IBP JOURNAL

VOL. 46
ISSUE NO.2

JULY
2021

THE OFFICIAL PUBLICATION OF THE
INTEGRATED BAR OF THE PHILIPPINES

IBP JOURNAL
INTEGRATED BAR OF THE PHILIPPINES

VOLUME 46, ISSUE 2
(July 2021)

BOARD OF GOVERNORS

DOMINGO EGON Q. CAYOSA
Chairman of the Board

BURT M. ESTRADA
Executive Vice President &
Governor for Eastern Mindanao Region

DOROTEO LORENZO B. AGUILA
Governor for Northern Luzon

BABY RUTH F. TORRE
Governor for Central Luzon

ELEAZAR S. CALASAN
Governor for Greater Manila

ERIC C. ALAJAR
Governor for Greater Manila

GIL G. TAWAY IV
Governor for Bicolandia

GINA H. MIRANO-JESENA
Governor for Western Visayas

JAMES JAYSON J. JORVINA
Governor for Eastern Visayas

NATIONAL OFFICERS

DOMINGO EGON Q. CAYOSA
National President

GRACE P. QUEVEDO-PANAGSAGAN
National Treasurer

JAYSON P. LOPEZ
Assistant National Treasurer

ROLAND B. INTING
National Secretary

JOSE ANGEL B. GUIDOTE, JR.
Assistant National Secretary

ERIC C. ALAJAR
National Director for Legal Aid

MARIE FE GALVEZ-GARCIA
National Executive Director for Administration

SHEENALYN R. TENGCO
National Executive Director for Administration

FLORIMON G. BERNARDO
National Executive Director for Planning

RANDALL C. TABAYOYONG
Director for Bar Discipline

EMERICO O. DE GUZMAN
Legal Counsel

ALICIA A. RISOS-VIDAL
Liaison Officer

ROAN I. LIBARIOS
Editor in Chief, IBP Journal

CONTENTS

IBP Journal (ISSN 0118-9247) is an official publication of the Integrated Bar of the Philippines.

Subscription Rates (inclusive of postage):
Php 1,000.00 (local)
US $20.00 (foreign individual)
US $25.00 (foreign institution)

Editorial Office
Integrated Bar of the Philippines
15 J. Vargas Avenue, Ortigas Center, Pasig City 1600
Telephone: (+632) 8631-3018 • Fax: (+632) 8634-4696
Website: www.ibp.ph • Email: publications@ibp.ph

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

Consistent with its historical praxis of subjecting to critical examination the timely and relevant political law issues of our time, the IBP Journal in this edition confronts questions on the parameters of the President's borrowing power, the constitutional duty to disclose information on the President's health, and the dimensions of free speech in the age of social media.

However, beyond these weighty subjects within the province of political law, this issue of the IBP Journal carries on the tradition of fostering scholarly understanding of various fields of law, this time presenting insightful articles on the principles of international commercial contracts and the rules on treaty observation and interpretation.

In *Constitutional Parameters of the President's Borrowing Powers: A Peek on the Philippines-China Loan Negotiations and Deals*, Ronel U. Buenaventura explores the power of the President, as chief architect of foreign policy, in the exercise of the constitutional power to contract and guarantee loans on behalf of the Philippines. Within the framework of national and foreign policy goals and the safeguards imposed by the 1987 Constitution, the author advocates the exercise of the President's borrowing power that ensures that foreign debts to be shouldered by the Filipino people are not only lawful but also well-justified.

In *#NasaanAngPangulo: A De Leon v. Duterte Dissent*, Prof. Dante Gatmaytan challenges the recent ruling in *De Leon v. Duterte*. The author tackles the historical context that influenced the framers of the Constitution to impose the duty to disclose information on the President's health, the proper remedy to compel production of such information, and the far-reaching legal and institutional implications of the cited decision.

In *Social Media and the New Free Press*, Charles Janzen C. Chua deliberates on whether social media and the user-generated content therein can be considered the "new free press." Taking into account the constitutionally imposed protections of free speech and freedom of the press, the author explores the differences between social media and traditional news media and between traditional journalists and "regular" social media users, while focusing on whether user-generated content can legally be considered news in the traditional sense.

In *Philippine Contract Law in Global Business and Global Crisis: A Comparison between the Treatment of the Rebus Sic Stantibus Doctrine in the Philippine Civil Code and in the UNIDROIT Principles of International Commercial Contracts*, Cristina A. Montes discusses *rebus sic stantibus* in the context of the UNIDROIT Principles of International Commercial Contracts vis-à-vis Philippine domestic law, with special focus on the provisions of the Civil Code.

In *To Apply or to Construe: Observance and Interpretation of Treaties*, authors and career diplomats J. Eduardo Malaya and Crystal Gale Dampil-Mandigma guide readers through the rules on treaty observation and interpretation by States. Beginning with a brief history on the origin of modern treaties, the authors examine various key principles such as *pacta sunt servanda* and the interplay of international and domestic laws. The authors also discuss how such interpretative rules have been received, treated, and applied in Philippine treaty practices and jurisprudence.

Through these articles of timely and relevant scholarship, the IBP Journal seeks to continue serving as a platform for critical thinking on various issues in political law, and likewise, deeper understanding of other realms of law.

CONSTITUTIONAL PARAMETERS OF THE PRESIDENT'S BORROWING POWERS: A PEEK ON THE PHILIPPINES-CHINA LOAN NEGOTIATIONS AND DEALS

Abstract

As the chief architect of foreign policy and affairs, the President plans, designs, and executes. The 1987 Constitution vested him with plenary foreign relations powers, save only for some limitations for specific foreign relations powers, such as those placed on his borrowing powers. The initiation of the Build! Build! Build! Program of President Duterte saw the exercise of the President's borrowing powers into much action, seeking to fund the flagship infrastructure projects through foreign loans. Challenged as unconstitutional, however, are two Philippines-China loan agreements involving the Chico River Pump Irrigation Project and the New Centennial Water Source – Kaliwa Dam Project, prompting an examination of the constitutional parameters of the President's borrowing powers and how these will play a vital role in on-going or future negotiations on foreign loans not only with China but also with all other countries.

CONSTITUTIONAL PARAMETERS OF THE PRESIDENT'S BORROWING POWERS: A PEEK ON THE PHILIPPINES-CHINA LOAN NEGOTIATIONS AND DEALS

Ronel U. Buenaventura[*]

> *The quagmire that is the foreign debt problem has especially confounded developing nations around the world for decades. It has defied easy solutions acceptable both to debtor countries and their creditors. It has also emerged as cause celebre for various political movements and grassroots activists and the wellspring of much scholarly thought and debate.*
>
> – Justice Tinga[1]

INTRODUCTION

Any animated discussion on Philippine contemporary foreign debt cannot successfully evade the topic of its origin which can easily be traced back to the Marcos regime. The Marcos presidency incurred foreign loans of U.S.$24.6 billion,

[*] The author serves under the Investigation and Enforcement Department of the Anti-Money Laundering Council (AMLC) Secretariat. Prior to that, he worked in the Bangko Sentral ng Pilipinas and the Office of the Solicitor General. He obtained his bachelor's and master's degrees in the University of the Philippines – Diliman and his Bachelor of Laws from Bulacan State University, where he graduated Magna Cum Laude and class valedictorian. In the 2015 Bar Examinations, he placed 10th.

He teaches various law subjects in Bulacan State University and Tarlac State University. In 2018, he presented his paper *Congruence of Philippine Commercial Laws with China's The Belt and The Road Initiative* in Guangxi University for Nationalities, China.

[1] Constantino v. Cuisia, 509 Phil. 486 (2005).

which interest the Philippine economy could ill afford to pay.[2] The debt service of foreign loans then was included in the annual appropriations bill at more than 40% thereof.[3] Under the excuse of "economic recovery," the Aquino administration that toppled the Marcos regime incurred additional foreign loans and has assigned 47% of its budget for foreign loan service then amounting to U.S.$29 billion.[4] Since then, the Philippines has always allocated in its general appropriations law a substantial percentage of its total budget to service foreign debt, while, at the same time, continually incurs additional foreign loans through contracts and guarantees to augment its national budget. Spearheading the contracting and guaranteeing of additional foreign loans is the President, who, as the chief architect of foreign policy, is clothed by no less than the 1987 Constitution with the borrowing powers.

I. THE CHIEF ARCHITECT OF FOREIGN AFFAIRS

Since every state has the capacity to interact with and engage in relations with other sovereign states, it is but logical that every state must vest in an agent the authority to represent its interests to those other sovereign states.[5] In the Philippines, this agent is its President. By constitutional fiat and by the intrinsic nature of his or her office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his or her "*dominance in the field of foreign relations is (then)*

[2] 3 A. Padilla, The 1987 Constitution of the Republic of the Philippines with Comments and Cases 265 (1989).
[3] 2 A. Padilla, The 1987 Constitution of the Republic of the Philippines with Comments and Cases 263 (1989).
[4] 3 A. Padilla, *op. cit. supra* note 2 at 265.
[5] Saguisag v. Executive Secretary, 777 Phil. 280 (2016).

conceded."[6] Wielding vast powers and influence, his or her conduct in the external affairs of the nation is "*executive altogether."*[7] As such chief architect, the President acts as the country's mouthpiece with respect to international affairs; accordingly, the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations.[8] Verily, the rationale of this presidential agency is aptly explained, *viz.:*

> The conduct of foreign relations is full of complexities and consequences, sometimes with life and death significance to the nation especially in times of war. It can only be entrusted to that department of government which can act on the basis of the best available information and can decide with decisiveness. X x x It is also the President who possesses the most comprehensive and the most confidential information about foreign countries for our diplomatic and consular officials regularly brief him on meaningful events all over the world. He has also unlimited access to ultra-sensitive military intelligence data. In fine, the presidential role in foreign affairs is dominant and the President is traditionally accorded a wider degree of discretion in the conduct of foreign affairs. The regularity, nay, validity of his actions are adjudged under less stringent standards, lest their judicial repudiation lead to breach of an international obligation, rupture of state relations, forfeiture of confidence, national

---

[6] BAYAN v. Executive Secretary, 396 Phil. 623, 663 (2000), citing Cortes, The Philippine Presidency a Study of Executive Power 195 (2nd ed.)

[7] *Id.,* citing Cruz, Philippine Political Law 223 (1995 ed.).

[8] Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain, 589 Phil. 387 (2008), citing Pimentel v. Executive Secretary, 501 Phil. 304, 313 (2005).

embarrassment and a plethora of other problems with equally undesirable consequences.[9]

The President's extensive foreign relations power, however, is neither absolute nor illimitable as it is circumscribed by the safeguards under the 1987 Constitution. Foremost among these is the mandate under Section 7, Article II which provides the strict duty to pursue an independent foreign policy, and in the relations of the Philippines with other states, the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination. Moreover, Section 2, Article II calls for the faithful adherence to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

The 1987 Constitution likewise employed the principle of checks and balances to ensure that the President's foreign relations power is tempered. While each department of the government has exclusive cognizance of matters within its jurisdiction and is supreme within its own sphere, it does not follow from the fact that the these powers are to be kept separate and distinct that the 1987 Constitution intended them to be absolutely unrestrained and independent of each other; the 1987 Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government.[10] In specific constitutional provisions, the President's foreign relations power is limited, or at least shared, as in Section 2 of Article II on the conduct of war; Sections 20 and 21 of

---

[9] Vinuya v. Executive Secretary, 633 Phil. 538, 570 (2010), quoting the Dissenting Opinion of then Assoc. Justice Reynato S. Puno in Secretary of Justice v. Lantion, 379 Phil. 165, 233-234 (2004).

[10] Re: COA Opinion on the Computation of the Appraised Value of the Properties Purchased by the Retired Chief/Associate Justices of the Supreme Court, 692 Phil. 147 (2012).

Article VII on foreign loans, treaties, and international agreements; Sections 4(2) and 5(2)(a) of Article VIII on the judicial review of executive acts; Sections 4 and 25 of Article XVIII on treaties and international agreements entered into prior to the 1987 Constitution and on the presence of foreign military troops, bases, or facilities.[11]

Considering the President's broad foreign relations power, what this Article will discuss is the President's power to contract or guarantee foreign loans on behalf of the Philippines, which will be done in relation to and within the factual milieu of the Philippines-China loan negotiations and previously closed accords.

II. THE PROJECTS TO BE FUNDED

Foreign loans are incurred as a means to an end. In case of the Duterte administration, that end is to finance its priority infrastructure projects through the loans to be obtained as part of official development assistance scheme with foreign countries and international financial institutions.

i. The "Build! Build! Build!" Program

In its 2017-2022 Public Investment Program, the National Economic and Development Authority ("NEDA") itemized the rolling list of priority programs and projects to be implemented by the government within the medium period term of 2017 to 2022. These priority programs and projects are aimed at contributing to the achievement of the societal goal and targets in the Philippines's development plan. The financing thereof will be variously sourced from national government financing, partnership with the private

[11] Saguisag v. Executive Secretary, *supra* at 5.

sector or the public-private partnership scheme, and official development assistance, which could either be in the form of grants and/or loans from development partners.[12]

As stated in the 2017-2022 Public Investment Program, among the top priorities of the government to sustain inclusive economic growth, generate new jobs, and improve the quality of life in both urban and rural communities is the acceleration of infrastructure development.[13] To effectuate this, President Duterte initiated his flagship infrastructure project so-called the "Build! Build! Build!" Program ("Program").[14] As the lack of infrastructure has long been cited as the Achilles' heel of Philippine economic development, this Program aims to be the centerpiece of the Duterte administration that aims to usher the "Golden Age of Infrastructure" in the Philippines. The Program, thus, seeks to accelerate public infrastructure expenditure from an average of 2.9 percent of gross domestic product during the Aquino regime to about 7.3 percent at the end of the Duterte administration. This will cost around PhP8 trillion to PhP9 trillion from 2016 to 2022 to address the huge infrastructure backlog in the country.[15] The Program is expected to grow the economy, reduce poverty, and solve congestion in Metro Manila,[16] by intensifying investments on public infrastructure whilst addressing implementation bottlenecks, ensuring readiness of infrastructure programs and projects in the pipeline, enhancing the absorptive capacities of the

---

[12] 2017-2022 Public Investment Program. https://www.neda.gov.ph/wp-content/uploads/2017/01/PIP-2017-2022-as-of-10042018.pdf. Last accessed 02 September 2020.

[13] *Id.*

[14] DuterteNomics unveiled. 18 April 2017. https://pcoo.gov.ph/dutertenomics-unveiled/. Last accessed 02 September 2020.

[15] Build Build Build Projects. https://scad.gov.ph/build-build-build/. Last accessed 02 September 2020.

[16] DuterteNomics unveiled, *op. cit. supra* note 14.

implementing agencies in project preparation, development, and implementation.[17]

Of the priority infrastructure projects and programs, the NEDA approved the adoption of 75 high-impact infrastructure flagship projects that represent the major capital undertakings that the government will implement within the medium term. These projects are envisioned to enhance the connectivity and the promotion of growth centers outside the urban-industrial region centered around Metro Manila, and are expected to significantly contribute to the Program.[18]

The Congressional Policy and Budget Research Department of the House of Representatives noted that the Duterte administration seeks to finance the majority of the Program through official development assistance and the national budget as compared to the previous Aquino administration when the bulk of infrastructure projects was funded by public-private partnership agreements. To break down, 57 projects amounting to PhP2 trillion will be financed through official development assistance either through loan or grant from the donor country or multilateral institution; 12 projects amounting to PhP138.5 billion through national government budget, and five projects amounting to PhP23.3 billion through public-private partnership. Of the 57 projects up for official development assistance financing, 12 will be funded by China with a combined indicative cost of PhP300.8 billion. Although Japan will finance only about six projects, the combined cost, however, is almost four times than that of China at PhP996.3 billion.[19]

---

[17] See note 12, *supra*.
[18] *Ibid.*
[19] Build! Build! Build! (BBB) Program. Facts in Figures. Congressional Policy and Budget Research Department House of Representatives. March 2019 (No. 7).

Two of the 57 projects for official development assistance are the Chico River Pump Irrigation Project ("Irrigation Project") and New Centennial Water Source – Kaliwa Dam Project ("Kaliwa Dam Project"), which are both funded by loans obtained from China. As both loan agreements concluded on these projects sparked controversies for having been allegedly obtained in violation of the 1987 Constitution, additional emphasis will be given thereon.

ii. The Chico River Pump Irrigation

The first large-scale infrastructure project to be financed by the China under the Duterte administration, the Irrigation Project aims to irrigate 8,700 hectares of land in the provinces of Kalinga and Cagayan, [20] thereby providing substantial and timely delivery of water supply for irrigation in support of agricultural development[21] benefitting 4,350 farmers and their families.[22] The Irrigation Project comes with a hefty price tag of PhP4.3 billion, with about PhP3.6 billion to be loaned from the state-owned China Export-Import Bank as an official development assistance.[23] For this purpose, the Government of the Republic of the Philippines, acting through the Department of Finance, and the Export-Import Bank of China ("Export-Import Bank") entered into an

---

https://cpbrd.congress.gov.ph/images/PDF%20Attachments/Facts%20in%20Figures/FF2019-07_BUILD_BUILD_BUILD.pdf. Last accessed 03 September 2020.

[20] Understanding The Problematic Chico River Pump Irrigation Project. 05 April 2019. https://thedefiant.net/understanding-the-problematic-chico-river-pump-irrigation-project/. Last accessed 03 September 2020.

[21] Whereas Clause D, Irrigation Project Loan Agreement. *See* copy in https://www.dof.gov.ph/?wpdmdl=23113. Last accessed 03 September 2020.

[22] Colmenares exposes 'onerous,' 'one-sided' loan agreement between PH, China. 01 March 2019. https://cnnphilippines.com/news/2019/3/1/chico-river-pump-irrigation-project-china-philippines-colmenares.html. Last accessed 03 September 2020.

[23] Understanding The Problematic Chico River Pump Irrigation Project, *op. cit. supra* note 20.

agreement titled *Preferential Buyer's Credit Loan Agreement on The Chico River Pump Irrigation Project* dated 10 April 2018 ("Irrigation Project Loan Agreement"), signed by Secretary of Finance Carlos G. Dominguez III for the Philippines and Ambassador Extraordinary and Plenipotentiary Zhaojian Hua for Export-Import Bank.

Under the conditions and utilization of the loan facility of the Irrigation Project Loan Agreement, the Export-Import Bank shall grant the Philippines a loan facility in an aggregate principal amount not exceeding USD62,086,837.82,[24] with interest of two percent per annum,[25] with a maturity period of 20 years, among which the grace period shall be seven years and the repayment period shall be 13 years.[26] The Philippines is also mandated to pay management fee in the amount of 0.3% or USD186,260.51 in one lump sum[27] and commitment fee equivalent to 0.3% per annum, to be paid semi-annually to Export-Import Bank calculated on the undrawn and uncanceled balance of the loan facility.[28]

In his statement dated 26 February 2019, Bayan Muna Chairman and then senatorial candidate for the May 2019 midterm elections Neri Colmenares lambasted the Irrigation Project Loan Agreement as a "*disaster for the Philippines*," describing it "*onerous*" and "*one-sided*."[29] Among the grounds cited by Colmenares were, first, the two percent interest rate is exceedingly high compared to loans offered by other countries which only charge 0.25 percent per year; second, there are other fees and charges, such as the management fee

---

[24] *Preferential Buyer's Credit Loan Agreement on The Chico River Pump Irrigation Project*, Article 2.1.
[25] *Id.,* Article 2.2.
[26] *Id.,* Article 2.3.
[27] *Id.,* Article 2.5.
[28] *Id.,* Article 2.6.
[29] Colmenares exposes 'onerous,' 'one-sided' loan agreement between PH, China, *op. cit. supra* note 20.

and commitment fee; third, China has demanded that the loan will be paid in full without retention, dictating that the payment must already be included in the General Appropriations Act; fourth, China will not pay any taxes or charges for the entire interest income it earns from the loan; fifth, China wants a Chinese firm to be the contractor for the Irrigation and, since a Chinese company would only hire Chinese nationals as workers, this will further lead to the displacement of Filipino workers; sixth, the Irrigation Project Loan Agreement does not allow immunity of the Philippines's patrimonial rights which could allow China to take control of the same should the Philippines fail to pay the loan.[30] Bayan Muna Representative Carlos Zarate added another ground in that the Irrigation Project Loan Agreement provides that any delay or default in payment should be settled under Chinese law in a tribunal in China, thereby making the Philippines lose from the start, even if China caused a delay or committed a breach of contract.[31] Even former Supreme Court Senior Associate Justice Antonio Carpio warned that *"[i]n case of default by the Philippines in repayment of the loan, China can seize, to satisfy any arbitral award in favor of China, 'patrimonial assets and assets dedicated to commercial use' of the Philippine government."*[32]

In response to the allegations, the Department of Finance assured the public that the Irrigation Project Loan Agreement was reviewed, negotiated, and approved by the Interagency Committee composed of the Department of Justice, the *Bangko Sentral ng Pilipinas* ("BSP"), and the

---

[30] Chico River irrigation deal hit for 'highly favoring' China. 27 February 2019. https://www.gmanetwork.com/news/money/economy/686384/chico-river-irrigation-deal-hit-for-highly-favoring-china/story/. Last accessed 03 September 2020.

[31] Colmenares exposes 'onerous,' 'one-sided' loan agreement between PH, China, *op. cit. supra* note 20.

[32] China could seize gas in Reed Bank if PH can't pay loans – Carpio. 24 March 2019. https://globalnation.inquirer.net/173827/china-could-seize-gas-in-reed-bank-if-ph-cant-pay-loans-carpio#ixzz5jKFDwSk7. Last accessed 03 September 2020.

Department of Finance.[33] The Department of Finance added that considering the Philippines' credit history and its law that automatically appropriates funds for debt servicing, it is "*highly unlikely*" for the Philippines and China to reach the arbitration process over the heavily contested Agreement as the country has always been a responsible borrower.[34]

Whatever the explanation of the Duterte Administration was, the same did not prevent Colmenares, Zarate, and other lawmakers, and concerned groups to file the *Petition for Prohibition* dated 04 April 2019 against President Duterte and the concerned agencies to declare the Irrigation Project Loan Agreement as unconstitutional for violating the provision on the right to information of Filipinos on foreign loans contracted by the government; being approved not prior but after-the-fact by the Monetary Board; being conditioned on the signing of a contractor's agreement awarding the Irrigation project to a Chinese construction firm and doing away with the procurement laws of the country and the Filipino First Policy; hauling the Philippines to a Chinese arbitration tribunal, officiated by Chinese arbitrators using Chinese laws; and containing express waiver of sovereign immunity over the State's patrimonial assets in favor of a foreign government.[35]

---

[33] $62-M China-PH irrigation project screened before approval: DOF. 02 March 2019. https://www.pna.gov.ph/articles/1063392. Last accessed 03 September 2020.

[34] DOF: PH, China highly unlikely to reach arbitration over Chico River project loan. 27 March 2019. https://business.inquirer.net/267491/dof-ph-china-highly-unlikely-to-reach-arbitration-over-chico-river-project-loan. Last accessed 03 September 2020.

[35] The case is pending with the Supreme Court docketed as G.R. No. 245981 entitled *Neri J. Colmenares, Bayan Muna Partylist Representative Carlos Isagani T. Zarate, Anakpawis Partylist Representative Ariel B. Casilao, Gabriela Women's Partylist Representative Emerenciana A. De Jesus, Gabriela Women's Partylist Representative Arlene D. Brosas, Act Teachers Partylist Representative Antonio L. Tinio, Act Teachers Partylist Representative Francisca L. Castro, Kabataan Partylist Representative Jane I. Elago, Kilusang Magbubukid ng Pilipinas Chairperson Danilo H. Ramos, and Elma A. Tuazon v. Rodrigo R. Duterte, President of the Republic of the Philippines, Executive Secretary Salvador C. Medialdea, Department of Finance Secretary Carlos G. Dominguez III,*

iii. The New Centennial Water Source – Kaliwa Dam

The controversy haunting the Philippines-China loan agreement involving the Irrigation Project was just the start. Barely a month after the filing of the *Petition for Prohibition* to assail the constitutionality of the Irrigation Project Loan Agreement, Colmenares, Zarate, and other lawmakers, most of whom joined in the said *Petition for Prohibition*, and concerned groups filed another petition, *Petition for Prohibition* dated 08 May 2019, this time to declare as unconstitutional the *Preferential Buyer's Credit Loan Agreement on the New Centennial Water Source – Kaliwa Dam Project* ("Kaliwa Dam Loan Agreement").[36]

As background, Kaliwa Dam Project, like the Irrigation Project, is one of the priority infrastructure projects and

---

National Economic and Development Authority Secretary Ernesto M. Pernia, Department of Justice Secretary Menardo I. Guevarra, National Irrigation Administration Administrator Ricardo R. Visaya. See the Facebook post of Colmenares dated 04 April 2019 outlining the grounds relied upon for the grant of the petition in *https://www.facebook.com/ColmenaresPH/posts/here-is-a-summary-of-the-supreme-court-petition-vs-the-chico-river-irrigation-pu/2128385970532452/.* Last accessed 08 September 2020. *See also* Colmenares, groups ask SC to stop Chinese-funded Chico River project. https://newsinfo.inquirer.net/1103055/colmenares-groups-ask-sc-to-stop-chinese-funded-chico-river-project. Last accessed 08 September 2020.

[36] The case is pending with the Supreme Court docketed as G.R. No. 246594 entitled *Neri J. Colmenares, Bayan Muna Partylist Representative Carlos Isagani T. Zarate, Anakpawis Partylist Representative Ariel B. Casilao, Gabriela Women's Party Representative Emmi A. De Jesus, Gabriela Women's Party Representative Arlene D. Brosas, Act Teachers Party-list Representative Antonio L. Tinio, Act Teachers Party-list Representative France L. Castro, Kabataan Partylist Representative Sarah Jane I. Elago, Casey Anne Cruz, Francisca Tolentino, April Porteria, Jose Leon A. Dulce, Maria Finesa Cosico, Fr. Alex Bercasio, CSSR, v. Rodrigo R. Duterte, President of the Republic of the Philippines, Executive Secretary Salvador C. Medialdea, Metropolitan Waterworks and Sewerage System Administrator Reynaldo V. Velasco, Department of Finance Secretary Carlos G. Dominguez III, National Economic and Development Authority Secretary Ernesto M. Pernia, Office of the Government Corporate Counsel Elpidio J. Vega, Department of Justice Secretary Menardo I. Guevarra.*

programs identified by NEDA, the funding of which will be sourced through official development assistance, specifically by loan obtained from China. The Kaliwa Dam Project is a new water source to be constructed to meet the increasing demand of the people of Metro Manila, Rizal and Quezon affecting an estimate of 17.46 million people or 3.49 million households, by constructing another dam and to reduce total dependence on the Angat Dam.[37] With Metropolitan Waterworks and Sewerage System ("MWSS") as project proponent, the Kaliwa Dam Project, with project cost of PhP12.189 billion, aims to produce a design and complete the construction of a 60-meter high dam and a 27.70 kilometer raw water conveyance tunnel within a period five years from 2019 to 2023,[38] to be undertaken by China Energy Engineering Corporation Limited, a Chinese contractor.[39]

Funding the majority of the expenses for the Kaliwa Dam Project is the Kaliwa Dam Loan Agreement dated 20 November 2018 entered by the MWSS and the Export-Import Bank and signed by Reynaldo V. Velasco as Administrator of MWSS and Hu Xiao Lian as Chairman of Export-Import Bank. Under the conditions and utilization of the loan facility of the Kaliwa Dam Loan Agreement, which are substantially similar to that of the Irrigation Project Loan Agreement, the Export-Import Bank shall grant the MWSS a loan facility in an aggregate principal amount not exceeding

---

[37] Frequently Asked Questions. https://mwss.gov.ph/projects/new-centennial-water-source-kaliwa-dam-project/frequently-asked-questions/. Last accessed 09 September 2020.

[38] New Centennial Water Source-Kaliwa Dam Project Environmental Impact Statement (July 2019). https://emb.gov.ph/wp-content/uploads/2019/08/Kaliwa-Dam_EIS.pdf. Last accessed 09 September 2020. *See* Frequently Asked Questions, *op. cit. supra* note 37.

[39] *Preferential Buyer's Credit Loan Agreement on the New Centennial Water Source – Kaliwa Dam Project*, Whereas Clause G. *See* copy in https://www.dof.gov.ph/?wpdmdl=23115. Last accessed 09 September 2020.

USD211,214,646.54,[40] representing 85% of the financing needs of the Kaliwa Dam Project,[41] with interest of two percent per annum,[42] with maturity period of 20 years, among which the grace period shall be seven years and the repayment period shall be 13 years.[43] The Philippines is also mandated to pay management fee in the amount of 0.3% or USD633,643.94 in one lump sum[44] and commitment fee equivalent to 0.3% per annum, to be paid semi-annually to Export-Import Bank calculated on the undrawn and uncanceled balance of the loan facility.[45]

Colmenares asserted that the Kaliwa Dam Loan Agreement is invalid because it contains onerous conditions that are detrimental to the Filipino people, claiming that *"[t]he Preferential Buyer's Credit Loan Agreement between the MWSS (Metropolitan Waterworks and Sewerage System) and China pertaining to the Kaliwa Dam Project is as onerous as the exposed Chico Dam Loan Agreement."*[46] In the *Petition for Prohibition* dated 08 May 2019, the Kaliwa Dam Loan Agreement was assailed as unconstitutional for the grounds substantially the same as those in the Irrigation Project Loan Agreement, namely, for being violative of the constitutional provision of the right to information of Filipinos on foreign loans contracted by the government; being approved not prior but after-the-fact by the Monetary Board; financing a project awarded to a pre-selected Chinese contractor in violation of constitutional preference to qualified Filipinos and existing procurement laws; hauling the Philippines to a

[40] *Id.,* Article 2.1.
[41] *Id.,* Whereas Clause I.
[42] *Id.,* Article 2.2.
[43] *Id.,* Article 2.3.
[44] *Id.,* Article 2.5.
[45] *Id.,* Article 2.6.
[46] Colmenares to question Kaliwa Dam project before SC. https://newsinfo.inquirer.net/1098825/colmenares-to-question-kaliwa-dam-project-before-sc. Last accessed 09 September 2020.

Chinese arbitration tribunal, officiated by Chinese arbitrators using Chinese laws; and containing express waiver of sovereign immunity over the State's patrimonial assets in favor of a foreign government.[47]

III. THE CONSTITUTIONAL PARAMETERS ON BORROWING POWERS

Having laid down the factual backdrop of the concluded loan agreements between Philippines and China, it is now ripe to make a disquisition on the constitutional parameters on the President's borrowing powers. References may be made to the Irrigation Project Loan Agreement and the Kaliwa Dam Loan Agreement but discussion on the merits of the two petitions for prohibition assailing them is avoided altogether in view of the principle of sub judice. This rule restricts comments and disclosures pertaining to judicial proceedings to avoid prejudging the issue, influencing the court, or obstructing the administration of justice; a violation of the rule renders one liable for indirect contempt.[48] Moreover, this disquisition is narrowed down to focus on the two (2) constitutional provisions directly and specifically limiting or regulating the foreign loan borrowings by the President, namely Section 20, Article VII and Section 21, Article XII. Constitutional provisions which may indirectly or incidentally affect the President's borrowing powers will not be highlighted but may be discussed in passing.

A. Section 20, Article VII

[47] *See Petition for Prohibition* dated 08 May 2019.
[48] Romero v. Estrada, 602 Phil. 312 (2009).

Directly delimiting the President's borrowing powers is Section 20, Article VII of the Constitution, which provides in full:

> The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decision on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

A *erbal egis* reading of the provision enables the President to contract or guarantee foreign loans on behalf of the Republic of the Philippines but imposes a twin-requirement thereon: (i) prior concurrence of the Monetary Board and (ii) subject to limitations as may be provided by law.

i. Contract or Guarantee of Foreign Loans

The 1987 Constitution is crystal clear in holding that foreign loans can be obtained by the President on behalf of the Philippines through contracting or guaranteeing the same. On one hand, loans are transactions wherein the owner of a property allows another party to use the property and where customarily, the latter promises to return the property after a specified period with payment for its use, called interest.[49] As understood in the Civil Code, by the contract of

[49] Constantino v. Cuisia, *supra* at 1.

loan involving money, one of the parties delivers to another money, upon the condition that the same amount of the same kind and quality shall be paid.[50] On the other hand, to guarantee is to assume a suretyship obligation; to agree to answer for a debt or default.[51] Foreign loans guaranteed by the Philippines may thus cover publicly-guaranteed private sector loans. These loans are foreign loans or borrowings that are guaranteed by public sector entities such as government-owned and -controlled corporations, government financial institutions, and local government units.[52]

In *Constantino v. Cuisia*,[53] the Supreme Court explained the nature of foreign loans as contracted or guaranteed by the President on behalf of the Philippines, *viz.:*

> Loans are transactions wherein the owner of a property allows another party to use the property and where customarily, the latter promises to return the property after a specified period with payment for its use, called interest. On the other hand, bonds are interest-bearing or discounted government or corporate securities that obligate the issuer to pay the bondholder a specified sum of money, usually at specific intervals, and to repay the principal amount of the loan at maturity. The word "bond" means contract, agreement, or guarantee. All of these terms are applicable to the securities known as bonds. An investor who purchases a bond is lending money to the issuer, and the bond represents the issuer's contractual promise to pay interest and repay principal according to specific terms. A short-term bond is often called a note.

---

[50] Civil Code, art. 1933.

[51] Black's Law Dictionary 820 (10th ed.).

[52] Manual of Regulations on Foreign Exchange Transactions (06 December 2019), p.104. http://www.bsp.gov.ph/downloads/Regulations/MORFXT/MORFXT.pdf. Last accessed 13 September 2020.

[53] 509 Phil. 486 (2005).

> The language of the Constitution is simple and clear as it is broad. It allows the President to contract and guarantee foreign loans. It makes no prohibition on the issuance of certain kinds of loans or distinctions as to which kinds of debt instruments are more onerous than others. This Court may not ascribe to the Constitution meanings and restrictions that would unduly burden the powers of the President. The plain, clear and unambiguous language of the Constitution should be construed in a sense that will allow the full exercise of the power provided therein. It would be the worst kind of judicial legislation if the courts were to misconstrue and change the meaning of the organic act.

Hence, when the President contracts a foreign loan on behalf of the Philippines, he or she enters into a contract with foreign entity wherein that foreign entity allows the Philippines to use the money with the promise to return the property after a specified period with interest, as payment for its use. On the other hand, when the President guarantees a foreign loan, he or she assumes on behalf of the Philippines a suretyship obligation or agrees to answer for a debt or default involving loans of private nature. As there are no preferences under the 1987 Constitution, the President appears to be at liberty to choose whether to contract or guarantee foreign loans and its kind and nature.

At issue also in *Constantino* is whether, based on the language of the 1987 Constitution, the President's borrowing powers may be validly delegated to his subordinates. The Supreme Court remarked that by legislative fiat – Republic Act No. 245, as amended by Presidential Decree No. 142, s. 1973, or *An Act Authorizing the Secretary of Finance to Borrow to Meet Public Expenditures Authorized by Law, and For Other Purposes* – and the doctrine of qualified political

agency, the President's borrowing powers may be validly delegated, to wit:

> If, as petitioners would have it, the President were to personally exercise every aspect of the foreign borrowing power, he/she would have to pause from running the country long enough to focus on a welter of time-consuming detailed activities – the propriety of incurring/guaranteeing loans, studying and choosing among the many methods that may be taken toward this end, meeting countless times with creditor representatives to negotiate, obtaining the concurrence of the Monetary Board, explaining and defending the negotiated deal to the public, and more often than not, flying to the agreed place of execution to sign the documents. This sort of constitutional interpretation would negate the very existence of cabinet positions and the respective expertise which the holders thereof are accorded and would unduly hamper the President's effectivity in running the government.
>
> Necessity thus gave birth to the doctrine of qualified political agency, later adopted in V*illena v. Secretary of the Interior* from American jurisprudence, *viz*:
>
> > With reference to the Executive Department of the government, there is one purpose which is crystal-clear and is readily visible without the projection of judicial searchlight, and that is the establishment of a single, not plural, Executive. The first section of Article VII of the Constitution, dealing with the Executive Department, begins with the enunciation of the principle that "The executive power shall be vested in a

> President of the Philippines." This means that the President of the Philippines is the Executive of the Government of the Philippines, and no other. The heads of the executive departments occupy political positions and hold office in an advisory capacity, and, in the language of Thomas Jefferson, "should be of the President's bosom confidence" (7 Writings, Ford ed., 498), and, in the language of Attorney-General Cushing (7 Op., Attorney-General, 453), "are subject to the direction of the President." Without minimizing the importance of the heads of the various departments, their personality is in reality but the projection of that of the President. Stated otherwise, and as forcibly characterized by Chief Justice Taft of the Supreme Court of the United States, "each head of a department is, and must be, the President's alter ego in the matters of that department where the President is required by law to exercise authority" (Myers vs. United States, 47 Sup. Ct. Rep., 21 at 30; 272 U. S., 52 at 133; 71 Law. Ed., 160).

As it was, the backdrop consisted of a major policy determination made by then President Aquino that sovereign debts have to be respected and the concomitant reality that the Philippines did not have enough funds to pay the debts. Inevitably, it fell upon the Secretary of Finance, as the *alter ego* of the President regarding "the sound and efficient management of the financial resources of the Government," to formulate a scheme for the

implementation of the policy publicly expressed by the President herself.

Nevertheless, there are powers vested in the President by the Constitution which may not be delegated to or exercised by an agent or *alter ego* of the President. Justice Laurel, in his *ponencia* in *Villena*, makes this clear:

> Withal, at first blush, the argument of ratification may seem plausible under the circumstances, it should be observed that there are certain acts which, by their very nature, cannot be validated by subsequent approval or ratification by the President. There are certain constitutional powers and prerogatives of the Chief Executive of the Nation which must be exercised by him in person and no amount of approval or ratification will validate the exercise of any of those powers by any other person. Such, for instance, in his power to suspend the writ of habeas corpus and proclaim martial law (PAR. 3, SEC. 11, Art. VII) and the exercise by him of the benign prerogative of mercy (par. 6, sec. 11, idem).

These distinctions hold true to this day. There are certain presidential powers which arise out of exceptional circumstances, and if exercised, would involve the suspension of fundamental freedoms, or at least call for the preeminence of executive prerogatives over those exercised by co-equal branches of government. The declaration of martial law, the suspension of the writ of habeas corpus, and the exercise of the pardoning power notwithstanding

the judicial determination of guilt of the accused, all fall within this special class that demands the exclusive exercise by the President of the constitutionally vested power. The list is by no means exclusive, but there must be a showing that the executive power in question is of similar *gravitas* and exceptional import.

We cannot conclude that the power of the President to contract or guarantee foreign debts falls within the same exceptional class. Indubitably, the decision to contract or guarantee foreign debts is of vital public interest, but only akin to any contractual obligation undertaken by the sovereign, which arises not from any extraordinary incident, but from the established functions of governance.

Another important qualification must be made. The Secretary of Finance or any designated *alter ego* of the President is bound to secure the latter's prior consent to or subsequent ratification of his acts. In the matter of contracting or guaranteeing foreign loans, the repudiation by the President of the very acts performed in this regard by the *alter ego* will definitely have binding effect. Had petitioners herein succeeded in demonstrating that the President actually withheld approval and/or repudiated the Financing Program, there could be a cause of action to nullify the acts of respondents. Notably though, petitioners do not assert that respondents pursued the Program without prior authorization of the President or that the terms of the contract were agreed upon without the President's authorization. Congruent with the avowed preference of then President Aquino to honor and restructure existing foreign debts, the lack of showing that she countermanded the acts of respondents leads us to conclude that said acts carried presidential approval.

With constitutional parameters already established, we may also note, as a source of suppletory guidance, the provisions of R.A. No. 245. The afore-quoted Section 1 thereof empowers the Secretary of Finance with the approval of the President and after consultation of the Monetary Board, "to borrow from time to time on the credit of the Republic of the Philippines such sum or sums as in his judgment may be necessary, and to issue therefor evidences of indebtedness of the Philippine Government." Ineluctably then, while the President wields the borrowing power it is the Secretary of Finance who normally carries out its thrusts. X x x

Similarly, in the instant case, the Constitution allocates to the President the exercise of the foreign borrowing power "subject to such limitations as may be provided under law." Following *Southern Cross*, but in line with the limitations as defined in *Villena*, the presidential prerogative may be exercised by the President's *alter ego*, who in this case is the Secretary of Finance.

It bears emphasis that apart from the Constitution, there is also a relevant statute, R.A. No. 245, that establishes the parameters by which the *alter ego* may act in behalf of the President with respect to the borrowing power. This law expressly provides that the Secretary of Finance may enter into foreign borrowing contracts. This law neither amends nor goes contrary to the Constitution but merely implements the subject provision in a manner consistent with the structure of the Executive Department and the *alter ego* doctrine. In this regard, respondents have declared that they have followed the restrictions provided under R.A. No. 245, which include the requisite presidential authorization and which, in the absence of proof and

> even allegation to the contrary, should be regarded in a fashion congruent with the presumption of regularity bestowed on acts done by public officials.

As comprehensive as the President's borrowing power can be, the same is subject to the twin limitations of prior concurrence of the Monetary Board and the provisions of law.

ii. Prior concurrence of the Monetary Board

The first of the twin limitations of the President's borrowing powers is the requirement of prior concurrence of the Monetary Board. At the time of the effectivity of the 1987 Constitution, the Monetary Board referred to is the Monetary Board governing the defunct Central Bank of the Philippines, the then central monetary authority pursuant to the second paragraph of Section 20, Article 12 of the 1987 Constitution, which was created under R.A. No. 265,[54] as amended, the old central bank law.[55] With the effectivity of R.A. No. 7653 or the *New Central Bank Act* on 03 July 1993, which Congress enacted pursuant to the same constitutional provision, the Monetary Board now referred to in the 1987 Constitution is the Monetary Board of the BSP.[56]

Notably, the prior concurrence of the Monetary Board for foreign loan borrowings is a novel provision that is not present in the 1973 Constitution. The only limitation provided under the predecessor provision in the original 1973 Constitution of the President's borrowing power is that

---

[54] An Act Establishing the Central Bank of the Philippines, Defining Its Powers in the Administration of the Monetary and Banking System, Amending the Pertinent Provisions of the Administrative Code with Respect to the Currency and the Bureau of Banking, and for Other Purposes.

[55] *See* Rep. Act No. 265 (1948), sec. 5 which provides that the powers and functions of the Central Bank shall be exercised by a Monetary Board.

[56] *See* Rep. Act No. 7653 (1993), sec. 6 which provides that the powers and functions of the BSP shall be exercised by the Monetary Board.

the same is subject to such limitations as may be provided by law. The provision reads:

> The President may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law.[57]

Several amendments were introduced to the 1973 Constitution, effectively changing the foregoing provision to read as follows:

> The Prime Minister may contract and guarantee foreign and domestic loans on behalf of the Republic of the Philippines, subject to such limitations as may be provided by law.[58]

While the only noticeable change was the title of the head of the Philippines, from President to Prime Minister, the introduction of amendments, particularly Amendment No. 6, to the 1973 Constitution rendered useless the limitation. By virtue of Amendment No. 6, then Prime Minister Marcos virtually became a one-man rule granting him legislative power even after the formal lifting of the Martial Law on 17 January 1981.[59] Thus, the limitations envisioned that would be provided by the laws became nugatory as the power to contract or guarantee foreign loans and the power to impose limitations thereon are both vested in one and the same person.

---

[57] Const. (1973), art. VII, sec. 12.

[58] Const. (1973) (amended), art. IX, sec. 15.

[59] The travesty of the 1973 Constitution. Tony La Viña. 20 September 2016. https://manilastandard.net/opinion/columns/eagle-eyes-by-tony-la-vina/216640/the-travesty-of-the-1973-constitution.html. Last accessed 10 September 2020.

Incidentally, under the Letter of Instructions No. 158 signed by President Marcos on 21 January 1974, all foreign borrowing proposals of the government, government agencies, and government financial institutions shall be submitted to the Monetary Board for its approval in principle as to purpose and credit terms among others, before commencement of actual negotiations. Actual negotiations for such foreign credits and/or accommodations shall be conducted by the Secretary of Finance and/or the Governor of the then Central Bank or their duly authorized representatives as chief or co-chief negotiators, together with the representatives of the government, government agencies, and government financial institutions or entities concerned.

What is obvious, however, is the rationale for the inclusion of the requirement of prior concurrence of the Monetary Board to restrict the President's borrowing powers. First, it is a means to check on the President's borrowing powers. It may be recalled that President Marcos contracted foreign loans during his martial law regime in the staggering amount of USD24.6 billion from the International Monetary Fund, World Bank, and 238 foreign banks.[60] Having learned from the experience under the President Marcos who practically enslaved the Filipinos to foreign banks, the 1986 Constitutional Commission that drafted the 1987 Constitution provided for a more effective way of checking the President, that is, he can no longer contract or guarantee foreign loans without the concurrence of the Monetary Board.[61] Second, as the custodian of the foreign reserves of the country, the Monetary Board has the expertise to determine the reasonableness of the contract or guarantee and whether the proposed foreign loan is within the ability

[60] 2 A. Padilla, *op. cit. supra* note 3 at 262.
[61] J. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 934 (2009).

of the country to pay.[62] Needless to say, in the past, huge foreign loans were contracted or guaranteed by the government even against the advice of the Monetary Board with disastrous consequences to the economy; many domestic private firms with borrowings from overseas sources heavily backed up by government guarantees defaulted on their obligations.[63] This rationale can clearly be derived from the intent of the revision which was explained to the 1986 Constitutional Commission by its proponent, Commissioner Sumulong, *viz.*:

> The next constitutional change that I would like to bring to the body's attention is the power of the President to contract or guarantee domestic or foreign loans in behalf of the Republic of the Philippines. We studied this provision as it appears in the 1973 Constitution. In the 1973 Constitution, it is provided that the President may contract or guarantee domestic or foreign loans in behalf of the Republic of the Philippines subject to such limitations as may be provided by law.
>
> In view of the fact that our foreign debt has amounted to $26 billion – it may reach up to $36 billion including interests – we studied this provision in the 1973 Constitution, so that some limitations may be placed upon this power of the President. We consulted representatives of the Central Bank and the National Economic Development Authority on this matter. After studying the matter, we decided to provide in Section 18 that insofar as the power of the President to contract or guarantee foreign loans is concerned, it must receive the prior concurrence of the Monetary Board.

---

[62] H. De Leon, Textbook on the Philippine Constitution 226-227 (1997). *See* Rep. Act No. 7653 (1993), as amended by Rep. Act No. 11211 (2018), arts. 64-67, regarding foreign reserves maintained by BSP.

[63] H. De Leon, Textbook on the Philippine Constitution 227 (1997).

> We placed this limitation because, as everyone knows, the Central Bank is the custodian of foreign reserves of our country, and so, it is in the best position to determine whether an application for foreign loan initiated by the President is within the paying capacity of our country or not. That is the reason we require prior concurrence of the Monetary Board insofar as contracting and guaranteeing of foreign loans are concerned.[64]

The duty of the BSP to ensure adequate foreign reserves to meet liabilities and warrant external debt sustainability is closely interlinked to its mandate to provide policy directions in the areas of money, banking, and credit,[65] maintain price stability conducive to a balanced and sustainable growth of the economy and employment, and promote monetary stability and the convertibility of peso.[66] Policies on external debt management are aimed at keeping debt service requirements at a level that is within the country's repayment capacity—for both short-term and long-term—and also includes rendering an opinion on the monetary implications of foreign borrowings.[67] The approval of foreign loans helps control the size of the country's obligations and keep debt service burden at manageable levels, channel loan proceeds to priority purposes and projects supportive of the country's development objectives

---

[64] Dissenting Opinion, Puno, C.J., Neri v. Senate Committee on Accountability of Public Officers and Investigation (Blue Ribbon), 572 Phil. 554 (2008), citing II Record of the Constitutional Commission, p. 387.

[65] Const. art. XII, sec. 20, par. (1). *See* Rep. Act No. 7653 (1993), sec. 3, as amended by Rep. Act No. 11211 (2018).

[66] Rep. Act No. 7653 (1993), sec. 3, as amended by Rep. Act No. 11211 (2018).

[67] Primer on Foreign/Foreign Currency Loans/Borrowings. http://www.bsp.gov.ph/downloads/Publications/FAQs/fxloan_primer.pdf. Last accessed 11 September 2020.

and promote optimum utilization of the country's foreign exchange resources.[68]

Notably, notwithstanding the need of prior concurrence of Monetary Board for the exercise of President's borrowing powers, such presidential power remains executive in nature. This has been rightly clarified by the Supreme Court in *Neri v. Senate Committee on Accountability of Public Officers and Investigations,*[69] *viz.:*

> The fact that a power is subject to the concurrence of another entity does not make such power less executive. "Quintessential" is defined as the most perfect embodiment of something, the concentrated essence of substance. On the other hand, "non-delegable" means that a power or duty cannot be delegated to another or, even if delegated, the responsibility remains with the obligor. The power to enter into an executive agreement is in essence an executive power. This authority of the President to enter into executive agreements without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence. Now, the fact that the President has to secure the prior concurrence of the Monetary Board, which shall submit to Congress a complete report of its decision before contracting or guaranteeing foreign loans, does not diminish the executive nature of the power.

Worthy to emphasize, however, that the responsibility of managing public sector external debt in the Philippines is not exclusive to the Monetary Board of the BSP. Said responsibility is shared with the Department of Finance, the

---

[68] BSP Rules on Foreign Loans, (September 2009). http://www.bsp.gov.ph/downloads/Publications/FAQs/forloans.pdf. Last accessed 13 September 2020.

[69] 572 Phil. 554 (2008).

Department of Budget and Management, the National Economic Development Authority, and the Office of the President.[70] Moreover, the audit function for foreign loans is also spread out among government agencies; the monitoring of project implementation funded by a foreign loan is within the purview of NEDA, Department of Budget and Management, and the implementing agency while monitoring utilization of loan proceeds is performed by the Commission on Audit.[71]

The duty of the Monetary Board does not stop from evaluating and, as it deems fit, giving prior concurrence to foreign loans to be contracted or guaranteed by the President. Under the same constitutional provision, the Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decision on applications for loans to be contracted or guaranteed by the government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law. Commissioner Sumulong explained the rationale of this duty, *viz.:*

> We also provided that the Monetary Board should submit complete quarterly report of the decisions it has rendered on application for loans to be contracted or guaranteed by the Republic of the Philippines so that Congress, after receiving these reports, can study the matter. If it believes that the borrowing is not justified by the amount of foreign reserves that we have, it can make the necessary

[70] Primer on Foreign/Foreign Currency Loans/Borrowings. http://www.bsp.gov.ph/downloads/Publications/FAQs/fxloan_primer.pdf. Last accessed 11 September 2020.
[71] *Ibid.*

> investigation in aid of legislation, so that if any further legislation is necessary, it can do so.[72]

Whether the Monetary Board gives its concurrence or not on the foreign loans sought to be contracted or guaranteed by the Philippines, it must disclose to Congress in a timely manner its decisions on the application for said foreign loans to enable the Congress to make necessary actions. Indeed, the report will guide Congress in the enactment of whatever legislation it may deem necessary to protect the national interest.[73]

Furthermore, based on the intent of the provision, the Monetary Board's primary function is the determination of whether the borrowing is justified by the amount of foreign reserves the Philippines have,[74] taking into consideration as well the reasonableness of the contract or guarantee and whether the proposed foreign loan is within the ability of the country to pay.[75] Rightfully so, while the Monetary Board cannot decide whether to enter into a contract or a guarantee of foreign loans as the same is a political question, the wisdom to do such is unequivocally vested by the 1987 Constitution to the President, it can determine if the borrowing is justified by the amount of foreign reserves and the ability of the Philippines to pay back the loan.

Inescapably clear is that in entering into foreign loan agreements, the prior concurrence of Congress is not required. In fact, a proposal to subject the contract or

---

[72] Dissenting Opinion, Puno, C.J., Neri v. Senate Committee on Accountability of Public Officers and Investigation (Blue Ribbon), *supra* at 64, citing II Record of the Constitutional Commission, p. 387.

[73] H. De Leon, Textbook on the Philippine Constitution 227 (1997).

[74] Dissenting Opinion, Puno, C.J., Neri v. Senate Committee on Accountability of Public Officers and Investigation (Blue Ribbon), *supra* at 64, citing II Record of the Constitutional Commission, p. 387.

[75] H. De Leon, Textbook on the Philippine Constitution 226-227 (1997)

guarantee of foreign loans to prior concurrence of Congress was rejected.[76] The participation of Congress relative to the President's borrowing power is merely to receive the report of the Monetary Board on the latter's decisions on the application for foreign loans to be contracted or guaranteed by the Philippines and to act accordingly. The reasons for not requiring congressional approval for foreign loans are, first, the loans urgently needed by the country may no longer be available when concurrence which usually takes some time is finally obtained, and second, an obstructionist Congress could withhold approval for political reasons.[77] Foreign loan agreements, therefore, may not be classified as treaties, which, under Section 21, Article VII of the 1987 Constitution, require the concurrence by at least two-thirds of all the members of the Senate to be valid and effective.[78]

This is not to say that the Senate, or the Congress as a whole, is without authority at all to check on the President's borrowing power. As already pointed out, Congress can make necessary investigations in aid of legislation[79] if it believes that the foreign loan agreement based on the report submitted by the Monetary Board is not justified. It may also determine the composition and organization of the Monetary Board, subject to those qualifications prescribed already by

---

[76] J. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 934 (2009). *See* footnote 276: A proposal to make such actions subject to the prior concurrence of Congress was rejected (II RECORD 526-530).

[77] H. De Leon, Textbook on the Philippine Constitution 227 (1997).

[78] *See* Department of Public Works and Highways v. CMC/Monark/Pacific/Hi-Tri Joint Venture, 818 Phil. 27 (2017), where the Supreme Court held that a foreign loan agreement with international financial institutions, such as a multilateral lending agency organized by governments like the Asian Development Bank, is an executive or international agreement contemplated by our government procurement system.

[79] Const. art. VI, sec. 21: The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in, or affected by, such inquiries shall be respected.

the 1987 Constitution.[80] Finally, based on the aforesaid constitutional provision, the exercise of the President's borrowing powers is expressly subject to the such limitations that the law may provide, which is essentially the second of the twin limitations on such powers.

iii. Limitations provided by law

The 1987 Constitution cannot be even more explicit: the exercise of the President's borrowing powers is subject to such limitations as may be provided by law. While the power to contract or guarantee foreign loans lies with the President, Congress can put limitations and restrictions thereon by enacting laws for the said purpose. Congress has not been remiss in enforcing its duty to impose limitations on the President's borrowing powers. Among these laws, some of which were even passed before the effectivity of the 1987 Constitution, are R.A. No. 245, as amended by P.D. No. 142, s. 1973, R.A. No. 1000, as amended by R.A. No. 4861, R.A. No. 4860, R.A. No. 8182, and R.A. 7653, as amended by R.A. No. 11211.

In *Constantino,* the Supreme Court noted that R.A. No. 245, as amended by P.D. No. 142, s. 1973, allows foreign loans to be contracted in the form, *inter alia*, of bonds, such as treasury bonds. Pursuant to this law, sovereign bonds may be issued not only to supplement government expenditures but

[80] Const. art. XII, sec. 20, par. (1): The Congress shall establish an independent central monetary authority, the members of whose governing board must be natural-born Filipino citizens, of known probity, integrity, and patriotism, the majority of whom shall come from the private sector. They shall also be subject to such other qualifications and disabilities as may be prescribed by law. The authority shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions.

also to provide for the purchase,[81] redemption,[82] or refunding[83] of any obligation, either direct or guaranteed, of the Philippine Government.[84] Moreover, this law authorizes the Secretary of Finance, with the approval of the President, after consultation with the Monetary Board, to borrow on the credit of the Republic of the Philippines such sum or sums as in his judgment may be necessary for the cited purposes, and to issue therefor evidences of indebtedness of the Philippine Government.[85]

---

[81] *See* footnote 37, Constantino v. Cuisia, *supra* at 1, where purchase fund is defined as a provision in some preferred stock contracts and bond indentures requiring the issuer to use its best efforts to purchase a specified number of shares or bonds annually at a price not to exceed par value. Unlike sinking fund provisions, which require that a certain number of bonds be retired annually, purchase funds require only that a tender offer be made; if no securities are tendered, none are retired. Purchase fund issued benefit the investor in a period of rising rates when the redemption price is higher than the market price and the proceeds can be put to work at a higher return. John Downes and Jordan Elliot Goodman, Barron's Financial Guides Dictionary of Finance and Investment Terms, (2003, 6th ed.), p. 548.

[82] *See* footnote 38, Constantino v. Cuisia, *supra* at 1, where redemption is defined as repayment of a debt security or preferred stock issue, at or before maturity, at PAR or at a premium price. John Downes and Jordan Elliot Goodman, Barron's Financial Guides Dictionary of Finance and Investment Terms, (2003, 6th ed.), p. 566.

[83] *See* footnote 39, Constantino v. Cuisia, *supra* at 1, where refunding is defined as the replacing an old debt with a new one, usually in order to lower the interest cost of the issuer. For instance, a corporation or municipality that has issued 10% bonds may want to refund them by issuing 7% bonds if interest rates have dropped. John Downes and Jordan Elliot Goodman, Barron's Financial Guides Dictionary of Finance and Investment Terms, (2003, 6th ed.), p. 567.

[84] Rep. Act No. 245 (1948), sec. 1, as amended by Pres. Decree No. 142, s. 1973 (1973), par. (2):

…

Such evidences of indebtedness may be of the following types:

…

(c) Treasury bonds, notes, securities or other evidences of indebtedness having maturities of one year or more but not exceeding twenty-five years from the date of issue.

[85] Rep. Act No. 245 (1948), sec. 1, as amended by Pres. Decree No. 142, s. 1973 (1973), par. (1): In order to meet public expenditures authorized by law or to provide for the purchase, redemption, or refunding of any obligations, either direct or guaranteed of the Philippine Government, the Secretary of Finance, with the approval of the President of the Philippines, after consultation with the Monetary Board, is authorized to borrow from time to time on the credit of the Republic of the Philippines such sum or sums as

Here, while the Secretary of Finance is given the delegated power to contract foreign loans, the same must be with approval of the President, such that if the President withheld its approval or repudiated the foreign loans agreement, then the same can be declared as invalid. In *Constantino*, the Supreme Court remarked that had the then President Aquino withheld approval or repudiated the Philippine Comprehensive Financing Program for 1992, which was the culmination of efforts that began during the term of former President Corazon Aquino to manage the country's external debt problem through a negotiation-oriented debt strategy involving cooperation and negotiation with foreign creditors, then the same would be declared void, to wit:

> Another important qualification must be made. The Secretary of Finance or any designated *alter ego* of the President is bound to secure the latter's prior consent to or subsequent ratification of his acts. In the matter of contracting or guaranteeing foreign loans, the repudiation by the President of the very acts performed in this regard by the *alter ego* will definitely have binding effect. Had petitioners herein succeeded in demonstrating that the President actually withheld approval and/or repudiated the Financing Program, there could be a cause of action to nullify the acts of respondents. Notably though, petitioners do not assert that respondents pursued the Program without prior authorization of the President or that the terms of the contract were agreed upon without the President's authorization. Congruent with the avowed preference of then President Aquino to honor and restructure existing foreign debts, the

in his judgment may be necessary, and to issue therefor evidences of indebtedness of the Philippine Government.

> lack of showing that she countermanded the acts of respondents leads us to conclude that said acts carried presidential approval.

Another law that restricts the President's borrowing powers is R.A. No. 1000, as amended by R.A. 4861. Under Section 1 of thereof, upon the recommendation of the Secretary of Finance, the Monetary Board, and the National Economic Council (now the NEDA), the President is authorized to issue, preferably in the Philippines, or abroad if necessary, in the name and in behalf of the Republic of the Philippines bonds in an amount not exceeding PhP2 billion to finance public works and self-liquidating projects for economic development, which are authorized by law, including expropriation of lands for subdivision and resale to individuals, or to repay or service bonded obligations of the Government incurred for such projects. Thus, pursuant to this law, before the President can issue bonds to finance authorized public works and self-liquidating projects for economic development, he must first secure the recommendation of the Secretary of Finance, the Monetary Board, and the NEDA. The law also caps the amount of bond that can be issued which is not to exceed PhP2 billion.

Perhaps one of the most important laws that limits the power of the President to contract or guarantee foreign loans is R.A. No. 4860. Section 1 thereof provides that the President is authorized on behalf of the Republic of the Philippines to contract such loans, credits, and indebtedness with foreign governments, agencies or instrumentalities of such foreign governments, foreign financial institutions, or other international organizations, with whom, or belonging to countries with which, the Philippines has diplomatic relations, as may be necessary and upon such terms and conditions as may be agreed upon, to enable the Government of the Republic of the Philippines to finance, either directly

or through any government office, agency or instrumentality or any government-owned or controlled corporation, industrial, agricultural, or other economic development purposes or projects authorized by law. It added that the authority of the President includes the power to issue, for the foregoing purposes, bonds for sale in the international markets the income from which shall be fully tax-exempt in the Philippines. Section 2 of the law puts a cap on the total amount of loans, credit, and indebtedness, excluding interests, which the President is authorized to incur to not exceed US$1 billion or its equivalent in other foreign currencies at the exchange rate prevailing at the time the loans, credits, and indebtedness are incurred.

Strikingly, the foreign loans obtained for the Irrigation Project and Kaliwa Dam Project were through the official development assistance, which has its legal basis on R.A. No. 8182. Under the said law, official development assistance is a loan or a loan and grant which meets all the following criteria: (a) it must be administered with the objective of promoting sustainable social and economic development and welfare of the Philippines; (b) it must be contracted with governments of foreign countries with whom the Philippines has diplomatic, trade relations or bilateral agreements or which are members of the United Nations, their agencies and international or multilateral lending institutions; (c) there are no available comparable financial institutions; and (d) It must contain a grant element of at least twenty-five percent. The grant element is the reduction enjoyed by the borrower whenever the debt service payments which shall include both principal and interest and expressed at their present values discounted at ten percent are less than the face value of the loan or loan and grant. The grant element of a loan or loan and grant is computed as the ratio of (i) the difference between the face value of the loan or loan and grant and the debt service payments to (ii) the face value of the loan or loan

and grant.[86] Official development assistance is excluded from the application of Section 2 of R.A. No. 4860 on the US$1 billion cap of the total amount of loans, credit, and indebtedness, excluding interests, which the President is authorized to obtain under that law, provided the weighted average grant element of all official development assistance at any time shall not be less than forty percent and that in no case shall the interest rate on the loan or loan component exceed seven percent.[87]

Remarkably, under R.A. No. 7653, as amended by R.A. No. 11211, Congress mandated that the BSP shall maintain international reserves adequate to meet any foreseeable net demands on the BSP for foreign currencies in order to maintain the international stability and convertibility of the Philippine peso.[88] Moreover, through said law, Congress supplemented the constitutional provision regarding the prior concurrence of the Monetary Board. Under Section 112 thereof, the government may authorize the BSP to represent it in dealings, negotiations, or transactions with foreign or international institution or agencies,[89] to wit:

> The *Bangko Sentral* may be authorized by the Government to represent it in dealings, negotiations or transactions with the International Bank for Reconstruction and Development and with other foreign or international financial institution or agencies. The President may, however, designate any of his other financial advisors to jointly represent the

[86] Rep. Act No. 8182 (1996), sec. 2.
[87] Rep. Act No. 8182 (1996), sec. 2.
[88] Rep. Act No. 7653 (1993), as amended by Rep. Act No. 11211 (2018), sec. 65.
[89] *See* Rep. Act No. 7653 (1993), as amended by Rep. Act No. 11211 (2018), sec. 18(a), where the Governor is designated as the principal representative of the Monetary Board and of the BSP in all dealings with foreign or international persons or entitites, whether public or private.

> Government in such dealings, negotiations or transactions.[90]

Hence, foreign loans which will be obtained by the Philippines from foreign or international institutions or agencies must be dealt, negotiated, or transacted by the BSP, on its own or jointly with other financial advisors designated by the President.

B. *Section 21, Article XII*

The second constitutional provision that directly affects the President's borrowing powers is Section 21, Article XII, which provides:

> Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.

Upon the initiative of Commissioner Garcia, this constitutional provision was introduced as a reaction to the centrality of the foreign loans problem during the deliberations of the Constitutional Commission in 1986.[91] This provision seeks to prevent, once and for all, the injudicious contracting of foreign loans in the past on the sole initiative of the President even against the advice of the Monetary Board of the Central Bank of the Philippines.[92]

---

[90] *See https://www.worldbank.org/en/who-we-are/ibrd* (last accessed 10 September 2020) detailing that the International Bank for Reconstruction and Development, which is an institution of the World Bank established in 1944, is the world's largest development bank providing financial products and policy advice to help countries reduce poverty and extend the benefits of sustainable growth to all of their people.

[91] J. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 1236 (2009).

[92] H. De Leon, Textbook on the Philippine Constitution 378 (1997).

According to Commissioner Garcia, the provision treats as serious matters the nation's ability to pay and the fact that foreign borrowings are matters of interest to the majority who have to shoulder the actual payment.[93] Indeed, as it is the people who will ultimately shoulder the payment of the country's indebtedness, the Constitution rightfully required that information on foreign loans obtained or guaranteed by the government shall be available to the public.[94]

Thus, under the first sentence of Section 21, Article XII, all foreign loans, whether public or private, guaranteed or not guaranteed by the government, are subject to the provisions of law and the regulations of the monetary authority,[95] which is now the BSP. Unlike Section 20, Article VII, the first sentence of Section 21, Article XII deals with all foreign loans without distinction and not limited only to loans obtained pursuant to the President's borrowing powers. Nonetheless, insofar as the President's borrowing powers are concerned, this provision complements Section 20, Article VII in emphasizing the legislative check which the Congress can impose on such powers as well as the regulations that the BSP can issue in relation to its constitutional mandate of giving prior concurrence, if warranted, on the foreign loans contracted or guaranteed by the President on behalf of the Philippines.

What may be considered as the primary regulation issued by the BSP on foreign loans, whether public or private, guaranteed or not guaranteed by the government is the Manual of Regulations on Foreign Exchange Transactions

[93] J. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 1236 (2009).
[94] H. De Leon, Textbook on the Philippine Constitution 378 (1997).
[95] J. Nolledo, The New Constitution of the Philippines Annotated 1751 (1997).

("MORFXT").[96] Sections 22 to 31 of the MORFXT specifically deals with loans and guarantees. As stated in the general policy of the MORFXT, the BSP shall regulate foreign/foreign currency loans/borrowings, including those in the form of bonds, notes, and other debt instruments, so that these can be serviced in an orderly manner and with due regard to the economy's overall debt servicing capacity.[97] Thus, foreign loans and borrowings as well as foreign currency loans from banks operating in the Philippines to be obtained by the public sector as well as the private sector that will be publicly-guaranteed shall require prior approval of the BSP unless otherwise indicated in the MORFXT.[98] Moreover, projects, programs, and purposes to be funded by the foreign, foreign currency loans, borrowings must be legitimate and not contrary to laws, regulations, public order, public health, public safety, or public policy.[99]

Meanwhile, the second sentence of Section 21, Article XII on public information on loans applies only to those obtained or guaranteed by the Philippine Government, in line with Section 20, Article VII of the 1987 Constitution, including government-guaranteed private loans.[100] This is but one of the constitutional provisions to effect transparency to the Filipino citizens and accountability on the part of the public officers in full recognition that the 1987 Constitution "*holds sacrosanct the people's role in governance*."[101] Under Section 28, Article II of the 1987 Constitution, subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its

---

[96] Updated as of 06 December 2019. http://www.bsp.gov.ph/downloads/Regulations/MORFXT/MORFXT.pdf. Last accessed 13 September 2020.
[97] Section 22, MORFXT.
[98] Section 22(2), MORFXT.
[99] Section 22(1), MORFXT.
[100] J. Nolledo, The New Constitution of the Philippines Annotated 1751 (1997).
[101] AKBAYAN v. Aquino, 580 Phil. 422 (2008).

transactions involving public interest. Verily, to prevent the participation of the people in government from being a mere chimera, the 1987 Constitution also gave more muscle to the right to information, protected in the Section 7, Article III, Bill of Rights, by strengthening it with the provision on transparency in government, and by underscoring the importance of communication,[102] *viz.:*

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

In *IDEALS, Inc. v. PSALM,*[103] the Supreme Court explained that the foregoing two constitutional provision envisions the promotion of transparency, to wit:

> The foregoing constitutional provisions seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. They are also essential to hold public officials "at all times xxx accountable to the people," for unless citizens have the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential

[102] *Ibid.*
[103] 696 Phil. 486.

to the existence and proper functioning of any democracy.

The rationale for the two foregoing provisions is equally applicable to the second sentence of Section 21, Article XII. As pointed out earlier, as it is the people who will ultimately shoulder the payment of the country's indebtedness, it is but right that the information on foreign loans obtained or guaranteed by the government made publicly available. While this constitutional right is granted to the people after-the-fact or after the foreign loans were obtained or guaranteed, the people can nevertheless act on the basis of this information within the legal and constitutional framework, such as consideration of the platforms of the candidates for subsequent elections, initiating people's initiative,[104] or even going to the courts for the declaration of their unconstitutionality or invalidity, similar to the cases now pending before the Supreme Court to assail as unconstitutional the Irrigation Project Loan Agreement and Kaliwa Dam Loan Agreement.

What is clear, however, is that unlike Section 28, Article II on the policy of full public disclosure of all transactions involving public interest and Section 7, Article III on the right to access, the second sentence of Section 21, Article XII on public information of foreign is not limited by any law. Arguably, that provision is not only unrestricted by law but also self-executing. A provision which is complete in itself and becomes operative sans the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing.[105] As the provision used the term "shall," a word of command which has always or which must

[104] Const. art. VII, sec. 32; art. X, sec. 3.
[105] Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82 (1997).

be given a compulsory meaning,[106] there is nothing left to the Congress to supplement or enable in the constitutional mandate that *"[i]nformation on foreign loans obtained or guaranteed by the Government shall be made available to the public."* Truly, while the 1987 Constitution does not specifically mention as to who must make public the information on foreign loans, it is safely assumed that said obligation rests on the President as the chief implementor of the laws of the land.

Arguably, however, failure to comply with the disclosure requirement under Section 21, Article XII of the 1987 Constitution does not necessarily tantamount to the declaration of nullity of the foreign loan contract or guarantee. Indeed, the 1987 Constitution does not specifically mention the effects of failure to disclose information on foreign loans obtained or guaranteed by the government to the public. Nevertheless, this constitutional safeguard should not be treated as a meaningless command as sanctions to comply therewith may be the basis of actions grounded on other provisions of the law or the 1987 Constitution, such as that culpable violation of the 1987 Constitution is a ground for impeachment.[107]

IV. THE CONSTITUTIONAL PARAMETERS ON THE PHILIPPINE-CHINA DEALS

In a nutshell, pursuant Section 20, Article VII and Section 21, Article XII of the 1987 Constitution, the President may validly contract or guarantee foreign loans provided the following inviolable conditions are satisfied:

[106] Enriquez v. Enriquez, 505 Phil. 193 (2005).
[107] Const. art. XI, sec. 2.

(i) There must be prior concurrence of the Monetary Board;

(ii) The foreign loans are obtained or guaranteed in conformity with the limitations provided by law;

(iii) The foreign loans are obtained or guaranteed pursuant to the regulations issued by the BSP; and

(iv) Information on foreign loans obtained or guaranteed are disclosed to the public.

Lest the principle of sub judice be violated, it may be difficult to tread on the Philippine-China deals involving the Irrigation Project Loan Agreement and Kaliwa Dam Loan Agreement the constitutionality of both is questioned and pending resolution before the Supreme Court on grounds, among others, of failure to comply with the requirements of prior concurrence of the Monetary Board and disclosure of information thereon to the public. These grounds strike at the heart of two (2) constitutional requisites that must be complied for a valid exercise of the President's borrowing powers.

Nonetheless, it appears that negotiations and deals with China for foreign loans will not stop with the Irrigation Project Loan Agreement and Kaliwa Dam Loan Agreement. As previously stated, among the priority programs and projects under Program, 12 will be funded by China under the official development assistance financing, with a combined indicative cost of PhP300.8 billion. Indeed, Presidential

Spokesperson Harry Roque recently reaffirmed that President Duterte decided that all infrastructure projects with China would continue as the Philippines is in need of those investments from China.[108] For its part, China, speaking through Chinese Ambassador to the Philippines Huang Xilian, defended projects in the Philippines involving Chinese firms, saying all initiatives would continue as they were conducted in compliance with the existing laws and regulations.[109] It is clear as daylight that the Philippines has not seen the last of the loan negotiations with China as other flagship infrastructure projects will continue to be funded under the loans to be obtained from China. As the constitutionality of two loan agreements with China is being challenged, the constitutional safeguards for the President's borrowing powers undoubtedly play a vital role for the on-going or future negotiations for foreign loans with China.

Moreover, the Irrigation Project Loan Agreement and Kaliwa Dam Loan Agreement are only two of the nine infrastructure projects with signed loan accords with China.[110] Four of the infrastructure projects were funded by Japan, through the Japan International Cooperation Agency; two by the Export-Import Bank of Korea; and one by the International Bank for Reconstruction and Development and Clean Technology Fund.[111] Other flagship infrastructure projects will be financed through official development assistance scheme by the Philippines obtaining loan from other countries. Indubitably, the constitutional safeguards

---

[108] China defends PH projects after US sanctions firms building islands in South China Sea. https://rappler.com/nation/china-defends-projects-philippines-after-us-sanctions-firms-south-china-sea-island-building. Last accessed 14 September 2020.

[109] *Ibid.*

[110] China's loan, investment pledges unlikely to be fulfilled under Duterte's term – Carpio. https://cnnphilippines.com/news/2020/6/8/China-investment-pledges-unlikely-fulfilled-Carpio.html. Last accessed 14 September 2020.

[111] https://www.dof.gov.ph/wp-content/uploads/2019/03/IFPs_Rates-at-Signing-Date_20190319_Final-CM.pdf. Last accessed 14 September 2020.

for the President's borrowing powers are applicable not only to negotiations and deals with China but with all other countries where loans will be obtained by the President in the exercise of his borrowing powers.

V. CONCLUSION

In relation to other states, the Philippines must consider as its paramount consideration, among others, national interest.[112] The President, as the chief architect of foreign policy, should always give this policy due regard. To be clear, however, the current administration's friendly relations with some countries, like China, is not frowned upon as indeed the Philippines adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[113] Yet, any friendly relations should never be at the expense of national interest. Hence, in the exercise of his foreign relations powers, specifically his borrowing powers or the power to contract or guarantee loans on behalf of the Philippines, the President should be guided not only by this foreign policy on national interest but also by the safeguards placed by the 1987 Constitution on such powers. These constitutional safeguards are perforce placed to ensure that the foreign debts that the Filipino people will shoulder are well-justified.

[112] Const. art. II, sec. 7.
[113] Const. art. II, sec. 2.

#NASAANANGPANGULO: A *DE LEON V. DUTERTE* DISSENT[*]

Dante Gatmaytan[**]

I. INTRODUCTION

On April 8, 2021, Philippine newspapers printed photographs of President Rodrigo Duterte sitting across Senator Bong Go purportedly, to show that the President was alive and well.[1] Students of Philippine history instantly saw parallels between this stunt and those performed by former President Ferdinand Marcos almost 40 years ago. The Marcos government staged events to mislead the public into thinking that the President's health was not deteriorating.[2]

To prevent the repetition of these acts of deception, framers of the 1987 Constitution included provisions that

---

[*] Initially presented in the University of the Philippines College of Law website, The President's Health, A Duty to Disclose, *https://law.upd.edu.ph/faculty-portfolio/the-ministerial-duty-of-the-president-to-disclose-health-status-in-case-of-serious-illness/* (last visited March 26, 2021).

[**] The author is a professor of the University of the Philippines, College of Law and has published various works on political and constitutional law. He earned his Master of Laws (LL.M.) from the University of California, Los Angeles, School of Law; his Master of Studies in Environmental Law (M.S.E.L.); and his Bachelor of Laws (LL.B.) from the University of the Philippines, College of Law. The author would like to thank Kent Alonzo and Samantha Chan for their help in preparing this Article for publication.

[1] Daphne Galvez, *Palace: Duterte remains 'fit and healthy for his age'*, Inquirer.net (Apr. 8, 2021), https://newsinfo.inquirer.net/1416321/palace-duterte-remains-fit-and-healthy-for-his-age. The photographs were initially posted by Senator Go on Facebook "to dispel rumors that Duterte is experiencing a mild heart condition." *Duterte 'busy with paperwork' amid heart attack rumors, says Go*, GMA newsonline (Apr. 8, 2021), https://www.gmanetwork.com/news/news/nation/782871/duterte-busy-with-paperwork-amid-heart-attack-rumors-says-go/story/.

[2] Jodesz Gavilan, *When Ferdinand Marcos hid his illness from Filipinos*, Rappler (Sep. 23, 2020), https://www.rappler.com/newsbreak/in-depth/ferdinand-marcos-hidden-illness-philippines.

would compel the President to inform the public about the state of his health in cases of "serious illness."[3]

This provision was invoked after Duterte's absence and public appearances suggested that he was not healthy.

The Supreme Court in *De Leon v. Duterte*[4] dismissed a petition for *mandamus* that sought to:

1. "[C]ompel respondents to disclose all the medical and psychological/psychiatric examination results, health bulletins, and other health records of the President ever since he assumed the Presidency"; and
2. "[C]ompel the President to undergo additional confirmatory medical and psychological /psychiatric examinations, which shall be publicly disclosed in order to ensure the accuracy of the health records to be released."[5]

The petition was an opportunity to interpret, for the first time, Article VII, Section 12 of the Constitution, which states that "[i]n case of serious illness of the President, the public shall be informed of the state of his health."[6] It was very timely because at that time, President Rodrigo Duterte has been absent from public view and incoherent when present and speaking to the public.

The Supreme Court, without bothering to require the President to respond via comment, dismissed the case less than a month after it was filed.

---

[3] CONST., art. VII, §12.

[4] De Leon v. Duterte, G.R. No. 252118, May 8, 2020, *available at* https://sc.judiciary.gov.ph/12172/.

[5] *Id.* at 2.

[6] CONST., art. VII, §12.

In this article, I demonstrate how this case was incorrectly decided.

II. THE ROAD TO THE SUPREME COURT

Why are we concerned with the President's health?

Firstly, it was the President himself drew attention to the state of his health. For instance, at the end of 2019, the President talked about how he is not at the "peak of health."[7] In another occasion, he was quoted saying that "life is taking its toll on (his) health."[8]

Secondly, the President's own conduct also fueled speculations that his health is affecting his work.

Since the outset of the COVID-19 pandemic in 2020, the President has held weekly briefings on what steps the government are taking to address this health crisis. In one particular briefing broadcasted on national television, the President talked about the Philippines referring to it as this "fucking country."[9] Likewise, in that same briefing, the President inexplicably digressed and started to talk about the "Roman Empire" and how those with birthmarks are witches burned at the stake.[10] This is the President of the Philippines, talking about burning witches at the stake, in a briefing that

---

[7] CNN Philippines Staff, *Duterte: I am alright but not at the peak of health*, CNN News Philippines (Nov. 30, 2019), https://cnnphilippines.com/news/2019/11/30/Duterte--I-am-alright-but-not-at-the-peak-of-health.html.

[8] *Philippines: Duterte says life taking toll on his health*, Al Jazeera (Nov. 17, 2019), https://www.aljazeera.com/news/2019/11/17/philippines-duterte-says-life-taking-toll-on-his-health.

[9] Julie Aurelo, *That 'fucking country' briefing: Did Duterte manage to assure Pinoys*, Inquirer.net (Mar. 11, 2020), https://newsinfo.inquirer.net/1239675/that-fucking-country-briefing-did-duterte-manage-to-assure-pinoys.

[10] *Id.*

was supposed to assure the country that the government was doing all that they can about the pandemic.

The President went on that night ranting about so many things; viewers were confused. To demonstrate the absurdity of that moment, here is an excerpt of the transcript from that evening:

> MS. CARIASO: Sir, another question po. Sir, paano po natin i-a-address 'yung kakulangan ng testing kit considering in-admit po ni Secretary Duque na hindi problema 'yung — ah, hindi, wala sa underreporting kundi 'yung problem sa resources eh limited tayo sa testing kit ng…?
>
> PRESIDENT DUTERTE: Well, the kit is there. It's kind of… To my understanding, it's a kit that can be distributed to the different health workers and they can do it. But at this time, kung kulang, they are always brought to a testing station. I do not know how they would term the facility.
>
> DOH SEC. DUQUE: RITM.
>
> PRESIDENT DUTERTE: RITM. It is where they are being… Kakaunti lang nga kasi o. But the kit? The kit is nadikit. Walang lumalabas pa.
>
> MS. CARIASO: So may enough naman, sir, in case na tumaas pa 'yung bilang ng mga…
>
> PRESIDENT DUTERTE: Oh…
>
> MS. CARIASO:…tinatamaan ng ano COVID?
>
> PRESIDENT DUTERTE: I think that the… Sabi ko nga, in every — not generation — but epoch, maybe meron 'yung noong una, Bubonic plague, 'yung sa Middle East pa noon, kasi mga g*** ang tao noon parang tamang-tama lang. Tapos 'yung

> Spanish flu right before or after the war — Second World War. Kawawa 'yung mga tao. Pero mas kawawa 'yung sa Middle East.
>
> The so-called Roman Empire. You have read the inquisition? Kung may birthmark ka, you are a witch and you are born (*sic*) at stake.[11]

Instead of discussing concerns related to the pandemic, the President talked about the bubonic plague, the Middle East, and then the Roman Empire; he talked about people, accused of being witches during the inquisition, burned at the stake on *live* national television.[12]

This is something that should concern every Filipino citizen because the President should be healthy. We want to be assured that our president is in good health and can actually lead the country, especially during a worldwide pandemic.

What do we do when the president's health is in question? There are legal remedies that are available. Atty. Dino de Leon filed his petition for *mandamus* claiming:

> [T]hat the President has been absent from several engagements due to health reasons and also had prolonged absences from public view. He further averred that the President appeared incoherent during the COVID-19 live press conference on March 12, 2020. Thus, on the same date, petitioner filed a Freedom of

[11] Press Conference of President Rodrigo Duterte following the Inter-Agency Task Force Briefing on COVID-19, Presidential Communications Operations Office Website (Mar. 9, 2020), https://pcoo.gov.ph/media-interview/press-conference-of-president-rodrigo-duterte-following-the-inter-agency-task-force-briefing-on-covid-19/.
[12] *Id.*

Information (FOI) Request under Executive Order No. 2 (2016) with the OP. Seeking to be clarified on the status of the President's health, petitioner specifically asked for copies of the President's latest medical examination results, health bulletins, and other health records. In response to his request, the Malacañang Records Office (MRO) sent to him an electronic mail dated March 13, 2020 stating that it is unable to provide the information requested. The MRO explained that the records requested are neither on file nor in its possession and that it shall accommodate petitioner's request as soon as the requested information becomes available for release. Petitioner allegedly failed to get a response from the MRO after further inquiry and follow-ups on the availability of the requested health records.

…Petitioner anchors his alleged right to be informed on the basis of Section 12, Article VII and Section 7, Article III, in relation to Section 28, Article II, of the 1987 Constitution (Constitution)….

[P]etitioner argues that the illnesses acknowledged by the President, i.e., Buerger's Disease, Barrett's Esophagus, Gastroesophageal Reflux Disease, and Myasthenia Gravis, together with migraine and spinal issues, are serious illnesses within the ambit of Section 12, Article VII of the Constitution. He also asserts that these illnesses should be considered in addition to the psychological report submitted in the course of the trial court proceedings for the declaration of nullity of marriage involving the President. The report stated that the President has "Antisocial

> and Narcissistic Personality Disorder." For petitioner, the alleged illnesses and psychological disorders of the President provide sufficient basis to trigger the right of the Filipino people to be informed under Section 12, Article VII and Section 7, Article III of the Constitution.[13]

III. THE CONSTITUTION

There are two constitutional provisions that are implicated by *De Leon*.

The first is Article VII, Section 12 of the 1987 Constitution which states that "[i]n case of serious illness of the President, the public shall be informed of the state of his health."[14] This provision, I argue here, creates a positive duty on the part of the government to inform the public of the state of the President's health. The second is a related provision in the Bill of Rights. Article III, Section 7 provides that "the right of the people to information on matters of public concern shall be recognized" and access to official records shall be afforded to citizens.[15]

We wrote these provisions in the Constitution to address practices of the past, specifically those of the former dictator. In fact, on more than one occasion back in the eighties, then–President Ferdinand Marcos would suddenly disappear for an extended period of time. No one would know where he was until he gets featured in the newspapers the next morning, holding a newspaper from the day before to assure the public that reports of his death "have been gravely exaggerated"—an obvious reference to Mark Twain.

---

[13] De Leon v. Duterte, G.R. No. 252118, May 8, 2020, *at* 1–2.
[14] CONST., art. VII, §12.

[15] CONST., art. III, §12.

These stories appeared in international publications as well. For example, the November 22, 1984 issue of the *Journal Herald* featured a picture of President Marcos holding an issue of the *Manila Bulletin*. The heading of the *Manila Bulletin* held up by Marcos read "*Marcos stresses he is healthy*,"[16] while the headline of that November 22, 1984 *Journal Herald* spreadsheet was "*Marcos surgery rumor denied*."

This article in the *Journal Herald* illustrates why there is a need to assure the public of the president's health.

According to that article, the former Information Minister Francisco Tatad, first said that "the President had undergone major surgery one week earlier, although he said that it was known whether the operation had involved the heart, the kidneys, or both," but he knew that the operation was a success.[17]

Tatad's uncertainty is hardly the way to assure the public that the President is well.

Reading on, we find that the Malacañang Palace then issued a statement saying that the President "was in seclusion to write a book."[18] The first lady, however, contradicted this in another statement, saying that President Marcos was "sick with a cold and bronchitis."[19] To cap off the conflicting reports, the Malacañang had also apparently issued another statement where it said that President Marcos visited "typhoon-ravaged areas" in the country.[20]

These were four different explanations—from Tatad, Mrs. Marcos, and two from Malacañang Palace—cited by that single story featured in the *Journal Herald*. As a result of this,

---

[16] *Marcos surgery rumor denied*, The Journal Herald (Dayton, Ohio), Nov. 22, 1984.

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

there was confusion and understandably, concern from the public then, because the people naturally needed to know who was in charge of the country.[21]

What legal remedies are available if the president's health is in question? Atty. Dino De Leon tested the waters by filing a case to compel Duterte to disclose health records[22] via mandamus.

IV. MANDAMUS

Mandamus is a writ commanding a tribunal, corporation, board, or person to do the act required to be done when it or he unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, there being no other plain, speedy, and adequate remedy in the ordinary course of law.[23] As a general rule, a writ of *mandamus* will not issue to control or review the exercise of discretion of a public officer since it is his judgment that is to be exercised and not that of the court.

---

[21] Incidentally, a Chicago Tribune article about the same time, October 28, 1985, identified the illness Marcos was supposedly suffering from—systemic lupus erythematosus. United Press International, *Marcos Reporterd Stricken by Fatal Illness,* Chicago Tribune (October 28, 1995), https://www.chicagotribune.com/news/ct-xpm-1985-10-28-8503130824-story.html Years later, a 2016 article came out where the doctors who allegedly treated President Marcos affirmed those rumors that he had in fact undergone two operations: one before Benigno Ninoy Aquino Jr. was assassinated and one after that; at least two operations in fact actually occurred. Barbara Mae Dacanay, *'Ferdinand Marcos underwent two kidney surgeries',* Gulf News, (Feb. 20, 2016) https://gulfnews.com/world/asia/philippines/ferdinand-marcos-underwent-two-kidney-surgeries-1.1676108

[22] Xave Gregorio, *Lawyer asks SC to compel Duterte to disclose health records since he assumed office*, CNN News Philippines (Apr. 13, 2020), https://www.cnnphilippines.com/news/2020/4/13/Rodrigo-Duterte-Supreme-Court-health-records.html

[23] Angchangco, Jr. v. Ombudsman, G.R. No. 122728, February 13, 1997.

Courts will not interfere to modify, control or inquire into the exercise of this discretion *unless it be alleged and proven that there has been an abuse or an excess of authority on the part of the officer concerned.*[24]

Mandamus is used to compel the performance of a ministerial duty, not a discretionary duty. For mandamus to issue, the petitioner should have a clear legal right to the thing demanded and there must be duty on the part of the public official or respondent to perform the act that is required.[25]

What do we mean by discretionary and ministerial? "Discretion" means a power or right conferred upon them by law or acting officially, under certain circumstances, uncontrolled by the judgment or conscience of others.[26] In other words, it is up to that public official to perform that duty and he is not to be controlled by anyone. As opposed to a purely ministerial duty, where the performance of that duty is prescribed by law without regard to the exercise of his own judgment upon the propriety or impropriety of the act done.[27]

There is also another way of looking at it. If the law imposes a duty upon a public officer and gives him the right to decide how or when the duty shall be performed, such duty is discretionary. It is ministerial only when the discharge of the same requires neither the exercise of official discretion nor judgment.[28]

---

[24] Laygo v. Municipal Mayor of Solano, Nueva Vizcaya, G.R. No. 188448, January 11, 2017 (emphasis added).

[25] Nicanor T. Santos Development Corp. v. Secretary, Department of Agrarian Reform, G.R. No. 159654, Feb. 28, 2006

[26] Laygo v. Municipal Mayor of Solano, Nueva Vizcaya, G.R. No. 188448, Jan. 11, 2017.

[27] Symaco v. Aquino, 106 Phil. 1130 (1960).

[28] Laygo v. Municipal Mayor of Solano, Nueva Vizcaya, G.R. No. 188448, Jan. 11, 2017.

V. THE RECORDS OF THE CONSTITUTIONAL COMMISSION

As stated earlier, Article VII, Section 12 is new—there was no similar provision in the 1935 and 1973 Constitutions. These following excerpts from the Record of the Constitutional Commission (hereinafter "Record") shed light on what the provision means.

Commissioner Blas Ople proposed the inclusion of this provision, explaining his reasons as follows:

> MR. OPLE: I think throughout history, there had been many recorded instances when the health of the President, or the emperor in Roman times, or the Chinese emperor in dynasties long past was concealed from the public. Generally, the wife conspires with others in order to conceal the leader's state of health. One effect of this has been on the necessary inputs to policy coming from Cabinet ministers which have been blocked from reaching the attention of the President in that state. This illness can occur during an awkward moment in the life of a nation when national survival ought to be secured in the face of a major threat short of, let us say, the proclamation of martial law or the suspension of the writ of *habeas corpus* when Congress comes in in order to exercise a monitoring function and, perhaps, a remedial function. We have not yet, in this example, attained that level of the seriousness of the situation. And yet the national security might be at stake. The national survival can hang in the balance and, therefore, the right of the people to know ought to be included in

this Article on the Executive, not only the right of the people to urgent access to a President in a state of illness, but especially those who deal with the safety and survival of the nation. The Cabinet minister in charge of national security and foreign relations and the Chief of Staff of the Armed Forces ought to have access to the President as commander-in-chief. The people as well should have access to this man in that kind of dubious state so that even in that critical and awkward moment in the fortunes of the national leader, we can be sure that the people have access to him for purposes of safeguarding the national security. That is the reason the Chief of Staff of the Armed Forces is also mentioned in the proposal. I think this is based on contemporary experience as well. And if we delegate this merely to a forthcoming legislature, there will arise situations or embarrassment considering that many who will compose this legislature will be very deferential towards those in power and may not even mention this at all in their agenda.

Therefore, I feel that there should be a constitutional cognizance of that danger, and the right of the people to know ought to be built into this Article on the Executive.[29]

From this excerpt, it can be seen that the provision was intended to be self-executing. However, the following exchange shows that the Commissioners eventually veered away from that initial intention:

[29] 2 RECORD CONST. COMM'N 043, July 30, 1986.

MR. OPLE: Madam President, I think we will leave the burden to the Office of the President to choose the appropriate means of releasing information to the public.

THE PRESIDENT: What does the Committee say?

MR. GUINGONA: Madam President, I was going to propose an amendment because, from the discussion, it would seem that there are many details that have to be filled in. Commissioner Ople mentioned about who should give the information, and Commissioner Suarez was talking about what kind of illness would fall within the perception of the proponent. So, I thought, if the distinguished proponent would accept, the details should be left to the Congress to determine by law, because we have no physician in this body, and perhaps the legislature would be able to provide the details. I agree fully with the principle or the concept expressed by the honorable proponent.

MR. OPLE: I accept the amendment, and so the first sentence will now read: IN CASE OF SERIOUS ILLNESS OF THE PRESIDENT, THE PUBLIC SHALL BE INFORMED OF THE STATE OF HIS HEALTH AS MAY BE PROVIDED BY LAW.

Madam President, I think I have just changed my mind after an expert on medical matters came around. We are called upon to be more trusting with respect to the Office of the President that they will know what appropriate means to take in order to release this information to the public in satisfaction of the public's right to know about the presidency.

> MR. GUINGONA: Madam President, may I explain? I thought all along that the honorable proponent was thinking of a situation such as when recently there was an attempt on the part of the Executive not to inform the public. And now, we are going to entrust this obligation or duty . . .
>
> MR. OPLE: Madam President, we will leave something for people power to do. Maybe Commissioner Aquino can lead a march, if they are not satisfied with the information coming from the Office of the President.
>
> THE PRESIDENT: So, the proponent does not accept the amendment.[30]

Here, we have Commissioner Guingona suggesting that Congress provide for the manner through which this right shall be enforced; he also talked about how a law should be passed, to make sure the public is informed about the president's serious illness.[31] In response, Commissioner Ople, who was initially agreeable to Commissioner Guingona's suggestion, changes the language of the proposed provision to include that phrase "as may be provided by law."[32] Yet after doing so, he inexplicably changes his mind after "an expert of medical matters" comes around.

Commissioner Ople then subsequently opines that the Office of the President should just be trusted to determine how this data or information is to be released to the public. This time, it was Commissioner Guingona who seemingly did not agree, replying that the country just had a president,

---

[30] *Id.*

[31] *Id.*

[32] *Id.*

Ferdinand Marcos, who made sure that the country was not informed of the state of his health. To this, Ople responded jokingly, "Maybe Commissioner Aquino can lead a march, if they are not satisfied with the information coming from the Office of the President."[33]

In any case, the way the provision is finally worded shows that no law is required to be crafted by congress.

Another important point would be the reference to a "right to know" as shown in the following excerpt from the Record:

> THE PRESIDENT: At any rate, the thrust of the amendment is that at least the public should be informed.
>
> MR. OPLE: Yes, Madam President. It is the public's right to know; besides the safeguarding of our national survival and security can be irretrievably impaired if the access of those in charge of national security and foreign relations is cut off through confabulations in the household, so that the President is kept in a state of ignorance about a period of national danger.[34]

Clearly, the Commissioners recognized a right to know the president's health and that the public should be informed of any "serious illness" of the President.

There is still ambiguity on the meaning of the word "serious." If we read on from the Record, it tells us that there was some ambiguity in the meaning of the word "serious," even among the Commissioners. This is shown in the following examples mentioned by them:

---

[33] *Id.*
[34] *Id.*

MR. OPLE: A serious illness in my layman's opinion ought to be one that almost but not quite incapacitates the President for that period of the serious illness.

MR. SUAREZ: Is there no duration as to the physically incapability or incapacity of the incumbent president.

Mr. OPLE: I feel that as the proponent of this amendment, I might be usurping the competence of others technically better prepared to answer this question. If there is a doctor on the Commission, maybe we can recruit him right now for his expert advice.

MR. ROSALES: Is a President, receiving dialysis treatment, considered seriously ill.

MR. OPLE: Since this deals with what is generally considered a serious organic ailment, a systemic disease, I suppose that, yes, this could come under the class of serious illness.

MR. ROSALES: Thank you.

MR. SUAREZ: I think in fairness to future interpreters of our Constitution, we have to give examples of what would constitute serious illness on the part of the President that would necessitate the issuance of a medical bulletin, in a manner of speaking, Madam President.[35]

Arguably, no one among the commissioners knew what the word "serious" really means because some members of

[35] 2 RECORD CONST. COMM'N 458–59 (July 30, 1986).

the commission were only talking about examples. Only Commissioner Ople attempted to define "serious," when he said that his illness is serious if it "almost but not quite incapacitates the president."[36] However, we all know that "almost but not quite" is not a medical standard. An apparent resolution to this matter would be Commissioner Suarez' reference to future interpreters of our Constitution, a reference that impliedly suggests that the Supreme Court would eventually have to determine what it means to have a serious illness.

Finally, we also know that the failure of the President to reveal, or provide information, about his health, is not an impeachable offense. This was the sentiment among the commissioners then:

> MR. OPLE. Did the Gentleman ask if this will be a culpable violation of the Constitution?
>
> MR. RODRIGO. If the President fails to comply with this, would it be classified as culpable violation of the Constitution?
>
> MR. OPLE. I think we are using the moral pressure of the Constitution.
>
> MR. SARMIENTO. May I ask that Commissioner Davide be recognized.
>
> MR. RODRIGO. For the record, would failure to comply with this constitutional mandate be considered culpable violation of the Constitution which is one of the grounds for impeachment?
>
> MR. OPLE. In the sense that a constitutional standard was violated, I think that is a perfectly censurable act. But I am not inclined to say at

[36] 2 RECORD CONST. COMM'N 458 (July 30, 1986).

this point that it attains to the level of a culpable violation.[37]

In summary, an examination of the Record of the Constitutional Commission shows that:

1. The public has a right to know the state of the President's health.
2. The Executive has a duty to inform the public about the President's health in case of "serious illness."
3. What is now Article VII, Section 12 is self-executing, and does not require an enabling law.
4. The Commission did not define "serious illness." The Commission left this question for the Supreme Court to answer.
5. The President's failure to inform the public about his or her serious illness is not a ground for impeachment.

In reference to Atty. Dino De Leon's petition, it appears like these standards have been met—there is both a duty on the part of State actors and a right to health, which are asserted by the petitioner. Unfortunately, the Supreme Court saw otherwise.

VI. CONSEQUENCES

What are the consequences of informing the public about the President's health? Well, Article VII, Section 8 of the Constitution says in part that:

[37] 2 RECORD CONST. COMM'N 459–60 (July 30, 1986).

> SECTION 8. In case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term. In case of death, permanent disability, removal from office, or resignation of both the President and Vice-President, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives, shall then act as President until the President or Vice-President shall have been elected and qualified.[38]

If the President's illness actually amounts to a "permanent disability," then the Vice President becomes the President.[39] Can one argue that the President's infrequent

---

[38] CONST., art. VII, §8.

[39] There does not appear to be any definition of "permanent disability" in the Records of the Constitutional Commission. Some statutes do define kinds of disability. The Government Service Insurance System Act of 1997 (Republic Act No. 8291 [1997]), for instance, provides in Section 2:

> "(q) *Disability* — Any loss or impairment of the normal functions of the physical and/or mental faculty of a member which reduces or eliminates his/her capacity to continue with his/her current gainful occupation or engage in any other gainful occupation;
>
> "(r) *Total Disability* — Complete incapacity to continue with his present employment or engage in any gainful occupation due to the loss or impairment of the normal functions of the physical and/or mental faculties of the member;
>
> "(s) *Permanent Total Disability — Accrues or arises when recovery from the impairment mentioned in Section 2(Q) is medically remote;*
>
> "(t) *Temporary Total Disability* — Accrues or arises when the impaired physical and/or mental faculties can be rehabilitated and/or restored to their normal functions;
>
> "(u) *Permanent Partial Disability — Accrues or arises upon the irrevocable loss or impairment of certain portion/s of the physical*

appearances and incomprehensible speech are signs of a "permanent disability"?

We can also look at Article VII, Section 11, that explains how the Vice President can be "Acting President." The provision reads:

> SECTION 11. Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice-President as Acting President.

---

faculties, despite which the member is able to pursue a gainful occupation.

In contrast the Labor Code, under Section 198 provides that:

(c) The following disabilities shall be deemed total and permanent:

(1) Temporary total disability lasting continuously for more than one hundred twenty days, except as otherwise provided for in the Rules;

(2) Complete loss of sight of both eyes;

(3) Loss of two limbs at or above the ankle or wrist;

(4) Permanent complete paralysis of two limbs;

(5) Brain injury resulting in incurable imbecility or insanity; and

(6) Such cases as determined by the Medical Director of the System and approved by the Commission.

(d) The number of months of paid coverage shall be defined and approximated by a formula to be approved by the Commission.

See Labor Code of the Philippines, Presidential Decree No. 442 (Amended & Renumbered), [July 21, 2015]).

Whenever a majority of all the Members of the Cabinet transmit to the President of the Senate and to the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice-President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President of the Senate and to the Speaker of the House of Representatives his written declaration that no inability exists, he shall reassume the powers and duties of his office. Meanwhile, should a majority of all the Members of the Cabinet transmit within five days to the President of the Senate and to the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Congress shall decide the issue. For that purpose, the Congress shall convene, if it is not in session, within forty-eight hours, in accordance with its rules and without need of call.

If the Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, determines by a two-thirds vote of both Houses, voting separately, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as the President; otherwise, the President shall

continue exercising the powers and duties of his office.[40]

When a majority of the members of the Cabinet think that the president is unable to discharge the powers and duties of his office, then the Vice President becomes President. And if the President refutes that assessment by the cabinet, the Congress can step in and make the determination by voting separately. If it is not in session, Congress shall convene within 48 hours in accordance with its rules, without need of call. If there is a dispute between the President and his cabinet—if that is even possible—then Congress will step in. By a vote of two-thirds, voting separately, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as the President; otherwise, the President shall continue exercising the powers and duties of his office.

Thus, if the report on the President's health convinces the majority of a Cabinet, and ultimately the members of Congress that the President is not fit to discharge the functions of his office, then this provision might come into play.

As shown above, illness on the part of the President can trigger a variety of Constitutional provisions that not only informs the public about the state of the President's health, but also safety valves that can be triggered to ensure that competent personnel are running the government.

[40] CONST., art. VII, §11.

VII. THE CASE

Now we return to the petition filed by Atty. De Leon. The Supreme Court dismissed the petition rather quickly through a very, very short notice.

Why did the court dismiss this case?

First, they cited the Record of the Constitutional Commission that refer to the Office of the President as being responsible for the manner, appropriate means, of releasing info to the public.[41] The Court here suggests that it is not a duty and that it is discretionary on the part of the president to release this information.[42]

Second, the Court then states that all the allegations presented by Atty. De Leon are hearsay evidence, as they are unverified, speculations, or surmises.[43]

The Court then concludes already, saying that in recent months the president has held regular cabinet meetings, without mentioning that the president has gone off to rant about the Roman Empire and burning people at the stake in those meetings. Ironically, the court actually refers to the regular televised addresses to the nation, to prove that the allegations of serious illnesses are unsubstantiated.[44]

The petition was dismissed.

VIII. THE DISSENTS

Two Justices, Justice Alfredo Caguioa and Justice Marvic M.V.F. Leonen, filed dissents in this case.

Justice Caguioa dissented from the outright dismissal of the case citing “the uncharted and heretofore unresolved

[41] De Leon v. Duterte, G.R. No. 252118, 2 (May 8, 2020).
[42] De Leon v. Duterte, G.R. No. 252118, 2 (May 8, 2020).
[43] De Leon v. Duterte, G.R. No. 252118, 2 (May 8, 2020).
[44] De Leon v. Duterte, G.R. No. 252118, 2 (May 8, 2020).

important legal and Constitutional issues that ought to have been considered and resolved by the Court through a full-blown decision."[45] He found it "perplexing that the majority dispensed with requiring the Respondents to submit a Comment" saying that it feeds into the public's perception that the Court is partial to the President.[46]

Referring to the deliberations of the Court, Justice Caguioa disagreed with the majority, which claimed that requiring a Comment was "antithetical to the respect, civility, and cooperation owed to a co-equal branch of government.[47]

In the rest of his dissent, Justice Caguioa laid down his views on the issues raised by *De Leon:*

1. The Court has the Constitutional duty to construe the meaning of "serious illness."[48]
2. Section 12, Article VII of the Constitution is self-executing. There is nothing in the text of the provision that suggests that suggests otherwise. He also cited the Records of the Constitutional Commission to show that the framers intended to make the provision self-executing.[49]
    a. He disagreed with the majority that Section 12 is not a right because it was not found in Article III of the Constitution. Evidently, some Justices opined that this was a signal that Section 12 is "not a fundamental constitutional right, but rather, a *sui generis* responsibility falling within the sole discretion of the Executive, similar to the

[45] De Leon v. Duterte, G.R. No. 252118, 2 (May 8, 2020) (Caguioa, J., *dissenting*).
[46] *Id.* at 3.
[47] *Id.* at 3.
[48] *Id.* at 4.
[49] *Id.* at 5.

other essential prerogatives inherent to the Executive. Department."[50]

b. He disagreed with the members of the Court who suggested that the President had privacy rights that superior to the constitutional mandate under Section 12.[51]

3. The duty of the President under Section 12 to disclose the state of his health in case of a serious illness is a ministerial duty.[52]

Justice Caguioa's revelations about the deliberations of the Court are astonishing. These revelations were not embodied in a decision—so they are not part of the Court's ruling—but still, that the Court would decline to require a Comment from the Respondent is incomprehensible if this is based on the notion that the Executive is a co-equal branch of government. This approach would free Executive and Legislative Branches from responding in cases involving their acts. Imagine the Supreme Court instantly ending litigation by simply refusing to require these respondents to comment.

The other shocking view that surfaced in this dissenting opinion was the view that the President can invoke privacy rights to override the constitutional mandate to inform the public about the state of his health. That this view can even be articulated in Supreme Court deliberations boggles the mind.[53]

Justice Leonen also differed with the majority decision to dismiss the petition. He wrote that "given the procedural,

---

[50] *Id.* at 17.
[51] *Id.* at 18.
[52] *Id.* at 5.
[53] Every law student is taught that in the hierarchy of laws, the Constitution is supreme and that "No branch or office of the government may exercise its powers in any manner inconsistent with the Constitution, regardless of the existence of any law that supports such exercise. The Constitution cannot be trumped by any other law. All laws must be read in light of the Constitution. Any law that is inconsistent with it is a nullity." *See* Sameer Overseas Placement Agency, Inc. v. Cabiles, G.R. No. 170139, August 5, 2014.

and constitutional issues raised by the petitioner, I believe it would be more prudent for this Court to at least require to file the usual comment without necessarily giving due course to the Petition."[54] A comment is essential to garner a full exposition of the issues from both parties and the dismissal of the Petition was highly irregular and constitutes a failure to carry out responsibility to properly and accurately interpret Article VII, Section 12 of our Constitution."[55]

Leonen also said that the importance of the issues raised by the Petition justifies the bypassing the judicial hierarchy.[56]

On the substantive matter, Justice Leonen is of the view that the President's health is a matter of public concern and interest[57] and that as a public officer, he must surrender to public scrutiny.[58] Justice Leonen stated his thesis:

> With the right of the people to know the President's health condition, Article VII, Section 12 cannot be discretionary on the President and his office, and the executive cannot be left to decide what would constitute serious illness and what would be the appropriate means of releasing the sought information to the public.[59]

IX. COMMENTS

First. The Supreme Court did not even ask the respondents to file a Comment on the petition. The Court not only dismissed the petition with haste, it did so through an unsigned resolution. Under the Internal Rules of the Supreme

---

[54] De Leon v. Duterte, G.R. No. 252118, 3 (May 8, 2020) (Leonen, J., *dissenting*).
[55] *Id.* at 3.
[56] *Id.* at 10.
[57] *Id.* at 16.
[58] *Id.* at 16.
[59] *Id.* at 23.

Court, the Supreme Court may dispose of a case through an unsigned resolution. The Court relies on unsigned resolutions:

> [W]hen the Court disposes of the case on the merits, but its ruling is essentially meaningful only to the parties; has no significant doctrinal value; or is of minimal interest to the law profession, the academe, or the public. The resolution shall state clearly and distinctly the facts and the law on which it is based.[60]

In contrast, the Court disposes of a case through a "decision":

> [W]hen the Court disposes of the case on its merits and its rulings have significant doctrinal values; resolve novel issues; or impact on the social, political, and economic life of the nation. The decision shall state clearly and distinctly the facts and the law on which it is based. It shall bear the signatures of the Members who took part in the deliberation.[61]

It is difficult to understand how the Supreme Court can say that *De Leon* can be "meaningful only to the parties; has no significant doctrinal value; or is of minimal interest to the law profession, the academe, or the public" in a pandemic-ravaged country where the President is often invisible or incoherent. This case was the first opportunity to interpret a constitutional provision specially designed to prevent a concern that occurred repeatedly during the Marcos regime. It is of supreme importance to the law profession, the academe, and the public.

---

[60] Internal Rules of the Supreme Court, A.M. No. 10-4-20-SC, § 2 (2010).

[61] *Id.*

Second. Ofcourse there would be "surmises and conjectures" in De Leon's petition because the petitioner is not sure about the President's health. That is the reason why the petition was filed; so that the President will have the opportunity to say that everything is in fact in good health. The petitioner is seeking information from the President in order to remove doubts about his health.

Third. The Court also ignored the discussion in the Record of the Constitutional Commission that actually referred to a right of the people to know the State of the President's health. Recall that as per the Record, the intent was to establish or create "a right to know" insofar as the President's health is concerned.[62]

Fourth. It is a ministerial duty on the part of the Office of the President to make the status of the President known to the public. What is discretionary is the manner in which it is to be released. The Court can compel the performance of that ministerial duty to ensure that the public can be informed of the President's Health.

Fifth. Mandamus can compel the performance of a ministerial duty; the Court should have ordered the Respondent to provide for the process for the release of the information on the President's health.

Sixth. Case law also tells us that the Courts can issue mandamus to compel the performance of a discretionary duty but not how it is going to be performed. If there is a discretionary duty on the part of a public official, the courts can compel the public official to exercise his or her duty, but

---

[62] Note that the records of the constitutional convention or commission are not binding on the courts. The proceedings of the convention are less conclusive of the power construction of the instrument than are legislative proceedings of the proper construction of a statute, since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at *the intent of the people* through the discussions and deliberations of their representatives. *See* Vera v. Avelino, G.R. No. L-543, August 31, 1946.

not tell them how it should be done. The Writ is available only to compel him to exercise his discretion or jurisdiction.[63]

Seventh. There is also another view found in another line of cases, such that when there is "gross abuse of discretion, manifest injustice or palpable excess of authority," the writ may be issued to control precisely the exercise of such discretion."[64] Grave abuse of discretion is defined as capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction. "The abuse of discretion must be patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility."[65] The facts of *De Leon v. Duterte* shows that the Office of the President is evading a positive duty and refusing to perform a duty enjoined by the Constitution. Mandamus should have been issued by the Court to prompt action on the part of the government.

X. CONCLUSION

De Leon v. Duterte should not have been immediately dismissed, especially because the provision is a novel one in the 1987 Constitution. It is also meant to address a very serious problem by a country struggling to fight a pandemic.

To be clear, the Office of the President is performing a ministerial duty should it disclose information on the President's health, which the public has the right to know. Assuming arguendo that it is a discretionary duty, there are

---

[63] Philippine Airlines Employees Association v. Philippine Airlines, Inc., G.R. No. L-31396, January 30, 1982.

[64] Licaros v. Sandiganbayan, G.R. No. 145851, November 22, 2001.

[65] Ganaden v. Court of Appeals, G.R. Nos. 170500 & 170510-11, June 1, 2011.

enough exceptions in case law that would have justified the Supreme Court in ordering the Office of the President to reveal the health records that would explain the president's health. Inaction is also covered when such amounts to an abuse of discretion. In all these cases, mandamus could have properly been issued by the Supreme Court.

De Leon prevents us from discovering the state of the President's health because according to the Supreme Court, the Office of the President has full discretion on how this information will be released.

De Leon, is the latest in a string of Supreme Court decisions that have rendered innovations and constitutional checks inert. We have all those cases on martial law, where the Supreme Court has dismantled all the checks and balances that we have written into the Constitution, and another horrific decision on the removal of the Chief Justice.[66] Now, through *De Leon*, the Supreme Court has ignored a constitutional directive to inform the public about the state of the President's health.

[66] For my treatment of these cases see Dante Gatmaytan, *Duterte, judicial deference, and democratic decay in the Philippines*, 28 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 553-563 (2018) and Dante Gatmaytan, *The Case of the Philippine Judiciary: Guardian of Democracy or Enabler of Populism?*, POPULISM AND DEMOCRACY (Sascha Hardt, et al., 2020).

SOCIAL MEDIA AND THE NEW FREE PRESS

Charles Janzen C. Chua[**]

ABSTRACT

Social media is a popular source of news information given its convenience and accessibility. It is, however, not mass media as the internet itself is not considered mass media, and the said news information is often user created content that is protected under the free speech clause for being covered under such user's freedom of expression right but not under freedom of the press. Social media is therefore, not the new free press and this discussion humbly explores the difference between social media and traditional news media and between traditional journalists and "regular" social media users, as well as how such differences relate to user content represented as "news" in light of their legal implications.

I. INTRODUCTION

"Stop the presses!" was a turn of phrase during bygone eras when the printing press reigned supreme as the prime instrument for disseminating information to the masses. The connotation was to desist and give way to something of extreme importance. Newspaper persons of old originally

[**] J.D., Ateneo de Manila School of Law (2003). Bachelor of Arts in Liberal Arts, Major in Communications Arts, De La Salle University (1998).

used the phrase to call for the literal stoppage of printing presses to include a "last minute" noteworthy story or news piece just in time for the next edition. However, technological advances in mass media such as the birth of broadcasting, and the advent of the internet, have rendered the original connotation of such phrase less and less popular, if not obsolete.

After German inventor, Johannes Gutenberg, changed the world with the first movable type print press, the word "*press*" took on a different meaning than the actual device used to make ink impressions on paper. Since printing presses were especially used for newspapers, "press" began referring to the group of individuals that gathered and reported the news, and that soon became widely recognized as an institution for that sole purpose. The press is also regarded as "the fourth estate," "the fourth branch of government," or "the fourth power."

Very soon, the press was no longer confined to newspaper journalists, but included broadcasters, anchorpersons, radio and television correspondents, and field reporters. The word "*media*" also had a similar turning. In the literal sense, it was the plural of "medium," which in practice referred to the medium of communication used at that time (i.e., print, radio, or television). However, much like "*press*," "*media*," more specifically news media, referred not only to journalists or their news team (e.g., writers, cameramen, utility personnel, editors, sound engineers, etc.) but to the very institution of news gathering and reporting.

When the internet took the stage as the newest and most effective, if not the most pervasive platform for disseminating information, news agencies took to it like moths to a flame and news publications, television and radio networks soon had their own piece of the pie. They each

wanted a space online which would supplement their traditional operations to better reach their readers or audience. After all, almost everyone today has a mobile phone with accessible Wi-Fi, and they would most likely have their eyes glued to their screens at one time or another.

Surprisingly, news outfits are no longer the only source of reliable news information they once were. Social media is an internet sensation, and has brought traditional word-of-mouth, gossip, rumor mongering, and yes, sometimes, authentic news reporting from their offline beginnings to the digital age whereby stories become "*trending*" and videos become "*viral*." More importantly, social media is a platform for free expression where even a regular Joe may share news information just as conveniently as journalists do.

This begs several questions: "Does that make him or her a journalist or a member of the press?" "Is the information presented as news even news in the traditional senses?" "Is such shared information protected under the free speech clause?" "What is the extent of such protection?"

This will not be a discussion on the history, function and effect of "tri-media" (print, radio and television) or the internet, nor on the legal aspects of the same. The purpose of this note is to lend a legal perspective on the above-identified questions and to address the impact social media has on press freedom. The focus will be limited to forms of social media that allow "ordinary" users ("non-journalists") news-sharing capabilities such as social-networking and video-sharing (e.g., *Facebook, YouTube, Twitter*, etc.), and shall exclude any social media accounts of news agencies or government bodies.

The information referred to as "news," subject of this discussion shall be limited to those of public interest (news

and public affairs) and not personal stories shared or forms of artistic or other expression (e.g., Tiktok videos, or personal blogs or vlogs, music videos, etc.). Commercial speech, e-commerce, and advertising made on social media (e.g., endorsements or promotional videos, etc.) are also excluded from discussion.

According to Canadian communication theorist, Marshall McLuhan, "the medium is the message."[67] This meant that the communication medium (i.e., the way the message is sent) is more important than the message itself because "it is the medium that shapes and controls the scale and form of human association and action."[68] Following such understanding, this paper also aims to generally discuss social media as a medium and how it warrants appropriate legal response to its consequent effects as a platform for mass communicating the news.

II. MASS MEDIA AND PRESS FREEDOM

The term "mass media" has been defined on several occasions in the Philippine legal landscape. The Department of Justice (DOJ) in an opinion construing several constitutional provisions defines "mass media" as follows:

> "The term mass media in the Constitution refers to any medium of communication, a newspaper, radio, motion pictures, television, designed to reach the masses and that tends to set standards, ideals, and aims of the masses. The distinctive features of any mass media

[67] M. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 1 (1964).
[68] *Id.,* at 2.

undertaking, is the dissemination of information and ideas to the public, or a portion thereof…"[69]

The DOJ also issued an opinion defining the term "internet" and finding that the same is not considered "mass media" as previously defined. Thus:

> "Upon the other hand, the *"Internet"* is a *"giant network which interconnects innumerable smaller groups of linked computer networks*" (American Civil Liberties Union vs. Reno, 929 F. Supp. 824,830, cited in *"Purging Pornography in the Internet"*, which virtually covers the entire globe, can either be through the use of a computer or computer terminal that is directly (and usually permanently) connected to a computer network that is itself directly or indirectly connected to the Internet, or through the use of a *"personal computer"* with *"modem"* to connect over a telephone line to a larger computer network that is itself directly or indirectly connected to the Internet (*id.*, at p 97).
>
> Considering the nature and function of an Internet and the fact that it offers three broad types of services, i.e., (1) electronic mail (e-mail) which is the computer version of the post office as it can transmit both text and still or moving visual messages to an addressee or multiple addresses in a mailing list; (2) Bulletin Board System (BBS) which emulates an ordinary bulletin board and; (3) World Wide Web (WWW) which consists of documents (with their

[69] Sec. of Justice Op. No. 24, s. 1986.

respective addresses) stored in the Internet containing varied information in text, still images or graphics (see, ACLU case, *supra*, at pp. 836-838) , it may be safely said that an Internet access provided is one engaged in offering to the owner of a computer the services of inter-connecting the latter's computer to a network of computers thereby giving him access to said services offered by Internet.

Construed in light of the earlier definition of "*mass media*" which involves not only the transmittal but also the creation/publication, gathering and distribution of the news, information, messages and other forms of communications to the general public, it appears indubitable that the Internet business does not constitute mass media. Accordingly, it cannot fall within the coverage of the constitutional mandate limiting ownership and management of mass media to citizens of the Philippines or wholly-owned and managed Philippine corporations.

The rationale is because in the Internet business, Internet access provided merely serves a carrier for transmitting messages. It does not create the messages/information nor transmit the messages/information to the general public, as mass media do, and the publication of the messages /information or stories carried by the Internet and transmitted to the computer owner, thru the access provider, is decided by the sender or the inter-linked networks."[70]

[70] Sec. of Justice Op. No. 40, s. 1998.

This, however, is not to say that information shared over the internet enjoys less or no protection unlike in mass media. In the Philippines, and in almost all democracies, freedom of speech is one of the fundamental rights held with the highest regard. The free speech clause in the Constitution cannot be any clearer:

> "No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."[71]

The provision closely resembles the free speech clause found in the First Amendment of the United States Constitution from where it was adopted:

> "Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[72]

Neither of the two provisions have any qualification or condition as to the when, how, to whom, and in what manner shall such protection extend to free speech. Nowhere was there any mention, nor can the legislature enact any law providing for such qualification or condition. Otherwise, that would amount to an abridgment of such right. Thus, by whatever medium, and in whatever forum, protected speech shared or uttered shall enjoy the same constitutional guarantee.

---

[71] CONST. art. III, sec. 4.
[72] U.S. CONST. amend. I.

A closer examination of the free speech clause in the Philippine Constitution would show that although they enjoy the same protection, there are actually three distinct rights (i.e., free speech, free expression, free press). This distinction appears similarly in the First Amendment which was pointed out by Justice Potter Stewart in a concurring opinion who argued:

> "That the First Amendment speaks separately of freedom of speech and freedom of the press is of no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively."[73]

This seemingly inconsequential distinction is extremely significant as the press traditionally occupy a position in society that is held with the highest regard in the search for truth. As such, members of the press are exposed to certain occupational hazards, more so than the ordinary citizen, such as pressure to reveal sources as an attack on their credibility and being made victims of extrajudicial killings to silence them. Thus, special attention and protection is given to the press to address the same.

To protect journalists from being compelled to reveal their sources, there should either be a privilege or a "Shield Law." In the Philippines, there appears to be no specific provision in the Revised Rules on Evidence (both old and new), covering privilege communication between a journalist and his/her sources. However, there exists a Shield Law since

[73] Houchins v. KQED, Inc., 438 U.S. 1 (1978).

1946 which gives such protection. The Press Freedom Act, or the Sotto Law,[74] specifically provides that:

> "The publisher, editor or duly accredited reporter of any newspaper, magazine or periodical of general circulation cannot be compelled to reveal the source of any news-report or information appearing in said publication which was related in confidence to such publisher, editor or reporter, unless the court or a House or committee of Congress finds that such revelation is demanded by the interest of the State."[75]

In 1956, the Sotto Law was later amended to include the phrase: "Without prejudice to his liability under the civil and criminal laws" at the beginning and amended "interest of the State" to read as: "security of the State."[76] The change from "interest of the State" to "security of the State" restricts potential abuse by limiting the exceptional circumstances by which journalists may be compelled to reveal their sources to when national security is at stake and not just any State interest.

The law was further amended recently in 2019 to expand the coverage of the protection and to bring the same up to speed for the digital age, as follows:

---

[74] Rep. Act. No. 53 (1946). An Act to Exempt the Publisher, Editor or Reporter of Any Publication from Revealing the Source of Published News or Information Obtained in Confidence.
[75] Rep. Act. No. 53 (1946), sec. 1.
[76] Rep. Act. No. 1477 (1956), sec. 1. An Act Amending Section One of Republic Act Numbered Fifty-Three Entitled "An Act to Exempt the Publisher, Editor or Reporter of Any Publication from Revealing the Source of Published News or Information Obtained in Confidence."

> "Without prejudice to his liability under the civil and criminal laws, any publisher, owner, or duly recognized or accredited journalist, writer, reporter, contributor, opinion writer, editor, columnist, manager, media practitioner involved in the writing, editing, production, and dissemination of news for mass circulation, of any print, broadcast, wire service organization, or electronic mass media, including cable TV and its variants, cannot be compelled to reveal the source of any news item, report or information appearing or being reported or disseminated through said media, which was related in confidence to the abovementioned media practitioners unless the court or the House of Representatives or the Senate or any committee of Congress finds that such revelation is demanded by the security of the State."[77]

As such, journalist utilizing online media such as websites of news agencies as well as social media to perform their duties as journalists are covered by the protection. Notably, the protection under the Shield Law extends to the individual members of the press in order to protect them as a matter of public interest, and not to mass media itself and definitely not to social media.

The other hazard previously mentioned is the reprehensible victimization of journalists and making them subjects of extrajudicial killings and enforced disappearances. The same was marked with massive

[77] Rep. Act. No. 11458, sec. 1. An Act Expanding the Coverage of Exemptions from Revealing the Source of Published News or Information Obtained in Confidence by Including Journalists from Broadcast, and News Agencies, Amending for the Purpose Section 1 of Republic Act No. 53, as Amended By Republic Act No. 1477

protests by members of the press, among others, condemning such acts. The government shared such sentiments and lead investigations and further legislative study.

On July 16, 2007, during the National Summit on Extrajudicial Killings and Enforced Disappearances, the Supreme Court, through the leadership of then Chief Justice Reynato Puno, officially declared as available in the Philippines, the Writ of Amparo.[78] Later, on August 25, 2007, the Chief Justice announced the supplement to Writ of Amparo, the Writ of Habeas Data.[79]

The twin remedies of Amparo and Habeas Data were a response to the apparent inefficacy of the Writ of Habeas Corpus[80] and the backdrop of rampant extrajudicial killings and forced disappearances affecting not only journalists, but judges, lawyers, and political activists, as well, among others. The two remedies are available to anyone, as follows:

> "The petition for a writ of amparo is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity."[81]

> "The writ of habeas data is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity

[78] A.M. No. 07-9-12-SC (2007). The Rule on the Writ of Amparo.
[79] A.M. No. 08-1-16-SC (2008). The Rule on the Writ of Habeas Data.
[80] REVISED RULES OF COURT, rule 102.
[81] A.M. No. 07-9-12-SC (2007), sec. 1.

engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party."[82]

Again, it can be seen from these two remedies that the relief is given to individuals in general. As such, in reference to journalists, the remedies are available to members of the press and not to mass media or social media.

In 2016, President Rodrigo Duterte signed his first administrative order, one creating the Presidential Task Force on Media Security (PTFoMS).[83] It is the duty of the PTFoMS to investigate and address and prosecute cases of disappearances and killings of journalists. The administrative order had the following recitals, among others:

"WHEREAS, the continuing attack on media workers is not only erosive of press freedom and free expression but also impedes the flow of information in a community;

WHEREAS, a free press and media perform the necessary function of providing accurate, fair and relevant information which is vital for a free citizenry to perform its duty of monitoring government actions, and communicating its views to the government;

WHEREAS, the murders and violent incidents against journalists create an impression of a

[82] A.M. No. 08-1-16-SC (2008), sec. 1.
[83] Adm. Order No. 1 (2016). Creating the Presidential Task Force on Violations of the Right to Life, Liberty and Security of the Members of the Media.

> culture of impunity, wherein security establishments of the State and non-State forces have been accused of silencing, through violence and intimidation, legitimate dissent and opposition raised by members of the press along with those who belong to cause-oriented groups, political movements, people's and non-government organizations, and by ordinary citizens;"[84]

Clearly, the administrative order reflects the State's recognition of the value of the press and the vital role it has in society. Moreover, the same also confirms that members of the press, or "media workers"[85] as defined in the administrative order, which included those engaged in media practice whether it be in print, internet, radio broadcast or commentaries, and television, deserve the privilege and protection the administrative order seeks to provide.

III. SELF-POLICING VS. STATE REGULATING

By tradition and practice, free speech or press freedom is not subject to state regulation. This has been a well-settled constitutional point in jurisprudence. Previously, a bill was proposed requiring journalists to take licensure examinations to be "accredited" and entitled to the rights and protection afforded to members of the press.[86] The bill proposed that this would ensure professionalism and regulate the journalist profession in general. However, it was immediately met with rejection and indignation by lawmakers and journalists alike who said that it was

---

[84] *Ibid.*
[85] *Id.,* at sec. 1.
[86] S. No. 380, 16th Cong., 1st Sess. (2013). An Act Creating the Magna Carta for Journalists.

tantamount to media censorship and government control of the press.

The press, however, has always been regarded as a self-policing profession, such that various journalist groups have created and formalized a Code of Ethics that serve as guiding principles and professional standards to be followed by members of the press. The Philippine Press Institute, the National Union of Journalists in the Philippines, and the National Press Club have approved the Journalists' Code of Ethics,[87] while the Kapisanan ng mga Broadkaster ng Pilipinas (Association of Broadcaster of the Philippines or KBP) have also adopted its own code.[88]

If any restriction by the government is to be made with respect to free speech, the same shall be met with the strictest scrutiny. The Supreme Court had ruled that: "…it is established that freedom of the press is crucial and so inextricably woven into the right to free speech and free expression, that any attempt to restrict it must be met with an examination so critical that only a danger that is clear and present would be allowed to curtail it."[89] The Supreme Court also made reference to specific tests developed in evaluating whether government restraint on free speech is valid or not:

> "Generally, restraints on freedom of speech and expression are evaluated by either or a combination of three tests, *i.e.*, (a) the **dangerous tendency doctrine** which permits limitations on speech once a rational connection has been established between the speech restrained and the danger

[87] Philippine Journalists' Code of Ethics (1988).
[88] Broadcaster Code of the Philippines (2007), as amended in 2011.
[89] Chavez v. Gonzales, et al., G.R. No. 168338, February 15, 2008.

> contemplated; (b) the **balancing of interests tests**, used as a standard when courts need to balance conflicting social values and individual interests, and requires a conscious and detailed consideration of the interplay of interests observable in a given situation of type of situation; and (c) the **clear and present danger rule** which rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. This rule requires that the evil consequences sought to be prevented must be substantive, "extremely serious and the degree of imminence extremely high."[90]

The Supreme Court had also on occasion ruled that not all speech deserve constitutional protection. This is whether the same is made by members of the press or not. Contemptuous speech is an example of non-protected speech. The Supreme Court had said that: "[f]ree speech is not a license to undermine the authority of the court to administer justice, neither is it a shield to protect persons who has shown distrust in our system."[91] In another case, it was ruled that:

> "…the making of contemptuous statements directed against the Court is not an exercise of free speech, but an abuse of such right. Unwarranted attacks on the dignity of the courts cannot be disguised as free speech, for the exercise of said right cannot be used to impair

[90] Chavez v. Gonzales, et al., G.R. No. 168338, February 15, 2008.
[91] Brillante v. Hon. Sandiganbayan, et al., G.R. No. 182644, September 15, 2010.

> public respect and confidence in the courts. Thus, "(f)ree expression must not be used as a vehicle to satisfy one's irrational obsession to demean, ridicule, degrade and even destroy this Court and its magistrates."[92]

Another example of non-protected speech is defamation. The Supreme Court had clearly pointed out that even journalists are not immune from prosecution when it comes to defamatory language. As such, members of the press are treated the same way as ordinary persons and the focus is on the speech and whether the same is defamatory or not. The Supreme Court had said that:

> "The freedoms of expression and of the press were not designed or intended to shield a person from liability for making defamatory statements against another. The Constitution and the law do not extend special treatment to journalists simply because they are journalists. It is the law that requires them to prove their lack of malice, their good intentions and their justifiable motives. This statutory requirement is true for all persons charged with libel, be they seasoned or novice journalists, or struggling campus reporters, or plain and simple citizens. The petitioner, even as a journalist, might have had the duty to inform the public about newsworthy personalities or events, but such duty did not vest him the immunity from liability for defaming another person even if he should prove

[92] Roxas v. De Zuzuaregui, Jr., G.R. Nos. 152072 and 152104, July 12, 2007.

his good intention or justifiable motive for doing so."[93]

In upholding the validity of cyber libel, the Supreme Court had said that: "…Libel, like obscenity, belongs to those forms of speeches that have never attained Constitutional protection and are considered outside the realm of protected freedom… a person's right to free expression and free speech is not an excuse to defame the reputation and honor of another."[94]

IV. SOCIAL MEDIA: THE NEW ANIMAL

Social media refers to "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content."[95]

Web 2.0 is said to refer to the second stage of development of the world wide web or the internet and it focuses on content from the participation of users (e.g., social media), which is a stark contrast to the first version of the web or Web 1.0, which was essentially "read-only." The term was coined by Darcy DiNucci in her article, *Fragmented Future*,[96] and later popularized by Tim O'Reilly and MediaLive International in 2004.

There are several forms of social media. These may include social networking (e.g, *Facebook, Twitter*, *Linkedin*); media sharing (e.g., *YouTube, Instagram*); discussion forums

[93] Alcala v. People of the Philippines, G.R. No. 170721, August 23, 2017.
[94] Disini Jr. v. Secretary of Justice, G.R. No. 203335, April 22, 2014.
[95] A.M. Kaplan and M. Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, 53 BUSINESS HORIZONS 59-68 (2010).
[96] Print Magazine, April 1999, p. 32.

(e.g., *Quora, Reddit*); bookmarking and content curation (e.g., *Pinterest*); consumer review (e.g., *TripAdvisor, Zomato*); blogging and publishing (e.g., *Wordpress, Tumblr*); internet-based network (e.g, *Goodreads*).[97]

Social media has proven to be exceedingly convenient and user-friendly. As such, it has, in a way, taken the place of mass media in reaching out to a wide audience and made the same extremely accessible to the ordinary person. It has taken free speech to a whole new level. Gone were the days when the ordinary person was at the mercy of newspaper, radio, or television companies whereby not everyone could easily avail of such mass media to get his/her message across. Editors, producers, production teams and the like would have to approve of what goes on print, radio or television.

With social media, a push of a button allows users to create and upload content and the same would immediately be made public. Granting the audience would not be "captured" as with traditional mass media, and the internet is not as pervasive as radio or television since content would still have to be searched and are not made readily available, such content is public nonetheless.

The convenience and user-friendly nature of social media have also changed the way the news is presented or received. The effectiveness of traditional mass media may already pale in comparison to how news spread in social media like wildfire. Terms like "*trending*" topics (i.e., popular and widely discussed at that time in social media) and "*viral*" videos (i.e., popular by repeated sharing on video sharing

---

[97] Garima Kakkar, 'Social Media Marketing' Available https://www.digitalvidya.com/blog/types-of-social-media. September 12, 2018.

social media) were new concepts that are tied closely to social media and were unheard of in traditional mass media.

It is because of the phenomenal popularity of social media and its uncanny effectiveness in spreading information, that traditional mass media operators and members of the press not only have their own websites (due to the popularity of the internet), but they also have their own social media accounts. However, because it is very easy for almost anyone to create a profile and sign up for a social media account, and almost everyone has his/her own story to tell, free speech and free expression have found a new home in social media. In fact, it came to a point where even "non-journalists," or non-members of the media have used social media not only to exercise their freedom of expression, but also to act like the press and share news stories, make commentaries on news events, and even upload videos of the same.

A. Social Media Does Not Make Journalists

Social media, however, with all its glitz and glamor, does not a journalist make. As discussed previously, mass media is not the press as the latter is the institutionalization of its members and refers mostly to such institution or the members themselves and not the medium used to disseminate the news. Therefore, the internet, or social media for that matter cannot be taken to refer to the press. Moreover, the mere fact that a "non-journalist" is able to create news content and upload the same, or has already done so, does not automatically make that person a member of the press.

Although there is no specific educational background, licensure examination, or any regulatory requirement to be qualified as a journalist (as any attempt at mandating such accreditation requirement would mostly be struck down for violating the freedom of the press), not all social media users may be regarded as members of the press. Journalists, or members of the press are markedly different from the ordinary social media users such that they are held to a higher standard and, as discussed, they police themselves in complying with set guidelines and codes of conduct.

Moreover, journalist and members of the press who report the news are rarely, if not never, anonymous. They are always exposed to occupational risks. The stark contrast is that in social media, given the convenience in signing up for an account, the platform is often plagued with fake accounts, identity theft, pseudonyms, and anonymous users. As such, the sense of accountability is absent in social media. Part and parcel of the professional duty of a journalist is to gather information, verify facts, check sources, and communicate the same, all in the search for, and for the sake of truth. This duty is also covered by the code of ethics. More often than not, social media users merely "reshare" stories or videos which were sourced elsewhere and the same ends up being "trending" or "viral" but the original source is unknown. It is also highly unlikely for the ordinary social media user to verify facts and actually check sources for credibility and accuracy. If it was a personal matter, objectivity of the said social media user comes into question.

This is of course a generalization and the exception being social media users who are actual journalists or members of the press, or a user who is willing to comply with the code of conduct, perform the professional duties of a journalist, and to face the risks, take responsibility and be accountable for the news information he/she will upload.

B. News on Social Media is Not Always News

Depending on your source, "*news*" can mean different things such as: "North East West South;" "Notable Events Weather and Sports;" or simply the pluralization of "new" connoting novelty and the current status of the information shared. The latter however, is said to be the most accurate definition of "*news.*" Regardless of definition, the general understanding of "news" and its elements is that it is truthful, verifiable, accurate, and current, or at least it is supposed to be.

In the case of social media, not all information shared may be considered news. It is humbly submitted that if the information to be shared does not meet the above-mentioned elements, then it should not be considered news in the strictest sense. The reason for this a simple one. The press, as discussed, have a duty that is heavily burdened with public interest, and that is to deliver the news to the masses. People rely on the press to report the news, and they expect the same to be factual and reliable. As such, before the news gets printed on newspapers, or read on air via radio or television, the same go through a painstaking process of vetting and verification. Moreover, should there ever be a mistake, the journalist, paper, or network can always issue an *erratum* or retraction, or even an apology.

With social media, it is worth noting that the user controls what information gets uploaded, with the exception of social media that have content teams who verify that such content conform to community standards and terms of use. However, in usual practice, this is more of a "upload-first-remove-later" type of situation leaving much of the review reserved in any of three instances: (1) when inappropriate

content is reported; (2) when a random or spot check is conducted on a specific upload; (3) when the software "tool" or "A.I." (artificial intelligence) flags a particular content for either removal or further review in accordance with previously set parameters and key words (e.g., child porn, seditious speech, racial slurs, etc.).

Unlike traditional mass media, social media has no editors or producers to review content prior to user upload. Although this gives the user a certain degree of creative freedom, limited only by the standards and review discussed above, this also means the accountability for such uploaded information is left solely to such user.

What makes the news "news" is the fact that the information has undergone and withstood an "acid test" of research, source check, verification and editing before it is shared with the public. The need for this is obviously consistent with the quest for truth, the avoidance of defamation and the placement of proper context. The result is a "neatly packed" product that is delivered with such objectivity and professionalism speaking only of the credibility and reliability of the journalists that write or present them.

This is not to say that this cannot be similarly done with social media. After all, several news networks have also branched online and the same is not limited to their own websites but have activated their respective social media accounts. Further, there are also social media influencers or content creators that have capitalized on internet fame and took freedom of expression to another level by presenting commentaries, videos, and stories, and representing the same as news. However, there is a marked difference between how information reaches the public via social media *vis-a-vis* more traditional methods. As such, information

represented as “news” in social media cannot and should not all be taken at face value.

C. Social Media Special Considerations

i. Convenience

Besides the fact that social media is a cultural phenomenon and that it is most identified with “Generation Y” and beyond, the most notable factor that attracts millions of users to social media is the convenience it offers.

It does not take much to sign up for an account and to create a profile. It takes even less to upload content. In fact, for the most part, it is completely free of charge. All a user needs to do is to access the desktop webpage or download the application.

Social media is generally accessible to everyone, but restricted access is provided under certain conditions. *Facebook* provides as follows:

> “We try to make Facebook broadly available to everyone, but you cannot use Facebook if:
>
> - You are under 13 years old (or the minimum legal age in your country to use our Products).
> - You are a convicted sex offender.
> - We’ve previously disabled your account for violations of our Terms or Policies.

- You are prohibited from receiving our products, services, or software under applicable laws."[98]

YouTube uses similar language and even encourages that potential users easily sign up to make use of added features:

> "You must be at least 13 years old to use the Service. However, children of all ages may use YouTube kids (where available) if enabled by a parent or legal guardian…
>
> You can use parts of the Service, such as browsing and searching for Content, without having a Google account. However, you do need a Google account to use some features. With a Google account, you may be able to like videos, subscribe to channels, create your own YouTube channel, and more…
>
> Creating a YouTube channel will give you access to additional features and functions, such as uploading videos, making comments or creating playlists (where available)…"[99]

On the other hand, *Twitter* especially highlights the fact that a potential user can readily avail of the services by agreeing to a contract and not being barred from doing so:

---

[98] Facebook. 'Terms of Service' Available https://www.facebook.com/terms.php. July 31, 2019.
[99] Youtube. 'Terms of Service' Available https://www.youtube.com/static?template=terms. December 10, 2019.

> "You may use the Services only if you agree to form a binding contract with Twitter and are not a person barred from receiving services under the laws of the applicable jurisdiction. In any case, you must be at least 13 years old, or in the case of Periscope 16 years old, to use the Services."[100]

Given the convenience of accessing social media and the relative ease in disseminating information to the public, getting the news out to more people in less time than with traditional counterparts gives social media an edge, however, as almost anyone can do this, and as there is little or no effort to vet such information, uploaded content in social media should be taken with a grain of salt and not readily considered as "news" per se. At the very least, however, it falls within the purview of self-expression and is protected not by freedom of the press, specifically, but by free speech and free expression.

ii. Anonymity

The convenience of social media also highlights another notable feature it has which is the level of anonymity it allows for the user. Although users are obligated to exercise candor and disclose true personal information such as their real name, age, and other details, because there is no way to cross-check the same (i.e., users are not required to submit proof of identification), it is extremely convenient and highly likely for a user to use an alias, and misrepresent who they are, their age, location, and others. According to *Facebook*, they require a commitment from their users to:

---

[100] Twitter. 'Terms of Service' Available https://twitter.com/en/tos#update/ June 18, 2020.

"use the same name you use in everyday life; provide accurate information about yourself; create only one account (your own) and use your timeline for personal purposes…"[101]

For *YouTube*, to enjoy the full experience, a user needs to sign up or sign in using his or her *Google* Account, which in turn is equally easy to create. There is no specific mandate for the user to use his or her real name and this is the same for *Twitter.* However, although such level anonymity is appealing due to user privacy considerations, it has its own drawbacks as when the user would like to lodge a complaint against another use or would like to a specific content taken down for, let us say, copyright or trademark infringement, misappropriation, or identity theft, in which cases using a "dummy" account or alias would be to the user's disadvantage.

As most users utilize aliases, pseudonyms or "hide" behind a fake name, or even a legitimate sounding news-agency-type of nomenclature (e.g., Philippine News Today), it would be difficult to hold such users to the journalistic integrity, credibility, and accountability of those who actually "face the music" and stand by their reports or comments. In any case, user uploads may be more appropriately referred to as "information" sharing rather than news reporting.

iii. Contractual Nature

As mentioned earlier, content is under more of an "upload-now-review-later" type of set up. Users are expected to abide by community guidelines to avoid their content from being flagged as inappropriate and later removed. This committed compliance by users is a contractual obligation in

[101] *Supra* note 33.

exchange for the use of the services offered by a specific social media. *Facebook* provides as follows:

> "If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account. We may also suspend or disable your account if you repeatedly infringe other people's intellectual property rights or where we are required to do so for legal reasons."[102]

Facebook community standards address the following subjects: "violence and criminal behavior, safety, objectionable content, integrity and authenticity, respecting intellectual property, and content-related requests."[103] Among these, the most relevant to this discussion are integrity and authenticity, specifically, "misrepresentation, inauthentic behavior, false news, and manipulated media."[104]

Its policy rationale against misrepresentation is as follows: "Authenticity is the cornerstone of our community. We believe that people are more accountable for their statements and actions when they use their authentic identities. That's why we require people to connect on Facebook using the name they go by in everyday life. Our authenticity policies are intended to create a safe

---

[102] *Ibid.*

[103] Facebook. 'Community Standards' Available https://www.facebook.com/communitystandards. July 31, 2019.

[104] Facebook. 'Integrity and Authenticity.' Available https://www.facebook.com/communitystandards/integrity_authenticity. July 31, 2019.

environment where people can trust and hold one another accountable."[105]

Facebook similarly addresses inauthentic behavior and provides that: "In line with our commitment to authenticity, we don't allow people to misrepresent themselves on Facebook, use fake accounts, artificially boost the popularity of content, or engage in behaviors designed to enable other violations under our Community Standards. This policy is intended to create a space where people can trust the people and communities they interact with."[106]

On the matter of false news, *Facebook* specifically acknowledges the need to stop its spread yet not at the expense of infringing free speech. Thus: "Reducing the spread of false news on Facebook is a responsibility that we take seriously. We also recognize that this is a challenging and sensitive issue. We want to help people stay informed without stifling productive public discourse. There is also a fine line between false news and satire or opinion. For these reasons, we don't remove false news from Facebook but instead, significantly reduce its distribution by showing it lower in the News Feed…" (Emphasis Supplied).[107] It also highlights other means by which it attempts to reduce false news:

---

[105] Facebook. 'Misrepresentation.' Available https://www.facebook.com/communitystandards/misrepresentation. July 31, 2019.

[106] Facebook. 'Inauthentic Behavior.' Available https://www.facebook.com/communitystandards/inauthentic_behavior. July 31, 2019.

[107] Facebook. 'False News.' Available https://www.facebook.com/communitystandards/false_news. July 31, 2019.

> "We are working to build a more informed community and reduce the spread of false news in a number of different ways, namely by
>
> - Disrupting economic incentives for people, pages, and domains that propagate misinformation
> - Using various signals, including feedback from our community, to inform a machine learning model that predicts which stories may be false
> - Reducing the distribution of content rated as false by independent third-party fact-checkers
> - Empowering people to decide for themselves what to read, trust, and share by informing them with more context and promoting news literacy
> - Collaborating with academics and other organizations to help solve this challenging issue"

Finally, with respect to manipulated media, *Facebook* specifically recognizes the potential dangers of media such as images, audio, and video that has been subtly edited to appear non-apparent and with the potential to mislead. The same provides as follows:

> "Media, including image, audio, or video, can be edited in a variety of ways. In many cases, these changes are benign, like a filter effect on a photo. In other cases, the manipulation isn't apparent and could mislead, particularly in the case of video content. We aim to remove this category of

manipulated media when the criteria laid out below have been met.

In addition, we will continue to invest in partnerships (including with journalists, academics and independent fact-checkers) to help us reduce the distribution of false news and misinformation, as well as to better inform people about the content they encounter online.

xxx

This policy does not extend to content that is parody or satire or is edited to omit words that were said or change the order of words that were said" (Emphasis Supplied).[108]

YouTube is one of those social media that utilizes both artificial intelligence tools and human reviewers to determine whether users comply with community standards. Moreover, in the process of such review, it specifically affords protection to protected free speech accordingly:

"YouTube takes action on flagged videos after review by our trained human reviewers. They assess whether the content does indeed violate our policies, and protect content that has an educational, documentary, scientific, or artistic purpose. Our reviewer teams remove content that violates our policies and age-restrict content that may not be appropriate for all audiences. Our automated flagging systems also help us

[108] Facebook. 'Manipulated Media.' Available https://www.facebook.com/communitystandards/manipulated_media. July 31, 2019.

> identify and remove spam automatically, as well as re-uploads of content we've already reviewed and determined violates our policies."[109]

The contractual relationship between the user and social media is best highlighted by *Twitter* by using familiar contract provision language as follows:

> "We may revise these Terms from time to time. The changes will not be retroactive, and the most current version of the Terms, which will always be at twitter.com/tos, will govern our relationship with you. We will try to notify you of material revisions, for example via a service notification or an email to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.
>
> x x x
>
> In the event that any provision of these Terms is held to be invalid or unenforceable, then that provision will be limited or eliminated to the minimum extent necessary, and the remaining provisions of these Terms will remain in full force and effect. Twitter's failure to enforce any right or provision of these Terms will not be deemed a waiver of such right or provision.
>
> These Terms are an agreement between you and Twitter, Inc., 1355 Market Street, Suite 900, San

[109] Youtube. 'Community Guidelines.' Available https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#enforcing-policies. December 10, 2019.

> Francisco, CA 94103 U.S.A. If you have any questions about these Terms, please contact us."[110]

In light of the above, it is clear that users, by giving their consent, either through a tick box, typing or clicking yes, or by using or continuing to use the services of a specific social media, enter into a contract with that social media and thus, they are contractually obligated to comply with certain conditions such as agreeing to follow community standards or guidelines. Although social media may have human reviewers, software tools, or even user community efforts in flagging inappropriate content or violations of such standards or guidelines, for the most part, user compliance is pretty much a self-policing endeavor. As such, by applying human nature, it would be imprudent to treat the user uploaded content as news per se if they are the ones who have control in saying whether they did comply with standards and guidelines or not.

This begs the question: "How is this different from journalist policing themselves as discussed above?" The answer is that it is precisely the convenience and anonymity provided by social media that prevents users from being truly accountable in the same manner as traditional journalists and media practitioners. Moreover, violation of social media community guidelines would warrant anything from a removal of content, suspension, or cancellation of service, or in the worst case, ban from future use. This is a slap on the wrist, especially since the user can always sign up anew, or if he/she already has multiple accounts.

On the other hand, with journalists and media practitioners, violations on their part would result in

---

[110] Twitter. 'Terms of Service.' Available https://twitter.com/en/tos#update. June 18, 2020.

potential reputational damage, civil lawsuits, criminal prosecution, and even physical harm because they are readily identified. Moreover, these risks also carry over to their editors, producers, and even the newspaper, radio, or television network. As such, given such risk factors, apparently, the information presented as news in the traditional media would most likely be more authentic than user content in social media which at the very least is protected under free speech albeit not under free press.

iv. Third Party Liability

As mentioned above, traditional media outlets such as publications and broadcast networks are also exposed to the same risk factors as journalists given their affiliation and their conformity to the news presentation. As such, they are vicariously liable, if not liable as principals for being complicit in whatever the journalists or media practitioners would write or present. Social media, however, merely has a contract with the users. Social media is not represented as a public service unlike mass media.

Several provisions or clauses in social media Terms and Conditions, or Terms of Use or Service specifically highlight the fact that social media should not 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.

Social media usually declare that their services and products are provided "as is" and disclaim any warranties and restrict any liability for indirect damages, loss profits and the like. Moreover, at the outset, it is made abundantly clear to the user that the user will be solely responsible for

uploaded content and it is highlighted that such social media is nothing but a third-party service provider. Generally, the contract between the social media and user also includes and indemnity clause that further affords protection to social media for user violations. According to *YouTube*:

> "To the extent permitted by applicable law, you agree to defend, indemnify and hold harmless YouTube, its Affiliates, officers, directors, employees and agents, from and against any and all claims, damages, obligations, losses, liabilities costs or debt, and expenses (including but not limited to attorney's fees) arising from: (i) your use of and access to the Service; (ii) your violation of any term of this Agreement; (iii) your violation of any third party right, including without limitation and copyright, property, or privacy right, or (iv) any claim that your Content caused damage to a third party…"[111]

Facebook does not appear to have such an indemnity clause but instead relies on prevailing laws and provides as follows: "Accordingly, our liability shall be limited to the fullest extent permitted by applicable law, and under no circumstance will we be liable to you for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms or the Facebook Products, even if we have been advised of the possibility of such damages."[112]

---

[111] Youtube. 'Terms of Service.' Available https://www.youtube.com/t/terms. December 10, 2019.
[112] Facebook. 'Terms of Service.' Available https://www.facebook.com/terms.php. July 31, 2019.

Besides such contractual protection available to social media, in the United States a Federal Statute affords protection to social media, one that does not appear to be available in the Philippines.

The Communications Decency Act of 1996,[113] was enacted to address concerns of minors' access to pornography via the internet. It was regarded as an attack on the freedom of speech and significant portions of which were struck down by the Supreme Court. However, ironically, the same also contains a provision that is highly valued as a protection of free speech and that is Section 230.[114]

The latter provides that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[115] As such intermediaries or republishers of such information enjoy the protection afforded by the law which includes immunity from civil liability. Notably, in light of this law, social media is protected from suit for user created content.

This is a special piece of legislation that is unique for the United States. As mentioned, there is no similar protective law in the Philippines. It essentially affords social media "safe harbor" and distinguishes it as different from the user that created the content, which is vastly different from the vicarious liability of traditional mass media. Thus, the accountability factor that is present with traditional mass media is not present with social media, in which case, the latter cannot be regarded as the press or a vehicle for the same to be able enjoy the protection afforded to it.

---

[113] Title V of the Telecommunications Act of 1996, 47 U.S.C., February 8, 1996
[114] U.S. Telecommunications Act of 1996, 47 U.S.C. (1996), title V, sec. 230.
[115] *Ibid.*

V. CONCLUSION

Social media is a revolutionary means of disseminating information via an already revolutionary medium that is the internet. The pervasive effects, convenience, and potential anonymity it affords users are appealing features that encourage not only professional journalists but also "ordinary" users to create and upload content. Whether or not such content is regarded as "news" is beside the point as such content is generally protected under the free speech clause as freedom of expression.

Despite the seemingly inconsequential nature of social media's regard for user content in light of the "upload-first-remove-later" protocol and the fine line between free speech and inappropriate content, that is not to say that social media has not made efforts to quell inappropriate content. As users enter into a contract to avail of the services of social media, there is an appurtenant user commitment to abide by community standards and guidelines set by social media to ensure that user content that will be uploaded should have been legitimate in the first place.

Given the contractual nature of the relationship between users and social media, and the fact that social media is significantly different from traditional mass media due to the apparent absence of the public service element, the accountability of social media for user content in a similar manner as traditional mass media has for journalist's contributions is seriously put into question. Moreover, the potential for anonymity made readily available to users also makes it extremely difficult to hold such users accountable and reliable for the content uploaded.

In light of the foregoing, uploaded user content cannot and should not be considered "news' in the traditional sense. Journalists and media people are not made by social media,

nor is uploaded content transformed into “news” by the same. Social media does have its uses, but it is, by any stretch of imagination, definitely not the new free press.

***

PHILIPPINE CONTRACT LAW IN GLOBAL BUSINESS AND GLOBAL CRISIS: A COMPARISON BETWEEN THE TREATMENT OF THE *REBUS SIC STANTIBUS* DOCTRINE IN THE PHILIPPINE CIVIL CODE AND IN THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Cristina A. Montes

I. INTRODUCTION

The phrase "rebus sic stantibus" is an abbreviation of the Latin maxim "Contractus qui habent tractum succesivum vel dependentiam de future rebus sic stantibus intelliguntur" which, loosely translated, means that long term contracts or contracts that depend on the future must be understood to assume that things remain as they are.[116] Today, it refers to a legal doctrine which exempts parties to a contract from fulfilling their obligations if fulfilment becomes too onerous due to a supervening change in the circumstances contemplated by the parties at the time they entered into the contract.

The *rebus sic stantibus* doctrine has become relevant with the recent outbreak of the COVID-19 virus which has compelled many to cancel business transactions and which have rendered compliance with contractual obligations difficult.

The worldwide scale of the crisis created by COVID-19 and widespread cross-border trade have highlighted the need for a harmonized treatment of the *rebus sic stantibus*

[116] UNIDROIT SECRETARIAT, NOTE OF THE UNIDROIT SECRETARIAT ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE COVID-19 CRISIS, 2-3 (2020), *available at* https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf (last visited on July 23, 2020).

doctrine across legal jurisdictions. To date, the closest equivalent to a universal law on contracts is the UNIDROIT Principles of International Commercial Contracts. In fact, in a note that it published for public discussion, the UNIDROIT Secretariat proposed that the UNIDROIT Principles of International Commercial Contracts are a suitable transnational instrument to deal with the COVID-19 situation.

For this reason, a comparison between the Civil Code and the UNIDROIT Principles of International Commercial Contract is useful in determining how a specific national law responds to the need for harmonization among laws governing cross-border business transactions.

This paper will first discuss the general features of the *rebus sic stantibus* doctrine. Afterwards, the paper will discuss how the treatment of the *rebus sic stantibus* doctrine in the Civil Code of the Philippines. Special attention shall be given to commentaries of the Spanish jurist Castan Tobeñas on counterpart provisions of the Spanish Civil Code of 1889 which, due to the history of the Civil Code of the Philippines, are useful in interpreting and analyzing the Civil Code of the Philippines. The paper will then introduce the UNIDROIT Principles of International Commercial Contracts and discuss how the principles treat the *rebus sic stantibus* doctrine. Finally, the paper will compare and contrast the treatment of *rebus sic stantibus* in the Civil Code of the Philippines with the treatment of *rebus sic stantibus* in the UNIDROIT Principles of International Commercial Contracts.

II. REBUS SIC STANTIBUS

The *rebus sic stantibus* doctrine developed within the civil law tradition under the influence of Roman law and

medieval canon law.[117] In the civil law tradition, as a general rule and as required by juridical security, a contract, once freely entered into by the parties, is binding even the circumstances in which the contract was entered into change due to causes beyond the control of the parties. However, this can make it excessively burdensome for the parties to comply with their contractual obligations in cases of contracts of long-term performance.[118]

According to the Spanish jurist Castan Tobeñas, there are two possible solutions to this problem. The first is a contractual solution, whereby the parties themselves foresee, at the moment of the execution of the contract, possible future altered circumstances and agree in advance on what measures to take in case of such alteration of circumstance. An example of this is a clause whereby the parties agree in advance on the exchange rate in which payment shall be made in case of extraordinary inflation. [119]

The second possible solution is a legal solution, whereby the state enacts laws to address the situation of altered circumstances, and/or empowers the courts to revise the contracts or declare them totally ineffectual in the case of altered circumstances.[120]

Several theories have been developed to justify the revision of a contract or declaring the contract ineffectual in case of altered circumstances.

One is that a "*rebus sic stantibus*" clause is impliedly incorporated in every contract, by virtue of which the obligor is allowed to "resolve" (that is, be exempted from his or her contractual obligation) the contract in case of supervening major change in circumstances that was not contemplated by

---

[117] Mary Jude V. CAntorias, *The Underpinnings of Contractual Relations – When Can a Promise Be Broken?*, 8 ARELLANO LAW AND POLICY REVIEW 2, 102 (2007).
[118] 3 J. Castan Tobeñas DERECHO CIVIL ESPAÑOL, COMUN Y FORAL (Spain), 447-448 (9th ed, 1958).
[119] *Id.* at 287, 448.
[120] *Id.* at 448.

the parties at the time of the execution of the contract. This doctrine originated in the Middle Ages, but became widely used in countries that were affected by World War I.[121]

According to another theory, the right to resolve the contract is based on the assumption that the circumstances under which a contract was executed were part of the representations on which each party based their respective consents to the contract.[122]

A related theory is that the doctrine of *rebus sic stantibus* is a necessary consequence of reciprocity of contracts. According to this theory, there can be no reciprocity if, because of essential alterations in the economic situation, the prestation of one of the parties has been converted, from the economic point of view, into a completely different one from that which was originally contemplated and wanted by the parties.[123]

A fourth theory is the theory of unforeseeable risk, according to which a contract may be revised or resolved when subsequent events which were unforeseen by the parties at the time of the execution of the contract render the performance of the contract extremely onerous or unfavorable for the contracting parties.[124]

Civil law jurists posit that *rebus sic stantibus* should be applied with caution. Ripert, for example, proposes that the following conditions must be present before *rebus sic stantibus* be applied: a) the unforeseeable character of the even that has supervened; b) that the execution of the contract has become extremely difficult or onerous such that it would constitute a loss for the debtor that is disproportionate to the advantage foreseen in the contract; c) that the contract does not have an aleatory character with

[121] *Id.* at 450-451.
[122] *Id.* at 452.
[123] *Id.* at 456.
[124] *Id.* at 453-454.

which the parties intended to foresee, to some extent, the possibility of the event happening.[125]

For Roca and Puig Brutau, the following conditions must be present before *rebus sic stantibus* should be applied:

1. That the change of circumstance be unforeseen;
2. That it produce an extraordinary difficulty;
3. That the risk was not the determining motive for the contract;
4. That there be no existing harmful action by any of the parties, given that the effects of delicts and quasi-delicts have already been predetermined by the law;
5. That the contract be one of future performance;
6. That the alteration of circumstances take place after the execution of the contract and is of a certain permanent character; and
7. That there be a petition by an interested party.[126]

Examples of specific applications of the *rebus sic stantibus* doctrine in civil law traditions are principles and court sentences which allow lawyers to argue for the renegotiability of long term contracts and judges/arbitrators to accept an escape from contractual obligations, such as the French doctrine of *imprevision* in the case of the *contrat administratif.*[127]

(A *contrat administratif* is a government contract. In many civil law jurisdictions, government contracts are governed by an administrative law that is distinct from the general law on contracts. Some common features of these contracts is the right of the contracting authority to unilaterally modify aspects of the contract when it deems the change to be in the public interest, and the right of *imprevision*, which is the right of the operator to

[125] *Id.* at 454.
[126] *Id.* at 454-455.
[127] M. CANTORIAS, *op. cit.,* at 102.

compensation for financial difficulties arising from large and unforeseen changes in economic conditions that render execution of the contract financially hazardous.) [128]

Compared to the civil law tradition, the common law tradition is even less willing to recognize changed circumstances and tends to reject adjustment as a general form of relief. For example, common law developed the doctrine that impossibility or changed circumstance is an excuse unless the obligor undertook the risk of the contingency.[129]

This is because common law tends to view the contract as an instrument of liberalism and private autonomy, whereas civil law has ascribed a social function to public agreements, which are thereby affected by extra-contractual considerations (although the voluntarist and laissez-faire philosophies also had their influence on the civil law tradition).[130] Another consequence of this distinction between common law and civil law is that the instinct of civil lawyers is to turn to the rules contained in civil codes, while the instinct of lawyers is to turn to the terms of the contract. [131] This affects the extent to which each legal tradition accommodates changed circumstances in interpreting and executing contracts.

A. Rebus Sic Stantibus in Philippine Law

The Philippine legal system is a hybrid between the civil law system and the common law system. In particular, and in relation to the present study, the Civil Code of the

---

[128] Victoria Rigby Delmon, *Civil Law Systems – Key Terms Implied by Law that can Impact PPP Arrangements*, World Bank, April 2008, *available at* www.worldbank.org/ppp (last accessed on March 24, 2020).

[129] *Id.*, pp. 101-102.

[130] M. CANTORIAS, *op. cit.,* at 101. But see CASTAN TOBEÑAS, *op. cit.* at 350-353 which notes that the voluntarist and laissez-faire philosophies also influenced the civil law tradition as well.

[131] M. CANTORIAS, *op. cit.* at 102.

Philippines that is currently in force incorporates many of the original provisions of the old Civil Code, which was the same civil code that was enacted in Spain in 1889. For this reason, commentaries on the relevant provisions of the Spanish civil code of 1889 are helpful in interpreting and analyzing their counterpart provisions of the Civil Code of the Philippines.[132]

At the same time, the drafters of the Civil Code of the Philippines added provisions that are based on Anglo-American common law principles.[133] In addition, the Philippine legal system recognizes judicial precedents as sources of law, based on Article 8 of the Civil Code of the Philippines which states that "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."

B. Rebus Sic Stantibus in the Civil Code of the Philippines

In the Civil Code of the Philippines, the doctrine of *rebus sic stantibus* is reflected in the provisions on force majeure, the provisions on the effects of loss of the prestation on the obligation, and the provisions on the effects of extraordinary inflation or deflation on obligations to pay a sum of money. It is also implied in Article 1315 of the Civil Code, as shall be discussed later.

III. FORCE MAJEURE

Article 1174 of the Civil Code of the Philippines provides:

> "Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the

[132] See R. Balane, *The Spanish Antecedents of the Philippine Civil Code*, in C. Sison, CIVIL CODE READER 251, at 301-304 (2005).

[133] *Report of the Code Commission on the Proposed Civil Code of the Philippines*, in C. Sison, *op. cit.*, at 545-546.

obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable."

This provision's counterpart provision in the Spanish Civil Code of 1889 is Article 1105 thereof.[134] Commenting on the latter, Castan Tobeñas identified the following requisites for its applicability:

1. It should involve a fact or event independent of the will of the obligor and, consequently, is not imputable to him or her.

2. The fact or event should be unforeseeable, or foreseeable but inevitable.

3. The fact or event should render it impossible for the obligor to comply with his or her obligation.

4. There must be a causal connection between the fact or event, the impossibility of performance, and the consequent harm to the creditor.[135]

Castan Tobeñas identifies the following effects of force majeure:[136]

1. It exempts the debtor from performance of the obligation and from the liability for damages which the creditor will suffer. This is subject, however, to the exceptions in Article 1105 of the Spanish Civil Code of 1889 (Article 1174 of the Civil Code of the Philippines) such as when the law

[134] Cross-references to provisions of the Spanish Civil Code of 1889 are taken from the annotations in the version of the Civil Code published on https://lawphil.net/statutes/repacts/ra1949/ra_386_1949.html (last accessed on July 23, 2020).
[135] CASTAN TOBEÑAS, *op. cit.*, at 163-165.
[136] *Id.*, at . 168-169.

provides otherwise, or when the parties stipulate otherwise, or when the nature of the obligation requires the assumption of risk. Another exception is when the debtor is in delay (Articles 1096 (third paragraph) and 1182 of the Spanish civil code of 1889; Articles 1165 (third paragraph) and 1262 of the Civil Code of the Philippines).

2. If performance becomes possible only in part, the obligation shall be performed to the extent that it is possible and the rest of the obligation is extinguished.

3. The creditor is entitled to certain occasional advantages from force majeure since, if he or she has to suffer damages from it, it is equitable that he or she also be allowed to enjoy the benefits that indirectly result from the situation. Examples are in Articles 1186 and 1777 of the Spanish civil code of 1889, whose counterparts in the Civil Code of the Philippines are Articles 1269[137] and 1990,[138] respectively.

Article 1575 of the Spanish Civil Code of 1889 distinguishes between ordinary and extraordinary fortuitous events.[139] The counterpart of the said provision in the Civil Code of the Philippines is Article 1680 thereof, which provides:

> "The lessee shall have no right to a reduction of rent on account of the sterility of

[137] "The obligation having been extinguished by the loss of the thing, the creditor shall have all the rights of action which the debtor may have against third persons by reason of the loss."

[138] "If the depositary by force majeure or government order loses the thing and receives money or another thing in its place, he shall deliver the sum or other thing to the depositor."

[139] CASTAN TOBEÑAS, *op. cit.*, at 168.

> the land leased, or by reason of the loss of fruits due to ordinary fortuitous events; but he shall have such right in case of the loss of more than one-half of the fruits through extraordinary and unforeseen fortuitous events, save always when there is a specific stipulation to the contrary.
>
> Extraordinary fortuitous events are understood to be: fire, war, pestilence, unusual flood, locusts, earthquake, or others which are uncommon, and which the contracting parties could not have reasonably foreseen."

Quoting Manresa, Castan Tobeñas notes that in distinguishing between ordinary and extraordinary fortuitous circumstance, this provision considers more the frequency of the event than the nature thereof.[140]

IV. SUPERVENING LOSS OR IMPOSSIBILITY OF THE PRESTATION

Article 1262 of the Civil Code of the Philippines states:

> "An obligation which consists in the delivery of a determinate thing shall be extinguished if it should be lost or destroyed without the fault of the debtor, and before he has incurred in delay.
>
> When by law or stipulation, the obligor is liable even for fortuitous event, the loss of the thing does not extinguish the obligation, and he shall be responsible for damages. The

[140] *Id*.

same rule applies when the nature of the obligation requires the assumption of risk."

Its counterpart provision in the Spanish civil code of 1889 is Article 1182 thereof. Commenting on it, Castan Tobeñas writes that an obligation to deliver a generic thing is not extinguished by the loss of the thing, because it is axiomatic that a genus does not perish and the obligor can deliver another thing of the same genus and quality of the thing that was lost.[141] This principle is reflected in Article 1263 of the Civil Code of the Philippines, which states that "In an obligation to deliver a generic thing, the loss or destruction of anything of the same kind does not extinguish the obligation." This provision has no counterpart in the Spanish civil code of 1889.

Castan Tobeñas comments, however, that the loss of a "delimited" generic thing extinguishes the obligation. Citing Ennecerus, he writes that the obligation is extinguished by the loss, through fortuitous event, of a limited quantity from which the prestation is to be taken or when it becomes impossible for the debtor to obtain the thing from that limited quantity. For example, a farmer who has sold 100 sacks of potatoes from his harvest is absolved of the obligation to deliver them if his entire production was lost, and he does not need to buy potatoes of the same kid in the market to fulfill his obligation to deliver.[142]

Article 1264 of the Civil Code of the Philippines provides that the courts shall determine whether, under the circumstances, the partial loss of the object of the obligation is so important as to extinguish the obligation. This provision has no counterpart in the Spanish civil code of 1889.

The burden of proof that the thing was lost without fault of the debtor is on the latter, except in the case of

---

[141] *Id.,* at 304.
[142] *Id.*

natural calamities.[143] Article 1265 of the Civil Code of the Philippines provides:

> "Whenever the thing is lost in the possession of the debtor, it shall be presumed that the loss was due to his fault, unless there is proof to the contrary, and without prejudice to the articles of Article 1165. This presumption does not apply in case of earthquake, flood, storm, or other natural calamity."

With regard to obligations to do, Article 1266 of the Civil Code of the Philippines provides, "The debtor in obligations to do shall also be released when the prestation becomes legally or physically impossible without the fault of the debtor."

This was taken from Article 1184 of the Spanish civil code of 1889. Commenting on it, Castan Tobeñas writes that this should be applied by analogy to obligations not to do when the prohibited act becomes physically or legally necessary.[144]

Article 1267 of the Civil Code of the Philippines provides, "When the service has become so difficult as to be manifestly beyond the contemplation of the parties, the obligor may be released therefrom, in whole or in part."

Article 1268 of the Civil Code of the Philippines provides,

> "When the debt of a thing certain and determinate proceeds form a criminal offense, the debtor shall not be exempt from the payment of its price, whatever may be the cause for the loss, unless the thing having been offered by him to the person who should

---

[143] *Id.*

[144] *Id.,* at 305.

receive it, the latter refused without justification to accept it."

Article 1269 of the Civil Code of the Philippines creates one of the advantages that the creditor may enjoy in case of force majeure. The article provides,

> "The obligation having been extinguished by the loss of the thing, the creditor shall have all the rights of action which the debtor may have against third persons by reason of the loss."

A. Extraordinary Inflation or Deflation

With regard to obligations to pay sums of money, Article 1250 of the Civil Code of the Philippines provides:

> "In case of extraordinary inflation or deflation of the currency stipulated should supervene, the value of the currency at the time of the establishment of the obligation shall be the basis of payment, unless there is an agreement to the contrary."

B. Article 1315 of the Civil Code of the Philippines

Article 1315 of the Civil Code of the Philippines provides:

> "Contracts are perfected by mere consent, and from that moment the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage, and law."

Commenting on its counterpart provision in the Spanish Civil Code of 1889 (Article 1258 thereof), Castan Tobeñas, citing Perez Gonzales and Alguer, writes that the phrase "may be in keeping with good faith" justifies the application of the *rebus sic stantibus* doctrine in the interpretation of contracts, since the theories justifying the application of *rebus sic stantibus* discussed above promote the equal standing of the interests of the parties to the contract, which should be the just consequence of the principles of good faith.[145]

Early in his commentary, Castan Tobeñas, commenting on the absence of a provision in the Spanish Civil Code of 1889 exempting the obligor in the case of supervening extraordinary hardship in fulfilling an obligation, and noting that extraordinary hardship is not the same as loss of a thing or legal or physical impossibility of performance which are provided for in the Spanish civil code of 1889, opines that nevertheless, because of the "good faith" clause of Article 1258 of the Spanish civil code of 1889, these provisions should not be interpreted with literal rigor that takes them to an extreme that is incompatible with a prudent spirit of justice.[146]

Turning back to the Civil Code of the Philippines, Tolentino comments that the "good faith" clause of Article 1315 thereof can be resorted to in applying Article 1250 of the same civil code, specifically in determining when there has been great fluctuation in the value of currency. He writes:

> "Debts in money, in case of inflation, or devaluation of currency, are considered as *debts of value*, except when the loan refers to particular coins. When the obligation is for P100, for instance, the substance of the debt is in reality the value represented by that amount, or its purchasing power in the

[145] *Id.,* at 456.
[146] *Id.,* at 306.

market, and not its quantitative or nominal value. When the currency is devalued in terms beyond what could have been reasonably foreseen by the parties, the doctrine of unforeseen risks can be applied, and the effects of the devaluation should not be borne by the creditor alone. The reevaluation of the credit in such cases must be made, according to the principles of good faith and in view of the circumstances of each particular case, recognizing the real value of the credit as in consonance with the intent of the parties."[147]

V. SELECTED RULINGS OF THE PHILIPPINE SUPREME COURT ON REBUS SIC STANTIBUS

Claudina Vda. De Villaruel et al vs. Manila Motor Co., Inc. and Arturo Colmenares[148]

On May 31, 1940, the plaintiffs Villaruel and the defendant Manila Motor Co., Inc. entered into a contract whereby the former agreed to convey by way of lease to the latter two buildings and a residential house for the use of Manila Motor Co., Inc.'s branch manager. The term of lease was for five years, renewable for an additional five years. The Manila Motor Co., Inc. was to pay a monthly rental of P300.00 payable in advance before the fifth day of each month and, for the residential house, a monthly rental not to exceed P50.00 payable separately by the manager. The leased premises were placed in the lessee's possession on October 31, 1940.

[147] IV A. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 303-304 (2002)
[148] G.R. No. L-10394, December 13, 1958.

In 1941, the Japanese military forces occupied the provincial capital of Bacolod. Shortly after the Japanese military occupation of Bacolod, the enemy forces held and used the leased properties as part of their quarters from June 1, 1942 until March 29, 1945, ousting the lessee therefrom. No rentals were paid during this period.

Immediately upon the liberation of Bacolod in 1945, the American forces occupied the same premises that the Japanese vacated until October 31, 1945. The Americans paid monthly rentals to the owners during the time that they were in possession of the property, at the same rate that the Manila Motor Co., Inc. used to pay.

Thereafter, when the United States army gave up the occupancy of the premises, the Manila Motor Co., Inc., through its branch manager, exercised its right to renew the contract for an additional five years. The parties agreed that the seven months of occupancy by the United States army would be part of the new five-year term. Simultaneously, the company sublet the same buildings, except that used for the residence of its branch manager, to Arturo Colmenares.

Dr. Alfredo Villaruel, who was entrusted with collecting the rentals, demanded payment of rentals corresponding to the time during which the Japanese military forces had control over the leased premises. Manila Motor Co., Inc. refused to pay, prompting Dr. Villaruel to give notice seeking the rescission of the contract of lease and the payment of rentals from June 1, 1942 to March 31, 1945 totaling P11,900.00. Manila Motor Co., Inc. rejected these demands in a letter dated July 27, 1946.

In that same month, Rafael B. Grey, the branch manager of Manila Motor Co., Inc., offered to pay Dr. Villaruel the sum of P350, for which he requested a receipt that would state that it was in full payment for the said month. Dr. Villaruel expressed willingness to accept the tendered amount provided that his acceptance should be understood to be without prejudice to the demand for the rescission of

the contract and for increased rentals until the buildings were returned to them. Later, Dr. Villaruel indicated willingness to limit the condition of his acceptance to be that "neither the lessee nor the lessors admit the contention of the other by the mere fact of payment."

As the parties could not come up with an agreement, no payment was tendered until the end of November 1946. On December 4, 1946, the Manila Motor Co., Inc. remitted P350.00 to Dr. Villaruel who issued a receipt that it was without prejudice to the demand for rents in arrears and rescission of the contract of lease.

Since the parties could not settle their dispute amicably, the Villaruels filed a case before the Court of First Instance of Negros Occidental. During the pendency of the case, one of the buildings was razed by fire, which also engulfed the other building. Because of this, the Villaruels demanded reimbursement; having been refused, they filed a supplemental complaint to include the recovery of the value of the burned buildings.

The trial court decided in favor of the Villaruels.

On appeal to the Supreme Court, the Supreme Court held that Manila Motor Co., Inc. was not liable to pay rentals for the period during which the Japanese military forces occupied the premises. According to the Supreme Court, the ouster of the Manila Motor Co., Inc. from the premises by the Japanese military forces constituted trespass under color of title, which was allowed under the general principles of international law which gave a belligerent occupant the right to billet or quarter its troops in privately owned land and buildings for the duration of its military operations, as opposed to a mere act of trespass. Since the occupation of the premises by the Japanese military forces constituted trespass under color of title, the lessors must respond for the resulting deprivation of the lessee of the peaceful use and enjoyment of the property leased. Thus, the lessee's

corresponding obligation to pay rentals ceased during such deprivation.

The Supreme Court differentiated between the treatment of contracts of lease in the common law system from their treatment in the civil law system. Citing US jurisprudence, the Supreme Court noted that under common law, a lease is the grant of an estate for years which the lessee takes title in and is bound to pay the stipulated rent notwithstanding any injury by flood, fire, or external violence. On the other hand, in the civil law system, a lease is a mere transfer of the use and enjoyment of the property which holds the landlord bound to keep it fit for the use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident, and if he does not do so, the tenant may have the lease annulled or the rent abated. Citing as well the reciprocity of a contract of lease, the Supreme Court concluded that the principle of *rebus sic stantibus* applies to contracts of lease.

Thus, the Supreme Court modified the trial court's decision in that the Manila Motor Co., Inc. was ordered to pay the Villaruels only the rent for the leased premises corresponding to July up to November 1946, at the rate of P350.00 per month, or a total of P1,750.00.

Philippine National Construction Corporation vs. Court of Appeals[149]

In this case, the private respondents owned a parcel of land which they leased to the Philippine National Construction Corporation. The contract of lease was executed on November 18, 1985. The contract stipulated that the first annual rent in the amount of P240,000.00 shall be due and payable upon the execution of the contract and the

[149] G.R. No. 116896, May 5, 1997.

succeeding annual rents shall be payable every 12 months thereafter during the effectivity of the contract.

The contract also stipulated that the property shall be used by the Philippine National Construction Corporation as the site, grounds, and premises of a rock crushing plant and field office, sleeping quarters, and canteen/mess hall.

On January 7, 1986, the Philippine National Construction Corporation obtained a Temporary Use permit from the Ministry of Human Settlements for the proposed rock crushing project. The permit was to be valid for two years unless by the ministry.

On January 16, 1986, the private respondents wrote to the Philippine National Construction Corporation requesting payment of the first annual rental in the amount of P240,000.00.

In reply, the Philippine National Construction Corporation wrote to the private respondents stating that the payment of the rental would commence on the date of the issuance of an industrial clearance by the Ministry of Human Settlements and not from the date of the signing of the contract. IT also expressed its intention to terminate the contract, as it had decided to discontinue with the rock crushing project due to financial as well as technical difficulties.

Private respondents refused to accede to the request to preterminate the lease contract. On May 19, 1986, they filed a case for specific performance with damages before the Regional Trial Court of Pasig.

On April 12, 1989, the trial court rendered a decision ordering the Philippine National Construction Corporation to pay the private respondents the amount of rental for two years with legal interest from January 7, 1986 until the amount was fully paid, plus attorney's fees and costs. The trial court's decision was affirmed on appeal, prompting the

Philippine National Construction Corporation to file a petition for review before the Supreme Court.

One of the arguments raised by the Philippine National Construction Corporation was that under Article 1266 of the Civil Code of the Philippines and the principle of *rebus sic stantibus*, it should be released from its obligation under the contract of lease because the purpose of the contract did not materialize due to unforeseen events and causes beyond its control, i.e., due to the abrupt change in political climate after the EDSA Revolution and financial difficulties.

The Supreme Court rejected this argument. First, the Supreme Court noted that Article 1266 refers to obligations to do, and thus, does not apply to the Philippine National Construction Corporation's obligation to pay rentals, which is an obligation to give. Second, the Supreme Court noted that the principle of *rebus sic stantibus* does not apply. The Supreme Court ruled:

> "The principle of *rebus sic stantibus* neither fits in with the facts of the case. Under this theory, the parties stipulate in the light of certain prevailing conditions, and once these conditions cease to exist, the contract also ceases to exist. This theory is said to be the basis of Article 1267 of the Civil code, which provides:
>
> > 'Art. 1267. When the service has become so difficult as to be manifestly beyond the contemplation of the parties, the obligor may also be released therefrom, in whole or in part.

> This article, which enunciates the doctrine of unforeseen events, is not, however, an absolute application of the principle of *rebus sic stantibus*, which would endanger the security of contractual relations. The parties to the contract must be presumed to have assumed the risks of unfavorable developments. It is therefore only in absolutely exceptional changes of circumstances that equity demands assistance for the debtor."[150]

The Supreme Court noted that when the Philippine National Construction Corporation entered into the lease contract on November 18, 1985, after the assassination of Senator Benigno Aquino on August 21, 1983, the Philippines has experienced political upheavals, turmoil, almost daily mass demonstration, unprecedented inflation, peace and order deterioration, and many other things that have brought about the hatred of people even against crony corporations. On November 3, 1985, President Ferdinand Marcos had already announced that there would be a snap election scheduled for February 7, 1986. Thus, according to the Supreme Court, when the Philippine National Construction Corporation entered into the contract of lease with the private respondents on November 18, 1985, it did so with its eyes open to the deteriorating conditions of the country.

With regard to the Philippine National Construction Corporation's claim of poor financial condition, the Supreme Court, citing its earlier ruling in *Central Bank vs. Court of Appeals*,[151] mere pecuniary inability to fulfill an engagement does not discharge a contractual obligation, nor does it constitute a defense to an action for specific performance.

---

[150] *Id.*

[151] 139 SCRA 46 (1985).

Spouses Jaime and Matilde Poon vs. Prime Savings Bank[152]

The Poon spouses owned a commercial building in Naga City which they used for their bakery business. On November 3, 2006, Matilde Poon and Prime Savings Bank executed a ten-year Contract of Lease over the building for the latter's use as its branch office in Naga City. They agreed on a fixed monthly rental of P60,000.00 with an advance payment of the rentals for the first 100 months in the amount of P6,000,000.00. The advance payment was to be applied immediately, while the rentals for the remaining period of the Contract were to be paid on a monthly basis.

In addition, Paragraph 24 of the contract provided that should the leased premises be closed, deserted, or terminated by the lessee, the lessor shall have the right to terminate the lase without the need of serving a court order and to immediately repossess the leased premises. In this event, all advanced rentals shall be forfeited in favor of the lessor.

Barely three years later, however, the Bangko Sentral ng Pilipinas placed Prime Savings Bank under the receivership of the Philippine Deposit Insurance Corporation (PDIC) by virtue of BSP Monetary Board Resolution No. 22, dated January 7, 2000. The said board resolution stated, among others, that Prime Savings Bank has violated final cease and desist orders involving acts or transactions which amount to fraud or a dissipation of the assets of the institution.

Eventually, the BSP ordered the liquidation of Prime Savings Bank.

On May 12, 2000, Prime Savings Bank vacated the leased premises and surrendered them to the Poon spouses. Subsequently, the PDIC wrote to the Poon spouses demanding the return of the unused advance rental

[152] G.R. No. 183794, June 13 2016.

amounting to P3,480,000.00 on the ground that Paragraph 24 of the Contract has become inoperative due to force majeure. The PDIC likewise invoked the principle of *rebus sic stantibus* under Article 1267 as an alternative legal basis for the refund.

The Poon spouses, however, refused to refund the money and insisted that Paragraph 24 of the Contract was still operative. Consequently, Prime Savings Bank, represented by PDIC, sued the Poon spouses for partial rescission of the contract and/or recovery of a sum of money before the Regional Trial Court of Naga City.

The trial ordered the partial rescission of the lease agreement on the ground that while the second clause of Paragraph 24 was a penal clause and a valid contractual agreement, the premature termination of the lease due to the BSP's closure of Prime Savings Bank was involuntary. Consequently, according to the trial court, it would be iniquitous for petitioners to forfeit the entire amount of P3,480,000.00. Invoking its equity jurisdiction under Article 1229 of the Civil Code, the trial court limited the forfeiture to one-half of amount to answer for Prime Savings Bank's unpaid utility bills and E-Vat, as well as the Poon spouses' lost business opportunity from its former bakery business.

On appeal, the Court of Appeals affirmed the trial court's decision but invoked a different rationale for applying Article 1229 of the Civil Code of the Philippines. According to the Court of Appeals, the closure of Prime Savings Bank's business was not a fortuitous event because Prime Savings Bank was found to have committed fraudulent acts and transactions; consequently, the first requisite of a fortuitous event, that is, that the cause of the breach of the obligation was independent of the will of the debtor, was lacking.

However, the Court of Appeals sustained the trial court's interpretation of the proviso on the forfeiture of advance rentals as a penal clause and the consequent

application of Article 1229 of the Civil Code of the Philippines.

The Supreme Court affirmed the Court of Appeals' decision. On the issue of *rebus sic stantibus*, the Supreme Court found it to be inapplicable. Citing its earlier ruling in *Tagaytay Realty Co., Inc. vs. Gacutan*,[153] the Supreme Court identified the following requisites for *rebus sic stantibus* under Article 1267 of the Civil Code of the Philippines to apply:

1. The event or change in circumstance could not have been foreseen at the time of the execution of the contract.

2. It makes the performance of the contract extremely difficult but not impossible.

3. It must not be due to the act of any of the parties.

4. The contract is for a future prestation.

According to the Supreme Court, the first and third requisites were lacking. Citing the testimony of Jaime Poon during trial, the Supreme Court noted that the parties had actually considered the possibility of a deterioration or loss of Prime Savings Bank's business during the ten-year effectivity of the contract of lease. Thus, the loss of Prime Savings Bank's business was not an unforeseen event. Furthermore, the event was not independent of the will of Prime Savings Bank because it was partly accountable for the closure of its banking business.

The Supreme Court rejected Prime Savings Bank's invocation of the Supreme Court's earlier ruling in *Provident Savings Bank vs. Court of Appeals*,[154] where the Supreme Court found that the closure of Provident Savings Bank by

[153] G.R. No. 160033, July 1, 2015.
[154] G.R. No. 97218, May 17, 1993.

the Central Bank of the Philippines was force majeure. The Supreme Court differentiated the case of Provident Savings Bank from that of Prime Savings Bank in that in the former, there was a previous finding that the monetary board acted arbitrarily and in bad faith in ordering the closure of Provident Savings Bank. By contrast, in the case of Prime Savings Bank, there was no indication or allegation that the BSP's action was arbitrary or in bad faith. Moreover, Prime Savings Bank was itself partly accountable for the closure of its banking business.

However, the Supreme Court sustained the finding that Paragraph 24 of the lease contract was a penal clause, and likewise sustained the equitable reduction of the penalty.

VI. BACKGROUND AND RELEVANCE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

The UNIDROIT Principles of International Commercial Contracts (UPICC) are a non-binding codification or "restatement" of the general part of international contract law.[155] The aim in drafting the UPICC was to provide a balanced set of rules adapted to the special requirements of modern international practice for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.[156] The latest edition of the UPICC was published in 2016.

The Preamble of the UPICC enumerates the purposes of the UPICC:

[155] www.unidroit.org/contracts (last accessed on April 7, 2020).
[156] *Id.*

> "These Principles set forth general rules for international commercial contracts.
>
> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
>
> They may be applied when the parties have not chosen any law to govern their contract.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may be used to interpret or supplement domestic law.
>
> They may serve as a model for national and international legislators."

The official commentary to the Preamble of the UPICC mentions other possible uses of the UPICC: as a guide for drafting contracts, in particular to facilitate the identification of issues to be addressed in the contract and provide a neutral legal terminology equally understandable by all the parties involved; as a substitute for the domestic law otherwise applicable; as course material in universities and law schools, to promote the teaching of contract law on a comparative basis.[157]

[157] UNIDROIT International Institute for the Unification of Private LAW, UNIDROIT Principles of International Commercial Contracts, p. 6, 2016, *available at* https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

In his study on the actual use of the UPICC, Michaels revealed that while private parties rarely make use of the UPICC as a chosen law or as a checklist for contract drafting, and rarely use it in its entirety, judges and arbitrators frequently cite it in their rulings, albeit very rarely on the ground that has been chosen as the applicable law by the parties. Usually, the UPICC is cited whenever the parties refer to *lex mercatoria*, general trade customs, and the like; and for the interpretation and supplementation of international commercial law or even domestic law. Michaels concluded that in practice, the UPICC serves more as a global background law, similar to the *ius commune*, the common law of continental Europe prior to the codification of private law in the twentieth century.[158] This *ius commune* served as the background for scholarship, adjudication, and local law-making. Explaining further, Michaels wrote:

> "The role of a background law is far from unimportant. A background law serves as residual law – it applies only if and insofar foreground law does not provide an answer. But this is not its only role. In addition, a background law provides the background against which the foreground law is interpreted: because foreground law cannot be interpreted on its own terms, it must be understood against the background law. And, moreover, a background law properly understood provides the framework within which the foreground law functions – its structure and, so to speak, its language and grammar."[159]

[158] *Ius Commune* should not be confused with the "common law" on which the Anglo-American legal system is founded.

[159] Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, 19/4 UNIFORM LAW REVIEW (2014), 16.

A. Rebus Sic Stantibus in the UPICC

The UPICC deals with the *rebus sic stantibus* doctrine in its provisions on "Hardship", which is a section in the portion on performance of contracts, and in its provisions on force majeure.

The UPICC on Hardship

According to Article 6.2.1 of the UPICC,

> "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship."

The purpose of this Article, according to the official commentary on the UPICC, is to make clear that as a consequence of the general principle of the binding character of the contract, performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party. Change in circumstances is relevant only in exceptional cases, when supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract.[160]

Article 6.2.2 of the UPICC gives the definition of "hardship:"

> "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

[160] UNIDROIT International Institute for the Unification of Private LAW, UNIDROIT Principles of International Commercial Contracts, 2016, p. 217.

(a) The events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) The events are beyond the control of the disadvantaged party; and

(d) The risk of the events was not assumed by the disadvantaged party."

According to the official commentaries, what is a fundamental alteration of the equilibrium of the contract depends upon the circumstances.[161]

Increase in the cost of performance for one party usually applies to the party who is to perform the non-monetary obligation. The substantial increase in cost may, for example, be due to a dramatic rise in the price of the raw materials necessary for the production of the goods or the rendering of the services, or the introduction of new safety regulations requiring far more expensive production procedures.[162]

With regard to decrease in the value of the performance received by one party, this may refer to either a monetary or non-monetary obligation. The substantial decrease or total loss of the value of the performance may be due either to drastic changes in market conditions, such as the effect of a dramatic increase in inflation of the contract price, or the frustration of the purpose for which performance was required, such as, for example, the

[161] *Id.,* p. 219.
[162] *Id.,* p. 219.

prohibition to build on a plot of land acquired for building purposes or the effect of an export embargo on goods acquired with a view to their subsequent export.[163]

The decrease in the value of performance must be capable of objective measurement. A mere change in the personal opinion of the receiving party as to the value of the performance is irrelevant. Frustration of the purpose of performance can only be taken into account when the purpose was known or at least ought to have been known to both parties.[164]

The commentaries also qualify that hardship can only become of relevance with respect to performance still to be rendered. If the fundamental alteration of the equilibrium of the contract occurs at a time when performance has been only partially rendered, hardship can be of relevance only to the parts of the performance still to be rendered.[165]

Article 6.2.3 mentions the effects of hardship:

> (1) In the case of hardship, the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
>
> (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
>
> (3) If the court finds hardship, it may, if reasonable,

[163] *Id.,* p. 219.
[164] *Id.,* pp. 219-220.
[165] *Id.,* p. 221.

a. Terminate the contract at a date and on terms to be fixed, or
b. Adapt the contract with a view to restoring its equilibrium.

According to the official commentaries on the UPICC, a request for negotiations is not admissible when the contract itself already incorporates a clause providing for automatic adaptation of the contract. However, even in such a case, the entitled party could still ask for renegotiation if the adaptation clause did not contemplate the events giving rise to the hardship.[166]

The request for renegotiation must be made without undue delay. What constitutes undue delay depends on the circumstances. According to the commentaries, the disadvantaged party does not lose its right to request renegotiations simply because it fails to act without undue delay; however, the delay in making the request may affect the finding as to whether hardship actually existed and, if so, the consequences for the contract.[167]

The commentaries emphasize the statement in paragraph 2 of Article 6.2.3 that the request for renegotiation does not of itself entitle the disadvantaged party to withhold performance. This is because of the exceptional character of hardship and in the risk of possible abuses of the remedy. Withholding of performance may only be done in exceptional circumstances.[168]

Although Article 6.2.3 does not explicitly say so, both the request for renegotiation by the disadvantaged party and the conduct of the parties during the negotiation process are subject to the general principle of good faith and fair dealing,

[166] *Id.,* pp. 223-224.
[167] *Id.,* p. 224.
[168] *Id.,* p. 225.

and the duty of cooperation. This is implied by Article 1.7 of the UPICC which provides,

> (1) Each party must act in accordance with good faith and fair dealing in international trade.
>
> (2) The parties may not exclude or limit this duty.

B. The UPICC and Force Majeure

The UPICC deals with force majeure in Article 7.1.7, which provides:

> (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
>
> (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew it or ought to have known of the impediment, it is liable

for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

The official commentaries on the UPICC clarify that this article does not restrict the rights of the party who has not received performance to terminate if the non-performance is fundamental. What it does do, where it applies, is to excuse the non-performing party from liability in damages.[169]

The UPICC provisions on hardship and force majeure are interrelated in that there may be factual situations which can be at the same time be considered as both cases of hardship and of force majeure. According to the commentaries, in that case, it is for the party affected by these events to decide which remedy to pursue. If the party invokes force majeure, it is with a view to performance being excused. On the other hand, if a party invokes hardship, this is for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.[170]

VII. COMPARISON BETWEEN THE CIVIL CODE OF THE PHILIPPINES AND THE UPICC WITH REGARD TO TREATMENT OF REBUS SIC STANTIBUS

Under both Philippine civil law (both the Civil Code of the Philippines and rulings of the Philippine Supreme Court)

[169] *Id.*, p. 241.
[170] *Id.*, p. 222.

and the UPICC, *rebus sic stantibus* should be applied only in extraordinary circumstances as it is an exception to the binding nature of contracts.

The UPICC goes further in upholding the binding nature of contracts in that in cases of hardship, the only remedy granted to the disadvantaged party is to request for a renegotiation of the contract. Furthermore, the relevant UPICC provisions explicitly state that the party requesting renegotiation is not entitled to withhold performance. Moreover, in the UPICC's definition of hardship, it is not enough that performance of the contract "become so difficult as to be manifestly beyond the contemplation of the parties," as provided for in Article 1267 of the Civil Code of the Philippines. The UPICC's definition of hardship in Article 6.2.2 is more specific: there must be a fundamentally alteration of the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, as well as the existence of other circumstances.

Unlike the Civil Code of the Philippines, the UPICC does not have any explicit provision regarding extraordinary inflation. However, according to the official commentaries on Article 6.2.2 of the UPICC, extraordinary inflation may be considered hardship, for which a request for renegotiation by the disadvantaged party is the remedy. By contrast, the Civil Code of the Philippines specifically provides that in case extraordinary inflation or deflation of the currency stipulated should supervene, the value of the currency at the time of the establishment of the obligation shall be the basis of payment, unless there is an agreement to the contrary.[171]

With regard to force majeure, the definitions of force majeure are similar, but the UPICC provides for temporary force majeure as well as notice requirements[172] which are not

[171] CIVIL CODE (1889), Article 1250.
[172] UPICC, Article 7.1.7.

provided for by Article 1174 of the Civil Code of the Philippines.

On the other hand, the UPICC, unlike the Civil Code of the Philippines, does not provide for instances when a party is still liable for its obligation despite the presence of force majeure. Unlike the UPICC, the Civil Code of the Philippines provides that an obligor is not released from the obligation by force majeure in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk.[173]

However, in interpreting or applying the UPICC, it may be argued that the clause "that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" implies the inclusion of situations where, for example, the nature of the obligation requires the assumption of risk, because in this situation it is reasonably expected that the parties have taken into account the impediment at the conclusion of the contract.

It should be noted that despite the differences between the UPICC and Philippine civil law with regard to *rebus sic stantibus*, Philippine civil law does not prohibit parties to a contract from agreeing on the applicability of the UPICC provisions or adapting terms and conditions of the contract that are similar to the provisions of the UPICC. Such contracts, should they be freely entered into by the parties, are binding under Philippine civil law, pursuant to Article 1315 of the Civil Code of the Philippines cited earlier, as well as 1306 of the Civil Code of the Philippines which provides that "[t]he contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy."

[173] CIVIL CODE (1889), Article 1174.

In any event, both Philippine civil law and the UPICC require good faith on both parties to a contract in situations of hardship and force majeure. This is embodied by Article 1.7 of the UPICIC and Articles 19 and 1315 of the Civil Code of the Philippines.

VIII. CONCLUSION

The principle of *rebus sic stantibus* is founded on principles of justice and equity, as well as a balancing of the economic interests of parties to a contract in the case of altered circumstances. As an exception to the general rule of the binding nature of contract, the principle of *rebus sic stantibus* is restrictively applied both by Philippine civil law and the UPICC, with the latter being even more restrictive as reflected in its provisions on hardship and its additional requirements for the application of the principles on force majeure. Nevertheless, the rules on *rebus sic stantibus* in both legal regimes fulfill the legal need to establish the respective rights and duties of parties to a contract in situations of altered circumstances.

The differences between the treatment of *rebus sic stantibus* in Philippine civil law and in the UPICC are differences of degree rather than of kind. While the UPICC tends more towards upholding the binding nature of contracts insofar as hardship is concerned, the differences between its concept of force majeure and that of the Civil Code of the Philippines are not radical. The relative advantages and disadvantages of Philippine civil law and the UPICC with regard to *rebus sic stantibus* would depend on the particular circumstances of each contemplated contract. Because of this, there is no basis yet to recommend the amendment of the Civil Code of the Philippines to make it conform to the UPICC, especially considering that even under the present version of the Civil Code of the Philippines, parties are not precluded from freely adapting the UPICC

provisions as the applicable rules governing their contracts. The current Civil Code of the Philippines would even uphold such stipulation as binding.

Nevertheless, it bears emphasizing that under both legal regimes, contracting parties are bound to observe good faith in their dealings among themselves. This principle applies even amidst altered circumstances.

***

TO APPLY OR TO CONSTRUE: OBSERVANCE AND INTERPRETATION OF TREATIES*

*J. Eduardo Malaya***
*Crystal Gale Dampil-Mandigma****

I. INTRODUCTION

Negotiation is one of the more delicate endeavors a person does in his or her day-to-day activities. Whether buying a car from a dealer or investing in a business venture, the person would like to be careful and precise with its terms as a lot could be at stake, including money, reputation, and relationships. The stakes are much higher in state-to-state negotiations and multilateral talks. For the more delicate issues, experienced negotiators would make certain that what have been agreed upon are put in writing.

In contrast, the implementation and interpretation of agreements are often overlooked and given scant attention.

Experience, however, tells us that interpretation should not be taken as an afterthought. It is as important as negotiation. Shakespeare[174] vividly illustrated this point.

---

* This article first appeared as Part II of the index book *Philippine Treaties in Force 2020 (March 2021)*, published by the University of the Philippines Law Center.

** Malaya is Undersecretary of Foreign Affairs and until August 2019 was Assistant Secretary for Treaties and Legal Affairs (Legal Adviser) at the Philippine Department of Foreign Affairs (DFA). A career member of the Philippine foreign service since 1986, he was Philippine Ambassador to Malaysia from September 2011 to March 2017. He also served as DFA Spokesman and concurrently Assistant Secretary for Treaties and Legal Affairs from February 2009 to September 2011. He is the author, main co-author or editor of eight books on Philippine diplomacy, the Philippine presidency and law, notably *Treaties: Guidance on Practices and Procedures (University of the Philippines Law Center, 2019)*; *Forging Partnerships: Philippine Defense Cooperation under Constitutional and International Laws (University of the Philippines Law Center/Foreign Service Institute,*

When Henry V wished to contend for "vasty fields of France," he asked the Archbishop of Canterbury and the Bishop of Ely whether his claim to French territory was legitimate. The claim came through his grandfather John of Gaunt, son of King Edward III, whose mother Isabella was the daughter of the King of France. Could Henry V inherit a claim to land in France from a woman? Or did the Salic Law bar that claim – as an assembly of French notables contended.

The bishops first examined the text. Pharamond, a legendary king of France, described the Salic Law as follows: *"In terram Salicam mulieres ne succedant"* (no female should be inheritrix in Salic land). But, the Bishops added, "Salic land" referred not to France but to Meissen, the German territory between the Sala and Elbe Rivers. Next they looked to history and purpose. The law reflected the fact that after Emperor Charlemagne subdued these territories, he left behind some French settlers who held "in disdain the German women for some dishonest manners of their life." Hence, to have included them in a line of succession risked lack of clarity – one couldn't be sure who the father was.

Finally, the Bishops looked to tradition and to precedent. In the "Book of Numbers," they said, it is written that "when the man dies, let the inheritance descend unto the

---

2017) and *Philippine Treaties Index, 1946 to 2010 (Foreign Service Institute/Central Lawbooks, 2010)*. He has BA Economics (*cum laude*) and Law degrees, both from the University of the Philippines. He is currently Vice President of the Philippine Society of International Law.

*** Dampil-Mandigma is a Foreign Service Officer IV assigned in the Office of Treaties and Legal Affairs at the DFA. A career member of the Philippine foreign service, she has a BS Customs Administration degree (Magna cum laude) from the Lyceum of the Philippines University-Batangas and a Juris Doctor Degree (Valedictorian-Second Honors) from the University of Batangas College of Law where she was the Editor-in-Chief of the UB Law Journal, 2016-2017.

[174] William Shakespeare, The Life of King Henry the Fifth, Act 1, Scene 2.

daughter." Moreover, King Pepin, Hugh Capet, and King Lewis the Tenth took a royal title that descended through a woman.

The above traditional legal considerations of language, history, purpose, and precedent have remained valuable through the ages.

Let us take an incident in early Philippine diplomatic experience to further underscore the importance of interpretation. When the issue of the trusteeship over South West Africa (now Namibia) was raised before the International Court of Justice by the United Nations General Assembly over the objection of the supervising state South Africa, the Philippines elected not only to submit written statements but sent one of its diplomats to orally argue before the court. On May 19-20, 1950, together with a representative of the UN Secretary General, Filipino diplomat-lawyer Jose D. Ingles[175] stated that South Africa has continuing international obligations under the UN Charter, specifically in Chapter XI, to submit accounts to the UN of its administration of the non-self-governing territory and its obligations include transmitting petitions from its inhabitants. He told the court that its decision will affect "the fate of the voiceless peoples of the territory, whose interest the UN Charter has recognized to be paramount and whose well-being the Covenant describes as a sacred trust of civilization." Finally, he urged the court that:

> "in the interpretation of the Charter, the construction should incline against that interpretation which would nullify its great objectives or stultify the Organization and should be

[175] Jose D. Ingles, *Filipino Advocate and Spokesman: Selected Articles and Statements on Foreign Policy and World Politics, The Philippine Branch of the International Law Association,* pp. 131-133 (1992).

in favor of carrying out its provisions and making the Charter what it is – a living instrument."

The Philippines was the only State to have an official argument, other than for respondent South Africa. Ingles, who later rose to be Undersecretary of Foreign Affairs, has the distinction of being the first Filipino to appear and argue before the ICJ.[176] In its Advisory Opinion on the International Status of South West Africa,[177] the ICJ sustained the position of the UN, noting that South Africa has no competence to modify the international status of the territory unilaterally.

Ingles' recommended approach to interpretation predated the Vienna Convention on the Law of Treaties, which entered into force in 1969. Fortunately for nation-states and in particular, for diplomats, government officials and foreign ministry lawyers, agreed rules on the observance and interpretation of treaties are now embodied in the Vienna Convention. Similar to rules of interpretation in domestic law, these rules seem simple and perhaps deceptively so, but one ignores them only to one's peril.

One can stress the point that when States differ in their interpretation of a treaty, a possible conflict between the State parties develops. A party may claim that the other is in breach of its international obligation due to its wrongful application of a treaty, which the other side would likely contest. Discussions turn to disagreements, and before long, the State parties are embroiled in an international dispute. It is worth noting that almost all cases that come before the

[176] J. Eduardo Malaya and Johaira Wahab-Manantan, "Dynamics between Diplomacy and International Law: Reflections on the Philippine Experience," The Philippine Yearbook of International Law 2017, p. 11.
[177] International Status of South West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128 (July 11).

International Court of Justice and most public international law arbitrations turn on the interpretation of treaties.[178]

The co-authors will present in this paper the relevant rules on the observance and interpretation of treaties, including the principle of *pacta sunt servanda* and the interplay between international law and domestic or municipal law. They will also examine how these rules have been dealt with in Philippine treaty practice and jurisprudence.

This paper is written as a companion piece to the book *"Treaties: Guidance on Practices and Procedures"* written by the first author and Professor Rommel J. Casis,[179] and the earlier article "Philippine Treaty Law and Practice" by the first author and diplomat-lawyer Maria Antonina Mendoza-Oblena in the *Philippine Treaties Index 1946-2010*.[180] Discussions on the concept of treaty, roles and mandates of the Department of Foreign Affairs and other agencies, and the stages of treaty making, from negotiations to ratification and entry into force, are found there.

A. Treaties, Defined

The *1969 Vienna Convention on the Law on Treaties* (hereinafter VCLT) defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[181]

---

[178] Sir Michael Wood, 'Foreword' in Richard Gardiner, *Treaty Interpretation*, (2nd Ed. 2015); Anthony Aust, *Modern Treaty Law and Practice*, p. 14, (3rd Ed. 2013).

[179] J. Eduardo Malaya and Rommel J. Casis, *Treaties: Guidance on Practices and Procedures* (2018).

[180] J. Eduardo Malaya, Maria Antonina Mendoza-Oblena and Allan Casupanan*, Philippine Treaties Index 1946-2010*, (2010).

[181] Article 2(1)(a), 1969 Vienna Convention on the Law on Treaties.

Similarly, Executive Order No. 459, series of 1997, defines international agreement as "a contract or understanding, regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments."[182]

Breaking down the definition, the elements of a treaty are as follows:

1. an international agreement;
2. concluded between States;
3. in written form;
4. governed by international law;
5. whether embodied in a single instrument or in two or more related instruments; and
6. whatever its particular designation.[183]

The phrase "governed by international law" means that the agreement must impose on the parties legal obligations which are binding under international law, or in other words, legally-binding, as opposed to mere political commitments and the like. It must be clear on the face of the instrument, whatever its form, that the parties intend to be legally bound under international law,[184] and in case of breach or non-compliance, there could be resort by the aggrieved party to judicial settlement, arbitration or other remedies. If there is no such intention to be legally bound, the instrument is *not* a treaty,[185] but a soft law instrument –generically known as a

[182] Section 2(a), E.O. No. 459, "Providing for the Guidelines in the Negotiation of International Agreements and its Ratification", series of 1997.
[183] Aust (2013), *Supra* Note 5, p. 14-20; Malaya and Casis, *Supra* Note 6, pp. 2-4.
[184] Treaty Section of the Office of Legal Affairs, United Nations, *United Nations Treaty Handbook*, p. 31, (Revised Ed. 2012).
[185] Aust (2013), *Supra* Note 5, p. 17; Malaya and Casis, Supra Note 6, p. 4.

"Memorandum of Understanding" (MOU) -- and the provisions of the VCLT would not apply.

If the parties intended the agreement to be governed by domestic law or any law other than international law, then it is not a treaty.[186] As noted by the Supreme Court in CNMEG v. Santamaria,[187] which involved the Northrail project, since the Contract Agreement explicitly provides that Philippine law shall be applicable, the parties have effectively conceded that their rights and obligations thereunder are not governed by international law. Thus, the Contract Agreement does not partake of the nature of an executive agreement. It is merely an ordinary commercial contract that can be questioned before the local courts.[188]

The term "treaty" – or commonly known as Memorandum of Agreement (MOA)[189] among States and their agencies – is used in this paper as defined in the VCLT or from the perspective of international law. It is not used in the same sense as the term "treaty" is treated in municipal law or especially in the Philippine Constitution where it is understood as an international agreement that requires the concurrence of the Senate after executive ratification.[190] Suffice it to note that both the terms "treaty" and "executive agreement" (i.e., international agreement that do not require legislative concurrence)[191] in municipal law fall within the category of "treaty" from the international law perspective.[192]

---

[186] Malaya and Casis, *Supra* Note 6, p. 3; see also Malaya, Mendoza-Oblena and Casupanan*, supra Note 7.*

[187] China National Machinery & Equipment Corp. (Group) vs. Hon. Cesar D. Santamaria, G.R. No. 185572, February 7, 2012.

[188] *Ibid.*

[189] Malaya and Casis, *Supra* Note 6, p. 5-6.

[190] E.O. No. 459, *Supra* Note 9, Sec. 2(b); Malaya and Casis, *Supra* Note 6, pp. 10—11.

[191] *Op.cit.*, Sec. 2(c).

[192] Malaya and Casis, *Supra* Note 6, p. 3.; See also: Malaya, Mendoza-Oblena and Casupanan, *Supra,* Note 7.

As noted by the first co-author and Professor Casis, "a treaty in the context of Philippine law is narrowly defined as an international agreement which requires the concurrence of the Senate after executive ratification … Thus treaties are only one type of international agreement under Philippine law … there are other types of international agreement recognized under Philippine law."[193] The latter refers to executive agreements.

B. Observance and Interpretation of Treaties, Defined

Observance literally means *the action or practice of fulfilling or respecting the requirements of law, morality, or ritual.*[194]

In treaty law, the observance of treaties means the reassertion of the fundamental principle that international treaties must be performed in good faith. To this end, it rules out the most mundane justification for non-compliance. It confirms a fundamental rule of the law of State responsibility, which signifies that a State cannot escape its responsibility on the international plane by referring to its domestic legal situation.[195]

Most disputes submitted to international adjudication involve some problem of treaty interpretation. Just as the interpretation of legislation is the constant concern of any government lawyer, treaty interpretation forms a significant part of the day-to-day work of a foreign ministry legal lawyer.[196]

---

[193] *Op.cit.*, p. 4.

[194] "Observance", *lexico.com,* Available from: https://www.lexico.com/en/definition/observance, Retrieved on 5 May 2020.

[195] Dörr O., Schmalenbach K. *Article 27. Internal Law and Observance of Treaties*, In: Dörr O., Schmalenbach K. (eds) Vienna Convention on the Law of Treaties, p. 453, (2012).

[196] Anthony Aust, *Modern Treaty Law and Practice*, p. 184, (1st Ed. 2000).

What does "interpretation" of a treaty entail? Linderfalk defined interpretation as the *clarification of an unclear text of a treaty*.[197]

The word "interpretation" may be taken to mean "to understand" the text of the treaty. Nonetheless, the text of a treaty does not have to be interpreted if such text is clear. The treaty text needs to be interpreted only if the treaty text is considered unclear.

II. OBSERVANCE OF TREATIES

Observance of treaties is dealt with in two articles in the VCLT: Article 26 on *pacta sunt servanda*, and Article 27 on how internal laws relate to the observance of treaties.

A. Pacta sunt servanda.

Pacta sunt servanda, Latin for "pacts must be respected", is a universally recognized principle. As both customary and conventional international law, it governs treaties in force as an agreement under international law between States."[198]

The Charter of the United Nations refers to this rule *vis-a-vis* the obligations of Member States, thus: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with this Charter."[199] It was repeatedly underscored in the *U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-*

---

[197] Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, p. 9, (2007).

[198] Merlin Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, pp, 79-80, (2010). *Cf:* Article 26 of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations which contains an identical article.

[199] Art. 2(2), Charter of the United Nations, October 24, 1945.

operation among States in Accordance with the Charter of the United Nations, which was enacted by the UN General Assembly, with the following lines:

> *Every State has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations.*
>
> *Every State has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law.*
>
> *Every State has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.*
>
> *Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail."*[200]

The rule's acceptance as one of the most fundamental principles of positive international law has been underscored by the jurisprudence of international tribunals, such as *In the North Atlantic Coast Fisheries Arbitration Concerning the Treaty of Ghent* where the ICJ said, "(f)rom the Treaty results an obligatory relation, whereby the right of sovereignty in making regulations is limited to such regulations as are made in good faith and not in violation of the Treaty." [201]

---

[200] UN General Assembly , *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970. A/RES/25/2625.

[201] Jorge R. Coquia and Miriam Defensor-Santiago, *Public International Law*, p. 607, (1984).

Having been identified as perhaps being the most important principle of international law[202] *pacta sunt servanda* is codified in Article 26, to wit:

> *Art. 26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

In the *Gabčíkovo-Nagymaros* case, the ICJ noted that there are two elements in Article 26 – the binding force of treaties and the performance of them in good faith. It further stated that the two are of equal importance,[203] and as it is, like all other rules in international law, the principle of good faith fulfillment of obligations derives from, and is kept in force by, the general consent of States.[204]

B. Consent to be bound.

For consent to be bound is the most significant, positive act that a State can take in relation to a treaty,[205] and no State can be bound by a treaty without its consent. Treaties are always voluntary, except for a limited category called treaties *ergo omnes* (against the whole world), such as treaties delimiting territorial boundaries. Furthermore, treaty governs the relationships of its parties among themselves. Hence, a treaty does not apply to relationship between a State that is a party, and a State that is *not* a party.[206]

---

[202] Sec. 321, Restatement (Third) of the Foreign Relations Law of the United Sates, 1987.
[203] ¶ 142, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 25 September 1997. See also, Malcolm D. Evans, *International Law,* p.151, *(5th Ed. 2018)* and Merlin Magallona, *Dictionary of Contemporary International Law*, pp. 206-207, (2011).
[204] UNGA *Supra*, Note 27.
[205] Aust (2013), *Supra* Note 5, p. 87.
[206] Miriam Defensor Santiago, *International Law with Philippine Cases and Materials and ASEAN Instruments,* p. 116, (2nd Ed. 2015). *Cf:* Article 35 of the VCLT on treaties providing for obligations for third States.

Under the VCLT, following are the means of expressing consent to be bound by a treaty:

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[207]

It must be noted though, that the act by which a State expresses its consent to be bound by a treaty is distinct from the treaty's entry into force. Consent to be bound is the act whereby a State demonstrates its willingness to undertake the legal rights and obligations under a treaty through definitive signature or the deposit of an instrument of ratification, acceptance, approval or accession. Entry into force of a treaty with regard to a State is the moment the treaty becomes legally binding for the State, that is, the moment at which that State becomes party to the treaty, which is after its compliance with the domestic requirements for entry into force. Each treaty normally contains provisions dealing with both aspects.[208]

Once a State gives its consent to be bound under international law, it becomes bound to observe *pacta sunt servanda*, which has evolved from its formal and abstract nature, and into a specific set of rules governing the process by which norms of international law are to be given effect, including their interaction with internal law,[209] as will be discussed later.

---

[207] Article 11, 1969 Vienna Convention on the Law on Treaties.

[208] Treaties Section, OLA-UN, *Supra* Note 8, p. 3.

[209] I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, The American Journal of International Law, Vol. 83, No. 3, pp. 513-518, (1989).

Philippine cases on *pacta sunt* servanda. The Philippine Supreme Court, noted Magallona, identified and adopted *pacta sunt servanda* as a "generally accepted principle of international law" under the Incorporation Clause, notably in *WHO v. Aquino* (48 SCRA 242), *Agustin v. Edu* (88 SCRA 195), *La Chemise Lacoste v. Fernandez* (129 SCRA 373) and *Tañada v. Angara* (272 SCRA 18).[210]

In *Agustin v. Edu*, the Supreme Court ruled on the validity of Letter of Instruction No. 229, issued in 1974 pursuant to the country's obligation under the 1968 Vienna Convention on Road Signs and Signals, as ratified by the President, which recommended the enactment of local legislation for the installation of road safety signs and devices. The Court upheld the validity of the LOI stating that the Philippines adopts the generally accepted principles of international law as part of the law of the land. The 1968 Vienna Convention on Road Signs and Signals is impressed with such a character, it added. It is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such attitude, which is, moreover, at war with the principle of international morality.[211]

In *Tañada v. Angara* on the issue of the constitutionality of the country's ratification of the World Trade Organization Agreement, the Court noted *pacta sunt servanda* as one of the oldest and most fundamental rules in international law, and stated that:

---

[210] Merlin Magallona, *International Law: A Bar Reviewer*, pp. 58-59, (2018); Magallona, *Supra* Note 25, pp. 79-80, (2010). See also Magallona's criticism on how the Court may have misapplied this international law principle in a way that it acquired supremacy over the Constitution, pp. 80-83.

[211] Leovillo C. Agustin vs. Hon. Romeo F. Edu, in his capacity as Land Transportation Commissioner, et. al, G.R. No. L-49112, February 2, 1979.

> "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties . . . A State which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[212]

Even before a treaty enters into force, a State is already bound to observe *pacta sunt servanda* once it gives its consent to be bound. As such, it may not do any act which would defeat the object and purpose of the treaty, in accordance with Article 18, which states that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> *(a)* It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;
> *(b)* It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

C. Applicability to Memorandum of Understanding.

When would *pacta sunt servanda* not apply? Treaties may be impeached from the point of view of their validity; and treaties may be validly suspended, denounced or terminated.[213] As long as one of these exceptions does not apply, *pacta sunt servanda* should be observed. If there is a

[212] Wigberto Tañada vs Edgardo Angara, G.R. No. 118295, May 2, 1997.
[213] See Part V - Invalidity, Termination and Suspension of the Operation of Treaties, VCLT.

breach of the treaty, there may be consequences for the non-observant State under the law of State responsibility.

Memorandum of Understanding (MOUs), political statements, and other soft law instruments are not legally binding and therefore are not treaties at all. The parties intend to carry out its terms on a best-effort basis.[214] Nevertheless, in the treaty practices of the Philippines and most countries, even though MOUs are non-legally binding and do not create legal obligations, they must be complied with in good faith as the *pacta sunt servanda* rule applies.

The introductory article "Philipine Treaty Law and Practice" in the *Philippine Treaty Index 1946-2010*[215] stated as follows:

> … both treaty/MOA and MOU are binding, following the rule of *pacta sunt servanda*, with the qualification that with respect to a MOU, the latter is neither legally-binding nor legally enforceable. In case of breach, the aggrieved party may not compel under international law the other party to carry out the provisions of an MOU.

At the same time, there can be legally enforceable provisions in a MOU such as confidentiality clause, protection of intellectual property clause, and final clauses (entry into force, amendments, etc.).[216]

In addition, there may be general principles of law that would impose legal consequences for breaches of MOU provisions. For instance, the doctrine of estoppel in

[214] Malaya and Casis, Supra Note 6, p. 4.
[215] Malaya, *Supra* Note 10, p. 4.
[216] Malaya and Casis, *Supra* Note 6, p. 4.

international law may apply.[217] The exact scope of this doctrine is far from settled, but in general it may be said that where clear statements (or conduct) of State led another State *bona fide* and reasonably to act to its own detriment, or to the benefit of the first State, then the first State is estopped from going back on its statements or conduct.[218]

As the ICJ in the case of the *Temple of Preah Vihear*[219] stated:

> *The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have "relied upon" the statements or conduct of the other party, either to its own detriment or to the other's advantage . . . the essential question is and remains whether the statements or conduct of the party impugned produced a change in relative positions, to its advantage or the other's detriment. If so, that party cannot be heard to deny what it said or did.*

In a recent incident, a government agency entered into an MOU on security cooperation with an agency of another country. Less than a year after its signing, the first agency under a new leadership sought to terminate the MOU even after the other side had made preparations for its implementation, including securing the much-needed funding. When its opinion was sought, the Department of Foreign Affairs said that having initiated and negotiated the MOU, the first agency is now estopped from going back on its statements or conduct as the other side had relied on these acts to its own detriment, and to unilaterally terminate the MOU would be in bad faith and therefore will have legal consequences.

---

[217] Anthony Aust, 'The Theory and Practice of Informal International Instruments', *The International and Comparative Law Quarterly*, Vol. 35, No. 4 (Oct., 1986), pp. 787-812.
[218] *Ibid*.
[219] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 15 June 1962.

D. Provisional Application.

Some treaties provide for provisional application before their entry into force. For instance, Article 7(1) of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994,* provides that "(i)f on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force." The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995* similarly provides for provisional application, ceasing upon its entry into force.

Under Art. 25 of the VCLT, a treaty or a part of a treaty is applied provisionally pending its entry into force if:

1. The treaty itself so provides; or
2. The negotiating States have in some other manner so agreed.

It further stated that unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.[220]

E.O. No. 459 similarly allows provisional effectivity for agreements entered into by the Philippines. Section 6 states that:

[220] Article 25, 1969 Vienna Convention on the Law on Treaties.

Sec.6. Entry into Force and Provisional Application of Treaties and Executive Agreements. –

a. A treaty or an executive agreement enters into force upon compliance with the domestic requirements stated in this Order.

b. No treaty or executive agreement shall be given provisional effect unless it is shown that a pressing national interest will be upheld thereby. The Department of Foreign Affairs, in consultation with the concerned agencies, shall determine whether a treaty or an executive agreement, or an amendment thereto, shall be given provisional effect.

Nonetheless, an international agreement that requires Senate concurrence may not be given provisional effectivity,[221] in keeping with Article VII, Section 21, of the Constitution which states that "(n)o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." Having provisional effectivity is thus rare in Philippine experience.

E. Internal Law and Observance of Treaties

Municipal law cannot, as a matter of principle, be invoked in order not to apply a treaty. This rule is closely linked with *pacta sunt servanda*. If a State could invoke with success its internal law so as to override a treaty provision, the binding nature of the commitment would disappear. Thus, when a State wishes to cease to be bound, it has to formally withdraw from the treaty. As Professor Robert Kolb

[221] Malaya and Casis, *Supra* Note 6, p. 39, and Malaya, Mendoza-Oblena and Casupanan, *Supra* Note 7, p. 13.

noted, "it would be unacceptable and unheard of that a party to a contract pleads it "internal matters" outside the recognized legal reasons for annulling or suspending the treaty commitment in order not to honor his pledge."[222]

The rule on how internal laws relate to the observance of treaties is contained in Article 27 of the VCLT which states that:

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

Article 46 of the Convention provides as follows:

> *Art. 46. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*
>
> *A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.*

F. Competence to Conclude Treaty, Exception.

This rule did not form part of the draft articles prepared by the International Law Commission (ILC) but was introduced in the Vienna Conference on the Law of Treaties. It affirms the pre-eminence of international law in regulating the relations of States and precludes the evasion of treaty

[222] Robert Kolb, *The Law of Treaties* (2016), p. 172.

obligations by states asserting their constitutional or statutory law as an excuse for failure to perform them. T.O. Elias summarized the three currents of opinion in the ILC on the relationship between international law and national law as it pertains to the law of treaties as follows:

> The first was that of Sir Hersch Lauterpacht who took the view that municipal law prevailed over international law. The second and opposite view was that of Sir Gerard Fitzmaurice who asserted the primacy of international law over municipal law unless there is a manifest violation of internal law which is invoked as a ground for invalidating a consent of a State to be bound by a treaty.
>
> The third view is embodied in Article 27, relating it to Article 46 of the Convention.
>
> The principle in Article 46 is that non-observance or violation of national law regarding competence to conclude treaties does not affect the validity of consent to be bound by a treaty as given by an organ or agent competent under international law to express that consent. The principle, however, admits one exception, i.e., in a case where the violation of national law "regarding competence to conclude treaties" is objectively evident and the rule of national law claimed to have been violated is of fundamental importance. [223]

The function of Article 46 of the VCLT is to define one of the seven grounds for invalidating a treaty or consent to be bound by a treaty. For this purpose, only one category of

[223] Merlin M. Magallona, *Fundamentals of Public International Law*, p. 193, (2005).

national law qualifies as a possible basis of claim to invalidity, specifically "internal law regarding competence to conclude treaties." On the other hand, Article 27 prevents a State from invoking the provisions of its entire internal law. Taken together, the two articles have the effect of making the possibility of a State plausibly invoking its internal law in justifying failure to perform its treaty obligations a highly exceptional and rare case, Magallona noted.[224]

Philippine law regarding competence to conclude treaties is found in E.O. No. 459. It requires that prior to any negotiation of a treaty or executive agreement, authorization in the form of Full Powers or Special Authority must be secured by the lead agency from the President through the Secretary of Foreign Affairs. However, the following persons shall not require Full Powers or Special Authority by virtue of the nature of their functions:

a. Secretary of Foreign Affairs;
b. Heads of Philippine diplomatic missions, for the purpose of adopting the text of a treaty or an agreement between the Philippines and the State to which they are accredited;
c. Representatives accredited by the Philippines to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."[225]

A Full Powers or Special Authority is also not required for the signing of a declaration, letter of intent, joint communique, joint statement and other political documents. It is likewise not generally required in the signing of a MOU

[224] *Ibid.*
[225] E.O. No. 459, *Supra,* Note 9, Sec. 3 and 4.

unless its text indicates an intent to be legally bound or the subject matter pertains to a major policy initiative or involves a matter of a senstive nature, in which case, it is advisable to secure prior authority from the President.[226]

G. Jurisprudence on international law-municipal law conflicts.

In *BAYAN vs. Zamora*[227] on the exercise by the Senate of its constitutional power to concur with the PH-US Visiting Forces Agreement (VFA), the petitioners contended that the VFA was invalid insofar as it does not meet the requirements prescribed by Section 25, Article XVIII of the Constitution for its entry into force. Petitioners specifically challenged the validity of the VFA as it was recognized by the U.S. as an executive agreement, which supposedly did not meet the standards in Section 25, Article XVIII which states that foreign military bases, troops, or facilities in the country, shall only be allowed if (a) it is under a treaty; (b) such treaty must be duly concurred in by the Senate; and (c) such treaty is recognized as a treaty by the other contracting State. They argued that the VFA should have the advice and consent of the US Senate pursuant to its own constitutional process.

Respondent Government officials, on the other hand, maintained that Section 21, Article VII of the Constitution applied since the VFA is not a basing arrangement but an agreement which involved merely the temporary visits of US personnel for joint military exercises.

In upholding the validity of the VFA, the Supreme Court stated that:

---

[226] Malaya and Casis, *Supra* Note 6, p. 27.

[227] BAYAN (Bagong Alyansang Makabayan), et. al vs Executive Secretary Ronaldo Zamora, et. al, G.R. No. 138570, October 10, 2000.

"…[I]t is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as binding as a treaty. To be sure, as long as the VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.

xxx

As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. While the international obligation devolves upon the state and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. As an integral part of the community of nations, we are responsible to assure that our government, Constitution and laws will carry out our international obligation. Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law. (underscoring supplied)

Beyond this, Article 13 of the Declaration of Rights and Duties of States adopted by the International Law Commission in 1949 provides: *'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it*

may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.'"[228]

In the subsequent case of *Lim v. Executive Secretary*, which dealt with a second challenge to the VFA, the issue was the validity of the "Balikatan 02-1" exercises. Petitioners contended that the exercises were inconsistent with the provisions of the PH-US Mutual Defense Treaty (MDT), specifically that the Abu Sayaff militants in Basilan could be considered as an external armed force to warrant US military assistance under the MDT.[229]

In deciding the case, the Supreme Court stated that:

"From the perspective of public international law, a treaty is favored over municipal law pursuant to the principle of *pacta sunt servanda.* Hence, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Further, a party to a treaty is not allowed to "invoke the provisions of its internal law as justification for its failure to perform a treaty."

"Our Constitution espouses the opposing view. Witness our jurisdiction as stated in Section 5 of Article VIII:

> The Supreme Court shall have the following powers: xxx
>
> (2) Review, revise, reverse, modify, or affirm on appeal or *certiorari,* as

[228] *Ibid.*

[229] Arthur D. Lim and Paulino R. Ersando vs. Executive Secretary, G.R. No. 151445, April 11, 2002.

> the law or the Rules of Court may provide, final judgments and orders of lower courts in:
>
> > (a) All cases in which the *constitutionality or validity of any treaty, international or executive agreement,* law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question. xxx

"In *Ichong v. Hernandez* (101 Phil. 1155, 1191 (1957)), we ruled that the provisions of a treaty are always subject to qualification or amendment by a subsequent law, or that it is subject to the police power of the State. In *Gonzales v. Hechanova* (9 SCRA 230, 242 (1969)),

> … As regards the question whether an international agreement may be invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative, by providing in Section 2 of Article VIII thereof, that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error as the law or the rules of court may provide, final judgments and decrees of inferior courts in - (a)

> All cases in which the *constitutionality* or *validity* of any *treaty, international or executive agreement,* law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question." In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but, also, when it runs counter to an act of Congress.*"[230]

It may be noted that the PH-US VFA was the subject of a revocation notice from the Philippine side in early 2020. However, a *Note Verbale* was subsequently issued by the DFA to toll the running of the period of termination.

When there is a conflict between international law and municipal law—and paraphrasing constitutionalist Joaquin Bernas SJ—the jurisprudence may be summarized as follows:

(a) As to which law should prevail depends on whether the case goes to an international tribunal or a domestic court.
(b) Before an international tribunal, a State may not plead its own law as an excuse for failure to comply with international law. An exception is made to this rule by Article 46 of the VCLT in cases where the constitutional "violation was manifest and concerned a rule of its internal law of fundamental importance." If the treaty that is declared unconstitutional, however, does not come under the exception, the treaty can be ignored domestically

[230] *Ibid.*

but only at the risk of international repercussions before an international court.

(c) When the conflict is before a domestic court, the domestic court is bound to apply the local law. However, courts are very rarely confronted with such a problem as courts are generally able to give domestic law a construction which would not come into conflict with international law.

(d) Before a domestic court, there should no such conflict between the Philippine Constitution or statutes on the one hand, and *customary* international law on the other, because the Constitution, in Article II, Section 2, adopts the generally accepted principles of international law as part of the law of the land.

(e) Before a domestic court, should a conflict arise between a treaty and the Constitution, the treaty would not be valid and operative as domestic law. The Constitution, in Article VIII, Section 5(2)(a)) explicitly recognizes the power of the Supreme Court to declare a treaty unconstitutional. This does not mean, however, that a treaty that has been declared unconstitutional loses its character as international law. Under the "dualist" theory, which the Constitution accepts, the unconstitutionality of a treaty is purely a domestic matter.

(f) Before a domestic court, treaties and statutes are equal in rank and that, since neither is superior to the other, the rule followed is that between an earlier treaty and a later law, the later one prevails. An Act of Congress is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. But again the rule applies only in the domestic sphere. The treaty, even if contrary to a later statute, remains as

international law. While an international tribunal would not have the power to reverse the nullification of the treaty in domestic law, it can take appropriate action in favor of an aggrieved State.[231]

III. TREATY INTERPRETATION

Before a treaty, like statute, may be construed, there must be ambiguity in its language. Ambiguity means a condition of admitting two or more meanings, of being understood in more than one way, or referring to two more things at the same time. Without such ambiguity in a treaty, there is no room for construction, and the treaty should be performed as its clear language dictates.[232]

When a treaty has some ambiguities, only then may interpretation and application of the rules of construction be required.

The VCLT has provisions relating to the interpretation of treaties. It consists of three articles: Article 31 on the general rule of interpretation, Article 32 on the supplementary means of interpretation, and Article 33 on the interpretation of treaties authenticated in two or more languages.

Whenever there is a need to interpret a treaty, Articles 31 is the starting-point. Article 31 provides as follows:

"General rule of interpretation

---

[231] Joaquin G. Bernas, *An Introduction to Public International Law*, pp. 60-64, (1st Ed. 2002).

[232] Ruben Agpalo, *Public International Law*, p. 406, (2006). See how the Extradition Treaty between the Philippines and Australia was applied, rather than construed, in *Wright v. Court of Appeals*, 235 SCRA 341 (1994).

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

As one should expect, the provisions of the VCLT are binding only for the parties to the Convention. The Philippines is a State party to the Convention, and the latter entered into force for the country on 27 January 1989. The Convention has as of this writing 116 State parties.[233]

Despite the its relatively recent entry into force, the VCLT has made significant contributions to State practice in this field. Parallel to the rules of interpretation laid down in Articles 31–33, customary law also contains a set of rules to be used for this purpose. These rules of international custom are identical to the rules laid down in the VCLT, a fact on which not only States, but also international organizations as well as authors and international courts and tribunals, seem to be in agreement.[234]

Articles 31–33 of the VCLT should therefore be seen as evidence, not only of the rules of interpretation that apply according to the Convention between its parties, but also of the rules that apply according to customary international law between States in general.[235] These apply to international organizations as well even if the Vienna Convention of the Law of Treaties between States and International Organizations and between International Organizations has yet to enter into force.

A. Schools of Interpretation.

In the absence of any authentic interpretation given by the parties, the interpretation of a provision whose meaning is unclear or obscure must be determined by recourse to rules of interpretation. While there are quite a number of

---

[233] Vienna Convention on the Law of Treaties, *United Nations Treaty Collection.* Available from: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en. Accessed on 18 May 2020.
[234] Linderfalk, *Supra*, Note 24, p. 7.
[235] *Ibid*.

rules, principles and maxims of treaty interpretation, many of them have been greatly influenced by principles of interpretation of statutes and contracts in various national legal systems.[236] Michael Evans, citing Oppenheim, along with some other authors,[237] is of the view that in general, there are three main schools of interpretation: the subjective (the 'intention of parties') approach; the objective (the 'textual') approach, and the teleological (or 'object and purpose') approach.[238]

Other authors identify five methods which have traditionally played a role in the theory of interpretation. First, the subjective or historical method seeks to identify, when interpreting a treaty, the "real" intentions of the drafters and, consequently, encourages recourse to the treaty's *travaux préparatoires*. Second, the latter have less significance for the textual or grammatical method. This method concentrates on the treaty text which is, in Max Huber's words, *"la seule et la plus récente expression de la volonté commune des parties"* (The only and most recent expression of the common will of the parties.). Third, the contextual or systematic method appreciates the meaning of terms in their nearer and wider context. Fourth, the teleological or functional method concentrates on the object and purpose of a treaty which it will seek in all materials available, including the *travaux préparatoires*; if necessary, it will even transgress the confines of the treaty text. Finally, fifth, the logical method favors rational techniques of reasoning and such abstract principles as *per analogiam, e*

[236] Abdul Ghafu Hamid and Khin Maung Sein, *Public International Law: A Practical Approach*, p. 199 (3rd Ed. 2011).
[237] See also Public International Law by Coquia and Defensor-Santiago, *Supra* Note 28.
[238] Evans, *Supra* Note 30.

contrario, contra proferentem, eiusdem generis and *expressio unius est exclusio alterius.*[239]

Analyzing the two additional approaches, the method of interpreting a treaty through the contextual method is in line with Article 31(1) which states that a treaty shall be interpreted in good faith in accordance with (a) the ordinary meaning to be given to the terms of the treaty, (b) in their context, and (c) in the light of its object and purpose. The logical method is also in line with Article 31(3)(c) which states that "(t)here shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."[240]

According to Bernas, Article 31 combines the various approaches to treaty interpretation. Article 31(1) follows the "objective approach," that is, interpretation according to the ordinary meaning of the words. This is supplemented by the "teleological" approach in Article 31(2), that is, interpretation according to the telos or purpose of the treaty. Finally, Article 31(3) and (4) follow a "subjective" approach that honors special meaning given by the parties.[241]

Regardless of the differences in the number of schools identified, various authors agree that a particular school of interpretation is not applied to the exclusion of others when interpreting a treaty, rather the VCLT draws on all three.[242]

On this note, Evans observed that the reconciliation of the objective and the subjective approaches is the most difficult, controversial, and some would say impossible task. For the International Law Commission, the starting point

---

[239] Mark E. Villiger, *The 1969 Vienna Convention on the Law of Treaties – 40 Years After*, Recueil des cours № 344/Collected Courses Vol. 344, p. 113.
[240] Ibid.
[241] Bernas, *Supra* Note 58, p. 37.
[242] Villiger, *Supra* Note 66.

when interpreting a treaty should be the text rather than the intention of the parties, since it is presumed that the text represented a real expression of what the parties did in fact intend. The ICJ's preferred method of interpretation is reliance on the text of a treaty, Evans noted.[243]

B. Ordinary Meaning (Article 31 (1)).

Article 31, paragraph 1, states as follows:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

It may be noted that though consisting of four provisions, Article 31 is expressed as a single rule (and not rules) forming an integrated whole.

Paragraph 1 has three elements: First, a treaty must be interpreted in good faith. Secondly, the terms of a treaty are to be given their "ordinary meaning." Thirdly, the determination of the ordinary meaning cannot be done in the abstract, only in the context of the treaty and in the light of its object and purpose.

At first impression, Art. 31 (1) may seem similar to Art. 26 and thus appear to be superfluous, but the two provisions are different yet related. Art. 26 pertains to observance or performance in good faith, while Art. 31(1) refers to interpretation in good faith.

On the first element, it is necessary to define the meaning of good faith. Good faith has been defined in the following manner:

---

[243] Evans, *Supra* Note 30, p. 153.

> A person acts in *bona fides* when he acts honestly, not knowing nor having reason to believe that his claim is unjustified ... *Bona fides* ends when the person becomes aware, or should have become aware, of facts which indicate the lack of legal justification for his claim.[244]

In relation to treaty interpretation, the principle of good faith flows directly from the rule *pacta sunt servanda* in Article 26 which imposes upon parties to a treaty the obligation to perform it in good faith. Interpretation is part of the performance of the treaty.[245]

On the second element, the terms of the treaty must be given their ordinary meaning because it is reasonable to assume that the ordinary meaning is most likely to reflect what the parties intended.[246] Further, according to the view expressed in judicial opinions from 1969 onwards, "the ordinary meaning" of a treaty is to be determined not by everyday language alone, but by everyday language and technical language considered as one single whole. This was evident in the *Kasikili/Sedudu Island Case*, the *AAPL vs. Sri Lanka Case*, the *Guinea-Guinea Bissau Maritime Delimitation Case,* and the *Young Loan Case*.[247]

On the third element, when one interprets using either "the context" or "the object and purpose" in accordance with the provisions of Article 31, both are not considered independently of other means of interpretation. It is always in relation to conventional language or "the ordinary meaning."[248]

---

[244] Linderfalk, *Supra* Note 24, p. 45.
[245] Hamid and Sein, *Supra* Note 63, p. 200.
[246] *Ibid.*
[247] Linderfalk, *Supra* Note 24, p. 67.
[248] *Op. cit,* p. 102, 203.

Thus, when "the context" or "the object and purpose" is used, it is always a second step in the interpretation process. They are secondary means of interpretation that are used only when the ordinary meaning of the treaty provision is either vague or ambiguous or when using conventional language leads to conflicting results. Therefore, using "the context" or "the object and purpose" will help to determine which one of several possible meanings is correct, and which one is not.[249]

The general rule in Article 31 primarily adopts the textual approach. The ILC was unanimous on the view that the textual approach is the established rule of customary international law. It is also confirmed by many pronouncements of the ICJ. The Court has also emphasized that interpretation is not a matter of revising treaties or reading into them what they do not expressly or by necessary implication contain, or of applying a rule of interpretation so as to produce a result contrary to the letter and spirit of the treaty's text.[250]

Context (Article 31 (2)). The context of a treaty for the purpose of interpretation includes not only its text, preamble and annexes, but also any agreement relating to the treaty and made between all the parties in connection with the conclusion of the treaty. Article 31 states as follows:

> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all*

[249] *Ibid.*

[250] Hamid and Seine, *Supra* Note 63, p. 201.

the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Paragraph 2 above is most important for treaty making. When adopting a treaty, the parties often issue a formal statement or their chair issues a Chairman's Statement, which is often also carefully negotiated during the conference. Issuance of the Chair's Statement is an established practice at the conclusion of ASEAN Ministerial Meetings. These are valuable aids to interpretation.[251] They may also enter into agreed minutes or an exchange of letters or add an annex regarding the detailed application of the terms used in the treaty rather.[252] A reason for employing such devices is at times political. A party may insist on a particular point but others may find it politically awkward to having it in the treaty text itself but would not mind having it in a separate document.[253]

A treaty text is thus not limited to a body of text – *text stricto sensu*. Treaties also often include a variety of non-textual representations, such as maps, tables, and diagrams. These are documents where the authentic and definite expressions of an international agreement are to be found, as opposed to preparatory work, unauthenticated translations, and other such documents. Furthermore, the treaty text is not necessarily tantamount to one instrument. A treaty is an agreement, and an agreement can take the form of any number of instruments, and still be considered as one, single

[251] Aust (2013), *Supra* Note 5, p. 211.
[252] *Ibid.*
[253] *Ibid*.

treaty text.[254] As noted earlier, in the Convention's definition of a treaty in Art. 2(1), it can be embodied in a single instrument or in two or more related instruments.

In order for an agreement to fit the description of sub-paragraph (a), it must have been: (1) made between all the parties; and (2) made in connection with the conclusion of the treaty.[255]

The word "agreement," as used in this provision, refers to agreements irrespective of form[256] which is (1) "relating to the treaty," i.e. the agreement and the treaty, according to their parties, must be exceptionally closely connected; and (2) made "in connection with the conclusion of the treaty," i.e., at the point in time when the treaty was established as definite.

As for sub-paragraph (b), under the VCLT, an instrument means a legally relevant document of some sort.[257]

In order for an instrument to fit the description in subparagraph (b), it must: (1) bear the form of a written document; (2) be made by one or more parties and accepted by the other parties as an instrument related to the treaty; and (3) be made "in connection with the conclusion of the treaty."[258]

Generally held to be among the instances typically falling within the provisions of Article 31(2)(b), are the

[254] Linderfalk, *Supra* Note 24, p. 103.
[255] *Op.cit,* p. 135.
[256] *Op. cit,* p. 139.
[257] *Op. cit,* p. 147.
[258] *Op. cit,* p. 148.

reservations and interpretative declarations made to a treaty.[259]

Article 31, paragraph 2 and subparagraphs (a) and (b) represent authentic interpretation when all parties agree on (or at least tacitly accept) the interpretation of treaty terms by means extrinsic to the treaty. This means of interpretation is not only particularly reliable; it is also endowed with binding force.[260]

C. Subsequent Agreement and Subsequent Practice (Article 31(3)).

Together with the context, account shall be taken of any "subsequent agreement" between the parties regarding the interpretation and application of the treaty and any "subsequent practice" in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Article 31(3) of the VCLT states the following:

> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *(c) any relevant rules of international law applicable in the relations between the parties.*

[259] *Ibid*.
[260] Villiger, *Supra* Note 66, p. 120.

Paragraph 3(a) is another important tool in treaty-making. Together with the context, there shall be taken into account any "subsequent agreement" between the parties regarding the interpretation of treaties. As noted by Anthony Aust, whose book *Modern Treaty Law and Practice* is often consulted by Foreign Ministry lawyers, since the parties can agree later to modify the treaty, they can subsequently also agree on an authoritative interpretation of its terms, and this can amount, in effect, to an amendment.[261]

Foreign ministry lawyers are, at times, asked the following question: can a treaty be modified without amending it, the latter process being lengthy and uncertain and may be subject to ratification? An answer is to come up with a "subsequent agreement" interpreting the treaty. For instance, when EU leaders decided in 1995 to replace the "ECU," the term for their currency under the Treaty of Rome, with "Euro," instead of amending the treaty, they recorded in the Conclusions of their meeting the following: "The specific name Euro will be used instead of the generic term "ECU" used in the Treaty to refer to the European currency unit. The Governments of the fifteen Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions."[262]

The following conditions must be met in order for an agreement to fall under Article 31(3)(a): (1) the agreement must be made between the parties; (2) it must be subsequent to the conclusion of the treaty, i.e. one whose earliest existence cannot be traced further back than to the point in time when the interpreted treaty was established;[263] and (3) it must be regarding the interpretation of the treaty or the application of its provisions," i.e., an agreement the purpose

[261] Aust (2013), *Supra* Note 5, p. 212.
[262] *Ibid.*
[263] Linderfalk, *Supra* Note 24, p. 163.

of which is to clarify the meaning of a treaty or to serve in some other manner as a guide for application.[264]

In his book *Treaty Interpretation,* Richard Gardiner notes that with respect to the form of the subsequent agreement, the VCLT does not specify that such an agreement constitute a treaty or have the same formal status as the instrument which is interpreted."[265] In other words, the subsequent agreement need not be legally-binding and may be in the form of a MOU or a decision adopted by the parties in a meeting.

The coverage of the PH-US Mutual Defense Treaty has been raised over the years, particularly as to whether it covers the South China Sea given the security challenges faced by the country there. Article IV of the MDT provides that, "Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would meet the common dangers in accordance with its constitutional processes."[266]

In a letter to Secretary of Foreign Affairs Domingo L. Siazon dated May 24, 1999, U.S. Ambassador to the Philippines Thomas C. Hubbard stated that:

> "The U.S. Government stands by its statements in the Vance-Romulo letter of January 6, 1979, which covers our obligation under the Mutual Defense Treaty in case of an armed attack against the Metropolitan territory of the Philippines, as well as in the case of an armed attack on Philippine forces

---

[264] *Op. cit,* p. 164.

[265] Gardiner, *Supra* Note 5, p. 247-250, citing the European Molecular Biology Arbitration (EMBL v Germany), Award of 29 June 1990, 105 ILR 1, and Seaboard World Airlines Inc. v Department of Trade, (1976) 1 Lloyd's Rep 42.

[266] Signed August 30, 1951. Entered into force on 27 August 1952.

> in the Pacific area. Last August, in response to questions on this issue during his visit to the Philippines, U.S. Secretary of Defense William Cohen stated that the U.S. considers the South China Sea to be part of the Pacific area."[267]
>
> The above is an interpretative declaration made by treaty party United States.

Subsequent practice of the parties is an important element in treaty interpretation, and reference to practice is well-established in the jurisprudence of international tribunals. However precise the text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean, provided the practice is consistent, and is common to, or accepted by, all the parties. An example of interpretation by subsequent practice is the way in which Members of the United Nations have interpreted and applied Article 27(3) of the Charter. Although the article states that substantive matters are to be decided by nine votes including "concurring votes" of the permanent members of the Security Council, the practice of the Security Council since 1946 has been to interpret "concurring" as meaning "not objecting." Therefore, abstention by a permanent member does not amount to veto.[268]

The following conditions must be met in order for an a practice to fall under Article 31(3)(b): (1) the phenomenon must be such that it can be considered a "practice," i.e., the sum total of a number of applications – any application – as

---

[267] See J. Eduardo Malaya and Maria Antonina Mendoza-Oblena, *Forging Partnerships: Philippine Defense Cooperation under Constitutional and International Laws*, pp. 74-75 (2016).

[268] Hamid and Seine, *Supra* Note 63, pp. 201-202. Article 27 of the UN Charter states in part that, "Decision of the Security Council on all matters shall be made by an affirmative vote of nine members, including the concurring votes of the permanent members …"

long as they "establish the agreement of the parties regarding its interpretation"; (2) it must concern of a practice "in the application of the treaty" or simply referring to each and every measure taken on the basis of the interpreted treaty; (3) the practice must be "subsequent"; and (4) it must be a practice "which establishes the agreement of the parties regarding its interpretation," i.e., a practice on the basis of which the assumption can arguably be made that an agreement exists. It need not necessarily be a practice to which all parties themselves have contributed. All that is needed is that all parties must have acquiesced in the interpretation. Thus, if the circumstances allow for the assumption that a party has consented, even though the party itself did not contribute to the practice, then this shall be sufficient.[269]

Finally, Article 31(3)(c) provides for "any relevant rules of international law" applicable in relations between the parties to be taken into account, together with the context. This is wide enough to include, without being limited to, the "inter-temporal rule." In certain cases, reaching an interpretation which is consistent with the intentions of the parties may require regard to be had to not only international law at the time the treaty was concluded (the "inter-temporal rule"), but also to contemporary international law.[270]

The following conditions must be met in order for a relevant rule to fall under Article 31(3)(c): (1) the phenomenon must be included within the expression "relevant rules of international law," i.e., all rules which spring from any of the formal sources of international law, that is to say, from international agreements, customary international law, or from "the general principles of law recognized by civilized nations"; and (2) the rule that is

[269] Linderfalk, *Supra* Note 24, p. 165-167.
[270] Hamid and Seine, *Supra* Note 63, pp. 202.

"applicable in the relations between the parties," i.e., each and every one of the States, which are bound by the interpreted treaty at the time of interpretation, must also be bound by the relevant rule of law.[271]

D. Special Meaning (Article 31(4)).

A special meaning must be given to a term if it is established that the parties so intended. Article 31 (4) of the VCLT states:

> *4. A special meaning shall be given to a term if it is established that the parties so intended.*

Notwithstanding the apparent meaning of a term in its context, it is open to a party to invoke any special meaning, but the burden of proof of the special meaning will rest on that party.[272]

For example, in the passage in the 'Chairman's Statement,'[273] which refers to islands 'over which the existence of state sovereignty is recognized by all Contracting Parties,' the word 'existence' was carefully chosen to indicate that the passage covered also islands where sovereignty is disputed, such as South Georgia and the South Sandwich Islands,[274] a British Overseas Territory to which Argentina asserts a claim as well as continuing to dispute this interpretation.

---

[271] Linderfalk, *Supra* Note 24, p. 177-178.
[272] Aust (2000), *Supra* Note 23, p. 196.
[273] Attached to the Final Act of the Conference which adopted the Convention on the Conservation of Antarctic Marine Living Resources 1980 is a formal statement regarding islands within the area of application of the Convention. The purpose of the statement is to permit the islands to be taken out of the normal application of the Convention. The statement was read out by the Chairman of the conference, and is known as the 'Chairman's Statement'.
[274] Aust (2000), *Supra* Note 23, p. 196.

The PH-US Enhanced Cooperation Agreement (EDCA), where the first author was part of the Philippine negotiating panel, contains a definition of terms. To be clear as to whether "US contractors" has the status protection conferred by the PH-US VFA on US personnel, the term "US contractors" was defined as "companies and firms, and their employees, under contract or subcontract to or on behalf of the United States Department of Defense. United States contractors are *not* included as part of the definition of United States personnel in this Agreement, including within the context of the VFA."[275]

E. Travaux préparatoires (Article 32).

Recourse may be had to the supplementary means of interpretation after employing the means of the General Rule in Article 31. These means serve as further evidence of, or will shed further light on, the intentions of the parties, and their common understanding regarding the meaning of treaty terms. Article 32 of the VCLT states as follows:

> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> *(a) leaves the meaning ambiguous or obscure; or*
>
> *(b) leads to a result which is manifestly absurd or unreasonable.*

[275] Article II (3), Agreement between the Government of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, signed April 28, 2014. Entered into force on 25 June 2014.

The above article refers to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. It follows that the means mentioned therein serve as examples and do not exclude other supplementary means of interpretation.[276]

The preparatory work (*travaux préparatoires* or *travaux* for short) of a treaty is not a primary means of interpretation, but is an important supplementary means. International tribunals have for a long time had recourse to the *travaux* for the purpose of confirming the meaning arrived at by the application of the general rule as set out in Article 31. In order to try to come to an understanding of what those who negotiated the treaty had intended, they may have recourse to supplementary means of interpretation, in particular the *travaux* and the circumstances of the conclusion of the treaty, and this is recognized by Article 32.[277]

Examples of preparatory materials include memoranda and other statements and observations of Governments transmitted to each other or to the drafting body; diplomatic exchanges between the parties; treaty drafts; negotiation records; and minutes of commission and plenary proceedings. An obvious example of resort to *travaux*, as seen in these pages, is the many references to the reports of the ILC when interpreting the provisions of the VCLT. Article 32 mentions next the circumstances of its conclusion. These include the political, social and cultural factors — the milieu — surrounding the treaty's conclusion.[278]

While the general rule is that interpretation is only resorted to if there is ambiguity, Aust notes that even when

[276] Villiger, *Supra* Note 66, p. 125.
[277] Aust (2000), *Supra* Note 23, p. 197.
[278] Villiger, *Supra* Note 66, p. 125.

the ordinary meaning appears to be clear, if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, the primary duty in Article 31(1) to interpret a treaty in good faith requires a court to 'correct' the ordinary meaning.[279]

There are several other means of interpretation, though it is not always easy to distinguish them from familiar legal techniques, often based on common sense or grammatical rules. Many derive from principles of domestic law, especially Roman law.[280]

Among other supplementary means "included" but not listed in Article 32, the following may be mentioned: interpretative declarations made by treaty parties which do not qualify as reservations, such as the Hubbard letter on the coverage of the PH-US Mutual Defense Treaty[281]; and any non-authentic translations of the authenticated text.

Other supplementary means also cover rational techniques of interpretation familiar to lawyers, such as *contra proferentem* (if it is possible to interpret a provision in two ways, the meaning that is less favorable to the party that proposed it, or for whose benefit it was included, should be adopted), *ejusdem generis* (when general words follow special words, the general words are limited by the genus (class) indicated by the special word), *expressio unius est exclusio alterius* (express mention of a circumstance or condition that excludes others), *lex posterior derogat legi priori* (when two rules apply to the same matter, the later in time prevails); and *lex specialis derogat legi generali* (a specific rule prevails over a general rule).[282]

---

[279] Aust (2000), *Supra* Note 23, p. 197.
[280] *Op. cit,* p. 200.
[281] PH-US MDT, *Supra* Note 93.
[282] Villiger, *Supra* Note 66, p. 126; Aust (2000), *Supra* Note 23, p. 200-201.

F. Authenticated Text in Two or More Languages (Article 33).

Article 33 provides for the rules on the interpretation of treaties authenticated in two or more languages. It states:

> 1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.*
> 2. *A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*
> 3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*
> 4. *Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

A text is established as "authentic" when it is signed, signed *ad referendum* or initialed by the representatives of the parties.[283]

An issue pertaining to the plurality of texts was noted by the ILC as follows:

---

[283] Art. 10, VCLT.

> The majority of more formal treaties contain an express provision determining the status of the different language versions. If there is no such provision, it seems generally accepted that each of the versions in which the text of the treaty was 'drawn' up is to be considered authentic, and therefore authoritative for the purpose of interpretation. Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts … the plurality of texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty. On the other hand, when meaning of terms is ambiguous or obscure in one language, but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretations of the text the meaning of which is doubtful.[284]

It is common nowadays that treaties and conventions concluded under the auspices of the United Nations and other international bodies are drafted in the six official languages of the United Nations. All the texts being authentic, considerable difficulty may arise in the interpretation of terms. The concordance of all the languages is therefore necessary, due to the general rule in Article 33 that the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.[285]

The different genus of the languages, the absence of complete consensus *ad idem*, or the lack of sufficient time to coordinate the texts, may result in discrepancies in the

[284] Evans, *Supra* Note 30, p. 158-159.

[285] Coquia and Defensor-Santiago, *Supra* Note 28, p. 614-615, quoting the Commentary of the International Law Commission, II (1966), Yearbook of the ILC, p. 224.

meaning of the texts. The plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty. On the other hand, when the meaning of the terms is ambiguous or obscure in one language, but it is clear as to the intention of the parties in another, the plurilingual character of the treaty facilitates interpretations of the text, the meaning of which is doubtful. For instance, a given term may have a broad, liberal meaning in one language, but has a restrictive and narrow meaning in another language. The tendency has been to utilize the narrower meaning in interpreting the treaty.[286]

Another instance is when a term in a treaty has a different meaning in the countries that are parties thereto. One solution is to apply the meaning prevalent in the country where the action contemplated by the treaty is to take place.[287]

It may be noted that the ICJ almost always consults only the English and French texts of treaties, those being the official languages of the Court.[288]

To avoid material differences between the language text, it is good practice before authenticating the text to comb through the texts to clean them up and straighten out inconsistencies.

To address the potential issues referred to above, it is Philippine treaty practice to prefer that the text be in English only, which is one of the two official languages of the country, together with Filipino. If the other party insists on having a text in its own language, the Philippine side would prefer having the following provision in the *testimonium*:

---

[286] *Ibid.*
[287] *Ibid*.
[288] Aust (2000), *Supra* Note 23, p. 206.

> Signed in (place) this xxx day of (month) 20xx, in the English and _____ languages, both being equally valid. In case of divergence of interpretation, the English text will prevail.[289]

G. Application of Articles 31 and 32 by the Supreme Court.

The Supreme Court has had a number of occasions to apply and interpret Articles 31 and 32. At issue in *Wright v. Court of Appeals*[290] was the Extradition Treaty between the Philippines and Australia, which allows the contracting parties to extradite "persons who are wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offense."[291] Petitioner alleged that he faced no pending case in Australia, thus he cannot be extradited. In rejecting the contention, the Court stated that "limiting the phrase "wanted for prosecution" to persons charged with an information or a criminal complaint renders the Treaty ineffective over individuals who absconds for purpose of evading arrest and prosecution," just like the petitioner. In this case, there was no need to interpreted the treaty; it only had to be applied.

In *Secretary of Justice v. Hon. Lantion*,[292] another extradition case, this time the PH-US Extradition Treaty, the Court was asked to rule on the due process rights of a prospective extraditee at the evaluation stage of the extradition proceedings, particularly whether or not he may be granted the right to notice and hearing at such stage. The

---

[289] Malaya and Casis, *Supra* Note 6, p. 150.

[290] 235 SCRA 341 (1994).

[291] Art. 1, Treaty on Extradition between the Republic of the Philippines and Australia, signed March 7, 1988, copy in J. Eduardo Malaya, Sheila Monedero-Arnesto and Ricardo V. Paras III, *Enhancing International Legal Cooperation: Extradition, Mutual Legal Assistance, Transfer of Sentenced Persons, and Cooperation on Traditional Organized Crimes and Narcotic Drugs*, pp. 190 – 197 (2019).

[292] Secretary of Justice vs. Hon. Ralph C. Lantion, Presiding Judge, Regional Trial Court of Manila, Branch 25 and Mark B. Jimenez, G.R. No. 139465, October 17, 2000.

Court held that private respondent is bereft of the right to notice and hearing during such evaluation stage, citing among others the following:

> *"… All treaties, including the PH-US Extradition Treaty,[293] should be interpreted in light of their intent. Nothing less than the Vienna Convention on the Law of Treaties to which the Philippines is a signatory provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." (emphasis supplied) The preambular paragraphs of P.D. No. 1069 define its intent, viz: xxx*
>
> > *WHEREAS, the suppression of crime is the concern not only of the state where it is committed but also of any other state to which the criminal may have escaped, because it saps the foundation of social life and is an outrage upon humanity at large, and it is in the interest of civilized communities that crimes should not go unpunished;" xxx*
>
> *It cannot be gainsaid that today, countries like the Philippines forge extradition treaties to arrest the dramatic rise of international and transnational crimes like terrorism and drug trafficking. Extradition treaties provide the assurance that the punishment of these crimes will not be frustrated by the frontiers of territorial sovereignty. Implicit in the treaties should be the unbending commitment that*

[293] Treaty on Extradition between the Republic of the Philippines and the Government of the United States of America, Nov. 13, 1994, copy in Malaya, Monedero-Arnesto and Paras, *Supra*, Note 118, pp. 295 – 303.

the perpetrators of these crimes will not be coddled by any signatory state.

It ought to follow that the PH-US Extradition Treaty calls for an interpretation that will minimize if not prevent the escape of extraditees from the long arm of the law and expedite their trial. The submission of the private respondent, that as a probable extraditee under the PH-US Extradition Treaty he should be furnished a copy of the US government request for his extradition and its supporting documents even while they are still under evaluation by petitioner Secretary of Justice, does not meet this desideratum. The fear of the petitioner Secretary of Justice that the demanded notice is equivalent to a notice to flee must be deeply rooted on the experience of the executive branch of our government. As it comes from the branch of our government in charge of the faithful execution of our laws, it deserves the careful consideration of this Court.[294]

The Court had a lengthier reference to Articles 31 and 32 in *Lim v. Executive Secretary,*[295] as discussed earlier, specifically the interpretation of the word "activities" in Article 1 of the PH-US VFA in order to determine whether the "Balikatan 02-1" exercises are covered under it. Article 1 of the treaty states that, "As used in this Agreement, "United States personnel" means United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine Government."

---

[294] *Ibid.*

[295] Lim vs. Executive Secretary, *Supra,* Note 56. For a discussion on the PH-US VFA and other defense and security agreements entered into by the Philippines, see J. Eduardo Malaya and Maria Antonina Mendoza-Oblena, *Forging Partnerships: Philippine Defense Cooperation under Constitutional and International Laws*, (2016).

In resolving the issue, the Court referred to the VFA itself but finding it unavailing, proceeded to construe the provision rather expansively, stating the following:

> The first question that should be addressed is whether "Balikatan 02-1" is covered by the Visiting Forces Agreement. To resolve this, it is necessary to refer to the VFA itself: Not much help can be had therefrom, unfortunately, since the terminology employed is itself the source of the problem. The VFA permits United States personnel to engage, on an impermanent basis, in "activities," the exact meaning of which was left undefined. The expression is ambiguous, permitting a wide scope of undertakings subject only to the approval of the Philippine government. The sole encumbrance placed on its definition is couched in the negative, in that United States personnel must "abstain from any activity inconsistent with the spirit of this agreement, and in particular, from any political activity." All other activities, in other words, are fair game.
>
> We are not left completely unaided, however. The Vienna Convention on the Law of Treaties, which contains provisos governing interpretations of international agreements, state:
>
> SECTION 3. INTERPRETATION OF TREATIES
>
> Article 31
> General rule of interpretation
>
> Article 32
> Supplementary means of interpretation

It is clear from the foregoing that the cardinal rule of interpretation must involve an examination of the text, which is presumed to verbalize the parties' intentions. The Convention likewise dictates what may be used as aids to deduce the meaning of terms, which it refers to as the context of the treaty, as well as other elements may be taken into account alongside the aforesaid context. xxx

The Terms of Reference rightly fall within the context of the VFA. (underscoring supplied)

xxx

After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word “activities" arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation's marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.

Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that “Balikatan 02-1," a "mutual anti-terrorism advising, assisting and training exercise," falls under the umbrella of sanctioned or allowable activities in the context of

> the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that *combat-related* activities - as opposed to *combat* itself - such as the one subject of the instant petition, are indeed authorized.[296]

It is significant to note the passage in the above Court's decision that "(t)he Terms of Reference rightly fall within the context of the VFA." Without being explicit about it, the Court considered the Terms of Reference, which was signed in February 2002, as a "subsequent agreement" regarding the "interpretation of the treaty," the VFA signed in February 1998 in the sense of Art. 32(3)(a) of the Convention. As noted earlier, the parties can subsequently agree on an authoritative interpretation of its terms, and at times, this may amount to an amendment.

IV. FINAL THOUGHTS

The co-authors wish to put across three points as final thoughts.

Firstly, the bulk of a lawyer's day-to-day work consist in interpreting legal provisions. For the law of treaties, the issue is regulated by Articles 31 to 33 of the VCLT, which are not only expressive of customary international law but also considered the most successful provisions of the VCLT as it "strike a proper and felicitous balance between sobriety, flexibility and normative guidelines."[297]

---

[296] *Ibid*.

[297] Kolb, *Supra* Note 49, p. 128.

Interpretation of documents, as the ILC noted, is to some extent an art, not an exact science.[298] A lawyer learns to interpret by his professional practice throughout his career. He will there get a sense of all the relevant arguments, tools, processes and underlying values. Going by the text and ordinary meaning is grammatical interpretation, by context is systematic interpretation, and by object and purpose is teleological interpretation. Each approach has valuable role to play.

It has been observed that the teleological, dynamic-evolutionary and effectiveness-oriented interpretation prevails over the textual, static or *travaux préparatoires*-oriented ones in certain types of treaties, notably in the field of human rights law and international institutional law. In the human rights arena, there is tendency by international bodies to insist on interpretations giving the rights enshrined in the instruments "practical and concrete effects" or a sort of "maximum effectiveness" by adding, for example, positive obligations. There is a distinct attempt here at effectiveness of the law, to the benefit of protected individuals.[299] This though is being resisted by certain countries. Similarly, the institutional treaties, such as the UN Charter, are more often than others interpreted in a purpose and aim-oriented way, that is, as a living constitution.[300] Jose Ingles exemplified this in the International Status of South West Africa case when he argued that the UN Charter, notably its provisions on trusteeship of non-self-governing territories, should be interpreted "in favor of carrying out its provisions and making the Charter what it is – a living instrument."[301]

---

[298] ILC Commentary on draft Articles 27 and 28, para. (4).
[299] Kolb, *Supra* Note 49, p. 162-163.
[300] *Op. cit*, pp. 163-164.
[301] Malaya and Wahab-Manantan, *Supra* Note 3.

Furthermore, the common intentions of the parties can play a greater role in bilateral treaties. Contrary-wise, the intentions may have a reduced role in multilateral treaties, except those in human rights and international institutions as cited above, as such agreements are much closer to legislation than to a contract.[302]

Second, the discussions in this paper underscored the need for negotiating and agreeing on terms that are not only precise and clear, but also with a view to full observance and smooth implementation by the parties. A key element to the full observance of treaty commitments is adherence to *pacta sunt servanda*, which is considered as "perhaps the most important principle of international law." This principle ensures the stability of agreements, which are the building blocks of peace, cooperation and security among States.

A key aspect highlighted in this paper, which has direct relevance to the works of diplomats and government negotiators, is the value of *travaux préparatoires*, the working papers and related documents in the preparations for and during negotiations, as supplementary means of interpretation. Recourse to these documents is allowed under Article 32 in order to have a better understanding of what the negotiators of a treaty had intended. This underscores the need for negotiators to keep and maintain meticulous records of their negotiations, particularly the more significant, sensitive ones.

A particular feature of treaty interpretation is that Courts and tribunals will not only give special weight to *travaux* but also to the views of foreign ministries and other agencies that are normally familiar with the drafting process and would understand better than others what the negotiators and signatories had in mind. These government

[302] Kolb, *Supra* Note 49, p. 133.

agencies would also have the relevant experience with the particular interpretation that have worked out previously in practice. Although not conclusive, the meaning attributed to treaty provisions by agencies charged with their negotiation and enforcement is entitled to great weight.[303] While courts interpret treaties for themselves, the meaning given them by agencies particularly charged with their negotiation and enforcement is given such weight.[304]

To recall the Supreme Court's observation in *Secretary of Justice v. Lantion*, "*The fear of the petitioner Secretary of Justice that the demanded notice is equivalent to a notice to flee must be deeply rooted on the experience of the executive branch of our government. As it comes from the branch of our government in charge of the faithful execution of our laws, it deserves the careful consideration of this Court.*"[305]

Finally, as King Henry V would have done during his reign, the charge therefore to diplomats, government officials and other negotiators are as follows: Negotiate in good faith with a view to implementing fully what has been agreed upon. Interpret the agreement in good faith. Keep and maintain meticulous records of the negotiations as such are valuable *travaux préparatoires*. And study and know deeply the subject matter in order to effectively carry out their mandate and also because their views are given great weight even by the courts.

***

[303] Sumitomo Shoji Am, Inc., v Avagliano, 457 US 176, 184-85 (1982).
[304] Kolovrat v. Oregon, 366 US 187, 194 (1961).
[305] SOJ v. Lantion, *Supra* Note 119. See also: World Health Organization v Aquino (48 SCRA 242 (1972) where the Court held that where the plea of immunity is recognized by the Executive Branch, it is the duty of the courts to accept the claim of immunity.