress, bodily injury and damage to property.

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[1] Julia M. MacAllister, The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information, 85 Fordham L. Rev. 2455 (2017)
https://ir.lawnet.fordham.edu/flr/vol85/iss5/21

Although it has nearly 20 years of history, and despite the prevalence and growing use and dependence on online resources, services and activities, "*doxxing"* is presently left with the harm or threat of harm unrealized, the act itself undefined, and the malice and recklessness unaddressed. Thus, it is humbly proposed that "*doxxing"* should be recognized as a serious and growing privacy concern, with very real harm, and that it is an act that deserves to be penalized accordingly.

This paper does not seek to address the practical aspects of law enforcement against "*doxxing*" or the remedial measures to prevent or mitigate its effects. The focus is limited to the recommendation for a legal definition of "*doxxing";* the criminalization of the act constituting "*doxxing"* as defined; and an identification and discussion of its elements. In this regard, there is no discussion on appropriate penalties. It includes a reference to select foreign laws addressing "*doxxing"* or its equivalent, followed by an exploration of the absence of a local law specifically defining or punishing the act.

II. FOREIGN STATUTORY RESPONSE

The below sampling of foreign legislation addressing "*doxxing*" reveals that the latter is treated as a form of harassment, and the same is penalized specifically for the act of unauthorized disclosure of restricted information of covered persons with malicious intent, or as a form of stalking in general, with penalties covering fine and/or imprisonment.

United States

In the United States, "*doxxing*" is addressed by current federal and state laws. Federal law against "*doxxing*" is specifically covered under the statute for the Protection of Individuals Performing Certain Official Duties (hereinafter referred to as the Federal Law).[2] The same was made effective January 7, 2011 and is geared towards the protection of covered persons who are either public officials or private persons performing official functions.

The Federal Law punishes the following accordingly:

> "(a) IN GENERAL.—Whoever knowingly makes restricted personal information about a covered person, or a member of the immediate family of that covered person, publicly available—
>
> (1) with the intent to threaten, intimidate, or incite the commission of a crime of violence against that covered person, or a member of the immediate family of that covered person; or
>
> (2) with the intent and knowledge that the restricted personal information will be used to threaten, intimidate, or facilitate the commission of a crime of violence against that covered person, or a member of the immediate family of that covered person, shall be fined under this title, imprisoned not more than 5 years, or both."[3]

[2] 18 U.S.C. § 119
[3] 18 U.S.C. § 119 (a)

The same law also defines "restricted personal information" to mean: "respect to an individual, the Social Security number, the home address, home phone number, mobile phone number, personal email, or home fax number of, and identifiable to, that individual."[4] It also defines covered persons as follows:

> "(A) an individual designated in section 1114;[5]
>
> (B) a grand or petit juror, witness, or other officer in or of, any court of the United States, or an officer who may be, or was, serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate;
>
> (C) an informant or witness in a Federal criminal investigation or prosecution; or
>
> (D) a State or local officer or employee whose restricted personal information is made publicly available because of the participation in, or assistance provided to, a Federal criminal investigation by that officer or employee;"[6]

Clearly, the Federal Law only protects such covered persons. However, private persons who are not covered (i.e., not performing any official functions or duties) are not

[4] 18 U.S.C. § 119 (b) (1)
[5] 18 U.S.C. § 1114 "…[A]ny officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance…"
[6] 18 U.S.C. § 119 (b) (2)

without recourse as they can still seek relief via the federal law against Stalking which penalizes:

> "Whoever—
>
> xxx
>
> (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—
>
> > (A) places that person in reasonable fear of the death of or serious bodily injury to a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or
> >
> > (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be

> punished as provided in section 2261(b)[7] of this title."[8]

There is, however, a pending House Bill in the US Congress entitled "Interstate Doxxing Prevention Act" (hereinafter referred to as the House Bill) seeking to amend Title 18 of the United States Code (U.S.C.) "to provide criminal and civil remedies for publication of personally identifiable information with the intent to do harm."[9] The same was introduced to the House on December 8, 2016, was heard on 2 sessions and referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.

The above-mentioned House Bill clearly seeks to extend covered persons to include even private individuals especially those not performing any official duties or functions. Thus:

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[7] 18 U.S.C. § 2261(b) PENALTIES.—A person who violates this section or section 2261A shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the victim results;
(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
(5) for not more than 5 years, in any other case,
or both fined and imprisoned.
(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.

[8] 18 U.S.C. § 2261A
[9] Bill - H.R. 6478 (114th)

> "SEC. 2. DISCLOSURE OF PERSONAL INFORMATION WITH THE INTENT TO CAUSE HARM.
>
> (a) PROHIBITION.—Whoever, with the intent to threaten, intimidate, harass, stalk, or facilitate another to threaten, intimidate, harass, or stalk, uses the mail or any facility or means of interstate or foreign commerce to knowingly publish the personally identifiable information of another person, and as a result of that publication places that person in reasonable fear of the death of or serious bodily injury to
>
> (1) that person;
>
> (2) an immediate family member of that person; or
>
> (3) an intimate partner of that person,
>
> shall be subject to the criminal penalty and the civil liability provided by this section."[10]

More significantly, the same also defines "*personally identifiable information*"[11] which effectively expands the

[10] Bill - H.R. 6478, Section 2

[11] Bill - H.R. 6478, Section 2 (b) (2) – (2) PERSONALLY IDENTIFIABLE INFORMATION —The term 'personally identifiable information' means—

(A) any information that can be used to distinguish or trace an individual's identity, such as name, prior legal name, alias, mother's maiden name, social security number, date or place of birth, address, phone number, or biometric data;

(B) any information that is linked or linkable to an individual, such as medical, financial, education, consumer, or employment information, data, or records; or

(C) any other sensitive private information that is linked or linkable to a specific identifiable individual, such as gender identity, sexual orientation, or any sexually explicit visual depiction of a person described in clause (1), (2), or (3) of subsection (a).

existing definition of "*restricted personal information.*" The House Bill also makes indispensable the element of "*resulting reasonable fear*" as to constitute the crime. Unfortunately, however, the same has not been enacted and the only available recourse for individuals would be with the previous cited statutes.

California

State legislatures have also tried to address acts associated with "*doxxing.*" A prime example is California that imposes "county jail time of up to 1 year or a fine of not more than a thousand dollars, or both."

California Law punishes any person who, by means of electronic communication, makes available personal identifying information of a person, with intent to cause fear or unwanted contact on said person. The same provides as follows:

> "Prohibited Distribution or Publication (Misdemeanor)
>
> 1. Every person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, which

> would be likely to incite or produce that unlawful action, is guilty of a misdemeanor punishable by up to one year in a county jail, by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment."[12]

Singapore

One of the most recent legal developments in Asia to address "*doxxing*" was passed by the Singapore Parliament on May 7, 2019. The same was assented to by the President last June 3, 2019 to amend Section 3 of the country's existing Protection from Harassment Act (hereinafter referred to as POHA2019) as follows:

> "Amendment of Section 3
>
> 4. Section 3 of the principal Act is amended –
>
> (1) An individual or entity must not, with intent to cause harassment, alarm or distress to another person (called in this section the target person), by any means –
>
> (a) use any threatening, abusive or insulting words or behavior;
> (b) make any threatening, abusive or insulting communication; or
> (c) publish any identity information of the target person or a related person of the target person;

[12] California Penal Code, Section 653.2 (1)

> and as a result causing the target person or any other person (each called in this section the victim) harassment, alarm or distress."[13]

The Amendment also redefines and amends "identity information" as:

> "any information that, whether on its own or with other information, identifies or purports to identify an individual, including (but not limited to) any of the following:
>
> (a) the individual's name, residential address, email address, telephone number, date of birth, national registration identity card number, passport number, signature (whether handwritten or electronic) or password;
> (b) any photograph or video recording of the individual;
> (c) any information about the individual's family, employment or education."[14]

HongKong

A much earlier development in Asia is Hong Kong's Personal Data Privacy Ordinance (hereinafter referred to as PDPO),[15] enacted 1995 and made effective December 1996, which is said to be the oldest data privacy law in Asia. In 2012, the PDPO had major amendments to address new public concern on privacy challenges.

The PDPO is applicable to both the private and public sectors. It applies to different technology and is based on

[13] Protection from Harassment Act 2019 (Amendment), Section 4
[14] Protection from Harassment Act 2019 (Amendment), Section 3
[15] (Cap. 486) Personal Data Privacy Ordinance

certain principles for data protection. Schedule 1 to the PDPO contains the Data Protection Principles (hereinafter referred to as the DPP) and outlines the proper manner for the collection, handling, and use of personal data by data users as supported by other relevant provisions imposing compliance requirements.

In connection with "*doxxing*," the most relevant provision in the PDPO is Section 64 - Offences for disclosing personal data obtained without consent from data users, which states thus:

> (1) A person commits an offence if the person discloses any personal data of a data subject which was obtained from a data user without the data user's consent, with an intent— (a) to obtain gain in money or other property, whether for the benefit of the person or another person; or (b) to cause loss in money or other property to the data subject.
>
> (2) A person commits an offence if— (a) the person discloses any personal data of a data subject which was obtained from a data user without the data user's consent; and (b) the disclosure causes psychological harm to the data subject.
>
> (3) A person who commits an offence under subsection (1) or (2) is liable on conviction to a fine of $1,000,000 and to imprisonment for 5 years.16

The PDPO also defines personal data to mean any data "(a) relating directly or indirectly to a living individual; (b)

[16] (Cap. 486) Personal Data Privacy Ordinance, Section 64

from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable."[17]

New Zealand

In New Zealand, the Harmful Digital Communications Act 2015 (hereinafter referred to as the HDCA)[18] assented to in July 2, 2015, penalizes the act of posting harmful digital communication by imprisonment of up to 2 years or a maximum fine of $50,000 for individual, and up to $200,000 for companies.

With respect to "*doxxing*," similar to Hong Kong's DPP, the HDCA is also principle-based, and the Communication Principles set forth in Section 6 provides, among others, that: "A digital communication should not disclose sensitive personal facts about an individual[19]… A digital communication should not be used to harass an individual[20]… A digital communication should not contain a matter that is published in breach of confidence[21]… A digital communication should not incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual[22]…"

[17] (Cap. 486) Personal Data Privacy Ordinance, Section 2
[18] Public Act 2015 No. 63, Harmful Digital Communications Act 2015
[19] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 6(1), Principle 1
[20] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 6(1), Principle 5
[21] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 6(1), Principle 7
[22] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 6(1), Principle 8

The HDCA also defines "digital communication,"[23] "intimate visual recording,"[24] and what "posts a digital communication"[25] constitute. Essentially, the act being punished is causing harm by the posting of digital communication as follows:

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[23] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 4, *digital communication*—
(a) means any form of electronic communication; and
(b) includes any text message, writing, photograph, picture, recording, or other matter that is communicated electronically

[24] Public Act 2015 No. 63, Harmful Digital Communications Act of 2015, Section 4, *intimate visual recording*—
(a) means a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—
(i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—
(A) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or
(B) engaged in an intimate sexual activity; or
(C) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or
(ii) an individual's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—
(A)from beneath or under an individual's clothing; or
(B) through an individual's outer clothing in circumstances where it is unreasonable to do so; and
(b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in—
(i) a physical form; or
(ii) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing

[25] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 4, *posts a digital communication*—
(a) means transfers, sends, posts, publishes, disseminates, or otherwise communicates by means of a digital communication—
(i) any information, whether truthful or untruthful, about the victim; or
(ii) an intimate visual recording of another individual; and
(b) includes an attempt to do anything referred to in paragraph (a)

"Causing harm by posting digital communication

(1) A person commits an offence if—

(a) the person posts a digital communication with the intention that it cause harm to a victim; and

(b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and

(c) posting the communication causes harm to the victim.

(2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—

(a) the extremity of the language used;

(b) the age and characteristics of the victim;

(c) whether the digital communication was anonymous;

(d) whether the digital communication was repeated;

(e) the extent of circulation of the digital communication;

(f) whether the digital communication is true or false; and

(g) the context in which the digital communication appeared.

(3) A person who commits an offence against this section is liable on conviction to,—

(a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding $50,000;

(b) in the case of a body corporate, a fine not exceeding $200,000;

(4) In this section, *victim* means the individual who is the target of a posted digital communication."[26]

The takeaway from these foreign laws addressing "*doxxing"* is that all of them consider harmful intent as an element and the recurring theme is that the subject information is qualified as "restricted" or "personal identifying" information. As such, mere unauthorized disclosure is not enough, and good faith may be considered a defense. Moreover, the results of such unauthorized disclosure is also made an essential element whether it be a resulting reasonable fear of an intended or expected harm; a likelihood to cause such harm; or the actual harm caused.

[26] Public Act 2015 No. 63, Harmful Digital Communications Act 2015, Section 22

III. LOCAL LEGISLATION

Data Privacy Act[27]

The Data Privacy Act of 2012 (hereinafter referred to as the Data Privacy Act) specifically penalizes unauthorized disclosures, however, the persons potentially liable are limited to "personal information controllers" (PICs) and "personal information processors" (PIPs) as defined in said law (PIC refers to a person or organization who controls the collection, holding, processing or use of personal information, including a person or organization who instructs another person or organization to collect, hold, process, use, transfer or disclose personal information on his or her behalf… while PIP refers to any natural or juridical person qualified to act as such under this Act to whom a personal information controller may outsource the processing of personal data pertaining to a data subject).[28] As such, it does not address "*doxxing*" in the general sense whereby anyone can be responsible for the act despite not being a PIC or PIP. The relevant penal provisions are as follows:

> SEC. 31. *Malicious Disclosure.* – Any personal information controller or personal information processor or any of its officials, employees or agents, who, with malice or in bad faith, discloses unwarranted or false information relative to any personal information or personal sensitive information obtained by him or her, shall be subject to imprisonment ranging from one (1) year and six (6) months to five (5) years and a fine of not less than Five hundred

[27] Republic Act 10173, Data Privacy Act of 2012
[28] Section 3(h) and (i), Republic Act 10173, Data Privacy Act of 2012

thousand pesos (Php500,000.00) but not more than One million pesos (Php1,000,000.00).

SEC. 32. *Unauthorized Disclosure.* – (a) Any personal information controller or personal information processor or any of its officials, employees or agents, who discloses to a third party personal information not covered by the immediately preceding section without the consent of the data subject, shall he subject to imprisonment ranging from one (1) year to three (3) years and a fine of not less than Five hundred thousand pesos (Php500,000.00) but not more than One million pesos (Php1,000,000.00).

(b) Any personal information controller or personal information processor or any of its officials, employees or agents, who discloses to a third party sensitive personal information not covered by the immediately preceding section without the consent of the data subject, shall be subject to imprisonment ranging from three (3) years to five (5) years and a fine of not less than Five hundred thousand pesos (Php500,000.00) but not more than Two million pesos (Php2,000,000.00).

Cybercrime Prevention Act[29]

Another local law that was approved in 2012 is the Cybercrime Prevention Act that essentially penalizes several acts as "cyber crimes" yet "*doxxing*" is not one of those

[29] Republic Act 10175, Cybercrime Prevention Act of 2012

included. The law enumerates, defines, and qualifies the following punishable acts:

> "SEC. 4. *Cybercrime Offenses.* — The following acts constitute the offense of cybercrime punishable under this Act:
>
> (a) Offenses against the confidentiality, integrity and availability of computer data and systems:
>
> (1) Illegal Access. – The access to the whole or any part of a computer system without right.
>
> (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.
>
> (3) Data Interference. — The intentional or reckless alteration, damaging, deletion or deterioration of computer data, electronic document, or electronic data message, without right, including the introduction or transmission of viruses.
>
> (4) System Interference. — The intentional alteration or reckless hindering or interference with the functioning of a computer or computer network by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or program, electronic document, or electronic data message,

without right or authority, including the introduction or transmission of viruses.

(5) Misuse of Devices.

(i) The use, production, sale, procurement, importation, distribution, or otherwise making available, without right, of:

(aa) A device, including a computer program, designed or adapted primarily for the purpose of committing any of the offenses under this Act; or

(bb) A computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed with intent that it be used for the purpose of committing any of the offenses under this Act.

(ii) The possession of an item referred to in paragraphs 5(i)(aa) or (bb) above with intent to use said devices for the purpose of committing any of the offenses under this section.

(6) Cyber-squatting. – The acquisition of a domain name over the internet in bad faith to profit, mislead, destroy reputation, and deprive others from registering the same, if such a domain name is:

(i) Similar, identical, or confusingly similar to an existing trademark registered with the appropriate government agency at the time of the domain name registration;

(ii) Identical or in any way similar with the name of a person other than the registrant, in case of a personal name; and

(iii) Acquired without right or with intellectual property interests in it.

(b) Computer-related Offenses:

(1) Computer-related Forgery. —

(i) The input, alteration, or deletion of any computer data without right resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible; or

(ii) The act of knowingly using computer data which is the product of computer-related forgery as defined herein, for the purpose of perpetuating a fraudulent or dishonest design.

(2) Computer-related Fraud. — The unauthorized input, alteration, or deletion of computer data or program or interference in the functioning of a computer system, causing damage thereby with fraudulent intent: *Provided,* That if no damage has yet been caused, the penalty imposable shall be one (1) degree lower.

(3) Computer-related Identity Theft. – The intentional acquisition, use, misuse, transfer, possession, alteration or deletion of identifying information belonging to another, whether natural or juridical, without right: *Provided,* that

if no damage has yet been caused, the penalty imposable shall be one (1) degree lower.

(c) Content-related Offenses:

(1) Cybersex. — The willful engagement, maintenance, control, or operation, directly or indirectly, of any lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favor or consideration.

(2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: *Provided,* That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

(3) Unsolicited Commercial Communications. — The transmission of commercial electronic communication with the use of computer system which seek to advertise, sell, or offer for sale products and services are prohibited unless:

(i) There is prior affirmative consent from the recipient; or

(ii) The primary intent of the communication is for service and/or administrative announcements from the sender to its existing users, subscribers or customers; or

(iii) The following conditions are present:

(aa) The commercial electronic communication contains a simple, valid, and reliable way for the recipient to reject. receipt of further commercial electronic messages (opt-out) from the same source;

(bb) The commercial electronic communication does not purposely disguise the source of the electronic message; and

(cc) The commercial electronic communication does not purposely include misleading information in any part of the message in order to induce the recipients to read the message.

(4) Libel. — The unlawful or prohibited acts of libel as defined in Article 355 of the Revised Penal Code, as amended, committed through a computer system or any other similar means which may be devised in the future.

SEC. 5. *Other Offenses.* — The following acts shall also constitute an offense:

(a) Aiding or Abetting in the Commission of Cybercrime. – Any person who willfully abets or aids in the commission of any of the offenses enumerated in this Act shall be held liable.

(b) Attempt in the Commission of Cybercrime. — Any person who willfully attempts to commit any of the offenses enumerated in this Act shall be held liable.

> SEC. 6. All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act: *Provided,* That the penalty to be imposed shall be one (1) degree higher than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be."[30]

Clearly, a reading of the above-mentioned provisions shows that the law is silent with respect to "*doxxing*" and does not specifically provide for, or penalize the same unless of course "*doxxing"* is covered by a special law in which Section 6 of the Data Privacy Act shall apply accordingly. Presently, the acts covered by "*doxxing*" in the intended sense of this writing is not covered by either the Revised Penal Code or any special law.

Anti-Bullying Act[31]

Following the above-mentioned enactments, the Anti-Bullying Act was signed into law the year after. The latter essentially penalizes "*bullying*" that is defined as:

> "any severe or repeated use by one or more students of a written, verbal or electronic expression, or a physical act or gesture, or any combination thereof, directed at another student that has the effect of actually causing or placing the latter in reasonable fear of physical or emotional harm or damage to his property; creating a hostile environment at school for the

[30] Chapter II Punishable Acts, Republic Act 10175, Cybercrime Prevention Act of 2012
[31] Republic Act 10627, Anti-Bullying Act of 2013

> other student; infringing on the rights of the other student at school; or materially and substantially disrupting the education process or the orderly operation of a school; such as, but not limited to, the following:
>
> XXX
>
> d. Cyber-bullying or any bullying done through the use of technology or any electronic means."[32]

The Implementing Rules and Regulations of the law expanded the definition of "*cyber-bullying"* by adding the following: "The term shall also include any conduct resulting to harassment, intimidation, or humiliation, through the use of other forms of technology, such as, but not limited to texting, email, instant messaging, chatting, internet, social media, online games, or other platforms or formats as defined in DepED Order No. 40, s. 2012."[33]

It is clear from the foregoing, that although the law does not specifically define or penalize "*doxxing,"* in light of the nature, practice, and intended effects of "*doxxing,"* the same may fall under the definition of "*bullying"* or "*cyber-bullying."* However, it is worth noting that from the very definition of "*bullying"* and the apparent rationale of the law based on other provisions in its body as well as the declared scope and coverage of the Implementing Rules and Regulations,[34] the law appears to apply only to students, schools and learning centers. As such, although in the broad sense "*cyber-bullying*" may cover acts constituting "*doxxing,"*

[32] Section 2, Republic Act 10627, Anti-Bullying Act of 2013
[33] Section 3 (b) (4), The Implementing Rules and Regulations of Republic Act 10627, Anti-Bullying Act of 2013
[34] Section 2, The Implementing Rules and Regulations of Republic Act 10627, Anti-Bullying Act of 2013

this leaves non-students with no viable relief for such acts under the Anti-Bullying Act.

Anti-Photo and Video Voyeurism Act[35]

In 2009, Congress enacted a law, which apparently was a response to the proliferation of celebrity "scandal" videos as that time, seeking to address similar acts in the future. The Anti-Photo and Video Voyeurism Act defines photo or video voyeurism as:

> "the act of taking photo or video coverage of a person or group of persons performing sexual act or any similar activity or of capturing an image of the private area of a person or persons without the latter's consent, under circumstances in which such person/s has/have a reasonable expectation of privacy, or the act of selling, copying, reproducing, broadcasting, sharing, showing or exhibiting the photo or video coverage or recordings of such sexual act or similar activity through VCD/DVD, internet, cellular phones and similar means or device without the written consent of the person/s involved, notwithstanding that consent to record or take photo or video coverage of same was given by such persons."[36]

The law further defines "*under circumstances in which a person has a reasonable expectation of privacy*" to means the belief "that he/she could disrobe in privacy, without being concerned that an image or a private area of the person was being captured; or circumstances in which a reasonable

[35] Republic Act 9995, Anti-Photo and Video Voyeurism Act of 2009
[36] Section 3 (d), Republic Act 9995, Anti-Photo and Video Voyeurism Act of 2009

person would believe that a private area of the person would not be visible to the public, regardless of whether that person is in a public or private place."[37] The prohibited acts are as follows:

> "(a) To take photo or video coverage of a person or group of persons performing sexual act or any similar activity or to capture an image of the private area of a person/s such as the naked or undergarment clad genitals, public area, buttocks or female breast without the consent of the person/s involved and under circumstances in which the person/s has/have a reasonable expectation of privacy;
>
> (b) To copy or reproduce, or to cause to be copied or reproduced, such photo or video or recording of sexual act or any similar activity with or without consideration;
>
> (c) To sell or distribute, or cause to be sold or distributed, such photo or video or recording of sexual act, whether it be the original copy or reproduction thereof; or
>
> (d) To publish or broadcast, or cause to be published or broadcast, whether in print or broadcast media, or show or exhibit the photo or video coverage or recordings of such sexual act or any similar activity through VCD/DVD, internet, cellular phones and other similar means or device.

[37] Section 3 (f), Republic Act 9995, Anti-Photo and Video Voyeurism Act of 2009

> The prohibition under paragraphs (b), (c) and (d) shall apply notwithstanding that consent to record or take photo or video coverage of the same was given by such person/s. Any person who violates this provision shall be liable for photo or video voyeurism as defined herein."[38]

Again, the law does not specifically address the issue of "*doxxing."* However, "*doxxing"* is broad enough to include acts that cover information that fall within the purview of "*under circumstances in which a person has a reasonable expectation of privacy*" as defined under the law, such as private photos or videos taken for personal purposes with absolutely no intention to make the same public.

Unfortunately, the law is silent as to other information which a person may have a "*reasonable expectation of privacy"* although not falling within the above-mentioned definition under the law such as non-sexual photos, name, address, contact numbers, etc. As such, a significant aspect of "doxxing" is still left unaddressed.

Safe Spaces Act[39]

The Safe Spaces Act is the most recent legislation that addresses unauthorized online disclosure of information. However, the very purpose of the law is to supplant the gaps in the Anti-Sexual Harassment Act of 1995[40] and to expand its coverage such that such unauthorized online disclosures are categorized under the heading of Gender-based Online Sexual Harassment. The same reads:

[38] Section 4, Republic Act 9995, Anti-Photo and Video Voyeurism Act of 2009
[39] Republic Act 11313, Safe Spaces Act of 2019
[40] Republic Act 7877, Anti-Sexual Harassment Act of 1995

> "Gender-based online sexual harassment includes acts that use information and communications technology in terrorizing and intimidating victims through physical, psychological, and emotional threats, unwanted sexual misogynistic, transphobic, homophobic and sexist remarks and comments online whether publicly or through direct and private messages, invasion of victim's privacy through cyberstalking and incessant messaging, uploading and sharing without the consent of the victim, any form of media that contains photos, voice, or video with sexual content, any unauthorized recording and sharing of any of the victim's photos, videos, or any information online, impersonating identities of victims online or posting lies about victims to harm their reputation, or filing, false abuse reports to online platforms to silence victims." (Emphasis supplied)[41]

A reading of the above-cited provision would show that the underscored portion appears to cover any unauthorized recording or sharing without qualification that it be of a sexual nature such that it would essentially cover the act of "*doxxing*" as generally understood. It appears that this provision would be the saving grace to address "*doxxing*" when the other pieces of local legislation previously mentioned did not. However, the definition of "Gender-Based Online Sexual Harassment" seems to make a qualification saying that it refers to:

[41] Section 12, Republic Act 11313, Safe Spaces Act of 2019

> "online conduct targeted at a particular person that causes or likely to cause another mental, emotional, or psychological distress, and fear of personal safety, sexual harassment acts including unwanted sexual remarks and comments, threats, uploading or sharing of one's photos without consent, video and audio recording, cyberstalking and online identity theft." (Emphasis supplied)[42]

As such, it appears that the unauthorized uploading or sharing of another's photo as a sexual harassment act is the one that is covered by the definition of "Gender-Based Online Sexual Harassment" and that such uploading or sharing of a non-sexual nature is not included. Moreover, the "unauthorized recording and sharing of any of the victim's photos, videos, or any information online" as stated in Section 12 of the law seems to be a prohibited act that is qualified by the fact that is should fall under the definition and nature of "Gender-Based Online Sexual Harassment."

This is apparently consistent with the general spirit of the law which is essentially an anti-sexual harassment statute with an expanded coverage. A reading of the entire law would show that all the penalized acts are "gender-based" with clear intent to penalize acts that count as sexual harassment. Referencing the original Senate and House Bills,[43] the proponents seemingly had no intention to include "*doxxing*" as a punishable act unless the same constitutes sexual harassment.

In the original Senate Bill, there was no provision on online disclosures or even online sexual harassment. However, it is worth noting that the bill did state in the title

[42] Section 3(e), Republic Act 11313, Safe Spaces Act of 2019
[43] Senate Bill 1558 and House Bill 8774 of the 16tth Congress

that it was intended to expand the definition of sexual harassment found in the Anti-Sexual Harassment Act of 1995.

With respect to the House Bill, its definition of Online Sexual Harassment[44] is the one appearing on the final version. Further, Section 12 of the Safe Spaces Act was also adopted verbatim from the House Bill.[45] However, what may shed light on the intent to limit unauthorized online disclosures to acts of sexual harassment only, thus excluding "*doxxing*" in the general sense, is Section 4 of the said House Bill:

> "The crimes of gender-based street, public spaces and online sexual harassment are committed through any unwanted and uninvited sexual actions or remarks against any person that result or will likely result in an invasion of the victim's sense of personal safety, regardless of the motive for committing such action or remark." (Emphasis Supplied)[46]

Thus, in light of the foregoing cited statutes, it is humbly submitted that "*doxxing*" in the general sense is not specifically defined, covered, or penalized by local legislation and existing laws are therefore inadequate to address the potential threats to personal privacy "*doxxing*" poses.

IV. RECOMMENDATION

In response to the apparent inadequacies of prevailing local laws, it is humbly recommended that Congress explores the possibility of enacting new criminal legislation

[44] Section 3(d) of House Bill 8774 of the 16th Congress
[45] Paragraph 3, Section 4 of House Bill 8774 of the 16th Congress
[46] Paragraph 1, Section 4 of House Bill 8774 of the 16th Congress

addressing "*doxxing*" in general with the following discussion as points of consideration.

The following are crucial to any legislation attempting to effectively address "doxxing:" (1) a clear definition of "*doxxing"* in the general sense; (2) an identification of its elements; (3) a specific description of the information covered; (4) an identification of the persons protected; and (5) an identification of persons liable.

Definition and Elements

"*Doxxing*" is proposed to be defined as "the unauthorized disclosure with malicious intent, or with knowledge or reasonable expectation of the harmful effects of such disclosure; by any means through any media or forum of a person's personal identifiable information, private information, or information that is not otherwise intended by its owner or subject to be made accessible by the general public; and such unauthorized disclosure resulted directly or indirectly in the harassment, alarm, distress, bodily, emotional, psychological or other harm of said person or any other person or the reasonable fear of such harm."

The elements are as follows: (1) disclosure without consent – this refers not only to the fact of disclosure but also as to the nature, purpose and extent of such disclosure; (2) malicious intent – this refers to any purpose such as the intent to threaten, harass, vex, intimidate, cause bodily, emotional, psychological or other harm, or to cause such threat, harassment, vexation, intimidation, bodily, emotional, psychological or other harm by any person, or to cause the victim to be stalked or placed under surveillance, and the like; (3) knowledge or reasonable expectation of the disclosure's harm – this is an alternative to malicious intent and refers to the criminal negligence of the one making the

disclosure as the latter should have known by common understanding and experience that the harm would be the natural effect of said disclosure; and (4) disclosure by any means in any media or forum – this refers to the method by which disclosure is made and the location of the disclosure; (5) information is not public – this refers to personal identifiable information, private information or information that is not intended to be accessible by the general public; (6) committed by any person – this refers to either natural or juridical persons; (7) against any person – this refers to natural persons only; and (8) result of the disclosure – this refers to the direct or indirect resulting harassment, alarm, distress, bodily, emotional, psychological or other harm, or the reasonable fear of such harm.

1. Disclosure without Consent

First, the logic behind unauthorized or non-consensual disclosure as an element of penal law is well-settled. Consent, or the lack of it, may refer (1) to how the information is acquired, secured or accessed, (2) the act of disclosure itself or (3) the nature, purpose, and extent of the disclosure.

In some jurisdictions, the element of consent is not expressly mentioned in the law such as the Federal Law[47], POHA2019 of Singapore[48], and HDCA of New Zealand.[49] However, it appears that the same is an implied requirement as common experience and understanding would dictate against anyone consenting to his/her personal information being disclosed for the purpose of having some harm befall upon him/her. Thus, if the objective of the disclosure is to inflict or cause some form or harm upon the owner or subject

[47] 18 U.S.C. § 119
[48] Protection from Harassment Act 2019 (Amendment), Section 4
[49] Public Act 2015 No. 63, Harmful Digital Communications Act 2015

of the information, or there is a reasonable expectation that the disclosure would cause such harm, then it is reasonable to presume that the owner or subject of the information did not, or would not consent to such disclosure in the first place.

In other jurisdictions, the absence of consent as an element is expressly provided in the law but the same has reference to the acquisition of the information and not to the disclosure. A clear example is Section 64 of Hong Kong's PDPO.[50] However, for purposes of the proposed legislation, non-consensual acquisition of information is not included as this may already be well-covered locally by the Cybercrime Prevention Act.[51]

Moreover, enforcement of penalizing non-consensual (thus illegal) acquisition of such information that does not fall under the specific acts of "*Illegal Access,*" "*Illegal Interception,*" or "*Computer-related Identity Theft*" of the Cybercrime Prevention Act or related offenses covered by the Revised Penal Code[52] would be challenging if there is no other proof or manifestation of such acquisition like the disclosure itself. It is worth noting that acquisition of information may also be done "offline" and even if the information is acquired online, this may still be done without leaving any identifiable trace of online presence (e.g., incognito mode browsing; screenshots; photo captures; manual copying of information, securing the information from other "public" online sources, etc.).

Thus, it is humbly proposed that the focus of any legislation penalizing "*doxxing"* be on the non-consensual disclosure of information as the acquisition of information

[50] (Cap. 486) Personal Data Privacy Ordinance, Section 64
[51] Republic Act 10175, Cybercrime Prevention Act of 2012
[52] Chapter II Punishable Acts, Republic Act 10175, Cybercrime Prevention Act of 2012

may already be covered elsewhere. If the owner or subject of the information did consent to the acquisition of said information he/she may refer to the Data Privacy Act[53] (should the same be applicable) for any mishandling of his/her information by the PIC or PIP which includes malicious and unauthorized disclosures.[54] If the acquisition was without consent, and the same falls under the circumstances provided for by the Cybercrime Prevention Act, then recourse may be had through said law for any illegal access. The illegal disclosure by a non-PIC or non-PIP, as discussed previously, may not be covered by these laws, hence the need for the proposed legislation on "*doxxing.*"

In the instance that acquisition was without consent, and such fact is not readily established by proof, but there was no disclosure at all, then it may be reasonable to presume that there was no harm yet to speak of. However, in the same instance, when there is a disclosure and the same was without consent, such unauthorized disclosure would be covered by the proposed law against "*doxxing.*" Should such disclosure be with the owner's or information subject's consent, and the acquisition of information is also with his/her consent (but the information is not handled by a PIC or PIP and falling outside the Data Privacy Act's application) the situation is a bit more complicated as other factors have to be taken into consideration in evaluating the consent given. Did he/she freely and voluntarily give consent to the disclosure? Was he/she informed of the nature purpose and extent of the disclosure for which consent was sought? Was the disclosure made for the nature, purpose and to the extent previously consented to by him/her? These are important questions that have to be answered first.

[53] Republic Act 10173, Data Privacy Act of 2012
[54] Section 31 and 32, Republic Act 10173, Data Privacy Act of 2012

If consent is not freely or voluntarily given, or if there is lack of information or any misinformation in the securing of consent, then this would be akin to the absence of consent or vitiated consent as the case may be. Either way, it is as if the owner or information subject did not consent at all. In this case, vitiated consent should be treated as lack of consent.

If consent is given with respect to a specific nature, purpose and extent of the disclosure, and the disclosure was not at par with said specific nature, purpose and extent, any deviation would be considered to not have been consented to by the owner or information subject. In such, case, it is humbly proposed that such disclosure is without consent and therefore an element of the proposed legislation against "*doxxing.*" Providing one's contact information for security logbooks or medical contact tracing purposes does not mean that one consents to having such information posted online for all to see.

2. Malicious Intent

The proposed legislation refers to such intent to threaten, harass, vex, intimidate, cause bodily, emotional, psychological or other harm, or to cause such threat, harassment, vexation, intimidation, bodily, emotional, psychological or other harm by any person, or to cause the victim to be stalked or placed under surveillance, and the like.

It is humbly submitted that for malice to be a key element of *"doxxing,"* the intended results of the unauthorized disclosure sought to be penalized shall have absolutely no justified reason or legitimate purpose, but rather, to cause another undue harm, in whatever form that harm may be, and from whatever source it may originate.

The malicious intent can be grouped into three categories: First, is the intent for the unauthorized disclosure to directly cause such threats, harassment, vexation, intimidation or any harm (hereinafter collectively referred to as "any harm") to the intended victim. Second, is the intent for the unauthorized disclosure to cause any harm to the intended victim without regard for the personality responsible for causing the harm. The difference between the two is that the first presupposes a situation where any harm is directly caused by the one who "*doxxed*" the victim and the disclosure may be the harm itself. Examples would be disclosure of the identities of anonymous "whistleblowers," persons under witness protection, or private personal information of celebrities and public figures. The second, on the other hand, is intended as a "catch all" provision that covers any harm caused by any other person that may or may not be the one who made the disclosure. The purpose of including this provision is to include situations which may not be covered by the first category. A prime example would be situations involving disclosures causing the intended victim harm such as "*swatting,*" "*red-tagging,*" or being made the target for "hate speech" due to such victims' beliefs, speech, preferences, or religious, political or cultural affiliations (i.e., posting a photo of the victim's attendance at a neo-nazi/white supremacist rally, or posting the personal mobile number of a person for an unpopular "*Tweet"*).

Third, refers to the intent to cause the victim to be stalked or placed under surveillance. An example of this would be to disclose the identities, whereabouts, and/or contact information of personalities who, as a result, are hounded by the *paparazzi*; or that the victim is on the government's sexual offender's list; or that the victim is previously a drug-offender under the government's "*Tokhang"* operation.

In any of the three categories, the attending malice of such intent is obvious from the harmful effects of the disclosure. Thus, establishing such malice is easy enough provided that it can be proven that the offender knew that "*doxxing*" the victim would veritably result in the harm and that the offender made such disclosure to specifically elicit the harm. In the event that malicious intent is not established, an alternative element is knowledge or reasonable expectation of harm.

3. *Knowledge or Reasonable Expectation of Disclosure's Harm*

In the event that the disclosure is not attended by the element of malicious intent, it is humbly proposed that knowledge or at the very least a reasonable expectation of the harmful effects of the disclosure be sufficiently considered as an element of "*doxxing.*" In such instance, good faith is not a satisfactory defense as the disclosure may be classified as criminal negligence.

This knowledge or reasonable expectation of harm should be sufficient to qualify the disclosure as criminal in nature if despite the same, the one who made the disclosure disregarded such harmful effects in performing the act/s. The disclosure itself would be classified as reckless or negligent as the one who made the disclosure should have known by common understanding and experience, or should have reasonable foresight that the harm would be the natural effect of said disclosure.

Take for example a situation where a person (Person A), who has decided to remain anonymous, exercises his/her freedom of speech or expression and takes an unpopular social, political or cultural opinion making unpopular statements that would be offensive to persons or groups that hold the opposite opinion (Opposite Group). A person

belonging to such Opposite Group (Person B) manages to discover the identity of Person A and decides to tag him/her or share a link to his/her social media account to the social media, chat group or online forum of the Opposite Group. The result would likely be that Person A would be subject to "bashing," "hate speech," harassment, death threats or worse. In such instance, Person B could argue good faith and claim that he/she merely made the disclosure as an exercise of his/her own freedom of speech or expression when the disclosure is made as part of an article, tweet, or post and his/her intent was merely to provide a platform or an equal opportunity for Person A to express his/her opinions directly to the Opposite Group. The results are catastrophic for Person A and there is no way to reverse the harmful effect already suffered by Person A. It can be said that Person B is criminally negligent or reckless in making such disclosure.

Criminal negligence is not a new concept as it is already part of the body of Philippine law more commonly referred to as reckless imprudence as provided in the relevant provisions of Quasi-Offenses in the Revised Penal Code[55], and there is even a provision finding persons criminally liable for gross negligence with respect to unauthorized disclosures under the Data Privacy Act.[56] Thus, it would be prudent to include the same as an alternative element to malicious intent to address indiscriminate unauthorized disclosures that would otherwise be considered "*doxxing.*"

4. Disclosure by Any Means in any Media or Forum

This refers to disclosure location and methodology. Traditional tri-media (television, radio, and print) no longer reign supreme in the dissemination of information to the masses as the advent of the internet and the popularity of

[55] Article 365, Revised Penal Code
[56] Section 34, Republic Act 10173, Data Privacy Act of 2012

social media has taken over the sharing of information and influencing of public opinion. Today, any information, no matter how seemingly insignificant spreads like wildfire over social media as any piece of "news" become "*trending*," and any video becomes "*viral*." It is no surprise that "*doxxing"* has its roots in internet "hacktivism" but note that it can very well be done offline as well, albeit not as effectively. Online "*doxxing"* is usually done on "*Wikipedia", "Facebook", "Youtube", Instagram", "Tiktok",* or chatrooms, forums, special websites, and others.

As such, it is humbly suggested that the coverage may not be limited to online acts of "*doxxing"* since an unauthorized disclosure may very well be done by hanging a tarpaulin with a person's name and other information as in the unfortunate case of a Judge who fell victim to apparent "red-tagging" with her name, official position, the branch court where she presides, and worse, her photograph on public display along a busy thoroughfare. Whether or not it is true is not the issue here but the fact that such information (although already public) is publicized unnecessarily as the poor Judge undoubtedly did not consent to such public display, nor can it be said that the intent of making such display is well-founded and there is no reasonable expectation of harm.

5. The Information is not Public

In the unfortunate case of the Judge as above-discussed, the information (i.e., her name, position, where she holds court, her photograph) is available in official government records or even in the lobby of the Hall of Justice where her court is located. However, there does not appear to be any intent that such information is to be made easily accessible to the general public, especially when presented

under such context as to make it appear that she is an alleged communist supporter.

The information referred to as an intended element of "*doxxing"* cover personal identifiable information, private information (as defined and covered by the Data Privacy Act) or information that is not intended to be accessible by the general public, the latter having reference to the fact that just because information is public (such as being part of public records) is not intended to be made for public display. One would not necessarily want their Birth Certificate or Income Tax Return plastered along the highway or to have one's home address, phone number or personal email address mentioned in the 6 o' clock news. The key is that the information should be such as to practicably allow the identity of the person to be directly or indirectly ascertainable. In determining the propriety of disclosing information, special consideration would have to be made of several factors: whether the information is private or personal identifiable information, in which case it not public at all; whether there is consent to disclosure in such manner; whether the purpose is in good faith, such as if it is part of a newsworthy account including only such information that should be part of the news; and whether the context and manner of presentation is not intended to mislead and/or cause harm. Should the consideration for any of the said factors be in the negative, it may be safe to presume that the disclosure is improper and therefore the element is satisfied. This should be treated on a case to case basis with a great deal of reliance on context and human experience as guides.

6. Committed by Any Person

It is humbly submitted that natural or juridical persons may commit the proposed offense of "*doxxing."* Moreover, it may also be committed by entities without juridical

personality in which case the persons who conspired, consented or actually did the act may be liable as principals. This begs the question: "Are accomplices and accessories also liable?" This is especially on point when dealing with juridical personalities that provide a specific online service such social media platforms like *Facebook, Youtube, Twitter*; and community blogs or bulletin boards.

Notably, more often than not, these juridical entities would have inserted in their Terms and Conditions, or Terms of Use or Service that they will in no way be liable for user content. Disclaimers, statements of no warranty, limitation of liability and assignment of responsibility are present in such terms to mitigate if not totally extinguish social media's liability for user content. Often, social media platforms would state that they provide an "as is" service or product and clearly states that the user will solely be responsible for uploaded content as the platform is only a third party service provider.

The digital age warrants a different standard of conduct and treatment of online intermediaries, a broad term referring to "a company providing access to the Internet" which includes Internet Service Providers (ISPs), search engines, and social media.[57] One of the proposals in the United States is to amend the Federal Law on "*doxxing"* by drawing reference from U.S. Copyright Laws and address online intermediaries' liability as secondary, in which case it can either be for contributory liability (for encouraging or inducing "*doxxing"*) or vicarious liability (for failure to remove the "*doxxed"* information upon notice), and that a safe harbor provision be inserted to afford an escape from

[57] Natalia Homchick, Reaching Through the "Ghost Doxer:" An Argument for Imposing Secondary Liability on Online Intermediaries, 76 Wash. & Lee L. Rev. 1315 (2019), https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss3/7

liability by immediately removing such "*doxxed"* information upon written notice.[58]

Contributory fault and vicarious liability are not new concepts under Philippine Laws and the same principles may be applied to juridical entities that are online intermediaries involved in "*doxxing"*. As such, they can incur criminal as well as civil liability if Congress finds merit in penalizing "*doxxing"* as proposed. Moreover, it is humbly submitted that the above-mentioned safe harbor proviso may also be applied accordingly thus enforcing a responsibility on online intermediaries to help mitigate, if not stem "*doxxing"* and its effects. As such, they can no longer hide behind disclaimers in their Terms and Conditions or Terms of Use. Although such written notice or request for removal may fall under "request to remove or block content" which may already be under such Terms and Conditions or Terms of Use, implementation is not always quick and effective and by that time the "*doxxed"* information may already have done its damage. Penalizing online intermediaries provide some "teeth" in dealing with enforcing requests to remove.

7. Against Any Person

There is a stark contrast between the potential perpetrators of "*doxxing"* and its intended targets as juridical persons are markedly different from natural persons most especially in terms of their treatment with respect to privacy rights. Since an individual's right to privacy is held sacred by the Constitution without any similar treatment of juridical entities, it is humbly submitted that victims of the proposed offense of "*doxxing"* be limited to natural persons. This is

[58] Natalia Homchick, Reaching Through the "Ghost Doxer:" An Argument for Imposing Secondary Liability on Online Intermediaries, 76 Wash. & Lee L. Rev. 1315 to 1316 (2019), https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss3/7

not to say that juridical persons are without recourse under the relevant provisions of civil law as circumstances may permit. Although civil recourse may also be available to natural persons under prevailing laws, "*doxxing"* is an act that warrants consideration as a public offense.

8. Result of the Disclosure

This refers to the resulting actual harm caused which may range from the physical such as harassment, bodily injury or damage to property to the emotional or psychological such as alarm, distress, anxiety, reasonable fear of such harm or any other harm.

Internet bashing, hate speech, death or rape threats, "*swatting*", defaced property, "*spamming*", "social engineering", stalking, harassment, physical violence and even identity theft are among the many varied follow-ups to, or results of "*doxxing."* Other than the anxiety of knowing that one's non-public information is suddenly made public (which may be considered a harm in itself), such follow-ups or results would carry with it any or all forms of the other harm as above-mentioned. As proposed, such resulting harm can be the direct or indirect result of "*doxxing"* because even if the unauthorized disclosure did not directly cause the harm, it may be the proximate cause of the same.

V. CONCLUSION

The awesome power of the Internet has been harnessed to secure, store and disseminate information in a far more effective and pervasive manner than when broadcasting first overshadowed print media. Such power, coupled with online accessibility available to almost anyone, magnify the potential harm and threat of harm "*doxxing*" poses.

"*Doxxing"* has a somewhat Pandora's Box effect whereby disclosed information can never be reverted back to its original status and the harmful effects can never be dismissed. Moreover, conduct attended by malice or reckless behavior transforms "*doxxing*" from a simple and innocent disclosure of information to something more sinister. Given this serious nature of "*doxxing"* and its effects, vigilance calls upon the appropriate legislation to address this threat in order to protect everyone's individual right to privacy.

FORENSIC EVIDENCE: A SCIENTIFIC TOOL TO PROPAGATE INJUSTICE

Cyrus I. Restauro[*]

Abstract

Forensic evidence has dual facets: a tool not only for justice, but also injustice. Forensic evidence, if used according to its purpose, is essential to provide inferences surrounding crimes, especially in the absence of any direct evidence like eyewitnesses. It is circumstantial in nature, and, if taken together with corroborating pieces of evidence, would prove essential for criminal prosecution and ultimately the administration of justice. However, with subjectivity caused by external influences, the results of scientific processing of evidence may be tampered with. As a result, an irreversible outcome of the criminal prosecution would become inevitable—injustice. An objective analysis of forensic evidence is therefore essential to serve the ends of justice. This paper will discuss the dangers of subjectivity of forensic evidence in light of the current context of human rights violations and the structure of law enforcement in the Philippines.

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I. FORENSIC SCIENCE AS A TOOL FOR JUSTICE AND INJUSTICE

Forensic science is the science applied to the interest of justice.[1] It is a tool used in relation to the collection, examination, and analysis of physical evidence.[2]To successfully prosecute a criminal case before the courts, just like in any other case, it is essential to present evidence that is not only relevant and competent, but also logically sound. Forensic science affords a new dimension in the administration of justice by giving an in-depth analysis of physical evidence that would tell a lot on a particular case that testimonies alone cannot provide on their own.

The beauty of forensic science is that it examines physical or tangible evidence. Among other pieces of evidence, physical evidence is considered an inherently more reliable and dependable kind of evidence because what can be perceived is basically what the evidence actually tells (though sometimes coupled with mathematical basis); in other words, it is what it is.[3] With this reason, physical (or forensic) evidence is afforded great weight in court.[4] Testimonies defying what the forensic evidence suggests

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[1] Paul Roberts, "Science In The Criminal Process," Oxford Journal of Legal Studies 14, no. 4 (Winter 1994): p. 472, https://www.jstor.org/stable/764729, citing B. Firth, 'Aspects of Forensic Science' [1954] Crim L R 107.

[2] Merriam-Webster, "Medical Definition of FORENSIC SCIENCE," Dictionary by Merriam-Webster: America's Most-trusted Online Dictionary, accessed April 8, 2021, https://www.merriam-webster.com/medical/%20forensic%20science.

[3] Joseph L. Peterson et al., "FORENSIC SCIENCE AND THE COURTS: The Uses and Effects of Scientific Evidence in Criminal Case Proceeding," last modified 1986, p. 10, https://www.ojp.gov/pdffiles1/pr/102387.pdf.

[4] Peterson et al, " FORENSIC SCIENCE AND THE COURTS: The Uses and Effects of Scientific Evidence in Criminal Case Proceeding ", p.10. *Citing* President's Commission on Law Enforcement and Administration of Justice (1967) Task Force Report: The Police. Washington, D.C.: National Institute of Justice.

would be frowned upon by the courts, unless the latter could be rebutted by meritorious reasons such as the presence of irregularities in the scientific processing of evidence.

In the United States, its judicial system has become more dependent on forensic science to elucidate evidence in relation to crimes:

> More and more, the solution of major crime will hinge upon the discovery (of physical evidence) at crime scenes and subsequent scientific laboratory analysis of latent fingerprints, weapons, footprints, hairs, fibers, blood and similar traces.[5]

Not only has forensic evidence been used by law enforcers and prosecutors in building their sound cases, but it also has served as an aid for judges to decide on cases exhaustively based on merits.

Ideally, forensic science is a tool for the administration of justice. Scientific processing and analysis of evidence have the capability of providing information on matters that may have transpired in the commission of a crime:

> Scientific laboratory techniques hold the potential of developing information from the physical clues left at the crime scene that can

[5] Peterson et al, " FORENSIC SCIENCE AND THE COURTS: The Uses and Effects of Scientific Evidence in Criminal Case Proceeding ", p.11. *Citing* President's Commission on Law Enforcement and Administration of Justice (1967) Task Force Report: The Police. Washington, D.C.: National Institute of Justice.

> assist in determining what transpired at the scene and who was (and was not) involved.[6]

It is the concomitant obligation of law enforcers to preserve the integrity of these physical clues they have gathered until they are submitted for processing in the crime laboratory and later presented in court.

Subsequently, law enforcers will submit the pieces of evidence gathered to crime laboratories for scientific processing. The objectives of scientific processing are as follows: (1) to establish an element of the crime, (2) to identify a suspect or a victim, (3) to find association or disassociation between offender and the crime scene or victim, (4) to test statements and alibis, (5) to reconstruct how a particular crime happened or the movements of offenders, victims, or instruments of an offense, (6) and finally to corroborate or refute information gathered from witnesses, suspects or victims.[7] All are indispensable considerations in criminal prosecutions.

Useful as it may seem, forensic evidence, however, is not standalone evidence. It is not direct evidence that would prove a certain fact, but only circumstantial evidence that will prove the probability of a certain fact by inference or implication. Nonetheless, it is still capable of producing conviction. To do this, forensic evidence must only be corroborative—it must be accompanied by other pieces of evidence:

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[6] Joseph Peterson et al., "The Role and Impact of Forensic Evidence in the Criminal Justice Process," 2010, p.2, https://www.ojp.gov/pdffiles1/nij/grants/231977.pdf.

[7] Peterson, " The Role and Impact of Forensic Evidence in the Criminal Justice Process", pp. 22-23.

> While a single piece of circumstantial evidence may not be enough to demonstrate a person's guilt, multiple pieces of evidence may be used together, and the prosecutor may ask the jury to "connect the dots" to determine that the defendant committed the alleged offense.[8]

Ideally, resorting to direct evidence will make it easier to establish what really transpired and who are the persons involved. In fact, there are some cases where a lone testimony would already suffice to produce conviction (i.e. testimony of the victim in a rape case).[9] While it may be complicated to utilize multiple pieces of circumstantial evidence, it may still come in handy especially in the absence of any direct evidence.

Forensic science is a double-edged sword: a tool for both justice and injustice. While forensic science is essential in crime investigation and prosecution, it has also brought about notorious injustices caused by over-reliance on seemingly powerful scientific evidence.[10] Technical expertise is needed to debunk another's scientific findings. Without any scientific background, law practitioners, as well as judges, will have a hard time refuting or dealing with such findings. At the end of the day, forensic evidence is countenanced without even knowing the possible errors or irregularities underlying it; objectivity and subjectivity of the findings will also be hard to identify.

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[8] Gimbel - Reilly - Guerin - Brown Law Office, "Circumstantial Vs. Direct Evidence in Wisconsin Criminal Cases," last modified August 18, 2018, https://www.grgblaw.com/wisconsin-trial-lawyers/circumstantial-vs-directevidence-in-wisconsin-criminal-cases.

[9] People vs. Gahi, G.R. No. 202976, February 19, 2014

[10] Roberts, "Science in the criminal process", p. 469.

The legal system needs a forensic science that is a "good science"— meaning it must be able to temper the risk of results being subjective. Otherwise, it will not be able to serve its purpose in our legal system.[11]

To be a good science, forensic science must exhibit two attributes. First, it must have valid and reliable methodologies. It must be ensured that processes utilized must have a well-grounded scientific foundation. Second, it must have the capability of minimizing the risk of results being dependent on subjective judgments or being tainted with error or threat of bias.[12] Absent any or both attributes, forensic science will not live up to its purpose.

In a nutshell, good science therefore must be an objective science—it must be free from external pressures.[13] Analyses of forensic evidence must be based on what the science [i.e. through the scientists] says, and not really what the scientists say. It may sound confusingly similar, but the latter situation is vulnerable to subjectivity, which defeats the essence of forensics as a science.

By nature, forensic science is objective in itself as it deals with the processing of physical evidence:

> This is [physical] evidence that does not forget. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be wrong; it cannot perjure itself; it cannot be

[11] Harry T. Edwards, "Solving the Problems that Plague the Forensic Science Community", p. 13, (lecture, Conference on Forensic Science for the 21st Century: The National Academy of Sciences Report, Sandra Day O'Connor College of Law, Arizona State University, Tempe, Arizona, April 3, 2009).
[12] Edwards, " Solving the Problems that Plague the Forensic Science Community", p. 13.
[13] Edwards, " Solving the Problems that Plague the Forensic Science Community", 17.

> wholly absent. Only its interpretation can err. Only human failure to find it, study and understand it, can diminish its value.[14]

However, since there is human intervention involved, there then lies an issue of subjectivity. No matter how objective the science is, the processing and interpretations of scientists may be prone to errors or biased results due to external influences. Scientists may therefore commit two kinds of subjectivity: indeliberate or deliberate.

Indeliberate subjectivity is the production of inaccurate scientific results grounded on unintentional causes. There may be three possible causes.

First, it may be in the form of unintentional errors committed by scientists. Errors may be classified into three kinds—systematic, random and gross:

1. "Systematic" are errors which include "…instrumental errors, method errors, individual errors, and environmental errors.";[15]

2. "Random" are errors caused by uncontrollable reasons;[16] and

3. "Gross" errors caused by negligence of scientists.[17]

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[14] Peterson, Ryan, Houlden, Mihajlovic. "FORENSIC SCIENCE AND THE COURTS: The uses and effects of scientific evidence in criminal case proceeding", p.10. citing Kirk, P. (1953) Crime Investigation. New York; Interscience.
[15] Mingxiao Du, "Analysis of errors in forensic science," Journal of Forensic Science and Medicine 3, no. 3 (2017): xx, Journal of Forensic Science and Medicine - Free Full Text Articles from the Journal of Forensic Science and Medicine.
[16] Du, " Analysis of errors in forensic science".
[17] Du, " Analysis of errors in forensic science".

Humans as they are, experts are fallible and may commit mistakes either in the processing of evidence or in the interpretation of results.

Second, it may be in the form of sheer incompetence of scientists.[18] Incompetence leads to error in either the processing of evidence or interpretation of results. To avoid this, there should be circumspect in the processing of forensic evidence and ensure that the scientist is competent enough to correctly process and interpret evidence.

Third, it may be in the form of lack of sufficient context. This stems from the fact that forensic scientists process and analyze evidence with blinders on—meaning their knowledge usually is confined on the evidence itself excluding its context in relation to the crime scene.

To illustrate, it is important to distinguish a crime scene investigator vis-à-vis a forensic scientist. The former is a first responder whose function is to examine the location and gather evidence relevant to the investigation, while the latter is in charge of the processing and analysis of evidence that has been provided.[19] Because of their limited knowledge, forensic scientists are precluded to know whether the pieces of evidence gathered authentically belong to, or merely cunningly and cleanly incorporated into the crime scene. The problem with the latter situation is that scientists may not be able to identify that evidence is merely planted. If the evidence is unknowingly planted and later processed by a

[18] Edwards, Solving the Problems that Plague the Forensic Science Community, p. 10.
[19] Forensic Colleges, "Crime Scene Investigation Vs. Forensic Science," Forensics Colleges, accessed April 1, 2021, https://www.forensicscolleges.com/blog/resources/csi-vs-forensic-science.

scientist, it would expectedly produce erroneous inferences that would lead to misleading results.

The other kind of subjectivity is deliberate or intentional subjectivity. It is commonly founded on scientists' questionable integrity and unique personal views. Questionable integrity pertains to a scientist's vulnerability of being swayed by extrinsic considerations; while the latter pertains to the varying conclusions that may be derived at depending on the unique lens—in the form of personal views— used in interpreting the results. Basically, subjectivity arises because of the possibility that conclusions produced by scientists might be tainted either by manifest bias or subtle influences, or both.[20]

Deliberate subjectivity may be attributed to crime laboratories' lack of operational autonomy. This is one of the problems that plagues the forensic science community.[21] By definition, autonomy is being free from external pressures and influences which degrade the integrity and probative value of the evidence.

In case of forensic laboratories, operational autonomy entails that public forensic laboratories and facilities are detached from the administrative control of law enforcement agencies. Otherwise, scientists would only be subjected to the will of law enforcement agencies prompting the former to manipulate the results in favor of the latter.

In the United States, the Committee on Identifying the Needs of Forensic Science Community[22] came across a question on whether a governing entity in the forensic science community could be established within an existing

[20] Roberts, *Science in the criminal process, p.* 478.
[21] Edwards. *Solving the Problems that Plague the Forensic Science Community*. p. 7.
[22] A Committee at the National Academy of Sciences

federal agency. The Department of Justice was one of the agencies brought up during their deliberations and there was a consensus that the forensic science community could not be lodged with them:

> There was also a strong consensus in the committee that no unit within the Department of Justice (DOJ) would be an appropriate location for a new entity governing the forensic science community. DOJ's principal and important mission is to enforce the law and defend the interests of the United States according to the law, not to pursue serious scientific research and education. The entity that is established to govern the forensic science community cannot be principally beholden to law enforcement. The potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great.[23] (emphasis supplied)

Later, the Committee decided that the forensic science community should be under a new and independent body to keep its objectivity and freedom from bias intact.

Forensic science ceases to be a good science when crime laboratories are at the whims of law enforcement agencies. In such case, it becomes a potent tool for abuses and oppression. Instead of giving aid to the administration of justice, it may even be considered as an "aid to the wishes of law enforcement and prosecution". This is why operational autonomy must always be upheld to ensure objectivity and

[23] Edwards, *Solving the Problems that Plague the Forensic Science Community*, p. 17.

impartiality in the processing and analysis of forensic evidence.

II. FORENSIC EVIDENCE IN THE PHILIPPINE LEGAL SYSTEM

In the Philippines, evidence is an indispensable means to shed light on the truth respecting a matter of fact.[24] Cases cannot be won in the absence of any supporting evidence that would meet the required quantum of proof in a case depending on its nature.

Criminal cases have the most stringent requirement of "proof beyond reasonable doubt." However, it does not mean an absolute certainty, but merely a moral certainty that the accused has committed the crime.[25] Robust pieces of evidence must be presented by the prosecution to meet the required quantum of proof and convict the accused. Among other pieces of evidence, resort to forensic evidence may be an indispensable ingredient that the prosecution needs to provide additional thrust to its allegations.

The courts afford greater weight to forensic evidence than eyewitness testimonies—all the more in the absence of any of the latter. In fact, the Supreme Court had the occasion to rule that scientific forms of identification of evidence are more accurate and authoritative than eyewitness evidence; the latter is treated by the court as "inherently suspect":

> Identification testimony has at least three components. First, witnessing a crime, whether as a victim or a bystander, involves perception of

[24] RULES OF COURT, Rule 128.
[25] Daayata, et. al. vs. People, G.R. No. 205745, March 8, 2017

> an event actually occurring. Second, the witness must memorize details of the event. Third, the witness must be able to recall and communicate accurately. Dangers of unreliability in eyewitness testimony arise at each of these three stages, for whenever people attempt to acquire, retain, and retrieve information accurately, they are limited by normal human fallibilities and suggestive influences.[26] (emphasis supplied)

The fallibility of witnesses may be due to the various influences in their perception and limited retention of events. Based on cognitive psychology and studies on eyewitness testimonies, human perception may be affected by various factors such as: "…exposure time [in the scene of the crime], frequency of exposure, level of violence of the event, the witness' stress levels and expectations, and the eyewitness' activity during the crime."[27] Witnesses' testimonies may not actually be the real truth, but only a subjective truth based on their own perception. Thus, the courts should conduct thorough scrutiny of testimonies before admitting the same as evidence, otherwise, a miscarriage of justice may result.[28]

Useful as it may be, forensic evidence can only be utilized before the courts if it passes the rule on admissibility of evidence, just like any other evidence. They must meet the requirements of relevancy and competency.[29]

On one hand, a piece of evidence is relevant when it has "…a relation to the to the fact in issue as to induce a belief in

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[26] People vs. Teehankee, Jr., G.R. No. 111206-08, October 6, 1995
[27] People vs. Teehankee, Jr., G.R. No. 111206-08, October 6, 1995 *citing* Elizabeth F. Loftus, EYEWITNESS TESTIMONY 23-51 (1996).
[28] People vs. Teehankee, Jr., G.R. No. 111206-08, October 6, 1995 *citing* Elizabeth F. Loftus, EYEWITNESS TESTIMONY 23-51 (1996).
[29] RULES OF COURT, Rule 128, Section 3.

its existence or non-existence."[30] On the other hand, evidence is competent when it is not prohibited by the Constitution, the law, or the Revised Rules on Evidence.[31] Thus, to reap its purpose, forensic evidence must be both connected with the fact in issue and must not be considered illegal by existing laws and rules.

Once admitted in court, forensic evidence must be accompanied by other corroborating pieces of evidence which, if put together, strongly suggest a certain fact. To reiterate, forensic evidence is circumstantial in nature. As such, it does not directly establish a fact, but it only indirectly does so by using the aid of inference:

> Circumstantial evidence, on the other hand, "indirectly proves a fact in issue, such that the factfinder must draw an inference or reason from circumstantial evidence."[32]

Be that as it may, circumstantial evidence may still produce conviction on the part of the prosecution. This comes in handy, especially in the absence of eyewitness accounts or direct evidence.

To convict using circumstantial evidence, the prosecution must be able to meet the following requisites:

> (a) there is more than one circumstance;
>
> (b) the facts from which inferences are derived are proven; and

[30] RULES OF COURT, Rule 128, Section 4.
[31] RULES OF COURT, Rule 128, Section 3.
[32] Bacerra vs. People, G.R. No. 204544, July 3, 2017 *citing* People vs. Fronda, 384 Phil. 732, 744 (2000).

> (c) the combination of all circumstances is such as to produce conviction beyond reasonable doubt.[33]

In simpler terms, forensic evidence is never meant to be standalone; it is merely a part of a set of circumstantial and/or direct evidence in a case. Failure to establish corroborating pieces of evidence does not only negate a forensic evidence's probative value, but also results to the failure to meet the required quantum of proof for conviction—proof beyond reasonable doubt.

But what kind of evidence is forensic evidence under rules on evidence? This is a tricky question to answer because forensic evidence is actually *sui generis*. Among the three kinds of evidence under the Philippine legal system, forensic evidence is a little bit of everything: object, documentary, and testimonial altogether.

In chronological order, forensic evidence transitions from being object, to being documentary, and finally to being testimonial evidence. At first, it is object evidence because it pertains to physical clues that may be gathered in a crime scene; penultimately, it becomes documentary when, after scientific processing, it is transformed into reports; and ultimately, testimonial because of the need for expert witnesses to elaborate on their reports and be subjected to cross-examination in court.

Forensic evidence starts as object evidence that is addressed to the senses of the court.[34] Its physical or tangible state makes it capable of being exhibited, examined or viewed during a trial. Scanning our jurisprudence, they may be in

[33] People vs. Nanas, G.R. No. 137299, August 21, 2001
[34] Section 1, A, Rule 130, Revised Rules on Evidence

various forms, such as but not limited to a slug of a gun[35], the gun itself[36], fingerprints[37], blood spatters[38], bloodied shirt[39], and drugs[40]. These are just some of the practical ones that may be presented and offered for viewing and examination. However, there are pieces of forensic evidence that are, although physical, considered impossible or impractical to show in court, such as the crime scene itself and a dead body, among others.

From object evidence, forensic evidence is later transformed into documentary evidence. Documentary evidence is, in essence, any document offered in court for the purpose of proving its contents.[41] In the case of forensic evidence, the pieces of object evidence gathered in the crime scene are submitted by investigators to forensic scientists for processing and analysis. The resulting findings are later embodied in a report stating the circumstances surrounding the object and how it relates to a particular fact trying to be established. Since these reports are going to be presented and offered in court to prove its contents, it is then befitting to treat these documents as documentary evidence.

Ultimately, forensic evidence is also testimonial in nature in criminal cases. As part of every individual's right to

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[35] Suerte-Felipe vs. People, G.R. No. 170974, March 3, 2008
[36] People vs. Mandapat, G.R. No. 76953, April 22, 1991
[37] People vs. Rodrigo et. al, G.R. No. 176159, September 11, 2008, *citing* People vs. Teehankee, G.R. No. 111206-08, October 6, 1995
[38] People vs. Manzano Jr., et. al., G.R. No. 217974
[39] People vs. Yatar, G.R. No. 150224, May 19, 2004
[40] People vs. Hementiza, G.R. No. 227398, March 22, 2017
[41] RULES OF COURT, Rule 130, Section 2:

> "Section 2. *Documentary Evidence.* Documents as evidence consist of writings, **recordings, photographs** or any material containing letters, words, **sounds,** numbers, figures, symbols, **or their equivalent,** or other modes of written expression offered as proof of their contents. **Photographs include still pictures, drawings, stored images, x-ray films, motion pictures or videos."**

due process[42], every accused has the right to meet the witnesses against them face to face.[43] The Rules of Court further clarify the accused's "right to meet" as the "right to confront and cross-examine" the witnesses against them at trial.

In the case of presenting and offering of forensic evidence, scientists who processed the pieces of evidence are obliged to testify in court as a matter of right for the accused. In addition, this will also allow the judge to have the opportunity to examine not only their credibility in the field of their supposed expertise but their findings as well:

> The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness are soon detected. ... The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which more or less control fear, love, have, envy, or revenge are all open to observation, noted and weighed by jury.[44]

Thus, aside from due process considerations on the part of the accused, calling the scientists and experts to the

[42] People vs. Abatayo, G.R. No. 139456, July 7, 2004
[43] Section 14(2), Article III, 1987 Constitution
[44] People vs. Estenzo, G.R. No. L-41166, August 25, 1976 *citing* Chief Justice Appleton in Wigmore on Evidence, p. 126

witness stand will enable the judge to see beyond the superficial aspects of the testimonies.

When called to testify, forensic scientists' testimonies concerning matters within their fields of expertise are generally admissible and afforded great respect by the courts:

> Section 52. Opinion of expert witness. – The opinion of a witness on a matter requiring special knowledge, skill, experience, training or education, which he or she is shown to possess, may be received in evidence.[45]

This rule on admissibility of expert opinions is rather an exception to the rule that mere opinions of witnesses are inadmissible as evidence in court.[46] In this jurisdiction, the court recognizes the expertise of forensic scientists and other professionals who have endured long years of studies and experience on their respective fields.

Be that as it may, courts are not bound by expert reports and testimonies. The trial court has the power to examine the witness and his/her testimony in relation to the issue. Anent this, several aspects may be considered by the court:

> a) ability and character of the witness;
>
> b) his actions upon the witness stand;

[45] RULES OF COURT, Rule 130, Section 52.

c) the weight and process of the reasoning by which he has supported his opinion;

d) his possible bias in favor of the side for whom he testifies;

e) the fact that he is a paid witness;

f) the relative opportunities for study and observation of the matters about which he testifies; and

g) any other matters which deserve to illuminate his statements. [46]

Hence, even if admissible, the weight of the testimony still depends on the court upon its examination. The court shall endeavor to assess the credibility of the witness and the relative weight and sufficiency of the testimony by using the above considerations.[47]

We now have fairly established that forensic evidence metamorphoses from object, to documentary, and ultimately to testimonial evidence. As an inevitable consequence, there is also a shift in the nature of the evidence—from an objective to a subjective one.

Subjectivity has no room in case of object evidence. Its physical appearance and tangible condition cannot lie before the courts; it is whatever the court perceives about it. However, the problem arises when the object evidence is already transformed into documentary and testimonial evidence where human intervention takes place. Scientists

[46] People vs. Tolentino, G.R. No. 70836, October 18, 1988
[47] Tabao vs. People, G.R. No. 187246, July 20, 2011

prepare the documents embodying the findings (documentary evidence) and talk about their findings in court (testimonial evidence).

No matter how objective forensic evidence ought to be, subjectivity still lurks in the background because forensic scientists speak on behalf of the evidence in the form of reports and testimonies. Since forensic scientists are inherently fallible just like any other persons, there will be possible errors and external influences that may come into play in their processing and analysis of evidence.

III. LAW ENFORCEMENT AND THE USE OF FORENSIC SCIENCE IN THE PHILIPPINES

The Philippine National Police (PNP) is a law enforcement agency in charge of peace and order in the country. As an adjunct to this function, the PNP has its own forensic division to aid them in building sound cases to be filed before the prosecutor and in court.

The PNP's forensic investigation is handled by their PNP Crime Laboratory.[48] Under the law, the crime laboratory shall serve as an administrative support unit of the PNP in charge of giving aid in investigation through the use of scientific processes:

> **Section 35.** ***Support Units.***
>
> x x x
>
> a) Administrative Support Units. – (1) Crime Laboratory. <u>There shall be established a central</u>

[48] Republic Act 6975, otherwise known as "Department of the Local Interior and Local Government Act of 1990."

> Crime Laboratory to be headed by a Director with the rank of chief superintendent, which shall provide[s] scientific and technical investigative aid and support to the PNP and other government investigative agencies.
>
> It shall also provide crime laboratory examination, evaluation and identification of physical evidences involved in crimes with primary emphasis on their medical, chemical, biological and physical nature.[49] (emphasis supplied)

In fulfillment of its mandate, the PNP Crime Laboratory performs a myriad of forensic services[50] which have proven key to criminal prosecution.

The PNP has the overarching duty in the administration of justice. They play indispensable roles in various stages of law enforcement commencing from the intelligence gathering, planning of and actual enforcement operations, investigation, gathering and processing of evidence, filing of cases before the prosecutor, and until the giving of testimony in court.

On the surface level, it would seem that incorporating forensic laboratories within their organization is a strategic measure in the performance of their noble duties. However, there lies an issue on independence and impartiality in the processing of evidence.

For the past years, the PNP has been under public scrutiny due to the spate of human rights violations in the

[49] Republic Act 6975, otherwise known as "Department of the Local Interior and Local Govern Act of 1990"
[50]Philippine National Police. *PNP Crime Laboratory Citizen's Charter*. n.d. https://www.pnp.gov.ph/images/Downloads/CLGServices.pdf.

guise of legitimate enforcement operations. This has been seen as brought about by the President's orders to crackdown suspected drug personalities and insurgents even at the expense of human rights[51] and accompanied by a promise of protection to the law enforcers who will abide by these orders.[52]

With the direction set by the President in law enforcement, we cannot help but question the autonomy of PNP forensic teams especially when their own personnel have their backs against the wall. Forensic laboratories run the risk of being manipulated to comply with their superior's orders—both from their immediate Heads of Office and the President—and to protect and favor their "kabaro". As a result, forensic processing of evidence is stripped of its integrity and reliability.

IV. HUMAN RIGHTS VIOLATIONS OF STATE FORCES IN THE PHILIPPINES

The United Nations High Commissioner for Human Rights' report characterizes the human rights situation in the Philippines as "…marked by an overarching focus on public order and national security, including on countering

[51] Ted Regencia, "'Kill Them': Duterte Wants to 'finish Off' Communist Rebels," Al Jazeera, last modified March 6, 2021, https://www.aljazeera.com/news/2021/3/6/kill-them-all-duterte-wants-communistrebels-finished; and Amnesty International, "Over 7,000 People Killed in Six Months in Philippines 'war on Drugs'," Amnesty Internation, Ltd, last modified March 27, 2017, https://www.amnesty.org.uk/philippines-president-duterte-war-on-drugsthousands-killed.

[52] Deutsche Welle, "UN Slams Philippine Police for Killing Nine Activists," DW.COM, accessed April 9, 2021, https://www.dw.com/en/un-slamsphilippine-police-for-killing-nine-activists/a-56819548.

terrorism and illegal drugs."[53] True enough, the current administration has been zeroing in on the war against drugs and insurgency.

However, despite the State's noble objectives, human rights have been gravely compromised:

> Four years into the Duterte administration, the human rights crisis in the Philippines deepens. Killings of alleged drug offenders and others suspected of committing crimes persist in a climate of impunity amid unceasing incitement to violence by the President. Attacks against activists perceived to be sympathetic to the Communist Party of the Philippines have surged and grown more brazen...[54]

Law enforcement agencies seem to have taken the apprehension and punishment of "suspects" into their own hands by resorting to means not properly sanctioned by legal processes, i.e., extra-judicial killings, arbitrary detention, vilification of dissenters, and persistent impunity.[55] But of course, these could not have been done by law enforcement without the blessing of the State, either through its orders or its negligence.

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[53] United Nations High Commissioner for Human Rights. "Human Rights Situation in the Philippines – Report of the United Nations High Commissioner for Human Rights." Last modified 2020. https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documen ts/A_HRC_44-22.docx.

[54] Amnesty International. ""My job is to kill" Ongoing human rights violations and impunity in the Philippines." p. 4, Amnesty International, Ltd. Last modified 2020. https://www.justice.gov/eoir/page/file/1325346/download.

[55] Amnesty International, ""My job is to kill" Ongoing human rights violations and impunity in the Philippines.", pp.4-25.

War against drugs

Former President Rodrigo Duterte has been infamous for his bloody war against drugs ever since his stint as a Davao City Mayor in 1988. When Duterte ran for President in 2016, he included in his platform the eradication of drugs (alongside corruption and crime) within 3-6 months from his assumption of office. He reaffirmed this promise by the time he assumed office in July 1, 2016, though the period would later be extended up to the end of his term in 2022.[56]

At the onset of his term, Duterte launched his anti-illegal drugs campaign called project "Double Barrel," the enforcement of which was lodged with the PNP.[57] The project had two components: Project HVT/LVT and Project Tokhang. The former entailed the intensified anti-illegal drugs operations, while the latter entailed the conduct of house-to-house visitations on suspected drug personalities to dissuade them on their illegal drug activities.[58]

The overall campaign received flak from the public because it was implemented "…at the expense of human rights, due process, rule of law, and accountability."[59] Collateral damages left thousands of people dead while treating the perpetrators with "near impunity." Other victims

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[56] Phelim Kine, "Philippine President Rodrigo Duterte's "War on Drugs"," Harvard International Review, last modified June 9, 2017, https://hir.harvard.edu/rodrigoduterte-war-on-drugs/.

[57] Philippine National Police Command Memorandum Circular No. 26-2016 (PNP
CMC No. 26-2016.

[58] Philippine National Police Command Memorandum Circular No. 26-2016 (PNP
CMC No. 26-2016.

[59] United Nations High Commissioner for Human Rights, *Situation of Human Rights in the Philippines*, (2020), p. 3, https://www.ohchr.org/Documents/Countries/PH/Philippines-HRC44-AEV.pdf.

were been relatively lucky enough to suffer only arbitrary detentions and deprivation of due process.

What makes the violations more appalling is that the "bloody" drug war has been given a hint of legitimacy. As can be gleaned in PNP CMC No. 26-2016[60], striking terms such as "negation" and "neutralization" of "drug personalities" are found in the circular.[61] Duterte was also vocal about his orders to employ force and brutality in actual operations; or worse, to kill drug personalities.

The PNP circular, accompanied by verbal orders from the President, might have led law enforcers to treat the circular as a permission to kill.[62] As a manifestation, law enforcers have even considered the number of persons killed during drug operations as accomplishments in the war against drugs. This has impelled the Supreme Court to infer the possibility that the killings might have been State-sponsored.[63]

Despite blatant human rights violations, the culture of impunity has crept into the status quo. Perpetrators of human rights violations—both vigilantes and state forces—remained untouchables under the Duterte administration. Police officers enjoyed the mantle of protection given by the President, while the vigilantes enjoyed the immediate protection given by the police.[64]

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[60] PNP Command Circular implementing Project Double Barrel
[61] United Nations High Commissioner for Human Rights, "Situation of Human Rights in the Philippines", p. 5.
[62] United Nations High Commissioner for Human Rights, "Situation of Human Rights in the Philippines", p. 5.
[63] *Petitioners v. Dela Rosa et al.*, notice of resolution, p. 48.
[64] Amnesty International, *If you are poor, you are killed" Extra Judicial Executions in the Philippines' "Drug War"*, (Peter Benenson House, 1 Easton Street, London, 2017), pp. 37-52, https://www.amnesty.org.uk/files/2017-

Police officers afford impunity due to non-existent or weak investigations not only within the PNP's organization, but also from other institutions—including the NBI—whose role supposedly was to "check and balance". Such fact was corroborated by a police officer belonging to an anti-illegal drugs unit upon interview by Amnesty International:

> But he [interviewee] said officers did not routinely hide their actions, whether summary executions or other human rights violations, because "we don't really need to, there aren't investigations."[65]

This situation creates an enabling culture that emboldens police officers to perpetrate abuses against other persons. In addition, police officers tend to stage the overall crime by planting evidence and falsifying incident reports to cover their tracks. In this connection, the UN Office of the High Commissioner for Human Rights (UNOHCR) had this alarming finding:

> On the basis of these reports, OHCHR found that the police had repeatedly recovered guns bearing the same serial numbers from different victims in different locations. OHCHR identified seven handguns with unique serial numbers. Each handgun appeared in at least two separate crime scenes, while two reappeared in five different crime scenes. The pattern suggests planting of evidence by police officers and casts doubt on the self-defence narrative, implying

04/ASA3555172017ENGLISH.PDF?9_73DdFTpveG_iJgeK0U13KUVFHKSL_X.

[65] Amnesty International, ""If you are poor, you are killed" Extra Judicial Executions in the Philippines' "Drug War"", p. 50.

that the victims were likely unarmed when killed.[66]

Implicating a person as a drug personality, coupled with the "nanlaban" narrative, seems sufficient to justify the killings. To make things worse, the victims who died during the operations were scapegoated by the police to afford impunity. Of course, it is easier for the police to pass the blame on the dead who cannot even testify otherwise.

On the part of the vigilantes, impunity is afforded to them because of police participation. Vigilantes may either be paid hired killers commissioned by the police or the police themselves under the guise of unidentified armed persons.[67] In any case, vigilantes are used by the police as a shield to resort to criminal acts in neutralizing suspected drug personalities. As expected, the police will neither incriminate themselves as culprits nor go after their commissioned killers because of the fear that the latter would incriminate the police later on. Thus, impunity sets in.

War against insurgency

Communist insurgency in the Philippines is one of the longest running insurgencies in Asia. It has been a primordial problem of several administrations for over half a century[68] and has resulted in the deaths of tens of thousands of combatants and civilians.[69] Many attempts, both peaceful and

[66] United Nations High Commissioner for Human Rights, "Human Rights Situation in the Philippines", p. 6.
[67] Amnesty International, "If you are poor, you are killed" Extra Judicial Executions in the Philippines' "Drug War", p. 33
[68] Prashanth Parameswaran, "What's Next for the Philippines Communist Insurgency Under Duterte?," The Diplomat, last modified March 31, 2020, https://thediplomat.com/2020/03/whats-next-for-the-philippines-communistinsurgency-under-duterte/.
[69] International Crisis Group, "The Communist Insurgency in the Philippines," Refworld | The Leader in Refugee Decision Support, last

violent, have been made by the government to end the insurgency; however, the insurgents have always refused to be subdued.

Some of the past administrations alternatively sought to settle matters at the negotiating table than to engage in bloody encounters in the field with the insurgents; unfortunately, none of them ever succeeded.[70] Despite these failed attempts, Duterte offered to open the negotiations anew, banking on his alleged ties with the left.[71]

Yet again, negotiations broke down when the CPP-NPA launched strings of attacks against government troops and civilians.[72] Duterte then formally ended peace negotiations with the NDF in November 23, 2017.[73] Barely 2 weeks after, in December 5, 2017, Duterte signed Proclamation 374[74] tagging the CPP-NPA as terrorist organizations because of their continued violence which sowed a condition of widespread fear among the populace.[75]

Duterte was left without any choice but to make a total 180-degree turn in his approach—from cordial dialogues to violent and brutal crackdowns. In relation to this, the military and police force were ordered by the President to kill and

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modified February 14, 2011, https://www.refworld.org/pdfid/4d5a310e2.pdf.

[70] Parameswaran, Prashanth, "What's Next for the Philippines Communist Insurgency Under Duterte?".

[71] Parameswaran, Prashanth, "What's Next for the Philippines Communist Insurgency Under Duterte?".

[72] Ruth Abbey Gita-Carlos, "Duterte Considers Communists As 'friends'," Philippine News Agency, last modified December 10, 2019, https://www.pna.gov.ph/articles/1088420.

[73] Through Proclamation 360

[74] Inked in December 5, 2017

[75] Pia Ranada, "Duterte Signs Proclamation Labeling CPP-NPA As Terrorist Group," Rappler, last modified December 5, 2017, https://www.rappler.com/nation/duterte-proclamation-communist-partyphilippines-new-peoples-army-terrorist-group.

finish off all communist rebels in the country.[76] A concomitant promise was given by Duterte in the state forces' performance of this order: "Do your duty, and if in the process you kill 1,000 persons because you are doing your duty, I will protect you."[77]

Both the order to kill and the promise of protection have been a good package deal for law enforcement agencies to resort to brutality, abuse, and other unlawful means to achieve the ends set by Duterte:

> Since the breakdown of peace talks between the government and the National Democratic Front of the Philippines, the political arm of the Communist Party of the Philippines, there has been a surge in human rights violations, including killings of activists accused of being linked to the communist insurgency in the country.[78]

As an offshoot of the operations, a spate of human rights violations has surfaced targeting dissenters and members of left-leaning organizations.

What makes the bloody operations against insurgents more alarming is the State's red-tagging of progressive groups, human rights defenders, and others on the left of the

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[76] Regencia, Ted, *'Kill Them': Duterte Wants to 'finish Off' Communist Rebels*.
[77] Deutsche Welle (www.dw.com), *UN Slams Philippine Police for Killing Nine Activists*.
[78] Amnesty International. "'"My job is to kill" Ongoing human rights violations and impunity in the Philippines", *p. 15* citing Alan Robles, The Philippines' communist rebellion is Asia's longest-running insurgency, South China Morning Post, 19 September 2019 https://www.scmp.com/weekasia/politics/article/3027414/explained-philippinescommunist-rebellion-asias-longest-running

political spectrum. Red-tagging is defined by Associate Justice Marvic Leonen as:

> "The act of labelling, branding, naming and accusing individuals and/or organizations of being left-leaning, subversives, communists or terrorists (used as) a strategy...by State agents, particularly law enforcement agencies and the military, against those perceived to be 'threats' or 'enemies of the State'."[79]

Red-tagged persons are pre-judged as to their affiliation with the rebel group without affording them due process. Persons included in the list become an identified target of the State in police and military operations without them knowing.

It has been proven in history that red-tagged individuals have been subjected to abuses and human rights violations. The most deplorable consequence of which would be death:

> "…prior to the killing of activists and peace consultants Zara Alvarez, Randall Echanis, and Randy Malayao, their names were included in the proscription petition filed with the Department of Justice in 2018, where over 600 individuals were identified with the CPP and NPA, and sought to be legally declared as terrorists. They were also red-tagged to both online and offline publics; in the provinces, there would be posters

[79] Antonio La Viña, "Criminalizing Red-tagging," Manila Standard, last modified December 8, 2020, https://manilastandard.net/mobile/article/341468.

would be put up bearing their names and faces and calling them terrorists."[80]

Some activists and members of progressive groups have suffered arbitrary detention for trumped up charges.[81] Meanwhile, others suffered enforced or involuntary disappearance.[82]

Even lawyers and judges have not been spared by the red-tagging and threats by the State. As of early 2021, a whopping figure of 61 lawyers, prosecutors, and judges had already been killed during Duterte's reign, with red-tagging noted as one of the causes.[83]

To cite recent incidents, the PNP blatantly requested a lower court for the names of lawyers representing personalities linked to the communist terror group.

The letter request clearly contained the words "mode of neutralization"[84] contemplating the intention to silence the named lawyers for defending their red-tagged clients.

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[80] La Viña, " Criminalizing Red-tagging."

[81] Amnesty International, ""My job is to kill" Ongoing human rights violations and impunity in the Philippines.", p. 17.

[82] Jadesz Gavilan, "What You Need to Know About Enforced Disappearances in the Philippines," Rappler, last modified August 29, 2018, https://www.rappler.com/newsbreak/iq/things-to-know-enforced-disappearancesphilippines.

[83] Amnesty International, "Surge in Killings of Lawyers and Judges Shows Justice System "in Deadly Danger" in the Philippines," Amnesty Internation, Ltd, last modified March 26, 2021, https://www.amnesty.org/en/latest/news/2021/03/philippines-surge-killings-lawyers/

[84] Mike Navallo, "SC: PNP Seeking from Calbayog RTC List of Lawyers Representing 'Communist-terrorist' Groups," ABS-CBN News, accessed May 2, 2021, https://news.abs-cbn.com/news/03/12/21/sc-pnpseeking-from-calbayog-rtc-list-of-lawyers-representing-communist-terroristgroups.

Another incident was the hanging of a banner showing the photo of a judge linking her to the communist-terror group. Apparently, the said judge dismissed the cases of left-leaning personalities by treating the evidence offered as inadmissible after declaring the search warrant used by law enforces as null and void.[85]

These actions of the State have caused threats against lawyers and a chilling effect in the whole legal profession; and according to the words of the Supreme Court *en banc*:

> To threaten our judges and our lawyers is no less than an assault to the Judiciary. To assault the Judiciary is to shake the very bedrock on which the rule of law stands.[86]

Unarguably, the administration of justice will gravely suffer when its agents would be hindered from performing their sworn duty to uphold the rule of law. Silencing the profession is a strategic move for the State; If it would happen, who else would be able to defend the rights of the abused if not the members of the bench and the bar. The State will all the more be emboldened to go on with their wrongful ways when the legal profession placed into oblivion.

In totality, brutality and violence in the crackdown of insurgents coupled with the red tagging of individuals are the recipes for disaster. Many innocent lives will suffer the collateral damages of stopping the insurgency. Persons are easily labeled as communists based on their leanings in the political spectrum, their dissents, and their support for the

[85] Nestor Corrales, "Lawmakers Urge SC to Look into Red-tagging of Mandaluyong RTC Judge," INQUIRER.net, last modified March 18, 2021, https://newsinfo.inquirer.net/1408313/sc-asked-to-look-into-red-tagging-of-judge.

[86] Statement issued by Supreme Court *en banc* with subject "A Statement of the Members of the Court *En Banc* Responding to Calls for Action on the Killings of Lawyers and Threats to our Judges" dated March 23, 2021.

abused. They may not even be aware that they are already targets of the State's neutralization and negation efforts. These pose grave consequences among the populace because: first, there is deprivation of due process because there is no opportunity to clear their names; second, there is a chilling effect in speeches which attempts to silence legitimate dissents; and third, there will be threats to life, liberty and security.[87]

V. COMMON DENOMINATOR IN WAR AGAINST DRUGS AND INSURGENCY: ABUSE IN LAW ENFORCEMENT

Both the drug war and war against insurgency share a common denominator: Rampant human rights violations committed by law enforcement agencies such as the PNP.

Duterte's orders to employ violence in eradicating drugs and insurgency were taken as a permission to resort to inhumane means. Consequently, law enforcers have assimilated such orders into their operations which gravely compromised human rights—many have died, suffered injuries, arbitrarily detained, and deprived of justice.

To make the orders more enticing, there have been promises of recognition and rewards[88] for accomplishments in neutralization and negation efforts and of protection[89] by the State.

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[87] La Viña, Antonio. "Criminalizing Red-tagging."
[88] CNN Philippines, "Duterte Promises Reward for Cops Who Kill Superiors Involved in Drugs," CNN, last modified November 7, 2018, https://cnnphilippines.com/news/2018/11/07/Duterte-drug-war-ninja-cops.html.
[89] Human Rights Watch, ""“License to Kill” Philippine Police Killings in Duterte's "War on Drugs"," Human Rights Watch, last modified July 13,

By inculcating the culture of violence and impunity within the PNP, it shall inevitably cause every part of the organization to be on board. When an agency is given a general direction—in this case the eradication of drugs and insurgency at all costs, all operating units are also steered towards the same direction. Enforcers, investigators, and forensic scientists alike, among others, will have to work hand in hand to comply with the orders of their superiors.

In illustration, when law enforcers conduct their dirty works in the field pursuant to superior orders, the natural tendency of internal investigating bodies and forensic scientists is to manipulate the results of the investigations in such a way that would favor their colleagues. This might be brought about by two possible reasons: threat to tenure and the existence of the "kabaro" system.

First, there is a threat to tenure against anyone who commits insubordination against their superiors. Bureaucracy has crept up on government agencies, including the PNP, for the longest time. Tracing from the top, the President appoints and gives orders to the highest official of the PNP—the PNP Chief. The defiance of the President's orders would endanger the tenure of the PNP Chief.

Moving onto the next level, the PNP chief relays the orders of the President to its subordinates. In replication, subordinates likewise have no option to not comply; otherwise, they run the risk of being removed from service.

Second, there exists the culture of "Kabaro system" in the PNP.[90] The culture breeds loyalty among personnel of

2017, https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killingsdutertes-war-drugs.

[90] Neil A. Mercado, "Gordon Says 'kabaro System' Must Stop Amid Rogue Cops Issue," INQUIRER.net, last modified November 6, 2019,

these law enforcement agencies. However, in reality, this is a blind loyalty at the expense of justice. If a "kabaro" commits irregularities, violations, or criminal acts, the other "kabaro" has the moral obligation to get the former off the hook, or if not, to just be silent about it.

Given the above reasons, the forensic laboratory of the PNP therefore is at risk of partiality. Instead of having a scientifically reliable output, results may be groomed in such a way that would favor either the orders of the superior or their "kabaros" in general. These are external influences that could contaminate forensic evidence and their corresponding analysis; the inevitable result of which would be erroneous prosecution, and ultimately miscarriage of justice.

VI. CONCLUSION

Ideally, forensic evidence is a tool to aid in the administration of justice. For it to achieve this end, it must retain its nature of objectivity. External influences should be set aside by law enforcers, investigators, and forensic scientists. Focus must be made on the science that specifically defines the procedure and the supposed outcome, without any room for subjectivity. Hence, forensic scientists must ensure that scientific procedure is faithfully observed and that analyses of evidence must be well-founded on science.

The PNP was given by President Duterte a general direction towards stemming insurgency and drugs, even if it entails compromising human rights. True enough, the police have lived up to these orders, resulting in human rights

https://newsinfo.inquirer.net/1186662/gordon-says-kabaro-system-must-stopamid-rogue-cops-issue.

violations. Victims are either killed because "nanlaban" or, if lucky to be left alive, arbitrarily arrested through incriminatory machinations.

Given the spate of human rights violations by law enforcement agencies, there lurks a danger of irregularity or subjectivity on the processing and analyses of data. Forensic scientists within the PNP may either be coerced or unduly influenced by their superior and peers to favor their position. As long as subjectivity exists, there will be failure in the administration of justice. It is imperative to detach all forensic processing of evidence from law enforcement agencies and lodge the function on an independent body.

As a conclusion, keeping forensic science as a good science in the current times requires forensic scientists to be independent and impartial in its dealings at all times. It is therefore recommended that the government must detach forensic laboratories from the organizational structure of law enforcement agencies like the PNP to avoid actual or any hint of subjectivity. Investigations must be done by an independent body to ensure that forensic science remains a relevant tool for the administration of justice. Should forensic laboratories remain incorporated in enforcement agencies, courts should exercise circumspection in dealing with these pieces of evidence, and vet not only their admissibility and relevance, but also their credibility.

THE JURIDICAL TREATMENT OF UNBORN CHILDREN IN PHILIPPINE LAW: HARMONIZING ARTICLES 40-41 OF THE CIVIL CODE OF THE PHILIPPINES WITH ARTICLE II, SECTION 12 OF THE 1987 CONSTITUTION

Cristina A. Montes

I. INTRODUCTION

Is the unborn child a person under Philippine law?

Article 40 of the Civil Code of the Philippines, which took effect on August 30, 1950,[1] states that birth determines personality, subject to some qualifications. The Supreme Court, in ***Geluz vs. Court of Appeals***,[2] has interpreted this provision to mean that the conceived but unborn child lacks legal personality.

On the other hand, Article II, Section 12 of the 1987 Constitution of the Philippines categorically provides that "the State xxx shall equally protect the life of the mother and the life of the unborn from conception." However, Article II, Section 12 of the 1987 Constitution does not categorically state that the unborn child is a person.

This paper investigates whether or not it is possible to harmonize Article 40 of the Civil Code of the Philippines and Article II, Section 12 of the 1987 Philippine Constitution without a direct amendment of the Civil Code. In doing so, this paper will analyze the legal texts in question, their history, and Philippine jurisprudence interpreting them.

[1] Ruben F. Balane, "The Spanish Antecedents of the Civil Code of the Philippines", in CIVIL CODE READER, 2005, 304.
[2] 2 SCRA 801 (1961).

Attention will also be given to the concept of "person" in relation to the concept of "juridicity", especially as it was expounded upon by the jurist Hervada. Relevant principles of statutory construction will also be referred to.

II. THE JURIDICAL CONCEPT OF "PERSON"

The Civil Code of the Philippines does not directly define the term "person". However, in his commentary on the Civil Code, Tolentino, citing several jurists, defines "person" as "any being, physical or moral, real or juridical and legal, susceptible of rights and obligations, or of being the subject of legal relations."[3] He also mentions that most writers on civil law consider personality as identical to juridical capacity.[4]

Article 37 of the Civil Code of the Philippines defines "juridical capacity" as "the fitness to be the subject of legal relations". The same provision says that juridical capacity "is inherent in every natural person and is lost only through death."

From these, "juridicity" is the defining characteristic of a person. But what is "juridicity", and what does it mean to be "juridical"?

Before discussing the essence of juridicity, a brief history of the concept is in order. The concept of juridicity began in Roman law. The word "juridical" comes from the Latin "ius" which means "law" but which also means "right".

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[3] 1 A. Tolentino, CIVIL CODE OF THE PHILIPPINES: COMMENTARIES AND JURISPRUDENCE, 153, (7TH ED., 1990).
[4] *Id.*, at 155.

It is the adjective that indicates what is characteristic of the *ius*, or what is just.[5]

"Ius" is also the root word of "justice", which is defined in the Institutes of Justinian as "*constans et perpetua voluntas ius suum cuique tribuendi*": "The habit of the will to give to each his right, that is, his own".[6] "Juridical", therefore, has to do with rights.

In relation to *ius*, Roman law also employed the terms *actio,* which referred to the possibility of obtaining a favorable judgment to pursue one's own interest or that to which one is entitled; and *obligatio,* which binds the debtor with a creditor and which the classical texts described as a *vinculum iuris*.[7]

Expounding on the relationship between *ius* and *actio*, later commentators on Roman law such as the glossators during the Middle Ages identified rights as that on which actions are founded. This gave rise to the concept of the juridical order as a system or constellation of rights.[8]

During the Enlightenment, there was a shift of emphasis from juridicity as a web of juridical relationships to the notion of "inherent rights". The juridical order was understood as nothing more than a delimitation and concretization of subjective rights. This was a translation of the notions of liberty and individual autonomy into juridical

[5] J. Hervada, *Critical Introduction to Natural Law*, 120 (Mindy Emons translation, 2006).
[6] *Id.*, at . xi-7,
[7] 1 L. Diez-Picazo and A. Gullon, SISTEMA DE DERECHO CIVIL, 213, (1992).
[8] *Ibid.*

terms.[9] In other words, the objective of the juridical order was to protect liberty and autonomy.

Since the Civil Code of the Philippines, as well as its predecessor, the Spanish Civil Code of 1889, is influenced both by classical Roman law and Enlightenment philosophy,[10] the notion of "person" in the Civil Code of the Philippines is likewise influenced by both intellectual trends.

Going back to the concept of *ius,* a thing becomes a right, that is, juridical, by virtue of its quality of being owed.[11] Rights have their origins in titles, which are the bases for which a thing is attributed to a subject as his or her own.[12] Titles may arise from various sources: Activity, contract, law, or nature.[13]

A juridical norm prescribes conduct which constitutes a just debt.[14] In other words, it is any rule of conduct, the compliance with which is an obligation of justice, whether it proceeds from the social authority or form the capacity for agreement on the part of persons, from the consent of the people, or from human nature.[15]

The juridical reality, however, does not only refer to juridical norms but to a web of juridical relationships which refer to natural or positive rights which human beings possess.[16]

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[9] *Ibid.*.
[10] Balane, *op. cit.*; Pacifico A. Agabin, *Philosophy of the Civil Code*, in CIVIL CODE READER, 222-249 (2005).
[11] Hervada, *op. cit.* note 5, at 30.
[12] *Id.*, at 34.
[13] *Id.*, at p. 34.
[14] *Id.*, at 122.
[15] *Id.*, at . 123.
[16] *Id.,* at 113.

The human capacity to enter into juridical relationships is a natural consequence of the social nature of human beings.[17] It is also a natural consequence of the human being's capacity to dominate his or her own being, such that all the goods inherent to his own being are the object of his or her dominion, as well as the corollary capacity of the human being to distribute things.[18]

According to Hervada, juridical relationships consist of three elements: The subjects (the holder of the right and the debtor), the binding relationship, and the content or juridical situations involved in the relationship.[19]

Applying the concept of juridicity to their discourse on the Civil Code of Spain of 1889, Diez-Picazo and Gullon identify the following elements of juridical relationships: a) the subjects, which are the persons between or among whom the relationship is established; and b) the object, which is the subject-matter of the relationship, such as the goods and services or interests to which the relationship refers.[20] They also refer to the content of a juridical relationship as the situation between the subjects with respect to powers and duties. Thus, every juridical relationship implies the power to demand from another a certain behavior or impose certain juridical consequences. It also implies the duty of the subject to adopt a determined conduct or behavior insofar as it is deemed necessary for the juridical order. [21]

An example to further illustrate the meaning of "juridical" is that of ownership. Once a person acquires

[17] *Id.,* at 113-114.
[18] *Id.,* at 51-55, 68-80.
[19] *Id.,* at p. 38.
[20] Diez-Picazo and Gullon, *op. cit.* note 7, at 217-218.
[21] *Id.,* at 218-219.

ownership of a thing through the means sanctioned by the law, he or she acquires certain rights that are protected by the law, the violation of which produces a cause of action. Thus, the person's relationship with the thing becomes governed by juridical order.[22]

Another example is the difference between marriage, which has been organized or regulated in the juridical order because such organization or regulation is necessary or is deemed necessary for the just order of the community, and friendship, which is not regulated but which may have incidental, indirect, or occasional juridical effects (for example, the duty of a judge to inhibit himself or herself if one of the parties to a case before him or her is a friend).[23]

It is in this light of the foregoing discussion of the concept of "juridicity" that the legal definition of "juridical capacity", and the notion of personality as being determined by juridical capacity, should be understood.

An important issue is whether personality, or fitness to be the subject of juridical relations, is inherent in every human being or is merely conferred by positive law, which is by human consensus.[24] Legal positivists posit that the fitness to be the subject of juridical relations is merely conferred by positive law.[25]

Indeed, there are rights under the juridical order that are purely positive and may even seem arbitrary (for example, the right to claim a tax deduction under certain conditions or the right to park in certain areas according to prevailing

[22] *Id.,* at 207.
[23] *Id.,* at 208-209.
[24] For a discussion of the distinction between natural and positive law, see Hervada, *op. cit.* note 5, at pp. 67-69.
[25] *Id.,* at 108-109.

traffic rules). However, as Hervada points out, it makes no sense to speak even of these rights if, in the first place, juridicity, or the capability to be the subject of rights and duties, is not natural to human beings. As an analogy, Hervada points out that even if there is an artificial and arbitrary element to the creation of languages, the creation of different languages is only possible because speech is natural to human beings. In the same manner, according to Hervada, even rights of purely positive origin only arise because it is natural to human beings to regulate their relationships with each other by allocating rights and duties.[26]

Another issue that arises – specifically in relation to the topic of this paper is: Given that the basis for the natural "juridicity" or personality of the human being is his or her dominion of himself or herself and all that are his or hers, what is the basis for recognizing personality in human beings who cannot exercise this dominion, such as minors or incompetents?

It is worth exploring this issue more deeply in another paper. For purposes of this paper, it suffices to distinguish between the capacity to exercise this dominion fully, and the innate capacity by nature for this dominion. The Civil Code of the Philippines implies this distinction in Article 37, where it distinguishes between juridical capacity and capacity to act,[27] and Article 38, where it clarifies that certain conditions such as minority are merely restrictions on capacity to act.[28]

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[26] *Id.*, at 103-116.

[27] Civil Code, Art 37: "Juridical capacity, which is the fitness to be the subject of legal relations, is inherent in every natural person and is lost only through death. Capacity to act, which is the power to do acts with legal effect, is acquired and can be lost."

[28] Civil Code, Art. 38: "Minority, insanity or imbecility, the state of being a deaf-mute, prodigality and civil interdiction are mere restrictions on

III. ARTICLES 40-41 OF THE CIVIL CODE OF THE PHILIPPINES

The Legal Texts

Article 40 of the Civil Code of the Philippines states:

> "Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided, it be born later with the conditions specified in the following article.

In turn, Article 41 of the Civil Code of the Philippines states:

> "For civil purposes, the fetus is considered born if it is alive at the time that it is completely delivered from the mother's womb. However, if the fetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb."

Explaining these provisions, Tolentino writes:

> "The existence of personality of natural persons depends upon birth. Birth means the removal of the foetus from the mother's womb; this may take place either

capacity to act, and do not exempt the incapacitated person from certain obligations, as when the latter arise from his acts or from property relations, such as easements."

> naturally or artificially by surgical means. Before birth, the foetus is not a person, but merely a part of the internal organs of the mother. However, because of the expectancy that it may be born, the law protects it and reserves its rights, making its legal existence, if it should be born alive, retroact to the moment of its conception.
>
> xxx The law considers the conceived child as born for all purposes favorable to it, if it is later born alive. Its personality, therefore, has two characteristics: (1) it is essentially limited, because it is only for purposes favorable to the child, and (2) it is provisional or conditional, because it depends upon the child being born alive later, such that if it is not born alive, its personality disappears as if it had never existed."[29]

In 1974, President Ferdinand E. Marcos enacted the Child and Youth Welfare Code, or Presidential Decree No. 603. Article 5 thereof provides:

> "The civil personality of the child shall commence from the time of his conception, for all purposes favorable to him, subject to the requirements of Article 41 of the Civil Code."

Although this provision pegs the commencement of civil personality at conception, as opposed to Article 40 of the Civil Code which pegs the commencement at birth, the

[29] Tolentino, *op. cit.* note 3, at 169.

provision still qualifies this with "for all purposes favorable to him" and subjects the personality of the unborn child to the conditions contained in Article 41 of the Civil Code.

Background of Articles 40-41 of the Civil Code

Articles 40-41 of the current Civil Code of the Philippines are amended versions of Articles 29-30 of the old Civil Code of the Philippines, which was the same Civil Code that was enacted in Spain in 1889.[30] The relevant articles from the Spanish Civil Code of 1889 read:

> "Artículo 29.
>
> El nacimiento determina la personalidad; pero el concebido se tiene por nacido para todos los efectos que le sean favorables, siempre que nazca con las condiciones que expresa el artículo siguiente.
>
> Artículo 30
>
> Para los efectos civiles, sólo se reputará nacido el feto que tuviere figura humana y viviere veinticuatro horas enteramente desprendido del seno materno."[31]

Article 41 of the current Civil Code of the Philippines removed the requirement in the old code that the child be born of "a human form", and added the requirement that a foetus must have had an intrauterine life of at least seven

[30] Balane, *op. cit.*, pp. 301-304. References to article numbers of the counterpart provisions to the current Civil Code of the Philippines in the Civil Code of Spain of 1889 are taken from the annotations to the 2002 Rex Book Store edition of the Civil Code of the Philippines .

[31] Spanish Civil Code of 1889 accessed at https://www.boe.es/eli/es/rd/1889/07/24/(1)/con on February 13, 2020.

months to be deemed to have been born if it dies within twenty four hours after its complete delivery from the maternal womb. The Code Commission, which drafted the current Civil Code of the Philippines, explained:

> "The child's birth alive, is the momentous and significant fact, not that it live (as formerly required by Art. 30 of the old code) twenty-four hours after birth. The old requisite of "a human form" was also discarded by the Code Commission, following all modern Codes. The Code of 1889 seemed to be the only one that required "a human form" and in that respect was quite extraordinary, as there are no monsters born of woman.
>
> The twenty-four hours required by the old Code is not required by a majority of the modern Codes. It is unjust to the child and to its heirs to require twenty-four hours (an arbitrary period) of life. There is also in the requirement as much temptation to simulate facts to defeat the child's rights as there is to assert them. The old article unfairly assumed that fake births were more likely than fake still-births.
>
> The second sentence avoids an abortion of a six month foetus from being considered as birth. In the case of a seven months old child, it is already well-formed and

> may live; in fact, many have grown up to maturity. Hence such child is viable."[32]

Historically, Article 30 of the Spanish Civil Code of 1889 (and, by extension, Article 41 of the Civil Code of the Philippines) arose as a solution to the problem of the rights of heirs who are conceived but unborn at the time of the death of the decedent.[33]

Roman law gave certain protections to the conceived but unborn child for purposes of succession. For example, Roman law provided for the preservation of the properties that a conceived but unborn child could inherit, until the child was born.[34] Roman law formulated the principle that "*Nasciturus pro iam nato habetur quotiens de commodis eius agitur"*,[35] which was adopted in the Western legal tradition.[36]

During the drafting of the Spanish Civil Code of 1889, the principle was proposed but only for purposes of succession. The first edition of the Spanish Civil Code provided, *"el nacimiento determina la personalidad, sin perjuicio de los casos en que la ley retrotrae a una fecha anterior los derechos del nacido."*.[37] The final version of the Spanish Civil Code of 1889 provides, *"El nacimiento determina la personalidad; pero el concebido se tiene por nacido para todos efectos que le sean favorable, siempre que nazca con las condiciones que expresa el articulo siguiente,*"

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[32] Francisco R. Capistrano, *Preface & Appendices to Civil Code of the Philippines with Comments and Annotations*, in CIVIL CODE READER 315-316 (2005).
[33] Diez-Picazo and Gullon, *op. cit.* Note 7, at 227.
[34] See, for example, Alvaro D'Ors, ELEMENTOS DE DERECHO ROMANO PRIVADO, 182 (2014).
[35] "The unborn is deemed to have been born to the extent that his own benefits are concerned."
[36] Diez-Picazo and Gullon, *op. cit.* note 7, at 227.
[37] "Birth determines personality, without prejudice to the cases in which the law retroacts the rights of the child to an earlier date." (Unofficial translation.)

which is the predecessor of Article 41 of the current Civil Code of the Philippines.[38]

Treatment of the Conceived but Unborn Child in the Spanish Civil Code of 1889 and in the Current Civil Code of the Philippines

Among the situations that illustrate the second sentence of Article 40 of the current Civil Code of the Philippines are donations and succession.

Article 742 of the current Civil Code of the Philippines provides that "Donations made to conceived and unborn children may be accepted by those persons who would legally represent them if they were already born". Its counterpart in the Spanish Civil Code of 1889 is Article 627 thereof.

Commenting on Article 627 of the Spanish Civil Code, Diez-Picazo writes that in cases of donations to conceived and unborn children that are accepted by the qualified person, the donor does not lose ownership of the thing donated, which takes place only upon the birth of the recipient. However, the donor has the obligation to preserve the thing until the birth or stillbirth of the recipient.[39]

Diez-Picazo and Gullon stress, however, that Article 627 of the Spanish Civil Code allows the donations to be accepted by "those persons who would legally represent them if they were already born" ("*le representaría si viviese"*). The reason for this phraseology, according to Diez-Picazo and Gullon, is that unborn children do not yet have legal representatives since they are not yet persons.[40]

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[38] Diez-Picazo and Gullon, *op. cit.* note 7, at 227-229.
[39] *Ibid.*
[40] *Id.*, at 227-228.

With regard to succession, the second paragraph of Article 1025 of the current Civil Code of the Philippines provides that "A child already conceived at the time of the death of the decedent is capable of succeeding provided it be born later under the conditions prescribed in Article 41.

This provision has no counterpart in the Spanish Civil Code of 1889. However, the Spanish Civil Code of 1889 contains its own provisions addressing the situation of a pregnant widow, with regard to succession. Articles 959 to 962 provide for the suspension of the division of the inheritance until the birth, miscarriage or until it is verified that the widow woman was not really pregnant. They also provide for the administration of goods in the interim, and measures to prevent the presumption of either the birth, stillbirth, or viability of the child. [41]

According to Diez-Picazo and Gullon, although the law refers to a pregnant widow, these provisions should apply even if the pregnant woman is not the widow of the decedent. They should apply, for example, in the case where a grandfather bequeaths by will one third of his property to his grandchildren and not to their parents, and at the moment of his death there exists a conceived but unborn child.[42]

Diez-Picazo and Gullon also comment that while the phrase "for purposes favorable to it" includes acquisitions by gratuitous title, it can include other cases such as for example, the right to be indemnified for damages suffered during the period of gestation.[43] They cite an a sentence dated June 5, 1926 in which the Spanish Supreme Court ruled that a pregnant widow should be considered a widow with

[41] *Id.*, at 229.
[42] *Id.*, at 229.
[43] *Id.*, at 228.

children for purposes of determining employment compensation for work-related accident suffered by the father.[44]

Rulings of the Philippine Supreme Court on Articles 40-41 of the Civil Code of the Philippines

In ***De Jesus vs. Syquia***,[45] which the Philippine Supreme Court decided in 1933, the plaintiff begot a child with the defendant. The latter wrote letters to a priest recognizing the child as his own before the child was born. According to the Supreme Court, the letters could be the basis of an action for the compulsory acknowledgment of the child by the defendant after its birth.

In ***Geluz vs. CA***[46], which was decided by the Philippine Supreme Court in 1961, the plaintiff, seeking damages, sued the doctor who performed three abortions on his wife. The trial court awarded damages in the amount of P3,000.00. The Court of Appeals sustained the award. The doctor appealed to the Supreme Court, which reversed the award. According to the Supreme Court, the lower courts erred in awarding the minimum award of damages for the death of a person because the fetus did not yet have legal personality.

In ***Quimiging vs. Icao***,[47] which the Philippine Supreme Court decided in 1970, the defendant had sexual intercourse with the plaintiff through force and intimidation, and got her pregnant as a result. The plaintiff claimed support in court. The defendant moved to dismiss, claiming that there has been no allegation that a child had been born. The trial court granted the defendant's motion. Thereafter, the plaintiff

[44] *Id.*, at . p. 228.
[45] 58 Phil. 866 (1933).
[46] 2 SCRA 801 (1961).
[47] 34 SCRA 132 (1970).

moved to amend complaint to allege that as a result of the sexual intercourse, she gave birth to a baby girl. The trial court denied the motion since original complaint had no cause of action. The Supreme Court reversed the trial court's ruling. According to the Supreme Court, a conceived child is given provisional personality, and has the right to support from its father. (However, the Supreme Court also held that in any event, independently of the child's right to support, the plaintiff herself had a cause of action against the defendant under Articles 21 and 2219 (3) and (10) of the Civil Code.)

In ***Continental Steel Manufacturing Corporation vs. Montaño***,[48] Hortillano, an employee of the petitioner, filed a claim for paternity leave, bereavement leave, and death and accident insurance for his dependent pursuant to the provisions of the collective bargaining agreement ("CBA") between his union and the petitioner. The claim was based on the death of his unborn child in the 38th week of pregnancy. The petitioner granted his claim for paternity leave but denied his claims for bereavement leave and other death benefits. The petitioner argued that the CBA did not contemplate the death of an unborn child without legal personality. According to the petitioner, two elements were required for the entitlement to the benefits: death, and the status as a legitimate dependent child, none of which existed in Hortillano's case. However, the voluntary arbiter decided in favor of Hortillano. The Court of Appeals affirmed the voluntary arbiter's decision. The Supreme Court likewise affirmed the decision. According to the Supreme Court, the civil personality of the unborn child was not the issue since life is not synonymous to civil personality. The Supreme Court held that the Civil Code does not provide that only those who have acquired life could die. Holding that the

[48] 603 SCRA 621 (2009).

unborn already has life, the Supreme Court held that the cessation thereof even prior to the child being delivered qualifies as death. With regard to the issue of the child being a dependent, the Supreme Court emphasized that the CBA does not require that a child dependent must have been born or must have acquired civil personality; thus, "child" must be understood in its more general sense, which includes the unborn fetus in the mother's womb.

Notably, the ***Continental Steel Manufacturing Corporation*** ruling did not explicitly state that the unborn child in the womb has civil personality and in fact has taken care to distinguish "life" from "civil personality".[49] However, in ***Imbong vs. Ochoa***,[50] the Supreme Court cited the ruling in the ***Continental Steel Manufacturing*** ruling to support its statement that "Even in jurisprudence, an unborn child has already a legal personality."[51]

IV. ARTICLES II, SECTION 12 OF THE 1987 CONSTITUTION

The Legal Text and its Background

Article II, Section 12 of the 1987 Philippine Constitution provides:

> "The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of

[49] *Id.*, at 633.
[50] 721 SCRA 146 (2014).
[51] *Id.,* at 295-296.

> the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the government."

In including this provision in the 1987 Constitution of the Philippines, the framers intended to eliminate any possibility that Congress would pass a law or the Supreme Court would ever render a decision that would make abortion legal at any stage of pregnancy, from conception to birth.[52]

In arguing for reckoning of the beginning of life from the moment of fertilization, the member of the Constitutional Commission who proposed the provision cited scientific facts:

> "MR. VILLEGAS:
>
> I propose to review this issue in a biological manner. The first question that needs to be answered is: Is the fertilized ovum alive? Biologically [sic] categorically says yes, the fertilized ovum is alive. *First of all*, like all living organisms, it takes in nutrients which it processes by itself. It begins doing this upon fertilization. *Secondly*, as it takes these nutrients, it grows from within. *Thirdly*, it multiplies itself at a geometric rate in the continuous process of cell division. All these processes are vital signs of life. Therefore,

[52] Maria Concepcion S. Noche, *The Unborn in the Womb of the Philippine Constitution: The Mantle of Protection under the Philippine Legal System,* 1 U. Asia & Pac. L.J., 17, 2018.

> there is no question that biologically the fertilized ovum has life.
>
> The second question is: Is it human? Genetics gives an equally categorical "yes". At the moment of conception, the nuclei of the ovum and the sperm rupture. *As* this happens 23 chromosomes from the ovum combine with 23 chromosomes of the sperm to form a total of 46 chromosomes. A chromosome of 46 is found only – and I repeat, only in human cells. Therefore, the fertilized ovum is human.
>
> Since these questions have been answered affirmatively, we must conclude that if the fertilized ovum is both alive and human, then, as night follows day, it must be human life. Its nature is human."[53]

In the drafting of the final constitutional provision, the phrase "from the moment of conception" and not "from the moment of fertilization" was used because the phrase "fertilized ovum" "may be beyond the comprehension of some people", according to one of the commission members.[54] However, it is clear from the record of the Constitutional Commission that the intent was to reckon the beginning of life from the moment of fertilization:

> "REV. RIGOS:
>
> Yes, we think that the word 'unborn' is sufficient for the purpose of writing a

[53] Record of the Constitutional Commission, Volume 4, September 12, 1986, 596.
[54] Record of the Constitutional Commission, Volume 4, September 12, 1986, 669.

> Constitution, without specifying 'from the moment of conception.'
>
> MR. DAVIDE:
>
> I would not subscribe to that particular view because according to the Commissioner's own admission, he would leave it to Congress to define when life begins. So, Congress can define life to begin from six months after fertilization; and that would be very, very dangerous. It is now determined by science that life begins from the moment of conception. There can be no doubt about it. So we should not give any doubt to Congress, too."[55]

Jurisprudence Interpreting Article II, Section 12 of the 1987 Constitution

In ***Imbong vs. Ochoa***,[56] the Supreme Court, citing the Record of the Constitutional Commission, interpreted "from conception" to reckon the beginning of life from fertilization. In that case, the Supreme Court struck down as unconstitutional Section 3.01 (a) of the Implementing Rules and Regulations of the Reproductive Health and Responsible Parenthood Law which defined "abortifacient" as

> "xxx any drug or device that primarily induces abortion or the destruction of a fetus inside the mother's womb or the prevention of

[55] Record of the Constitutional Commission, Volume 4, September 12, 1986, 800.
[56] 721 SCRA 146 (2014).

> the fertilized ovum to reach and be implanted in the mother's womb upon the determination of the Food and Drug Administration (FDA)"

and Section 3.01 (j) of the same rules which defined "contraceptive" as

> "xxx any safe, legal, effective and scientifically proven modern family planning method, device, or health product, whether natural or artificial, that prevents pregnancy but does not primarily destroy a fertilized ovum or prevent a fertilized ovum from being implanted in the mother's womb in doses of its approved indication as determined by the Food and Drug Administration (FDA)".

According to the Supreme Court,

> "xxx There is a danger that the insertion of the qualifier 'primarily' will pave the way for the approval of contraceptives which may harm or destroy the life of the unborn from conception/fertilization in violation of Article II, Section 12 of the Constitution. With such a qualification in the RH-IRR, it appears to insinuate that a contraceptive will only be considered as an 'abortifacient' if its sole known effect is abortion or, as pertinent here, the prevention of the implantation of the fertilized ovum."[57]

In its analysis, the Supreme Court took into consideration the portions of the Record of the

[57] *Id.*, at 311.

Constitutional Commission pertinent to Article II, Sec. 12 of the 1987 Constitution as well as medical authorities that life begins at fertilization.[58]

V. ANALYSIS AND CONCLUSION

To reiterate, the Civil Code of the Philippines reckons the beginning of civil personality at birth, albeit considering a fetus to have been born for purposes beneficial to it subject to certain conditions.

On the other hand, the 1987 Constitution of the Philippines recognizes the right to life of the unborn from the moment of conception. The 1987 Constitution does not, however, explicitly state that the unborn from the moment of conception is already a legal person.

Nevertheless, with the exception of ***Geluz vs. Court of Appeals***,[59] jurisprudence to date has tended towards protecting conceived but unborn children. Under Article 8 of the Civil Code, such rulings are part of the legal system of the Philippines.

However, given that the doctrine of *stare decisis* applies only when the facts of a future case are essentially the same as those in the judicial precedent in question, the clear literal meaning of Articles 40-41 of the Civil Code, and the rule that the judiciary cannot change the law but is constrained to merely interpret and apply the law,[60] it is impossible to predict how the Supreme Court might decide future cases involving the same issues but with different

[58] *Id.*, at 302-303.
[59] 2 SCRA 801 (1961).
[60] See ***Victoria vs. COMELEC,*** 229 SCRA 269, 273 (1994).

essential facts. For this reason, the recognition of the conceived but unborn child as a person is still tenuous under Philippine law, despite Article II, Section 12 of the 1987 Constitution.

With regard to the interpretation of Articles 40-41 of the Civil Code of the Philippines, it is a principle of statutory construction that a statute must be interpreted so as to be in harmony with the Constitution and other laws.[61] Where a statute seems to be in conflict with the Constitution, but a construction that is in harmony with the Constitution is possible, that construction should be preferred.[62] It is, likewise, a principle of statutory construction that when laws are in conflict with one another, every effort must be exerted to reconcile them, and that the two laws must be absolutely incompatible, and a clear finding thereof must surface, before the inference of implied repeal may be drawn.[63]

Therefore, there are two possible positions with regard to harmonizing Articles 40-41 of the Civil Code of the Philippines and Article II, Section 12 of the 1987 Constitution.

The first position is that there is, in reality, no conflict between the two provisions because Articles 40-41 of the Civil Code of the Philippines refer to the capacity to be the subject of juridical relations while Article II, Section 12 of the 1987 Constitution refers to an inherent right, the right to life.

This position is supported by the record of the Constitutional Commission:

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[61] See ***Career Executive Service Board et al vs. Civil Service Commission***, 819 SCRA 482, 523 (2017).
[62] See ***Resident Marine Mammals of the Protected Seascape Tañon Strait et al vs. Reyes,*** 756 SCRA 513, 558 (2015).
[63] See *id.*, at 557.

"MR. SUAREZ:

Madam President, there is another legal point, but I hope the Commissioner and I can thresh this out together for the benefit of the other Commissioners. In our Civil Code, whenever we speak of a child, we speak in the context of a born child so much so that we have what are known as legitimate, illegitimate, legitimated, spurious and adulterous children and children born of rape incidents. These all speak in terms of a born child, and these born children necessarily enjoy legal rights pursuant to the constitutional position that every person has the right to right, liberty, property and the pursuit of happiness.

MR. VILLEGAS:

Yes, Madam President.

MR. SUAREZ:

Going to these unborn children who will be given protection from the moment of conception, does the Commissioner have in mind giving them also proprietary rights, like the right to inheritance?

MR. VILLEGAS:

No, Madam President. Precisely the question of whether or not that unborn is a legal person who can acquire property is a secondary question. The only right that we

> want to protect from the moment of conception is the right to life, which is the beginning of all the other rights.
>
> MR. SUAREZ:
>
> So, it is only the right to life.
>
> MR. VILLEGAS:
>
> Yes, it is very clear, only the right to life.
>
> MR. SUAREZ:
>
> That is the only right that is constitutionally protected by the State.
>
> MR. VILLEGAS:
>
> That is right, Madam President."[64]

The problem with this position is that it is impossible to speak of rights – even inherent rights – without the elements of a juridical relation: A subject of the right, an object of the right, as well as the content of the obligation towards the subject of the right. In other words, the idea of rights – even inherent rights – is premised upon the subject of the right possessing personality, that is, the capacity to be the subject of juridical relations. Article II, Section 12 implies a juridical relation at least between the conceived but unborn child, on one hand, and the State, on the other.

[64] Record of the Code Commission, Vol. IV, pp. 682-683.

A related problem is that under the principle of *"Ubi jus, ibi remedium"*,[65] (where there is a right, there is a remedy) the right granted under Article II, Section 12 of the 1987 Constitution would, in effect, be non-existent without a remedy for the violation of the right. But to enforce a right in court, one must be endowed with personality, since under Rule 3, Section 1 of the Rules of Court, only natural or juridical persons or entities authorized by law may be parties to a civil action. (With regard to minors, Rule 3, Section 5 of the Rules of Court allows a minor to sue or be sued with the assistance of his father, mother, guardian, or if he has none, a guardian *ad litem*).

Another problem with this position is whether it is just to recognize that a conceived but unborn child has the right to life, and at the same time to deny him or her rights such as the right to own property, the right to inherit, the right to damages for injuries suffered, among others, especially since other minors are afforded these rights. An equal protection issue may be involved,[66] although the discussion of this is beyond the scope of this paper.

The second possible position is that Article II, Section 12 of the 1987 Constitution impliedly amended Articles 40-41 of the Civil Code of the Philippines. Reasons for this position are the arguable incompatibility between both provisions under the *verba legis* principle of statutory construction;[67] the principle the inference of implied repeal

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[65] ***Republic vs. Sereno***, G.R. No. 237428, May 11, 2018.
[66] CONST., art. III, sec. 1 provides that no person shall be denied the equal protection of the laws. It is interpreted in jurisprudence to mean that that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed. (See, for example, ***Bartolome vs. SSS***, G.R. No. 192531, July 11, 2019.)
[67] For an enunciation of the *verba legis* principle, see ***Bolos vs. Bolos,*** 634 SCRA 429, 437 (2010).

may be drawn if the two laws are absolutely incompatible and there is a clear finding thereof.

The implications of this position are radical and far-reaching. It would mean, for example, that if a man dies while his wife is pregnant with his child, and the child is eventually born after an intra-uterine life of less than seven months and dies within twenty-four hours after being delivered from the mother's womb, the child nevertheless inherits from the father. Upon his or her death, the child in turn transmits this inheritance to his or her heirs.[68]

However, there is no legal authority explicitly and categorically stating that Article II, Section 12 of the 1987 Constitution has repealed and amended Articles 40-41 of the Civil Code of the Philippines. In fact, as stated above, the drafters of the 1987 Constitution explicitly clarified that the recognition of the right to life of the unborn in Article II, Sec. 12 of the Constitution does not necessarily imply granting them other rights such as the right to inherit (at least, not without an amendment of the relevant provisions of the current Civil Code of the Philippines).[69] While there is a statement in ***Imbong vs. Ochoa***[70] that "[e]ven in jurisprudence, an unborn child already has legal personality", the issue in that case was whether certain provisions of the Reproductive Health and Responsible Parenthood Act violates the right to life, and not whether the conceived but unborn child has "legal personality" understood as the right to be the subject of juridical relations—as in the Civil Code of the Philippines. To reiterate, the Philippine case cited in support of the assertion that an unborn child already has

[68] CIVIL CODE, Arts. 777 and 1025 paragraph 1.
[69] Supra note 63.
[70] 721 SCRA 146, 295-296 (2014).

legal personality carefully distinguished between "life" and "civil personality".

That having been said, there are a lot of protections for the conceived but unborn child under Philippine law and jurisprudence, as mentioned throughout this paper.

Nevertheless, legislative or constitutional amendment to explicitly recognize the conceived but unborn child as a person in Philippine law would eliminate doubts about the status of the conceived but unborn child in Philippine law, and would promote his or her full juridical protection. The explicit and unconditional recognition of the legal personality of the conceived but unborn child – thus recognizing his or her capacity to be the subject of juridical relations – would be a step towards promoting justice, defined as "*constans et perpetua voluntas ius suum cuique tribuendi*". Indeed, justice demands that the conceived but unborn child also be given what is his or her own.