UNIVERSITY OF ST. LA SALLE COLLEGE OF LAW

LAW JOURNAL

VOLUME 13 NUMBER 01 APRIL 2024

UNIVERSITY OF ST. LA SALLE
COLLEGE OF LAW

LAW JOURNAL

OFFICIAL PUBLICATION OF THE
UNIVERSITY OF ST. LA SALLE
COLLEGE OF LAW

VOLUME 13

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The USLS Law Journal is published once during the academic year by the students of the USLS College of Law. It contains articles and contributions of interest to students and legal practitioners.

The views expressed by the contributors do not necessarily reflect the views of either the USLS College of Law or the USLS Law Journal Editorial Board and Staff. The Editorial Board reserves the right to edit the articles submitted for publication.

UNIVERSITY OF ST. LA SALLE
COLLEGE OF LAW
Volume 13 | Issue 1

LAW JOURNAL STAFF

Academic Year 2023-2024

FOREWORD

In today's fast-paced society, legal frameworks struggle to keep up with technological and social changes. Traditional legal structures cannot anymore provide ample protection and accountability. While efforts are made to legislate and regulate these emerging complexities and novel issues, the reality remains that legal processes often lag, and the gaps are becoming more evident.

As we confront this dynamic tension between progress and regulation, it becomes increasingly vital for legal practitioners and policymakers to collaborate and strive to bridge the gap between law and innovation in pursuit of a more just and equitable future.

In this volume of the USLS Law Journal, we are honored to present a range of topics tailored to the varied interests and preferences of our readers. Our goal is to provide a holistic learning experience, empowering readers with the insights needed to expand their perspectives and stay abreast of developments in various facets of both local and international law.

The first article by *Atty. Maria Reylan Garcia* reviews jurisprudence on the use of *res ipsa loquitur*. She sheds light on how inadequate guidelines may lead to potential conflicting decisions in medical malpractice cases and eventually affect the delivery of patient care.

In the second article, *Jarre V. Gromea* discusses the critical importance of international criminal laws in holding accountable those responsible for core international crimes. Ultimately, he suggests how Philippine courts can exercise universal jurisdiction, ensuring full compliance with international obligations.

In her article, *Atty. Rhodora P. Lo* analyzes jurisprudence on the legal nuances behind the criminality of depriving financial support, and how criminal intent shapes the interpretation of this act of violence under R.A. No. 9262.

Bryan Alvin Rommel Y. Villarosa's contribution addresses the pressing global issue of climate change, providing insights into legislative and innovative approaches adopted by nations and global institutions.

Rachel Lois B. Gella and *Atty. Joevel A. Bartolome* explore the evolving landscape of digital rights, navigating uncharted legal territory and discussing the complexities of exercising constitutionally-guaranteed rights in digital spaces.

The final article, authored by *Jose Adrian Miguel P. Maestral*, discusses the imperative regulation of initiation rites within associations like fraternities and sororities.

We extend our heartfelt gratitude to our contributors, whose passion, dedication, and expertise have elevated the content of this inaugural issue. We are also thankful to the Dean of the College of Law, Atty. Ralph A. Sarmiento, for his guidance and encouragement. To our readers—seasoned practitioners, curious students, and knowledge enthusiasts alike—we earnestly hope that the USLS Law Journal serves not just as a repository of information but also acts as a catalyst for meaningful dialogue and the advancement of legal thought, law, and jurisprudence in the Philippines.

Animo, La Salle!

STEFFANI MITCHELLE M. PATRIARCA
Editor-in-Chief
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RES IPSA LOQUITUR: A REVIEW OF ITS APPLICATION IN PHILIPPINE MEDICAL MALPRACTICE CASES

Atty. Maria Reylan M. Garcia, R.N.[*]

Res Ipsa Loquitur, which translates to "the thing speaks for itself," is a shared maxim among law and health sciences students. It finds itself at the juncture of two highly specialized fields wherein its application frequently arises in medical malpractice suits. Requisites of *res ipsa loquitur* have been held in various jurisdictions, including the Philippines. There is a necessity for legal parameters because its application infers negligence; thus, it relieves the plaintiff from the burden of proving the negligent act or omission of medical practitioners.

This legal essay explores *res ipsa loquitur* as to its requisites used in Philippine jurisprudence, its practicality and benefits during the trial, and consequent questions in its application in contrast to expert testimony.

Res Ipsa Loquitur is believed to have been first used by the Roman statesman and scholar Cicero in his speech *Pro Milone*. Later, in the 19th-century English tort law case of *Byrne v. Boadle*,[1] this phrase came into legal rebirth. In this case, Plaintiff Byrne was walking along Scotland Road when a barrel of flour from a second-story loft fell on him and hit his shoulder. Defendant Boadle was the dealer of flour who owned the subject barrel. While there were witnesses who saw the injury, no witnesses could attest to how the barrel fell. In this case, it was ruled that the plaintiff was not required to provide evidence as to how the barrel fell and what the actual cause of why it fell. It held that the barrel

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[1] *Byrne v. Boadle*, 159 E.R. 299, Exchequer Court, 25 November 1863.

could only roll out of a warehouse with some negligence from the persons who keep the barrels there.

Later on, *res ipsa loquitur* transformed into a legal presumption of negligence mainly utilized in medical malpractice suits, which could effectively dispense the need for an expert witness to prove the negligent act of a healthcare practitioner. It has been reported to be applied by courts of other jurisdictions to cases like leaving a foreign object in the body of a patient after an operation, injuries sustained on a healthy part of the body which was not under, or in the area, of treatment, removal of the wrong part of the body when another part was intended, knocking out a tooth while a patient's jaw was under anesthetic for the removal of his tonsils, and loss of an eye while the patient was under the influence of the anesthetic, during or following an operation for appendicitis.[2]

Medical malpractice or medical negligence cases, whether civil, criminal, or administrative cases, have four elements that must be established by competent evidence. These are (a) the duty owed by the physician to the patient, as created by the physician-patient relationship, to act following the specific norms or standards established by his profession; (b) the breach of the duty by the physician's failing to act per the applicable standard of care; (c) the causation, i.e., there must be a reasonably close and causal connection between the negligent act or omission and the resulting injury; and (d) the damages suffered by the patient.[3] Being a legal presumption of negligence, *res ipsa loquitur* became a mode to prove the second element – breach of duty – in a medical malpractice suit.

Breach of duty occurs when the doctor fails to comply with or improperly performs his duties under professional standards. This determination is factual, legal, and specific to each

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2 *Reyes v. Sisters of Mercy Hospital*, G.R. No. 130547, 3 October 2000.

3 Flamm, Martin B., Medical Malpractice and the Physician Defendant, Chapter 11, Legal Medicine, Fourth Edition (1998), pp. 123-124, American College of Legal Medicine, Mosby, Inc., St. Louis, Missouri.

case.[4] Hence, proof of breach of duty may be established through (1) expert testimony or (2) application of *res ipsa loquitur*. Since violation of duty requires evidence that the health practitioner did not perform or improperly performed their duties under professional standards, what these professional standards are may be attested to by fellow health practitioners with considerable skill and experience. However, this is only so when circumstances of such breach of duty are not readily apparent to a layperson. When matters surrounding breach of duty are within the common knowledge of humankind, then the need for expert testimony is dispensed with, and *res ipsa loquitur* is made to apply.

The application of *res ipsa loquitur* and the non-necessity of an expert witness were comprehensively discussed in the case of *Ramos v. Court of Appeals*[5] and re-emphasized in the case of *Reyes v. Sisters of Mercy Hospital*.[6] Hence:

> There is a case when expert testimony may be dispensed with, and that is under the doctrine of *res ipsa loquitur*. As held in *Ramos v. Court of Appeals:*[7]
>
> Although generally, expert medical testimony is relied upon in malpractice suits to prove that a physician has done a negligent act or that he has deviated from the standard medical procedure, when the doctrine of *res ipsa loquitur* is availed by the plaintiff, the need for expert medical testimony is dispensed with because the injury itself provides the proof of negligence. The reason is that the general rule on the necessity of expert testimony applies only to such matters clearly within the domain of medical science, and not to matters that are

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4 *De Jesus v. Uyloan*, G.R. No. 234851, 15 February 2022.

5 *Ramos v. Court of Appeals*, G.R. No. 124354, 29 December 1999.

6 *Supra* note 2.

7 *Supra* note 5.

> within the common knowledge of mankind which may be testified to by anyone familiar with the facts. Ordinarily, only physicians and surgeons of skill and experience are competent to testify as to whether a patient has been treated or operated upon with a reasonable degree of skill and care. However, testimony as to the statements and acts of physicians and surgeons, external appearances, and manifest conditions which are observable by anyone may be given by non-expert witnesses. Hence, in cases where the *res ipsa loquitur* is applicable, the court is permitted to find a physician negligent upon proper proof of injury to the patient, without the aid of expert testimony, where the court from its fund of common knowledge can determine the proper standard of care. Where common knowledge and experience teach that a resulting injury would not have occurred to the patient if due care had been exercised, an inference of negligence may be drawn giving rise to an application of the doctrine of *res ipsa loquitur* without medical evidence, which is ordinarily required to show not only what occurred but how and why it occurred. When the doctrine is appropriate, all that the patient must do is prove a nexus between the particular act or omission complained of and the injury sustained while under the custody and management of the defendant without need to produce expert medical testimony to establish the standard of care. Resort to *res ipsa loquitur* is allowed because there is no other way, under usual and ordinary conditions, by which the patient can obtain redress for injury suffered by him.

Nonetheless, upon determination of whether or not *res ipsa loquitur* may be applied, it must thereafter comply with the

legal parameters or requisites in its application. In the same case of *Ramos v. Court of Appeals*,[8] the Supreme Court enumerated the same: (1) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it is caused by an instrumentality within the exclusive control of the defendant or defendants; and (3) the possibility of contributing conduct which would make the plaintiff responsible is eliminated.

The Philippine Supreme Court has had several medical malpractice or medical negligence cases where it considered an issue of whether or not to apply *res ipsa loquitur* and, upon the determination that it is, whether all of its requisites are met.

First, in the previously quoted case of *Ramos v. Court of Appeals*,[9] the Supreme Court applied *res ipsa loquitur* over someone who is to undergo gallbladder surgery but, later on, incurred brain damage because of improper administration of anesthesia and the use of an endotracheal tube. Erlinda Ramos is supposed to undergo an operation called cholecystectomy, or the removal of her gallbladder, by Dr. Hosaka. However, during the intubation of Erlinda Ramos by the anesthesiologist Dr. Gutierrez, she began to have a bluish discoloration of her nailbeds and was placed in a Trendelenberg position (a position where the head is lower than the feet). Erlinda reportedly had bronchospasm and was later transferred to the ICU as she was rendered comatose. Ramos filed a case for damages, alleging negligence in her management and care. During the trial, both parties presented evidence of the possible cause of Erlinda's injury. Plaintiff presented Dean Herminda Cruz and Dr. Mariano Gavino to prove that the sustained by Erlinda was due to a lack of oxygen in her brain caused by the faulty management of her airway by private respondents during the anesthesia phase. On the other hand, private respondents presented Dr. Eduardo Jamora, a pulmonologist, who testified that the cause of brain damage was Erlinda's allergic reaction to the anesthetic agent Thiopental Sodium (Pentothal).

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8 *Supra* note 5.

9 *Id.*

The Regional Trial Court ruled in favor of Ramos; however, the Court of Appeals reversed the ruling. Ramos then elevated the case to the Supreme Court, which agreed with the Regional Trial Court and held that *res ipsa loquitur* is applicable. Here, the Supreme Court cited the Kansas Supreme Court decision of *Voss v. Bridwell*[10] because of their striking similarity, wherein the plaintiff therein was supposed to undergo a mastoid operation, but the operation was never performed as he ended up decerebrate and incapacitated right after he was put under anesthesia. Here, the Kansas Supreme Court applied *res ipsa loquitur* in finding for the plaintiff. Following the rationale of *Voss*, the Philippine Supreme Court held that considering Erlinda Ramos was neurologically sound at the time of the surgery, the brain damage she suffered was not something that normally occurs in the process of a gall bladder operation. It further ruled:

> "In fact, this kind of situation does not in the absence of negligence of someone in the administration of anesthesia and in the use of endotracheal tube. Normally, a person being put under anesthesia is not rendered decerebrate as a consequence of administering such anesthesia if the proper procedure was followed. Furthermore, the instruments used in the administration of anesthesia, including the endotracheal tube, were all under the exclusive control of private respondents, who are the physicians-in-charge. Likewise, petitioner Erlinda could not have been guilty of contributory negligence because she was under the influence of anesthetics which rendered her unconscious.
>
> Considering that a sound and unaffected member of the body (the brain) is injured or destroyed while the patient is unconscious and under the immediate and

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[10] *Voss v. Bridwell*, 364 P2d 955, 970 (1961).

> exclusive control of the physicians, we hold that a practical administration of justice dictates the application of *res ipsa loquitur*. Upon these facts and under these circumstances the Court would be able to say, as a matter of common knowledge and observation, if negligence attended the management and care of the patient. Moreover, the liability of the physicians and the hospital in this case is not predicated upon an alleged failure to secure the desired results of an operation nor on an alleged lack of skill in the diagnosis or treatment as in fact no operation or treatment was ever performed on Erlinda. Thus, upon all these initial determination a case is made out for the application of the doctrine of *res ipsa loquitur*."

Second, in the case of *Reyes v. Sisters of Mercy Hospital*,[11] the Supreme Court did not apply *res ipsa loquitur* since the doctor's alleged negligence was not readily apparent to a layman, wherein, in this case, expert opinion is necessary to establish whether the respondents did breach their duty of the standard of care required under the circumstances. Jorge Reyes was taken to the Mercy Community Clinic because he was suffering from recurring fever with chills. Dr. Rico examined him and ordered a Widal Test as she suspected Jorge was suffering from Typhoid Fever. After the results of the Widal Test and other laboratory tests were available, Dr. Rico concluded and diagnosed Jorge with Typhoid Fever. He was then treated with chloromycetin. After a while, however, he exhibited respiratory distress, convulsions, and vomiting and eventually died. The heirs of Jorge Reyes filed a complaint for damages and contended that he did not die of typhoid fever but wrongful administration of chloromycetin. They contended that had respondent doctors exercised due care and diligence, they would not have recommended and rushed the performance of the Widal Test, hastily concluded that Jorge was suffering from typhoid fever, and administered chloromycetin without first

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[11] *Supra* note 2.

conducting sufficient tests on the patient's compatibility with said drug.

During the trial, the heirs of Jorge Reyes presented Dr. Apolinar Vacalares, Chief Pathologist at the Northern Mindanao Training Hospital, Cagayan de Oro City, who performed the autopsy and testified that Jorge did not die of typhoid fever. He also stated that he had not seen a patient die of typhoid fever within five days from the onset of the disease. On the other hand, the respondent healthcare professionals presented Dr. Peter Gotiong, whose expertise is microbiology and infectious diseases and who has treated over a thousand cases of typhoid patients. According to Dr. Gotiong, the patient's history and positive Widal Test results ratio of 1:320 would make him suspect that the patient had typhoid fever. The respondents also presented Dr. Ibarra Panopio, a member of the American Board of Pathology and an examiner of the Philippine Board of Pathology from 1978 to 1991. Dr. Panopio stated that although he was partial to using the culture test for its greater reliability in the diagnosis of typhoid fever, the Widal Test may also be used. Like Dr. Gotiong, he agreed that the 1:320 ratio in Jorge's case was already the maximum by which a conclusion of typhoid fever may be made.

The Regional Trial Court ruled in favor of the respondent health professionals and absolved them from responsibility. Upon appeal, the Court of Appeals affirmed the lower court's decision. The Supreme Court, thereafter, still agreed with the lower courts. It held that the case of *Ramos v. Court of Appeals* is not applicable because, in *Ramos*, anesthesia procedures are fairly common that an ordinary person could tell if it was administered correctly; however, in the instant case, there was nothing extraordinary or unusual about the death of Jorge Reyes that was readily apparent to a layman to justify the application of *res ipsa loquitur*. It further held, citing *Ramos v. Court of Appeals*, that:

> *Res ipsa loquitur* is not a rigid or ordinary doctrine to be perfunctorily used but a rule to be cautiously applied, depending upon the circumstances of each case. It is generally restricted to situations in malpractice cases

> where a layman is able to say, as a matter of common knowledge and observation, that the consequences of professional care were not as such as would ordinarily have followed if due care had been exercised. A distinction must be made between the failure to secure results, and the occurrence of something more unusual and not ordinarily found if the service or treatment rendered followed the usual procedure of those skilled in that particular practice. It must be conceded that the doctrine of *res ipsa loquitur* can have no application in a suit against a physician or a surgeon which involves the merits of a diagnosis or of a scientific treatment. The physician or surgeon is not required at his peril to explain why any particular diagnosis was not correct, or why any particular scientific treatment did not produce the desired result.[12]

Third, in the case of *Cantre v. Spouses Go*,[13] the Supreme Court applied *res ipsa loquitur* in a case where, after giving birth, a woman suffered a gaping wound near her armpit after concluding that the instruments – droplight or blood pressure cuff – that may have caused the injury were under the exclusive control of the health care professionals and that the gaping wound is not an ordinary occurrence in the act of delivering a baby and would not have happened unless there was some negligence. Nora Go gave birth to her fourth child, and her attending physician was Dr. Cantre. A few hours later, she suffered profuse bleeding inside her womb because some parts of the placenta had not yet been completely expelled. She suffered hypovolemic shock, which caused her blood pressure to drop. A droplight and a sphygmomanometer, which measures her blood pressure, were consistently used on her to monitor her status. Later, her husband, John David Go, noticed a gaping wound in the inner portion of her left arm, close to the armpit. The same could have been caused

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12 *Ramos v. Court of Appeals*, *supra* note 5.

13 *Cantre v. Spouses Go*, G.R. No. 160889, 27 April 2007.

by the droplight or the blood pressure cuff. Nora underwent skin grafting to treat the said injury. The spouses then filed a complaint for damages, which the Regional Trial Court granted in their favor. The lower court's decision was affirmed upon appeal to the Court of Appeals.

The Supreme Court affirmed the lower courts' decision and explained why *res ipsa loquitur* was applicable since the instant case complied with its three requisites. Thus:

> In cases involving medical negligence, the doctrine of *res ipsa loquitur* allows the mere existence of an injury to justify a presumption of negligence on the part of the person who controls the instrument causing the injury, provided that the following requisites concur:
>
> 1. The accident is of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> 2. It is caused by an instrumentality within the exclusive control of the defendant or defendants; and
>
> 3. The possibility of contributing conduct which would make the plaintiff responsible is eliminated.[14]
>
> As to the first requirement, the gaping wound on Nora's arm is certainly not an ordinary occurrence in the act of delivering a baby, as far removed as the arm is from the organs involved in the process of giving birth. Such injury could not have

[14] *Ramos v. Court of Appeals*, *supra* note 5.

> happened unless negligence had set in somewhere.
>
> Second, whether the injury was caused by the droplight or the blood pressure cuff is of no moment. Both instruments are deemed within the exclusive control of the physician in charge under the "captain of the ship" doctrine. This doctrine holds the surgeon in charge of an operation liable for the negligence of his assistants when those assistants are under the surgeon's control. In this case, it can be logically inferred that petitioner, the senior consultant in charge during the delivery of Nora's baby, exercised control over the assistants assigned to both the use of the droplight and the taking of Nora's blood pressure. Hence, the use of the droplight and the blood pressure cuff is also within the petitioner's exclusive control.
>
> Third, the gaping wound on Nora's left arm, by its very nature and considering her condition, could only be caused by something external to her and outside her control as she was unconscious while in hypovolemic shock. Hence, Nora could not, by any stretch of the imagination, have contributed to her own injury.

Fourth, in the case of *Solidum v. People of the Philippines*,[15] the Supreme Court held that *res ipsa loquitur* could not be applied because while the patient experiencing bradycardia or the slowing of the heart rate would not commonly occur during the pull-through operation or the administration of anesthesia, it does not automatically prove the negligence of the healthcare professionals involved. Gerald Gercayo was born with an imperforate anus, and so he was admitted to the hospital for a

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[15] *Solidum v. People*, G.R. No. 192123, 10 March 2014.

pull-through operation. Dr. Resurreccion, Dr. Luceno, Dr.Valena, and Dr. Tibo were his surgeons, and Dr. Abella, Dr. Razon, and Dr. Solidum were his anesthesiologists. However, during the operation, Gerald experienced bradycardia and went into a coma. When he regained consciousness, he could not see, hear, or move. His mother then filed a case for reckless imprudence resulting in serious physical injuries against the attending physicians; however, the prosecutor only filed an Information against Dr. Solidum. The Regional Trial Court found Dr. Solidum guilty. Upon appeal, the Court of Appeals affirmed the conviction and justified the application of *res ipsa loquitur*. However, upon appeal to the Supreme Court, the same was reversed, and Dr. Solidum was acquitted.

The Supreme Court held that while the second and third requisites of *res ipsa loquitur* were indeed present in this case, the first requisite – the accident was of a kind that does not ordinarily occur unless someone is negligent – is wanting because while bradycardia would not ordinarily occur in the process of a pull-through operation, or during the administration of anesthesia to the patient, but such fact alone did not prove that the negligence of any of his attending physicians, including the anesthesiologists, had caused the injury. The anesthesiologists attending to him had sensed in the course of the operation that the lack of oxygen could have been triggered by the vago-vagal reflex, prompting them to administer atropine to the patient. The Supreme Court even cited another United States case, *Swanson v. Brigham*[16] as a precedent. In such cited case, Randall Swanson was admitted to the hospital for infectious mononucleosis and was under the care of Dr. Brigham. Upon Dr. Brigham's initial assessment, Randall's air passage was satisfactory. However, a few hours later, the hospital advised him that Randall was having respiratory difficulty. Dr. Brigham then ordered that oxygen and medicine be administered. Despite this, the patient was arrested, and attempts to revive him failed. It was found that Randall died of asphyxiation. The Court of Appeals of Washington held that:

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[16] *Swanson v. Brigham*, 571 P.2d 217, 18 Wn. App. 647 (Wash. Ct. App. 1977).

> It is a rare occurrence when someone admitted to a hospital for the treatment of infectious mononucleosis dies of asphyxiation. But that is not sufficient to invoke *res ipsa loquitur*. The fact that the injury rarely occurs does not in itself prove that the injury was probably caused by someone's negligence. Mason v. Ellsworth, 3 Wn. App. 298, 474 P.2d 909 (1970). Nor is a bad result by itself enough to warrant the application of the doctrine. Nelson v. Murphy, 42 Wn.2d 737, 258 P.2d 472 (1953). See 2 S. Speiser, The Negligence Case – Res Ipsa Loquitur § 24:10 (1972).
>
> The evidence presented is insufficient to establish the first element necessary for application of *res ipsa loquitur* doctrine. The acute closing of the patient's air passage and his resultant asphyxiation took place over a very short period of time. Under these circumstances it would not be reasonable to infer that the physician was negligent. There was no palpably negligent act. The common experience of mankind does not suggest that death would not be expected without negligence. And there is no expert medical testimony to create an inference that negligence caused the injury.

Over a decade, the Supreme Court made little to no change in the legal parameters in determining the negligence of a healthcare professional using the doctrine of *res ipsa loquitur*. The three (3) requisites remain constant. However, before determining whether the facts of a case comply with the requisites, there is an initial evaluation as to whether the surrounding circumstances of the case are within the common knowledge of humankind or, at least, judicial notice.

Take, for example, the previously cited cases of *Ramos v. Court of Appeals* vis-à-vis *Solidum v. People*. In *Ramos*, the Supreme Court concluded that it is a matter of common knowledge that generally, a person being put under anesthesia is not rendered decerebrate due to administering such anesthesia if the proper procedure was followed. The Supreme Court even cited a question based on the United States case of *Sanders v. Smith* in determining the same. Thus:

> The real question, therefore, is **whether or not in the process of the operation any extraordinary incident or unusual event outside of the routine performance occurred which is beyond the regular scope of customary professional activity in such operations, which, if unexplained would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence**. If there was such extraneous interventions, the doctrine of *res ipsa loquitur* may be utilized and the defendant is called upon to explain the matter, by evidence of exculpation, if he could.[17] (emphasis supplied)

In the case of *Solidum*, it has even cited the case of *Ramos* to justify its non-application of *res ipsa loquitur*. *Solidum* concluded that the performance of a pull-through operation or even the administration of anesthesia. At the same time, it does not necessarily result in hypoxia or bradycardia and does not in itself prove that there was negligence on the part of the attending physicians and health care professionals. Thus:

> The Court considers the application here of the doctrine of *res ipsa loquitur* inappropriate. Although it should be conceded without difficulty that the second and third elements were present, considering

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17 *Sanders v. Smith*, 27 So.2d 889, 893 (1946).

> that the anesthetic agent and the instruments were exclusively within the control of Dr. Solidum, and that the patient, being then unconscious during the operation, could not have been guilty of contributory negligence, the first element was undeniably wanting. Luz delivered Gerald to the care, custody and control of his physicians for a pull-through operation. Except for the imperforate anus, Gerald was then of sound body and mind at the time of his submission to the physicians. Yet, he experienced bradycardia during the operation, causing loss of his senses and rendering him immobile. Hypoxia, or the insufficiency of oxygen supply to the brain that caused the slowing of the heart rate, scientifically termed as bradycardia, would not ordinarily occur in the process of a pull-through operation, or during the administration of anesthesia to the patient, but such fact alone did not prove that the negligence of any of his attending physicians, including the anesthesiologists, had caused the injury. In fact, the anesthesiologists attending to him had sensed in the course of the operation that the lack of oxygen could have been triggered by the vago-vagal reflex, prompting them to administer atropine to the patient.

In effect, if the surrounding circumstances are within the area of common knowledge, there will be no necessity for an expert witness. This conclusion has been consistently held in Philippine jurisprudence, repeatedly citing *Ramos v. Court of Appeals*:

> Although generally, expert medical testimony is relied upon in malpractice suits to prove that a physician has done a negligent act or that he has deviated from the

standard medical procedure, when the doctrine of *res ipsa loquitur* is availed by the plaintiff, **the need for expert medical testimony is dispensed with because the injury itself provides the proof of negligence. The reason is that the general rule on the necessity of expert testimony applies only to such matters clearly within the domain of medical science, and not to matters that are within the common knowledge of mankind which may be testified to by anyone familiar with the facts.** Ordinarily, only physicians and surgeons of skill and experience are competent to testify as to whether a patient has been treated or operated upon with a reasonable degree of skill and care. However, testimony as to the statements and acts of physicians and surgeons, external appearances, and manifest conditions which are observable by anyone may be given by non-expert witnesses. **Hence, in cases where the *res ipsa loquitur* is applicable, the court is permitted to find a physician negligent upon proper proof of injury to the patient, without the aid of expert testimony, where the court from its fund of common knowledge can determine the proper standard of care. Where common knowledge and experience teach that a resulting injury would not have occurred to the patient if due care had been exercised, an inference of negligence may be drawn giving rise to an application of the doctrine of *res ipsa loquitur* without medical evidence, which is ordinarily required to show not only what occurred but how and why it occurred.** When the doctrine is appropriate, all that the patient must do is prove a nexus between the particular act or omission complained of and the injury

> sustained while under the custody and management of the defendant without need to produce expert medical testimony to establish the standard of care. Resort to *res ipsa loquitur* is allowed because there is no other way, under usual and ordinary conditions, by which the patient can obtain redress for injury suffered by him." (emphasis supplied)

The preliminary question, therefore, to be answered before *res ipsa loquitur* could even be considered is whether the matters surrounding the case are within the shared knowledge and experience of humankind. This consideration, however, begs for guidelines on how exactly to determine whether the issues could be reasonably expected to be covered by common knowledge and experience. While the case of *Solidum* proceeds to further specify the question as to whether, in the process of the operation, any extraordinary incident or unusual event outside of the routine performance occurred which is beyond the regular scope of customary professional activity in such operations, which, if unexplained would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence, specific subsequent questions foreshadow the potential for conflicting decisions in the progressing jurisprudence on medical negligence.

How will the Court objectively determine if the event is extraordinary or unusual during the medical intervention? Since in cases where *res ipsa loquitur* is applicable, there will be no need for an expert witness who is necessarily a person of considerable skill and experience in the field of health sciences, how will it be credibly determined whether the event is extraordinary or unusual? As in the case of *Ramos*, some expert witnesses testified despite the application of *res ipsa loquitur*. Sans these testimonies, would the Court have been able to conclude that the injury suffered by the patient is extraordinary or unusual? Medical procedures and interventions have possible complications or side effects that could be expected. Arguably, these are not readily known to an average person.

Furthermore, considering the highly specialized field of health sciences, how should the term "average person" be defined? Information about surgical operations and medical interventions is less readily available than information about vehicular or traffic accidents. Hence, if it can be expected that the average person has the credibility to reasonably conclude as to the negligent cause, or more particularly, that the extraordinary or unusual incident (that is not within the regular scope of professional activity) is the negligent cause of the injury, it follows that the average person is someone with some background of basic health sciences. Just as in the case of *Ramos*, can it be reasonably expected that the average person is someone who, without a background in primary health science, would know what is done during the administration of anesthesia or, at the very least, that an endotracheal tube is being inserted in the airway of the patient for anesthesia to be administered?

These questions must be explored to make the guidelines in proving medical negligence, as whether *res ipsa loquitur* may be applied will be significant in the strategy and resources the plaintiff will consider in going to trial. First, if *res ipsa loquitur* could be applied, a prima facie presumption of negligence is already present, and all the plaintiff has to do is prove that an injury did occur. The plaintiff is relieved of the burden to produce specific proof of negligence. It narrows down the quantity of evidence that the plaintiff needs to secure. Second, considering the prima facie presumption, the defendant has the burden to go forward with proof and establish that he is not liable for the ascribed negligence. Third, if *res ipsa loquitur* could be applied, the need for expert testimony would be satisfied, and the plaintiff would be relieved of the difficulty of finding a medical professional who would testify against a fellow medical professional. Finding an expert witness to testify against a colleague is daunting as this usually involves getting a witness from a different geographical region, which would require additional travel and accommodation costs aside from the default professional fee.

More importantly, other than trial techniques, how jurisprudence shapes the applicability of *res ipsa loquitur* in medical negligence or medical malpractice cases will, on a grander scale, affect the delivery of patient care. A wider latitude for applying *res ipsa loquitur* owing to even more particular legal parameters would make medical negligence or malpractice suits more accessible and sustainable for patients. Consequently, healthcare institutions must amplify their safety precautions, making them more stringent, patient-determined, and meticulously documented.

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UNMASKING POWER: THE TUG OF WAR BETWEEN STATE OFFICIAL IMMUNITY AND INTERNATIONAL CRIME PROSECUTION

Jarre V. Gromea[*]

I. Introduction

In the sanctum of power, state officials exercise authority. Yet, in the shadows of these corridors, some abuse their authority, and commit international crimes that fracture the very bedrock of justice. These officials shroud themselves in the cloak of immunity to avoid criminal prosecution. This immunity, originally intended to protect diplomatic relations and state operations, has enabled impunity, allowing those who commit international crimes to escape accountability.

At present, we are witnessing impunity in various ongoing conflicts. In Ukraine, the incursion[1] by Russian forces has resulted in the commission of international crimes,[2] with accusations[3] of misconduct on both sides. Despite the universal demand for accountability, the conflict persists, and the culprits remain unpunished.

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[1] Andrew Osborn and Polina Nikolskaya, *Russia's Putin authorises 'special military operation' against Ukraine*, Reuters, 24 February 2022 <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/> (visited 1 March 2024).

[2] United Nations Human Rights Office of the High Commissioner. *UN Commission concludes that war crimes have been committed in Ukraine, expresses concern about suffering of civilians.* <https://www.ohchr.org/en/press-releases/2022/10/un-commission-concludes-war-crimes-have-been-committed-ukraine-expresses> (visited 1 March 2024).

[3] *Russia accuses Ukraine of killing 14 in 'deliberate' strike on hospital*. Reuters, 30 January 2024 <https://www.reuters.com/world/europe/russia-accuses-ukraine-killing-14-deliberate-strike-hospital-2023-01-28/> (visited 1 March 2024).

In the Gaza Strip,[4] the dispute between Israel and Hamas[5] has led to a multitude of international crimes. Despite the high number of civilian casualties[6] and the devastation of civilian infrastructure, there has been minimal progress in holding those responsible accountable.

Furthermore, several other ongoing armed conflicts globally, such as in Myanmar,[7] Yemen,[8] and the Sahel[9] region of Africa, are marked by the commission of grave international crimes. Yet, the culprits remain beyond the reach of justice due to a range of factors, including state immunity and the intricacies of international law.

Here in the Philippines, the war on drugs[10] waged by the previous administration led to several cases of extrajudicial killings[11] of civilians perpetrated by state forces. There is a

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4 *Israel declares state of war, attacks on Gaza intensify*, Al Jazeera, 8 October 2023 <https://www.aljazeera.com/gallery/2023/10/8/intense-battles-as-israel-declares-state-of-war> (visited 1 March 2024).

5 Bethan McKernan, *Israel and Hamas at war after surprise attacks from Gaza Strip*, The Guardian, 7 October 2023 <https://www.theguardian.com/world/2023/oct/07/hamas-launches-surprise-attack-on-israel-as-palestinian-gunmen-reported-in-south> (visited 1 March 2024).

6 Julian Borger, *Civilians make up 61% of Gaza deaths from airstrikes, Israeli study finds*, The Guardian, 9 December 2023 <https://www.theguardian.com/world/2023/dec/09/civilian-toll-israeli-airstrikes-gaza-unprecedented-killing-study> (visited 1 March 2024).

7 *Myanmar: Intense fighting spreads to cities, as civilians seek shelter*, UN News, 17 November 2023 <https://news.un.org/en/story/2023/11/1143702> (visited 1 March 2024).

8 International Committee of the Red Cross, *War in Yemen* <https://www.icrc.org/en/war-yemen> (visited 1 March 2024).

9 *Central Sahel: Lives of 10 million children on the line as conflict rages*, UN News, 17 March 2023 <https://news.un.org/en/story/2023/03/1134697> (visited 1 March 2024).

10 *Philippines' Duterte says he takes full responsibility for drugs war*, Reuters, 21 October 2023 <https://www.reuters.com/world/asia-pacific/philippines-duterte-says-he-takes-full-responsibility-drugs-war-2021-10-21/> (visited 1 March 2024).

11 Amnesty International UK, *More than 7,000 killed in the Philippines in six months, as president encourages murder.*

pending investigation before the International Criminal Court (ICC) but the Philippines refuses to cooperate.[12]

These examples highlight the pressing need for a more robust international legal framework to combat impunity and ensure accountability for core international crimes. The world must pursue justice, not merely in theory, but also in practice.

This paper aims to explore the development of international criminal law in holding perpetrators of core international crimes individually criminally responsible. An in-depth discussion and analysis will be conducted on the following sub-topics: core international crimes, the principle of universal jurisdiction, and the immunity of officials from foreign criminal jurisdiction. The author will then synthesize the different concepts and propose a new legal framework to address the impunity that the world is currently facing.

II. Core International Crimes

Core International Crimes, as defined in the Statute of the International Criminal Court, are those "that deeply shock the conscience of humanity such that it threatens the peace, security and well-being of the world."[13] In its draft for the ICC Statute, The International Law Commission[14] included four core crimes which the international community considers the most serious crimes of concern to the international community as a whole, namely: 1) Acts of Aggression; 2) Genocide; 3) Crimes Against Humanity; and 4) War Crimes.

<https://www.amnesty.org.uk/philippines-president-duterte-war-on-drugs-thousands-killed.> (visited 1 March 2024).

12 Benjamin Pulta, *Remulla says PH won't engage with ICC any longer*, Philippine News Agency, 19 July 2023. <https://www.pna.gov.ph/articles/1205956> (visited 1 March 2024).

13 Rome Statute of the International Criminal Court preamble, signed July 17, 1998, 2187 U.N.T.S. 1.

14 International Law Commission. *Draft Statute for an International Criminal Court with commentaries*, ¶ 3, p. 38 (2005).

Apart from the ICC Statute, these core international crimes are also prohibited under existing conventions such as the UN Charter,[15] the Genocide Convention, the Hague regulations,[16] and the Geneva Conventions.

In fact, the International Court of Justice (ICJ) acknowledges the obligation to prevent such crimes under contemporary international law.[17] These obligations are part and parcel of customary international law, as stated in some of the ICJ's Decisions and Advisory Opinions.

In the Barcelona Traction case, the ICJ held:

> In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. (emphasis supplied)

As to War Crimes, the ICJ held in its Wall Advisory Opinion:

> A great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human

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15 U.N. CHARTER art. 2, ¶ 4.

16 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 89 (9 July).

17 Barcelona Traction (Belgium v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 33-34 (5 February).

> person and elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" x x x these rules incorporate obligations which are essentially of an *erga omnes* character. (emphasis supplied)

Clearly, it is in the legal interest of the international community as a whole to outlaw the commission of core international crimes. As such, the obligation to do so is *erga omnes* in character. *Erga omnes* obligations are those owed to the international community as a whole.[18] The *erga omnes* character of these obligations is also supported by the ILC's draft conclusions on the identification and legal consequences of peremptory norms. These conclusions contain, in their annex, the aforementioned core international crimes.

III. *Jus Cogens* Nature of the Prohibition of Core International Crimes

The prohibition of core international crimes are *jus cogens* norms. *Jus Cogens* norms, reflecting and protecting the international community's fundamental values, are universally applicable and hierarchically superior to other rules of international law.[19]

In the ILC's draft conclusions on peremptory norms, the first *jus cogens* norm identified in the annex is the prohibition of aggression. This prohibition was referenced by the Commission in the commentary on the articles concerning the responsibility of

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[18] Obligation Erga Omnes in International Law, Institut de droit international Krakow Session 2005 Res. (27 August 2005).

[19] International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*, Conclusion 2 (2022).

States for internationally wrongful acts.[20] In 1966, the Commission stated that the 'law of the Charter [of the United Nations] concerning the prohibition of the use of force' is a conspicuous example of a rule in international law with the character of *jus cogens*."[21] While originally aggression is defined to serve as a guide for the UN Security Council to determine aggression by States,[22] recent developments in international criminal law has expanded the definition of aggression to individual criminal responsibility.[23]

The second norm annexed to the draft conclusions is the prohibition of genocide. The prohibition of genocide has been referred to by the Commission with a consistent formulation in all its relevant work. In particular, the articles on responsibility of States for internationally wrongful acts, both in the commentary to article 26 and in the commentary to article 40, referred to the prohibition of genocide.[24] Already in 1951, before the adoption of the 1969 Vienna Convention or the 1966 draft articles on the law of treaties, the International Court of Justice had linked the prohibition of genocide, a prohibition today widely accepted and recognized as a peremptory norm, to fundamental values, noting that the prohibition was inspired by the commitment "to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations."[25]

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20 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, ¶ 4 of the commentary to article 40, pp. 112–113 (2001).

21 International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, ¶ 1 of the commentary to draft article 50, p. 247 (1966).

22 Definition of Aggression, G.A. Res 3314 (XXIX), (14 December 1974).

23 Activation of the jurisdiction of the Court over the crime of aggression, International Criminal Court Res. ICC-ASP/16/Res.5 (14 December 2017).

24 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, ¶ 5 of the commentary to article 26 and ¶ 4 of the commentary to article 40, pp. 112–113 (2001).

25 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, p. 23 (28 May).

The third norm in the annex is the prohibition of crimes against humanity. Paragraph 4 of the preamble to the 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity recalled that "the prohibition of crimes against humanity is a peremptory norm of general international law."[26] Article 2 of the 2019 Draft Articles defines Crime against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

> (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Concerning the basic rules of international humanitarian law (IHL), the fourth norm in the annex, has been referred to by the Commission in its commentary to Article 40 of its Articles on

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[26] International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, preamble (2019).

Responsibility of States for Internationally Wrongful Acts.[27] The ICJ has also clarified the customary nature of IHL's intransgressible principles in its Wall Advisory Opinion.[28]

Considering that the prohibition on the conduct of the core international crimes is universally applicable and superior to other rules of international law, it follows that the prosecution of individuals who engage in such acts should also be universal in character. Such conclusion could be deduced from some judgments and advisory opinions of the ICJ. For instance, every norm described by the Court[29] as one having an *erga omnes* character is also one that has been included in the non-exhaustive list of norms previously referred to by the Commission as having peremptory status.

Furthermore, the Court has applied the legal consequences under Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts concerning breaches of peremptory norms, to breaches of such *erga omnes* obligations.[30] The relationship between peremptory norms and obligations *erga omnes* has also been recognized in scholarly writings.[31]

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27 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, ¶ 5 of the commentary to article 40, p. 113 (2001).

28 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 89 (9 July).

29 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 169, ¶ 180 (25 February); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 91, p. 47, ¶ 87 (26 February); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 88, 149, and 155 (9 July); and Barcelona Traction (Belgium v. Spain), Judgment, 1970 I.C.J. 3, p. 32 ¶¶ 33-34 (5 February).

30 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 1986 I.C.J. 14, ¶ 188 (27 June); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971, p. 56 ¶ 126 (21 June).

31 Rebecca J Barber, *Cooperating through the General Assembly to end serious breaches of peremptory norms*, British Institute of International and Comparative Law Quarterly, vol. 71, pp. 1–35, at p. 4 (2002); Yoshifumi Tanaka, *The Legal Consequences of Obligations Erga Omnes in International Law*,

Having established the *erga omnes* character of the obligation to prohibit acts of aggression, genocide, crimes against humanity, and war crimes, we now turn to the question of whether all states have the obligation to investigate and prosecute individuals who have perpetrated such acts.

IV. Principle of Universal Jurisdiction

The principle of universal jurisdiction, in the sense of a competence for all states to extradite or prosecute (*aut dedere, aut judicare*) a suspected perpetrator of grave international crimes, undoubtedly forms part of general international law.[32]

Aut dedere, aut judicare was originally termed as "*aut dedere aut punire*" (either extradite or punish), which was proposed by Hugo Grotius. This recognizes the importance of the obligation to extradite or prosecute in promoting international collaboration to combat impunity. This principle underscores the role of these obligations in the global fight against impunity. "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal."[33] In contemporary language, "prosecution" is used instead of "punishment" as an alternative to extradition. This change better encapsulates the potential outcome where an accused individual may be acquitted.

However, there must be a distinction between universal jurisdiction and *aut dedere aut judicare*. Universal jurisdiction involves a criterion for the attribution of jurisdiction, whereas the

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Neth Int Law Rev 68, 1–33 (2021); Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press (2005).

32 International Law Commission, *The obligation to extradite or prosecute (aut dedere aut judicare)*, ¶ 9, p. 5 (2014).

33 HUGO GROTIUS, DE JURE BELLI AC PACIS, BOOK II, CHAPTER XXI, SECTION IV, PP. 527–529 AT 527. (English Translation By Francis W. Kelsey, Oxford/London: Clarendon Press/Humphrey Milford, 1925).

obligation to extradite or prosecute is fulfilled either by extraditing the accused or by prosecuting the accused based on any existing basis for jurisdiction which may or may not be universal.

An analysis of the ILC's 1996 Draft Code of Crimes against the Peace and Security of Mankind history suggests that draft article 9 is driven by the need for an effective system of criminalization and prosecution of the said core crimes, rather than actual state practice and *opinio juris*.[34] The article is justified on the basis of the grave nature of the crimes involved and the desire to combat impunity for individuals who commit these crimes.[35]

As to war crimes, the underlying principle of the four Geneva Conventions of 1949 is the establishment of universal jurisdiction over grave breaches of the Conventions, as can be seen in these common provisions:[36]

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be

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[34] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), p. 80, ¶ 142.

[35] International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, art. 8 ¶¶ 3, 4, 8, art. 9 ¶ 2 (1996).

[36] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50; Convention (III) relative to the Treatment of Prisoners of War art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 147, *signed* August 12, 1949.

> committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

For the First and Second Geneva Conventions, grave breaches are defined as follows in Articles 50 and 51, respectively:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Art. 130 of the Third Geneva Convention stipulates:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Art. 147 of the Fourth Geneva Convention provides:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The four Conventions have been ratified by all 196 UN member states in 1949. Hence, it is clear that the prosecution for war crimes may be undertaken in any domestic court.

As to crimes against humanity, the 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity by the ILC lays down the following obligations:

> Article 3
> General obligations
>
> 1. Each State has the obligation not to engage in acts that constitute crimes against humanity.
> 2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.
> 3. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be

> invoked as a justification of crimes against humanity.
>
> x x x
>
> Article 10
> *Aut dedere aut judicare*
>
> The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

This establishes that any state has the obligation to prosecute or extradite those charged with the crimes against humanity if such person falls within their jurisdiction.

The ICJ has also ruled on issues concerning the issue of universal jurisdiction for crimes of serious concern to the international community.

The Arrest Warrant Case.

> In its application to the Court, the Democratic Republic of Congo accused Belgium of violating its sovereignty by issuing an arrest warrant against Yerodia Ndombasi, who, at the time of the warrant,

was the DRC's Minister for Foreign Affairs.[37] The arrest warrant was issued in order to secure Yerodia's extradition to Belgium from any third state, to face trial for inciting crimes against humanity and grave breaches of the Geneva Conventions.[38] In the Belgian investigation, the investigating magistrate continued to interpret Belgian law to mean that voluntary presence was not a requirement for exercising universal jurisdiction and that custody could be secured through extradition from third states or a practice that was captured under the phrase 'universal jurisdiction in absentia.'[39] The DRC claimed that the arrest warrant violated immunity of its Minister for Foreign Affairs from foreign criminal jurisdiction[40] and amounted to arbitrary interference in its domestic affairs, violating the maxim par in *parem non habet*.[41]

The ICJ held that Belgium failed to respect the immunity from criminal jurisdiction of the incumbent Minister for Foreign Affairs.

However, the Court emphasized that immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect

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37 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Counter-Memorial of Belgium, Part 1, ¶¶ 2.26–2.38.

38 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Counter-Memorial of Belgium, Part 1, ¶¶ 1.3–1.5.

39 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Counter-Memorial of Belgium, Part 1, ¶ 1.14.

40 ICJ Application to Institute Proceedings Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium).

41 Malcolm N. Shaw, International Law 647 (6th Ed. Cambridge University Press Cambridge 2008).

> of any crimes they might have committed. While jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[42]

Interestingly, the Court chose not to address the concept of universal jurisdiction *in absentia* in its ruling, despite the fact that universal jurisdiction and immunity are opposing principles. The significance of each principle lies in its contrast to the other, as they effectively neutralize each other due to their conflicting nature. After all, a foreign state's claim of jurisdiction can be valid yet simultaneously barred by immunity or, as the Court put it, immunity does not mean impunity.[43]

To better understand the concept of universal jurisdiction, it must be correlated to the principle of immunity from jurisdiction.

V. Immunity From Jurisdiction

In the Jurisdictional Immunities case, the ICJ noted the proposition of Italy that "*jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law."[44] The Court did not reject that proposition, but clarified that there was no conflict between the rule on State immunities in civil proceedings and

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42 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, 2002 I.C.J. 121, ¶ 60 (14 February).

43 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, 2002 I.C.J. 121, ¶ 60 (14 February); Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Counter-Memorial of Belgium, ¶ 0.25 and Memorial of the DRC, ¶ 97.

44 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 143, p. 99, at p. 140, ¶ 92 (3 February).

peremptory norms of general international law (*jus cogens*).[45] There is no conflict because these two principles operate in different legal spheres. State immunity from foreign jurisdiction applies to legal proceedings in the courts of another state and not in a state's own courts. Whereas peremptory norms apply universally regardless of jurisdiction.

Now as to immunity from foreign criminal jurisdiction, state officials do have such immunity. It stems from the sovereign right of the state not to be subjected to the authority of another state, which in turn was derived from the principle of sovereign equality of states.[46] It must be noted however that the immunities accorded to State officials are not granted for their personal benefit, but to protect the rights and interests of the State.[47]

Furthermore, such immunity is not absolute. The ILC's draft articles on immunity of State officials from foreign criminal jurisdiction provides the following parameters:

> Article 3
> Persons enjoying immunity ratione personae
>
> Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity ratione personae from the exercise of foreign criminal jurisdiction.
>
> Article 4
> Scope of immunity ratione personae
>
> 1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity

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45 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 143, ¶ 93 (3 February).

46 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 143, p. 28, ¶ 57 (3 February).

47 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, 2002 I.C.J. 121, p. 3, at p. 14, ¶ 31 (14 February).

ratione personae only during their term of office.
2. Such immunity ratione personae covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity ratione personae is without prejudice to the application of the rules of international law concerning immunity ratione materiae.

x x x

Article 6
Scope of immunity ratione materiae

1. State officials enjoy immunity ratione materiae only with respect to acts performed in an official capacity.
2. Immunity ratione materiae with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity ratione personae in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Article 7
Crimes under international law in respect of which immunity ratione materiae shall not apply

1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;
(b) crimes against humanity;
(c) war crimes;
(d) crime of apartheid;
(e) torture;
(f) enforced disappearance.

From these articles, we can distill that the principle on immunity by state officials has two aspects: *ratione personae* or *ratione materiae.*

For immunity *ratione personae*, State officials do enjoy immunity for as long as they hold office during their term,[48] even if the acts were performed prior to their term of office.[49] However, the (ILC) has clarified that the immunity *ratione personae* does not extend beyond the term of office for those who enjoy such immunity.[50] Furthermore, the provisions do not imply that immunity *ratione personae* transforms into immunity *ratione materiae*.[51]

Turning to immunity *ratione m*ateriae, it applies exclusively to acts performed in an official capacity. Such immunity extends even when the State official ceases hold office except if such acts are considered crimes under international law.

To summarize, State officials will not always enjoy immunity. As the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their term of office"[52] and

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48 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 4, ¶ 1 (1991).

49 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 4, ¶ 2 (1991).

50 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 4, ¶ 15 (1991).

51 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 4, ¶ 3 (1991).

52 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 4, ¶¶ 1-3 (1991).

the cessation which does not prejudice the application of the law concerning immunity *ratione materiae*.[53] In addition, individuals who enjoyed immunity *ratione personae* …, whose term of office has come to an end, continue to enjoy immunity only with respect to acts performed in an official capacity during their term."[54] As this residual immunity is immunity *ratione materiae*, draft article 7 concerning the rule on international crimes will be applicable. Therefore, such immunity *ratione materiae* will cease to exist if these former officials are charged for the commission of core international crimes.

VI. State Practice in Universal Jurisdiction

The work of the ILC is supported by current state practice. In the 2023 Universal Jurisdiction Annual Review, several domestic cases have been compiled concerning the application of universal jurisdiction. Prosecutors remarkably managed to put on trial several perpetrators for crimes committed up to 40 years ago. A former Iranian prosecutor, who had been arrested in 2019 while travelling to Sweden, was found guilty of war crimes committed in 1988 for his involvement in the mass executions of political prisoners.[55] In the Netherlands, a former prison commander in Kabul was convicted of the war crimes of arbitrary detention and cruel and inhuman treatment committed in the 1980s in Afghanistan.[56] The Hague Court of Appeal also upheld the sentence of life imprisonment imposed on a former Ethiopian official involved in war crimes during the late 1970s, in what was known as the "Red Terror".[57] Finally, France convicted a former Rwandan prefect for his role in the 1994 genocide against

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53 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 4, ¶¶ 3, 14-15 (1991).

54 International Law Commission, *Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries*, art. 6, ¶¶ 3, 9-15 (1991).

55 Universal Jurisdiction Annual Review 2023, Iranian Former Official Convicted For Karaj Prison Mass Executions, p. 76 <https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf> (visited 1 March 2024).

56 Abdul Razaq Arif Case (Hague District Court 2022) (NLD).

57 Eshetu Alemu Case (Hague Court of Appeal 2022) (NLD).

the Tutsi[58] as well as Liberian former rebel commander Kunti Kamara for crimes against humanity committed between 1993 and 1997.[59] It is clear that such convictions made by domestic courts were rendered out of a sense of a legal obligation.[60]

VII. Conclusion

Asserting that an individual possesses immunity does not negate the unlawfulness of the act committed. When an unlawful act is a core international crime, such immunity ceases to exist. As held by the Nuremburg Tribunal:

> The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[61]

While it may seem that the principle of universal jurisdiction runs counter to the principle of sovereign equality of states, recent developments in international law suggest that a revised rule of universal jurisdiction, which allows for external examination of a state official's acts, is more consistent with international law and should take precedence over the immunity that former state officials have from foreign criminal jurisdiction.

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58 Laurent Bucyibaruta Case (Paris Criminal Court 2022) (FRA).

59 Universal Jurisdiction Annual Review 2023, First Conviction For Crimes Against Humanity In The Context Of The Liberian Civil Wars, p. 31 <https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf.> (visited 1 March 2024).

60 North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, 1969 I.C.J. 52, p. 44, ¶ 77 (20 February).

61 Office of United States Chief of Council for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression, Opinion and Judgment*, United States Government Printing Office, p. 58 (1947).

VIII. Recommendation

Here in the Philippines, we have Republic Act No. 9851 also known as the 2009 Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity. On 25 October 2023, victims of the Myanmar Junta filed a criminal complaint in the Philippines against Myanmar's top Generals for war crimes.[62]

However, an examination of R.A. No. 9851 would lead to a reasonable conclusion that Philippine courts cannot acquire jurisdiction because of the following provision:

> SECTION 17. Jurisdiction. — The State shall exercise jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined and penalized in this Act, regardless of where the crime is committed, provided, any one of the following conditions is met:
>
> a. The accused is a Filipino citizen;
> b. The accused, regardless of citizenship or residence, is present in the Philippines; or
> c. The accused has committed the said crime against a Filipino citizen.

Unfortunately, the Court cannot acquire jurisdiction *ratione personae* over Myanmar's generals because they are neither Filipino citizens, nor are they present in the Philippines. Furthermore, the alleged crimes were not committed against a Filipino citizen. The three conditions are not universal but refer to jurisdiction based on: a) nationality, b) territoriality, and c) passive personality.

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62 Tina G. Santos, *Myanmarese mount 'test case' of PH law*, Philippine Daily Inquirer, 26 October 2023 <https://globalnation.inquirer.net/221532/myanmarese-mount-test-case-of-ph-law> (visited 2 March 2024).

As such, it is recommended that a future legislation be enacted by the Philippines modifying the aforementioned section to read as follows:

> SECTION 17. Jurisdiction. — The State shall exercise universal jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined and penalized in this Act, regardless of where the crime is committed.

This amendment will enable the Philippine courts to exercise universal jurisdiction in order to fully comply with its international obligation of *aut dedere aut judicare* for core international crimes.

DEPRIVATION OR DENIAL OF FINANCIAL SUPPORT, NOT JUST FAILURE TO GIVE, AS ACTS CONSTITUTING PSYCHOLOGICAL VIOLENCE AND ECONOMIC ABUSE AGAINST WOMEN AND THEIR CHILDREN

Atty. Rhodora P. Lo[*]

In a sense, patriarchy, while privileging men, also victimizes them.[1]

I. R.A. NO. 9262: A LANDMARK LEGISLATION TO ADDRESS GENDER-BASED VIOLENCE

Republic Act No. 9262, "***An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefor, and for Other Purposes***" was enacted by Congress on March 8, 2004, and took effect on March 27, 2004.

It is a landmark legislation that defines and criminalizes acts of violence against women and their children (VAWC) perpetrated by women's intimate partners, i.e., husband; former husband; or any person who has or had a sexual or dating relationship, or with whom the woman has a common child. The law provides for protection orders from the barangay and the courts to prevent the commission of further acts of VAWC; and outlines the duties and responsibilities of barangay officials, law enforcers, prosecutors and court personnel, social workers, health

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[1] *Garcia v. Drilon*, G.R. No. 179267, 25 June 2013 (J. Leonen, concurring opinion).

care providers, and other local government officials in responding to complaints of VAWC or requests for assistance.[2]

The necessity for the enactment of the law was made clear by the figures provided by the National Commission on the Role of Filipino Women (NCRFW). For the years 2000-2003, female violence comprised more than 90% of all forms of abuse and violence and more than 90% of these reported cases were committed by the women's intimate partners such as their husbands and live-in partners.[3]

Violence against women (VAW) is deemed to be closely linked with the unequal power relationship between women and men otherwise known as "gender-based violence". Societal norms and traditions dictate people to think men are the leaders, pursuers, providers, and take on dominant roles in society while women are nurturers, men's companions and supporters, and take on subordinate roles in society. This perception leads to men gaining more power over women. With power comes the need to control to retain that power. And VAW is a form of men's expression of controlling women to retain power.[4]

Section 3 of R.A. No. 9262 defines "violence against women and their children" as any act or series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty. It includes, but is not limited to, the following acts:

A. Physical Violence xxx;

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2 *Garcia v. Drilon*, G.R. No. 179267, 25 June 2013.

3 *Id.*

4 *Id.*

B. Sexual violence xxx;
C. Psychological violence xxx;
D. Economic abuse.

Section 5 of R.A. No. 9262 enumerates the acts through which violence against women and their children may be committed:

> SECTION 5**.** *Acts of Violence Against Women and Their Children*.- The crime of violence against women and their children is committed through any of the following acts:
>
> (a) Causing physical harm to the woman or her child;
>
> (b) Threatening to cause the woman or her child physical harm;
>
> (c) Attempting to cause the woman or her child physical harm;
>
> (d) Placing the woman or her child in fear of imminent physical harm;
>
> **(e) Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or**

restricting the woman's or her child's movement or conduct:

(1) Threatening to deprive or actually depriving the woman or her child of custody to her/his family;

(2) Depriving or threatening to deprive the woman or her children of financial support legally due her or her family, or deliberately providing the woman's children insufficient financial support;

(3) Depriving or threatening to deprive the woman or her child of a legal right;

(4) Preventing the woman in engaging in any legitimate profession, occupation, business or activity or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties;

(f) Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions;

(g) Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family;

(h) Engaging in purposeful, knowing, or reckless conduct, personally or through another, that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts:

(1) Stalking or following the woman or her child in public or private places;

(2) Peering in the window or lingering outside the residence of the woman or her child;

(3) Entering or remaining in the dwelling or on the property of the woman or her child against her/his will;

(4) Destroying the property and personal belongings or inflicting harm to animals or pets of the woman or her child; and

(5) Engaging in any form of harassment or violence;

(i) **Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and <u>denial of financial support</u> or custody of minor children of access to the woman's child/children.**

Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced and economic isolation of women, is also common.[5]

II. THE DUTY TO PROVIDE FINANCIAL SUPPORT ON THE PART OF THE HUSBAND AS ACKNOWLEDGED IN R.A. NO. 9262

Financial support is mentioned twice in the enumeration of the punishable acts constituting violence against women and their children: (1) DEPRIVING OR THREATENING TO DEPRIVE

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5 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

A WOMAN AND HER CHILD FINANCIAL SUPPORT, AND (2) DENIAL OF FINANCIAL SUPPORT.

Firstly, Section 5, which provides for the enumeration, in paragraph (e), provides:

> **(e) Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct:**
>
> **xxx**
>
> **2) Depriving or threatening to deprive the woman or her children of financial support legally due her or her family, or deliberately providing the woman's children insufficient financial support**;

Secondly, Section 5 paragraph (i), states:

> **(i) Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of**

minor children of access to the woman's child/children.

III. MUTUAL OBLIGATION TO PROVIDE SUPPORT BETWEEN HUSBAND AND WIFE UNDER THE FAMILY CODE

Executive Order No. 209, or the Family Code of the Philippines, contains a full chapter on the subject of support and includes support as one of the expressly enumerated obligations between husband and wife.

Support comprises everything indispensable for sustenance, dwelling, clothing, medical attendance, education and transportation, in keeping with the financial capacity of the family. The education of the person entitled to be supported referred to in the preceding paragraph shall include his schooling or training for some profession, trade or vocation, even beyond the age of majority. Transportation shall include expenses in going to and from school, or to and from place of work.[6]

Article 68 of the Family Code provides that: The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support.

The spouses are jointly responsible for the support of the family. The expenses for such support and other conjugal obligations shall be paid from the community property and, in the absence thereof, from the income or fruits of their separate properties. In case of insufficiency or absence of said income or fruits, such obligations shall be satisfied from the separate properties.[7] Legitimate children shall have the right to receive support from their parents, their ascendants, and in proper cases, their brothers and sisters, in conformity with the provisions of this Code on Support.[8]

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6 Family Code, Art. 194.

7 Family Code, Art. 70.

8 Family Code, Art. 174, par. 2.

The amount of support, in the cases referred to in Articles 195[9] and 196,[10] shall be in proportion to the resources or means of the giver and to the necessities of the recipient.[11] Support in the cases referred to in the preceding article shall be reduced or increased proportionately, according to the reduction or increase of the necessities of the recipient and the resources or means of the person obliged to furnish the same.[12]

IV. DEPRIVATION OR THREAT OF DEPRIVATION OF FINANCIAL SUPPORT AS AN ACT OF ECONOMIC ABUSE PUNISHED UNDER SECTION 5 PARAGRAPH I(2)

In *Del Socorro v. Van Wilsem*,[13] the Court made the pronouncement that a father may be made liable under Section 5(e) and 5(i) of R.A. No. 9262 for unjustly refusing or failing to give support to his child.

The Supreme Court declared that Sec. 5, par. (e)(2) of R.A. No. 9262 penalizes the deprivation of financial support legally due the woman or child, which is a continuing offense.[14] In G.R. No. 221370, the Court in convicting a father (XXX) under Section 5, paragraph (e)(2) of R.A. No. 9262, explained that:

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9 Subject to the provisions of the succeeding articles, the following are obliged to support each other to the whole extent set forth in the preceding article: (1) The spouses; (2) Legitimate ascendants and descendants; (3) Parents and their legitimate children and the legitimate and illegitimate children of the latter; (4) Parents and their illegitimate children and the legitimate and illegitimate children of the latter; and (5) Legitimate brothers and sisters, whether of full or half-blood.

10 Brothers and sisters not legitimately related, whether of the full or half-blood, are likewise bound to support each other to the full extent set forth in Article 194, except only when the need for support of the brother or sister, being of age, is due to a cause imputable to the claimant's fault or negligence.

11 Family Code, Art. 201.

12 Family Code, Art. 202.

13 *Del Socorro v. Van Wilsem*, 749 Phil. 823, 840 (2014).

14 *XXX v. People*, G.R. No. 221370, 28 June 2021.

> "As correctly found by the courts a quo, all the elements of a violation of Section 5 (e)(2) of RA 9262 are present, as it was established that: (a) XXX and AAA were married after being pregnant with BBB; (b) XXX acknowledged BBB as his child; (c) he failed to provide sufficient support for BBB; (d) he withheld financial support for BBB due to the ire he felt towards his wife; (e) he only provided financial support after the complaint against him in the Prosecutor's Office was filed."
>
> xxx
>
> "In the case at bar, XXX deliberately deprived his son BBB of financial support for the latter's sustenance, clothing, medical, and educational expenses. From the moment the child was born until the case was filed, petitioner was only able to give a total of about P10,000.00 in a span of five years. To the mind of this Court, this does not meet the necessity of BBB's expenses, considering that the child is suffering from Congenital Torch Syndrome, resulting in delayed development and hearing impairment. This especially holds true since petitioner is capable of giving support based on his Income Tax Return for the year 2009 when his gross compensation was P234,565.79.55."

V. THE CASE OF CELSO MELGAR AND APPLICATION OF THE VARIANCE DOCTRINE

In the case of *Celso M.F.L. Melgar v. People of the Philippines*,[15] Melgar was charged in the Information with

[15] *Melgar v. People*, G.R. No. 223477, 14 February 2018.

violation of Section 5 of R.A. No. 9262 for having committed acts of economic abuse against one AAA, and her minor son BBB, 12 years old, by depriving them of financial support, which caused mental and emotional anguish, public ridicule or humiliation to AAA and her son.

The Supreme Court ruled that "economic abuse" may include the deprivation of support of a common child of the man-accused and the woman-victim, whether such common child is legitimate or not. The specific act is penalized by Section 5 (e) of R.A. 9262. Under this provision, the deprivation or denial of financial support to the child is considered an act of violence against women and children. Notably, case law instructs that the act of denying support to a child is a continuing offense. In this case, the courts *a quo* correctly found that: *(a)* Melgar and AAA had a romantic relationship, resulting in BBB's birth; *(b)* Melgar freely acknowledged his paternity over BBB; *(c)* Melgar had failed to provide BBB support ever since the latter was just a year old; and (*d)* his intent of not supporting BBB was made more apparent when he sold to a third party his property which was supposed to answer for, among others, his support-in-arrears to BBB.[16]

In an attempt to absolve himself from criminal liability, Melgar argues, *inter alia,* that he was charged of violation of Section 5(i) of R.A. 9262 as the Information alleged that the acts complained of "caused mental or emotional anguish, public ridicule or humiliation to [AAA] and her son[, BBB]." As such, he contends that he cannot be convicted of violation of Section 5(e) of R.A. 9262.[17]

The Court found Melgar's contention untenable and applied the Variance Doctrine. The court ratiocinated thus:

> Section 5 (i) of RA 9262, a form of psychological violence, punishes the act of **"causing mental or emotional anguish,**

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16 *Id.*

17 *Id.*

public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and **denial of financial support** or custody of minor children or denial of access to the woman's child/children." Notably, "psychological violence is an element of violation of Section 5 (i) just like the mental or emotional anguish caused on the victim. Psychological violence is the means employed by the perpetrator, while mental or emotional anguish is the effect caused to or the damage sustained by the offended party. To establish psychological violence as an element of the crime, it is necessary to show proof of commission of any of the acts enumerated in Section 5 (i) or similar acts. And to establish mental or emotional anguish, it is necessary to present the testimony of the victim as such experiences are personal to this party." Thus, in cases of support, it must be first shown that the accused's denial thereof - which is, by itself, already a form of economic abuse - further caused mental or emotional anguish to the woman-victim and/or to their common child.

In this case, while the prosecution had established that Melgar indeed deprived AAA and BBB of support, no evidence was presented to show that such deprivation caused either AAA or BBB any mental or emotional anguish. Therefore, Melgar cannot be convicted of violation of Section 5 (i) of RA 9262.

This notwithstanding - and taking into consideration the variance doctrine which allows the conviction of an accused for a

> crime proved which is different from but necessarily included in the crime charged - the courts *a quo* correctly convicted Melgar of violation of Section 5 (e) of RA 9262 as the deprivation or denial of support, by itself and even without the additional element of psychological violence, is already specifically penalized therein.[18]

The Variance Doctrine is based on Sections 4 and 5 of Rule 120 of the 2000 Revised Rules of Criminal Procedure, which read:

> Section 4. *Judgment in case of variance between allegation and proof.* - When there is variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.
>
> Section 5. *When an offense includes or is included in another.* - An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form part of those constituting the latter.

In the case of *Caoili v. People,*[19] the Court held that an accused may be held guilty of acts of lasciviousness performed on

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18 *Id.*

19 *People v. Caoili*, G.R. No. 196342, 8 August 2017.

a child, *i.e.*, lascivious conduct under Section 5(b) of R.A. 7610, which was the offense proved, because it is included in rape, the offense charged.

The Supreme Court, in the *Caoili* case, ratiocinated the constitutionality of the application of the variance doctrine, thus:

> The due recognition of the constitutional right of an accused to be informed of the nature and cause of the accusation through the criminal complaint or information is decisive of whether his or her prosecution for a crime stands or not. The right is not transgressed if the information sufficiently alleges facts and omissions constituting an offense that includes the offense established to have been committed by the accused.[20]

VI. MELGAR RULING AFFIRMED IN THE CASE OF ESTEBAN DONATO REYES

In the subsequent case of *Esteban Donato Reyes v. People of the Philippines*,[21] the accused was charged in an Information, which reads as follows:

> That on or about the month of July, 2005 and continuously up to the present, in Quezon City, Philippines, the said accused, did then and there, willfully, unlawfully and feloniously commit **economic abuse** upon his wife, AAA, by then and there **abandoning her without any financial support** thereby depriving her of her basic needs and inflicting upon her **psychological and emotional suffering and/or injuries**, to

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20 *People v. Manansala*, 708 Phil. 66-80 (2013).

21 *Reyes v. People*, G.R. No. 232678, 3 July 2019.

> the damage and prejudice of the said offended party.

After trial on the merits, the Regional Trial Court rendered a decision finding the accused guilty as charged, for violation of Section 5(i) of R.A. 9262 for psychological violence, which was affirmed by the Court of Appeals.[22]

The Supreme Court, in upholding the propriety of the conviction, as well as the sufficiency of the averments in the Information, explained thus:

> Section 5 (i) of RA 9262 penalizes some forms of psychological violence that are inflicted on victims who are women and children through the following acts:
>
> x x x x
>
> (i) Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and *denial of financial support or custody of minor children* or access to the woman's child/children.[23]

Citing the case of *Dinamling v. People*,[24] the Court reiterated the elements of violation of Section 5(i) of R.A. No. 9262, to wit:

> (1) The offended party is a woman and/or her child or children;

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22 *Id.*

23 *Id.*

24 *Dinamling v. People*, G.R. No. 199522, 22 June 2015.

> (2) The woman is either the wife or former wife of the offender, or is a woman with whom the offender has or had a sexual or dating relationship, or is a woman with whom such offender has a common child. As for the woman's child or children, they may be legitimate or illegitimate, or living within or without the family abode;
> (3) The offender causes on the **woman and/or child mental or emotional anguish**; and
> (4) The anguish is caused through acts of public ridicule or humiliation, repeated verbal and emotional abuse, **denial of financial support** or custody of minor children or access to the children or similar acts or omissions.[25]

The Supreme Court in *Reyes*, did not however, stop in declaring that Reyes is liable for violation of Section 5(i). It went on to declare that if properly indicted, Reyes can also be convicted of violation of Section 5(e), par. 2 for having committed economic abuse against AAA. Also, it pronounced that criminal liability for violation of Section 5(e) of R.A. No. 9262 attaches when the accused deprives the woman of financial support which she is legally entitled to. Deprivation or denial of support, by itself, is already specifically penalized therein.

VII. DOCTRINES IN *MELGAR* AND *REYES* ABANDONED IN THE CASE OF CHRISTIAN ACHARON

With Justice Caguioa as *ponente*, and with Justices Perlas-Bernabe, Leonen, Zalameda, M. Lopez, and Lazaro-Javier, issuing their concurring opinions, the doctrines laid down in the cases of Melgar and Reyes were expressly abandoned in the case of *Christian Pantonial Acharon v. People of the Philippines*.[26]

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[25] *Id.*

[26] G.R. No. 224946, 9 November 2021.

In *Acharon*, the accused was charged in an Information, the accusatory portion of which reads:

> That sometime in (sic) January 25, 2012, up to the present, in Valenzuela City and within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully and feloniously cause mental or emotional anguish, public ridicule or humiliation to his wife AAA, by denying financial support to the said complainant.

The Regional Trial Court convicted Acharon for violation of Section 5 (i) of R.A. No. 9262 for his failure to maintain an open communication with his wife, his having a paramour while he was in Brunei, and his neglect of his legal obligation to extend financial support. The Court of Appeals upheld Acharon's conviction and affirmed the RTC's decision holding that Christian's failure to provide financial support, xxx, constitutes economic abuse.[27]

The Supreme Court believed otherwise and acquitted Acharon by stating that mere failure or an inability to provide financial support is not punishable by R.A. No. 9262. All the elements necessary to prove a violation of Section 5(i) of R.A. No. 9262 were not present, specifically, the fourth element.

1. DENIAL/DEPRIVATION IS DIFFERENT FROM FAILURE

> The Court stresses that Section 5(i) of R.A. 9262 uses the phrase "denial of financial support" in defining the criminal act. The word "denial" is defined as "refusal to satisfy a request or desire" or "the act of not allowing someone to do or have

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[27] *Id.*

something." The foregoing definitions connote willfulness, or an active exertion of effort so that one would not be able to have or do something. This may be contrasted with the word "failure," defined as "the fact of not doing something [one] should have done," which in turn connotes passivity. From the plain meaning of the words used, the act punished by Section 5(i) is, therefore, dolo in nature - there must be a concurrence between intent, freedom, and intelligence, in order to consummate the crime.[28]

2. SECTIONS 5(i) AND 5(e) ARE CRIMES MALA IN SE, EVEN THOUGH R.A. NO. 9262 IS A SPECIAL LAW

Crimes penalized under Sections 5(i) and 5(e) of R.A. 9262 are mala in se, not mala prohibita, even though R.A. 9262 is a special penal law. The acts punished therein are inherently wrong or depraved, and the language used under the said penal law requires a mental element. Being a crime mala in se, there must thus be a concurrence of both actus reus and mens rea to constitute the crime. Actus reus pertains to the external or overt acts or omissions included in a crime's definition while mens rea refers to the accused's guilty state of mind or criminal intent accompanying the actus reus.

It is not enough, therefore, for the woman to experience mental or emotional anguish, or for her partner to deny financial support that is legally due her. In order for criminal liability to arise under Section 5(i) of R.A. 9262, insofar as it deals with "denial of financial support," there must, therefore, be

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[28] *Id.*

evidence on record that the accused willfully or consciously withheld financial support *legally due* the woman for the purpose of inflicting mental or emotional anguish upon her. In other words, the *actus reus* of the offense under Section 5(i) is the willful denial of financial support, while the *mens rea* is the intention to inflict mental or emotional anguish upon the woman. Both must thus exist and be proven in court before a person may be convicted of violating Section 5(i) of R.A. 9262.[29]

xxx

In other words, to be punishable by Section 5(i) of R.A. 9262, it must ultimately be proven that the accused had the intent of inflicting mental or emotional anguish upon the woman, thereby inflicting psychological violence upon her, with the willful denial of financial support being the means selected by the accused to accomplish said purpose. xxx This means that the mere failure or one's inability to provide financial support is not sufficient to rise to the level of criminality under Section 5(i), even if mental or emotional anguish is experienced by the woman. In other words, even if the woman were to suffer mental or emotional anguish due to the lack of financial support, but the accused merely *failed* or was *unable* to so provide support, then criminal liability would not arise. A contrary interpretation to the foregoing would result in absurd, if not outright unconstitutional, consequences.[30]

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29 *Id.*

30 *Id.*

3. ELEMENTS OF THE CRIME PUNISHED UNDER SECTION 5(i)

Therefore, the Supreme Court, decreed that the elements of Section 5(i) on deprivation of financial support are as follows:

> (1) xxx;
>
> (2) xxx;
>
> (3) The offender willfully refuses to give or consciously denies the woman and/or her child or children financial support that is legally due her and/or her child or children; and
>
> (4) The offender denied the woman and/or her child or children the financial support for the purpose of causing the woman and/or her child or children mental or emotional anguish.
>
> Applying the foregoing discussion to the facts of the present case, the Court finds that Christian is not guilty of violating Section 5(i) of R.A. 9262 for the failure of the prosecution to establish the third and fourth elements of the crime. The Court finds him innocent, for there is undenied evidence that Christian tried, as he successfully did for a time, to provide financial support. He testified under oath that he failed to continue providing support only when his apartment in Brunei was razed by fire, and when he met a vehicular accident there. There is also no dispute that he had already paid P71,000.00 out of the P85,000.000 of the debt that the spouses - not the husband alone - were

obligated to pay from their community property.[31]

4. ELEMENTS OF THE CRIME PUNISHED UNDER SECTION 5(e)

The language of Section 5(e) is clear: the denial of financial support, to be punishable, must have the "purpose or effect of controlling or restricting the woman's x x x movement or conduct." To be sure, Section 5(e) uses the word "deprive" which, like the use of the word "denial" in Section 5(i), connotes willfulness and intention. The denial or deprivation of financial support under Section 5(e) is, therefore, an intentional act that has, for its purpose, to control or restrict the woman's movement or conduct. The willful deprivation of financial support, therefore, is the actus reus of the offense, while the mens rea is the intention to control or restrict the woman's conduct. Thus, similar to the discussion in Section 5(i), Section 5(e) cannot be read as punishing the mere failure or one's inability to provide financial support, which is what happened in this case.[32]

xxx Section 5(e), if read and understood in its entirety, punishes acts, or the employment of machinations, that have the effect of either (1) compelling a woman and/or her child or children to do something unwillingly or (2) preventing her and/or her child or children from doing something which is within her or her child's or her children's right/s to do. Absent this element, the failure to provide

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31 *Id.*

32 *Id.*

financial support will entail only civil, not criminal, responsibility.[33]

In sum, this is, therefore, the proper understanding of Section 5(e) of R.A. 9262, insofar as it deals with the deprivation, or threat of deprivation, of financial support: There must be allegation and proof that the act was done with the intent to control or restrict the woman's and/or her child's or her children's actions or decisions, consistent with the letter of Section 5(e) itself.[34]

It is this element of specific intent to control or restrict the woman's and/or her child's or her children's actions or decisions which is the defining characteristic that makes the act of "deprivation of financial support" under Section 5(e) of R.A. 9262 criminally punishable. It is what elevates or qualifies the act of "deprivation of financial support" from one in which only civil liability may arise to an act that incurs criminal liability under Section 5(e) of R.A. 9262. As previously discussed, a contrary interpretation to the foregoing would result in absurd, if not outright unconstitutional, consequences as the law imposes the obligation to support mutually upon the spouses.[35]

In fine, and to reiterate, for deprivation of financial support to rise to a level that would make a person criminally liable under Section 5(e), R.A. 9262, there must be allegation and proof that it was

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33 *Id.*

34 *Id.*

35 *Id.*

made with the ***intent to control or restrict the woman's and/or her child's or her children's actions.***[36]

The third and fourth elements of violation of Section 5(e) of R.A. 9262, insofar as it deals with deprivation of financial support, are therefore:

(1) xxx

(2) xxx

(3) The offender either (a) deprived or (b) threatened to deprive the woman or her children of financial support legally due her or her family, or (c) deliberately provided the woman's children insufficient financial support;

(4) The offender committed any or all of the acts under the third element for the purpose of controlling or restricting the woman's or her child's movement or conduct.[37]

The doctrines laid down in *Acharon* were consistently reiterated by the Supreme Court in the subsequent cases of *Calingasan v. People of the Philippines,*[38] *XXX256611 v. People of the Philippines,*[39] and *XXX v. People of the Philippines*.[40]

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36 *Id.*

37 *Id.*

38 G.R. No. 239313, 15 February 2022.

39 G.R. No. 256611, 12 October 2022.

40 G.R. No. 255877, 29 March 2023.

VIII. CONCLUSION

This article ends with the wise words of Justice Marvic Leonen, in his concurring opinion, and that of the *ponencia* himself, Justice Alfredo Benjamin Caguioa, in the case of *Acharon*.

According to Justice Leonen:

> In our pursuit of equality, we need to acknowledge and dismantle the 'obstacles to the full realization of the potentialities of women.' Nevertheless, it is also improper to think that women are always victims. This will only reinforce their already disadvantaged position. The perspective that portrays women as victims with a history of victimization results in the unintended consequence of permanently perceiving all women as weak. Laws such as Republic Act No. 9262 are intended to negate the patriarchy in our culture, not to bolster it. In safeguarding the interests of women as a discriminated class, we must be careful not to perpetuate the very prejudices and biases that contribute to their discrimination. Applied correctly, Sections 5(e) and 5(i) of Republic Act No. 9262 should not result in the over-patronage of women. It is entirely possible that the woman in the sexual or dating relationship is more financially capable than the man. Consistent with the spouses' mutual obligation to provide support under the Family Code, the duty to provide financial support should not fall on the man alone. His mere failure or inability to provide financial support should not be

> penalized as a crime, especially when the woman is more financially capable.[41]

Finally, Justice Caguioa's real-world wisdom on the matter, concludes this discourse, hence:

> R.A. 9262 was not meant to make the partners of women criminals just because they fail or are unable to financially provide for them. Certainly, courts cannot send individuals to jail because of their mere inability - without malice or evil intention - to provide for their respective families. In a developing country like ours, where poverty and unemployment are especially rampant, courts would inevitably find themselves incarcerating countless people, mostly fathers, should the interpretation be that mere failure or inability to provide financial support is enough to convict under Sections 5(e) and 5(i). As Associate Justice Rodil V. Zalameda put it simply during the deliberations of this case, 'poverty is not a crime x x x [and] the failure or inability to provide support, without more, should not be the cause of a man's incarceration.'[42]

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41 *Acharon v. People*, G.R. No. 224946, 9 November 2021 (J. Leonen, concurring opinion).

42 *Acharon v. People*, G.R. No. 224946, 9 November 2021.

FOR A LIVABLE CLIMATE: LEGAL AND POLICY INNOVATIONS FOR A NET ZERO 2050

Bryan Alvin Rommel Villarosa [*]

What is Net Zero by 2050?

Net Zero by 2050 is a study released by the International Energy Agency (IEA) that outlines the policies, technologies, and behavioral changes needed to achieve net-zero carbon dioxide (CO2) emissions by the year 2050.

This roadmap outlines the necessary steps to primarily guide the global energy sector, governments, corporations, and other institutions to ensure a sustainable and environmentally friendly future.

Net Zero by 2050 aligns with the objectives of the Paris Agreement, which aims to limit the global average temperature rise to below 2°C above pre-industrial levels and strive for an even more ambitious goal of 1.5°C.[1] To achieve this goal, emissions need to be reduced by 45% by 2030 and reach net zero by 2050.[2]

Why is Net Zero Important?

The Intergovernmental Panel on Climate Change (IPCC), an international scientific body established by the United Nations (UN) and the World Meteorological Organization, provides the

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1 Paris Agreement art. 2.1(a), *adopted* 12 December 2015, 3156 U.N.T.S. 79.

2 United Nations, For a livable climate: Net-zero commitments must be backed by credible action, <https://www.un.org/en/climatechange/net-zero-coalition> (visited 21 November 2023).

latest scientific, technical, and socio-economic literature on climate change. It published in 2023 the Sixth Assessment Report (AR6), which combined scientific and socio-economic research. According to the AR6, the following are the impacts of climate change, highlighting the importance of Net Zero by 2050:[3]

Extreme Weather

Hot extremes, including heatwaves, have become more frequent and more intense across most land regions since the 1950s, while cold extremes have become less frequent and less severe.[4] The frequency and intensity of heavy precipitation events have also increased since the 1950s over most land areas. Ironically, droughts in some regions due to increased land evapotranspiration have also increased. With high confidence, the IPCC AR6 states that human-caused climate change is the main driver of these changes.

Hot extremes also lead to sea level rise thereby causing coastal flooding and erosion. In the long term, this can result in the displacement of coastal communities. Salinization, or the intrusion of saltwater into freshwater resources, is another risk associated with rising sea levels. This can contaminate rivers and freshwater aquifers, jeopardizing the availability of drinking water.

Loss of Species

Climate change has caused ecosystem changes such as permafrost thaw, retreats of glaciers, ocean acidification, and sea level rise. These changes have caused marine species globally to

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3 IPCC, 2023: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 35-115 <https://www.ipcc.ch/report/sixth-assessment-report-cycle/> (visited 21 November 2023).

4 World Meteorological Organization, Climate Change and Heatwaves, 21 September 2023 <https://wmo.int/content/climate-change-and-heatwaves> (visited 21 November 2023).

shift to the poles or, on land, to higher elevations. Some species cannot sufficiently cope, resulting in massive deaths on land and in the ocean.

Food Insecurity

Climate change has slowed down agricultural and aquacultural productivity over the past 50 years. Ocean warming, combined with the impacts of overfishing, has adversely affected fish production. Global warming is also associated with severe dryland water scarcity causing unsustainable agricultural expansion, reduced water security, and food insecurity.

Decreased Wellbeing in Cities

Extreme heat makes urban living less livable as it compromises energy systems, water sanitation, and transportation. It also increases demand for electricity due to the use of air conditioning and refrigeration. This can strain energy systems, leading to blackouts, brownouts, and high utility bills. Higher temperatures also increase the rate of evaporation of water reservoirs, reducing the availability of clean water.[5] These factors ultimately decrease the well-being of city dwellers.

Negative Effects on Physical and Mental Health

Extreme heat events have resulted in the occurrence of climate-related food-borne and water-borne diseases[6] which ultimately cause a high mortality and morbidity rate. Zoonotic diseases, or those transmitted from animals to humans, are

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5 Cascade Tuholske, Kelly Caylor, Chris Funk and Tom Evans, *Global urban population exposure to extreme heat*, 4 October 2021 <https://www.pnas.org/doi/full/10.1073/pnas.2024792118> (visited 21 November 2023).

6 National Institute of Environmental Health Sciences, Climate Change and Human Health <https://www.niehs.nih.gov/research/programs/climatechange/health_impacts/waterborne_diseases/index.cfm> (visited 21 November 2023).

emerging in new areas. High temperatures and humidity have been linked to mental health problems such as suicide,[7] depression, anxiety disorder, and bipolar disorder.[8]

Loss of Livelihoods and Culture

Climate-exposed sectors such as tourism, energy, fisheries, agriculture, and those involving outdoor production suffer the most economic impact. Tropical cyclones and heavy precipitation have reduced economic growth. Wildfires in many regions have affected built assets and economic activity.

Weather extremes are driving the displacement of Indigenous Peoples and those who are directly reliant on the environment for subsistence, resulting in irreversible losses of valued culture. Small island states in the Pacific and Caribbean are threatened with involuntary migration due to their vulnerability to rising sea levels, tropical cyclones, and storm surges brought about by climate change.[9]

The Poorest Nations are the Most Vulnerable

Unfortunately, the world's poorest countries are the most vulnerable to the adverse effects of the climate crisis.[10] These people are suffering from high poverty levels, governance challenges, and high levels of climate-sensitive livelihoods.

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7 Michelle Horton, The effects of climate change on suicide rates, 29 March 2019 <https://earth.stanford.edu/news/effects-climate-change-suicide-rates> (visited 21 November 2023).

8 Laurence Wainwright and Eileen Neumann, *Heat waves can impact our mental health. Here's how*, 14 July 2022 <https://www.weforum.org/agenda/2022/07/heatwaves-mental-health-climate-change-global-warming/> (visited 21 November 2023).

9 United Nations Caribbean, Small islands are increasingly affected by climate change: IPCC report, 28 February 2022 <https://caribbean.un.org/en/173533-small-islands-are-increasingly-affected-climate-change-ipcc-report> (visited 21 November 2023).

10 United Nations Climate Change, Most Vulnerable Countries Leading Climate Response, 28 October 2021 <https://unfccc.int/news/most-vulnerable-countries-leading-climate-response> (visited 21 November 2023).

Approximately 3.3 to 3.6 billion people live in these vulnerable countries.

Legal and Policy Innovations

Climate change responses and adaptation options include economic, legal, technological, institutional, social, environmental, and geophysical responses. This article surveys laws, policies, and some technological innovations that are focused on mitigating Greenhouse Gas Emissions (GHG) to achieve the Net Zero by 2050 goal.

Requiring Countries to Articulate their Climate Plans

Nationally Determined Contributions (NDC) are self-defined national climate pledges submitted by countries to the United Nations Framework Convention on Climate Change (UNFCCC) under the Paris Agreement. NDCs outline each country's efforts to reduce greenhouse gas emissions, mitigate climate change, and enhance adaptation measures. They represent the commitments of countries to limit global warming.[11]

Financial Policy Innovations for Renewables

The United Kingdom's legislature proposed the Road to Zero Strategy where the government required and granted tax benefits for all new homes with Electric Vehicle (EV) charge points.[12] India collected $1.8 billion tax on coal with some of its revenue going to fund renewable energy projects.[13] Indonesia

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11 United Nations Climate Change, The Paris Agreement and NDCs <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs> (visited 21 November 2023).

12 Munir Hassan and Dalia Majumder-Russell, Renewable Energy in United Kingdom <https://cms.law/en/int/expert-guides/cms-expert-guide-to-renewable-energy/united-kingdom> (visited 21 November 2023).

13 Yale School of the Environment, India Using Coal Tax Money to Fund Renewable Energy Projects, 22 February 2017

reduced subsidies on inefficient fossil fuels and channeled the funds to protect the poor and accelerate economic recovery.[14]

In the Philippines, the government's Home Development Mutual Fund offers financing for members to power their homes with solar panels.[15]

Investment in Batteries and Electricity Networks

According to the Special Report by the IEA,[16] an organization focusing on sustainable energy, investment in electricity networks is crucial for achieving the transformation to clean energy.

In the United States, a law has accelerated the market for battery energy storage systems (BESS), which are essential for renewable energy generation. More than $5 billion was invested in BESS in 2022.

However, dependence on electricity in the Net Zero goal has both positive and negative implications. On the positive side, greater reliance on electricity makes energy-importing countries more self-sufficient since a higher share of the electricity supply is based on domestic sources than other fuels.

<https://e360.yale.edu/digest/india-using-coal-tax-money-to-fund-renewable-energy-projects> (visited 21 November 2023).

14 Theresia Betty Sumarno and Lourdes Sanchez, Financing Green Recovery From Fossil Fuel Taxation and Subsidy Reform, September 2021 <https://www.iisd.org/publications/fossil-fuel-taxation-subsidy-reform-indonesia> (visited 21 November 2023).

15 Greenergy Development Corp., Greenergy Solar PH, Pag-ibig offer loan for panel installation <https://www.greenergysolar.ph/greenergy-solar-ph-pag-ibig-offer-loan-for-panel-installation/> (visited 21 November 2023).

16 International Energy Agency, Net Zero by 2050, A Roadmap for the Global Energy Sector, October 2021 <https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf> (visited 21 November 2023).

On the other hand, the negative implications of electricity dependence mean that any disruption to the electricity system would have larger impacts, making electricity infrastructure more vulnerable to physical shocks such as extreme weather events. Climate change could exacerbate this vulnerability, through factors like more frequent droughts that could decrease the availability of water for hydropower and cooling at thermal power plants.

Furthermore, the rapid electrification of road transport could put additional strain on electricity grids. The increased demand for electricity could lead to spikes in demand that could challenge the stability of the electricity supply.

"Walkable Cities"

London's Transport Authority has developed the London Walking Action Plan.[17] This resource outlines strategies for designing, building, and managing cities in a way that facilitates active mobility such as walking and cycling in the community. This plan includes establishing better signposting and maps, promoting walking routes, implementing timed closures for vehicles and car-free days, creating better streets for walking and cycling, and improving air quality.

Paris adopts the '15-minute city' concept. This concept challenges the dominance of cars and enables those living in an urban environment should have all their daily needs - shopping, education, health, leisure, and even work - within an easily reachable 15-minute walk or cycle ride.[18] In the Netherlands, most

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17 Heart Foundation, London Walking Action Plan <https://www.healthyactivebydesign.com.au/news-and-events/london-walking-action-plan> (visited 21 November 2023).

18 *What is a '15-minute city' and how is it working in Paris?*, The Local France, 15 February 2023 <https://www.thelocal.fr/20230215/what-is-a-15-minute-city-and-how-is-it-working-in-paris> (visited 21 November 2023).

cyclists do not wear helmets because they have invested in street designs and policies that keep cycling safe and inclusive.[19]

Imagine if our cities will create spaces to be more people-centric rather than car-centric, it will create neighborhoods full of life and movement. This shift would not only make our public spaces safer but also more welcoming and inclusive for everyone.

Ban on Single-Use Plastics

In the Philippines, the Climate Change Commission has adopted a resolution to phase out single-use plastics. Baguio City passed Ordinance No. 35-2017 entitled "Regulating the Sale, Distribution, and Use of Plastic/Shopping Bags and Styrofoam in the City of Baguio and Providing Penalties Thereof."[20]

Use of Digital Technologies

Digital technologies, if scaled across the top three highest emitting sectors, could deliver up to 20%[21] of the 2050 Net Zero goal. These sectors are energy, materials, and mobility which can quickly reduce carbon emissions by up to 10% if digital technologies are adopted immediately. These technologies would likely require supportive laws, policies, and regulations. These might include incentives for companies to adopt digital technologies, standards for data transparency, and initiatives to develop digital talent.[22]

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19 Government of the Netherlands, Safe cycling <https://www.government.nl/topics/bicycles/safe-cycling> (visited 21 November 2023).

20 City Government of Baguio, Primer: "The Plastic and Styrofoam Free Baguio Ordinance" Ordinance Number 35 Series of 2017 <https://new.baguio.gov.ph/city-environment-and-parks-management-office/downloadables> (visited 21 November 2023).

21 World Economic Forum, Digital for Climate Scenarios <https://initiatives.weforum.org/digital-transformation/climate-scenarios> (visited 21 November 2023).

22 Manju George, Karen O'Regan and Alexander Holst, Digital solutions can reduce global emissions by up to 20%. Here's how, 23 May 2022

Here are digital technologies that can quickly accelerate the net zero trajectories:

- **LED lights:** LED lights use about 75% less electricity and last 25 times longer than previous forms of lighting.[23] On average, LED lighting uses 40% less power than fluorescent solutions and 80% less than incandescent bulbs while producing the same amount of light.[24] Widespread adoption of LEDs reduced half a billion tons of CO2 in 2017 — equivalent to shutting down 162 coal-fired power plants.[25]

- **Sensing and control technologies**: Drones, automation and robotics, and the Internet of Things (IoTs), can collect data and alter physical processes to be more eco-friendly.
    - IoTs, imaging, and geo-location technologies for road and rail transportation could decrease up to 5% of GHG emissions by 2050. These technologies gather real-time data that drive decision-making to improve route optimization and lower emissions.

- **Enabling technologies** such as:
    - **Cloud Technology:** Cloud computing helps us transition to a paperless society, eliminates

<https://www.weforum.org/agenda/2022/05/how-digital-solutions-can-reduce-global-emissions/> (visited 21 November 2023).

23 Ian Morse, *LED lights could contribute to massive carbon reductions*, 9 November 2022 <https://news.mongabay.com/2022/11/led-lights-could-contribute-to-massive-carbon-reductions/> (visited 21 November 2023).

24 Shawn Knight, LED bulbs reduced carbon dioxide emissions by more than half a billion tons in 2017, 28 December 2017 <https://www.techspot.com/news/72489-led-bulbs-reduced-carbon-dioxide-emissions-more-than.html> (visited 21 November 2023).

25 Morse, *supra* note 23.

billion metric tons of CO_2[26], and reduces the use of on-premise data centers which consume large amounts of energy to cool the environment. Microsoft has been experimenting with underwater data centers called Project Natick. The consistently cool underwater environment allows data centers to save energy.[27]

- **5G Networks:** Due to its ultra-low latency, 5G enables smart, real-time monitoring solutions[28] that could be used for smart grids, smart charging for electric vehicles, smart buildings, and IoT applications that ultimately optimize energy use.[29]

- **Foundational technologies** such as **big data analytics** can provide up to 7% GHG reductions by 2050 in the manufacturing industry by improving efficiency and promoting circularity.

Here are possible threats and challenges that come along with digitalization:

- **Digital technologies create carbon emissions too:** It's important to note that while digital technologies offer significant potential for reducing emissions, they also contribute to greenhouse gas emissions, accounting for

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[26] Dashveenjit Kaur, How cloud computing can reduce carbon emissions, 19 March 2021 <https://techhq.com/2021/03/how-cloud-computing-can-reduce-carbon-emissions/> (visited 21 November 2023).

[27] John Roach, Microsoft finds underwater datacenters are reliable, practical and use energy sustainably <https://news.microsoft.com/source/features/sustainability/project-natick-underwater-datacenter/> (visited 21 November 2023).

[28] Nokia, 5G reduces emissions, explained <https://www.nokia.com/about-us/newsroom/articles/5g-reduces-emissions-explained/> (visited 21 November 2023).

[29] STL Advisory Limited, How 5G can cut 1.7 billion tonnes of CO2 emissions by 2030, October 2020 <https://stlpartners.com/research/how-5g-can-cut-1-7-billion-tonnes-of-co2-emissions-by-2030/> (visited 21 November 2023).

about 2% of the total.[30] Therefore, efforts to reduce the carbon footprint of digital technologies themselves are also crucial.

- **Digital Security Concerns.** Along with the increased integration of digitalization into our energy grid, cybersecurity could pose an even greater risk to electricity security.

- **Resistance and Lack of Digital-Savvy Executives:** Digitalization can be disruptive for most of the workforce; hence, it is crucial to address this and ensure a smooth transition. Moreover, a lack of knowledge of the benefits of digital transformation among the decision-makers can hinder the process.

Policymakers have a central part to play in ensuring that the cyber resilience of electricity is enhanced. Measures need to be taken to ensure that the digitalization of the energy sector, including the use of digital controls, does not compromise cybersecurity and that potential social acceptance issues are addressed. However, laws and regulations in the digital space can also be complex.[31]

Emerging Renewable Energy Sources

The drivers of renewable energy towards the Net Zero by 2050 goal are solar photovoltaics (PV), concentrating solar power,[32] onshore wind, offshore wind, hydropower, bioenergy,

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30 Defra Desa, How to reduce your digital carbon footprint, 14 October 2019 <https://sustainableict.blog.gov.uk/2019/10/14/how-to-reduce-your-digital-carbon-footprint/> (visited 21 November 2023).

31 Deloitte, Managing Risk in Digital Transformation, January 2018 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/in-ra-managing-risk-in-digital-transformation-1-noexp.pdf> (visited 21 November 2023).

32 U.S. Solar Energy Technologies Office, Concentrating Solar-Thermal Power Basics <https://www.energy.gov/eere/solar/concentrating-solar-thermal-power-basics> (visited 21 November 2023).

geothermal, and marine power. Solar PV is the cheapest and the most mature because it has policy support in more than 130 countries.

Other energy sources are still maturing but have the potential to make important contributions in the long term if coupled with supportive legislation and policies.

Here are some notable innovations:

- **Floating solar farm in Indonesia:** Indonesia recently launched Southeast Asia's largest floating solar farm. The 192MW floating solar power plant was inaugurated by President Joko Widodo and is located on a reservoir in West Java province.[33]

- **Underwater turbines in China:** The next frontier for renewable energy may be found in underwater currents. In May 2022, China constructed a new power station powered by the ebb and flow of the tide. It is expected that the electricity generated will power 30,000 homes. [34] Along with other Asian nations, China is looking to harness the power of moving waters in rivers and ocean tidal currents.

- **Solar Canals:** A start-up in California is trialing to install solar roofs over the canals to accomplish two things: generate power and cut evaporation. If all 6,400 km of California canals were fitted, it is forecasted to save 283

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33 The Institution of Engineering and Technology, Indonesia launches South-east Asia's largest floating solar farm, 17 November 2023 <https://eandt.theiet.org/content/articles/2023/11/indonesia-launches-southeast-asias-largest-floating-solar-farm/> (visited 21 November 2023).

34 Han Quing, China's ocean power stations set to go commercial, 26 January 2023 <https://chinadialogueocean.net/en/climate/chinas-ocean-power-stations-set-to-go-commercial/> (visited 21 November 2023).

billion liters of water a year and generate power for 9.4 million homes.[35]

Emissions Trading System (ETS)

ETS is a European Union policy that serves as a "carbon market" where states "buy" and "sell" carbon emissions. Governments give companies emission permits, and these permits can be traded. Meaning, companies that reduce their carbon emissions and have leftover allowances can sell them to another company that is over its limit.[36]

By making it more expensive to emit carbon through carbon pricing and taxing, businesses and individuals are encouraged to reduce their carbon footprint, innovate, and switch to cleaner technologies or practices.[37]

Climate Financing

Climate financing is a key aspect of the Paris Agreement, which is a legally binding international treaty.[38] Article 9 of the Paris Agreement provides that developed country Parties shall provide financial resources to assist developing country Parties with respect to their existing obligations under the Agreement,[39] particularly those that are less developed but are more vulnerable nations.

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35 Douglas Broom, 5 smart renewable energy innovations, 21 September 2023 <https://www.weforum.org/agenda/2023/09/renewable-energy-innovations-climate-emergency/> (visited 21 November 2023).

36 European Commission, What is the EU ETS? <https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/what-eu-ets_en> (visited 21 November 2023)

37 The World Bank, What is Carbon Pricing? <https://carbonpricingdashboard.worldbank.org/what-carbon-pricing> (visited 21 November 2023).

38 Paris Agreement, *supra* note 1, art. 9.

39 United Nations Climate Change, Climate Finance in the negotiations <https://unfccc.int/topics/climate-finance/the-big-picture/climate-finance-in-the-negotiations> (visited 21 November 2023).

While funding for climate change adaptation has indeed increased since the Fifth Assessment Report (AR5) of the Intergovernmental Panel on Climate Change (IPCC), it still constitutes a small portion of total climate finance. Calls for increased funding and implementation of actions are made to help vulnerable nations adapt to climate change. [40]

Carbon Capture, Utilization, and Storage (CCUS)

CCUS refers to a suite of technologies that affect the capture of CO_2 from large-point sources, including industrial facilities. The captured CO_2 is then either reused or stored so it will not enter the atmosphere. Some examples include:

- Giant CO2 vacuum cleaners or Direct Air Capture[41] with Carbon Capture and Storage (DACCS)[42]
- Algae farms that capture carbon.[43] Algae 30x more effective in extracting CO2 from the air.
- Turning green waste into Biochar which is a potent tool for carbon capture and storage.[44]
- Giant canopy involves creating a large structure in space to reduce the amount of sunlight reaching Earth and ultimately cool our planet.[45] This was inspired by Mt.

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40 *More funding needed for climate adaptation, as risks mount*, UN News, 3 November 2022 <https://news.un.org/en/story/2022/11/1130142> (visited 21 November 2023).

41 Elizabeth Stamp, How This CO2 "Vacuum Cleaner" Is Fighting Climate Change, 27 April 2021 <https://www.architecturaldigest.com/story/co2-vacuum-cleaner-fighting-climate-change> (visited 21 November 2023).

42 International Energy Agency, *supra* note 15.

43 Richard Sayre, *Microalgae: The Potential for Carbon Capture*, BioScience, Volume 60, Issue 9, October 2010, Pages 722–727 <https://doi.org/10.1525/bio.2010.60.9.9> (visited 21 November 2023).

44 DGB Group, Turning waste into opportunity: The feasibility stage of our biochar project, 9 June 2023 <https://www.green.earth/projects/updates/turning-waste-into-opportunity-the-feasibility-stage-of-our-biochar-project> (visited 21 November 2023).

45 Cara Buckley, *Could a Giant Parasol in Outer Space Help Solve the Climate Crisis?*, New York Times, 2 February 2024,

Pinatubo's explosion and its effect on the cooling of the atmosphere.[46] Suggestions were made to construct the canopy from a 2,000 km-wide glass shield, Moon dust, or 16 trillion flying space robots.[47] This is an intriguing concept and still needs significant technology advancements and international cooperation.

As we navigate towards the crucial goal of a net-zero future by 2050, the role of legal frameworks and policy initiatives cannot be overstated. These are fundamental in catalyzing transformative changes in societal behavior, practices, and norms. This journey towards a sustainable and livable climate is not the responsibility of a single entity; rather, it demands a collective, concerted effort from various sectors of society.

<https://www.nytimes.com/2024/02/02/climate/sun-shade-climate-geoengineering.html> (visited 15 February 2024).

46 NASA Langley Research Center, Global Effects of Mount Pinatubo <https://earthobservatory.nasa.gov/images/1510/global-effects-of-mount-pinatubo> (visited 21 November 2023).

47 Zaria Gorvett, *How a giant space umbrella could stop global warming*, BBC News, 27 April 2016 <https://www.bbc.com/future/article/20160425-how-a-giant-space-umbrella-could-stop-global-warming> (visited 21 November 2023).

THE PHILIPPINE NEGLECTED TORT: A REGULATORY APPROACH TO CONSUMER PROFILING?*

*Rachel Lois Gella***

> *"…If he surrenders his will to others, he surrenders his personality. If his will is set by the will of others, he ceases to be master of himself. I cannot believe that a man no longer master of himself is in any real sense free."*[1]
>
> — Harold J. Laski, *Liberty in the Modern State*

I. INTRODUCTION

Justice Antonio T. Carpio, then writing as the Chairman of the *Philippine Law Journal* in 1972, observed that the Supreme Court's application of American intentional torts has broadened the concept of quasi-delicts while crowding out other kinds of torts.[2] Every decided tort case in the Philippines is a testament to this observation. Each case is treated as a quasi-delict, eroding its difference from intentional torts and ultimately preempting the area reserved for the latter. The Philippine tort jurisprudence is then marred by a convergence of two different concepts, widening the gap in addressing emerging digital technologies.

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* *Cite as* Rachel Lois B. Gella, *The Philippine Neglected Tort: A Regulatory Approach to Consumer Profiling?,* 13, USLS Law Journal, (page cited) (2024).

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1 Harold H. Laski, Liberty in the Modern State, Harper & Bros., 44 (1944).

2 Antonio T. Carpio, Retired Associate Justice of the Philippines, *Intentional Torts in Philippine Law,* 47 PHIL. L.J. 649 (1972).

What goes beyond every digital screen is mostly inscrutable. Victims of privacy violations are left without legal recourse as technological tools blur the causal link between an act and its resulting damage. For this reason, tort actions in the Philippines have remained untapped in the digital context, and the use of existing tort laws to address invasive personal data collection is often overlooked in the privacy debate.

The right to privacy in the digital realm is confronted with new challenges since "forces of the technological age operate to narrow the area of privacy and facilitate intrusions into it."[3] Regulating these intrusions may encounter obstacles as laws lag behind the growing demand for technology, particularly consumer profiling.

This Essay advocates for a tort-based approach to consumer profiling, which is not sufficiently regulated by current laws. Although profiling has been defined, the potential misapplication of such a process may lead to damages for which courts may not have a basis to provide relief. For this inquiry, the Essay will focus on intentional torts in the Philippines, which were adopted from American jurisprudence and culled from Philippine civil law. The Essay seeks to establish that Article 26 of the New Civil Code ("NCC"), which is a neglected tort provision, may be applied in addressing the invasive nature of consumer profiling.

II. THE EVOLUTION OF PRIVACY TORTS

In 1879, Judge Thomas Cooley's "*A Treatise on the Law of Torts or the Wrongs Which Arise, Independent of Contract*" paved the way for the development of privacy in tort law and liability. In this treatise, Judge Cooley adopted an approach to privacy that emphasizes tort law's applicability to cases where an individual's

[3] *Disini, Jr. v. Secretary of Justice*, G.R. No. 203335, 18 February 2014 [Disini Case].

privacy rights have been violated.[4] Beyond the right to life and the right to immunity from attacks and injuries, and:

> As damages are the only penalty that the law provides for the commission of a tort, it is evident that recovery of these must be allowed in every case in which a wrong is committed, or those wrongs for which no damages are awarded will be committed with impunity.[5]

Taking such an approach, the invasion of one's privacy was considered a legal wrong subject to relief based on the premise that "if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right."[6]

A few years later, the 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandeis entitled *The Right to Privacy* embraced the notion of a tort remedy for privacy intrusions.[7] Warren and Brandeis concluded that the right to privacy is at the core of tort cases and further established that such a right is entitled to recognition as an independent tort.

In recent times, privacy torts have been defined and applied in varying forms. The U.S. Supreme Court in *Lloyd v. Google LLC*[8] in 2021 ruled, to wit:

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4 Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract, Sec. 135, vol. 1, 4th ed., (1932); *see also* Warren and Brandeis "*The Right to Privacy*," 4 Harvard. L. Rev. 193-220 [1890] — this article greatly influenced the enactment of privacy statutes in the United States (Cortes, I., The Constitutional Foundations of Privacy, p. 15 [1970]).

5 *Id.*

6 *Pavesich v. New England Life Insurance Co.*, 122 Ga. 90 (1905) [Pavesich].

7 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harvard. L. Rev. 193 (1890).

8 *Lloyd v. Google LLC*, UKSC 50 (2021).

> The privacy tort, like other torts for which damages may be awarded without proof of material damage or distress, is a tort involving strict liability for deliberate acts, not a tort based on a want of care.[9]

The standard of liability in privacy violations, though a relatively new concept, is an evolving matter, especially in the context where modern systems may be of crucial account. In *Campbell*, Lord Hoffmann articulated:

> Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses on the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[10]

The American concept of tort has influenced the application and interpretation of tort laws in the Philippines.[11] Consequently, American precedents related to the application of tort laws in the digital realm can be used as references in the adjudication of tort cases in the Philippines.

Before the NCC took effect, there was a significant gap in the law that left victims of acts and omissions that were neither crimes nor quasi-delicts without legal relief. The NCC incorporated American tort principles, particularly in Article 26, which helped address much of this legal limbo.

The Code Commission explained the inclusion of such a provision in the NCC: "The present laws, criminal or civil, do not

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9 *Id.*

10 *Campbell v. MGN Limited*, UKHL 22 (2004).

11 Roland S. Suarez, Torts and Damages 4 (3rd ed. 2019).

adequately cope with the interferences and vexations mentioned in Article 26." Despite being "one of the most fruitful sources of litigation under the present Code,"[12] Article 26 remains scarcely enforced.

In 2018, the National Privacy Commission ("NPC") referred to Article 26 as a basis of actionable tort when an HR employee accessed fellow employees' personal iCloud accounts without their consent, which was considered a violation of privacy.[13] Other than this, no definitive case based on such a provision has been filed since the effectivity of the NCC in 1950.[14]

III. THE LEGAL FOUNDATIONS OF CONSUMER PROFILING

In the consumer digital landscape, the old saying "*You are what you eat*" has a modern twist—now it is "*You are what you buy.*"

The goal of creating consumer profiles is not to produce the impression that the consumer has chosen the identity that led them to purchase a service or product. The reality is that the profiler has ascribed to and imposed on the consumer an identity.

Consumer data profiling is the process of gathering intelligence about the needs, values, choices, and preferences of consumers.[15] This includes producing a data set and creating consumer data profiles that contain information that is personal to human life: religion, health, finances, political affiliation, and more aspects that constitute the core of the identity of the

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12 1 Arturo M. Tolentino, Civil Code of the Philippines 88 (1968).

13 Privacy Police Office, Advisory Opinion No. 2018-090, Re: Data Privacy and Office-Issued Mobile Devices (2018).

14 *Supra* note 2.

15 Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling,* Northwestern University L. Rev. 98 (2003).

consumer.[16] The purpose of this is to help online businesses assess opportunities or risks regarding the data subject.[17]

Although consumer profiling is not a new strategy that businesses use to leverage sales, it has gained traction recently. The main driver for this is the rise of technological tools that influence consumers' behavior on a daily basis. What lies beyond the screen is a vast accumulation of data at the disposal of actors—businesses and companies—that utilize these tools to profile and target data consumers.

The European Union, through the General Data Protection Regulation ("GDPR"), has defined profiling as consisting of "any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular, to analyze or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behavior, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her."[18]

The Philippine counterpart of GDPR is the Data Privacy Act of 2012 ("DPA"), which is the premier law addressing unauthorized data processing. The DPA, however, did not provide a specific understanding of profiling until the publication of its Implementing Rules and Regulation ("IRR") and NPC Circular No. 17-01. Rule VII of the DPA IRR shows the layout of how profiling is subsumed in the right to be informed and the right to object by data consumers. Section 34 of the IRR provides:

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> 1. The data subject has a right to be informed whether personal data pertaining to him or

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16 Nancy J. King & Jay Forder, *Data Analytics and Consumer Profiling: Finding Appropriate Privacy Principles for Discovered Data*, Computer Law & Security Review (Elsevier, 2016).

17 Mireille Hildebrandt & Serge Gutwirth, Profiling the European Citizen: Cross-Disciplinary Perspectives (Springer Dordrecht 2008).

18 Recital 71, GDPR.

her shall be, are being, or have been processed, *including the existence of automated decision-making and profiling*.[19] (emphasis supplied)

Additionally, Section 34 (b) states:

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b. Right to object. The data subject shall have the right to object to the processing of his or her personal data, *including processing for direct marketing, automated processing, or profiling*. The data subject shall also be notified and given an opportunity to withhold consent to the processing in case of changes or any amendment to the information supplied or declared to the data subject in the preceding paragraph. (emphasis supplied)

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Mostly adopting the definition from GDPR, *profiling*, in the Philippine context, refers to "any form of automated processing of personal data consisting of *the use of personal data to evaluate certain personal aspects relating to a natural person*, in particular, to *analyze or predict* aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements."[20] (emphasis supplied)

As further emphasized in the DPA, "No decision with *legal effects* concerning a data subject shall be made *solely on the basis of automated processing* without the consent of the data subject."[21] The term "effects" in this context refers to legal consequences that impact the legal rights of data consumers.

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19 DPA IRR, Rule VIII, § 34 (a).

20 DPA IRR, §3 (p).

21 DPA IRR, §48 (b).

Businesses and organizations have integrated profiling solutions to target, collect, and segment large amounts of data from consumers. Businesses utilize consumer profiles for a variety of commercial purposes, such as personalized, targeted marketing, and online behavioral advertising.[22] In such cases, many data consumers feel like they have lost control over their personal information.[23]

Sources of consumer data available for businesses to leverage may include data that have not been collected directly from data consumers. Several online service providers in the Philippines have engaged software developers and programmers to create personalized commercial practices to communicate with their customers effectively. Philippine-based digital companies that offer customer data analytics and technology use consumer profiling to build an audience based on the consumers' demographics, purchase intent, and interests as data points.

Part of its strategy is to provide profiling services to identify the target audience and enable personalized marketing. In some cases, data processing for profiling may not be limited to the primary purpose that the data consumer has initially consented to. Hence, the crucial point of this analysis is the relation of consumer profiling with the extent of the "purpose" for processing data for profiling.

Under the DPA, the data subject must be provided specific information on the *purpose and extent* of processing their data for profiling, direct marketing, and data sharing.[24] With profiling, the purpose and extent of processing information are not often specified to the data consumer.

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22 Sophie C. Boerman, Sanne Kruikemeier & Frederik J. Zuiderveen Borgesius, *Online Behavioral Advertising: A Literature Review and Research Agenda*, Journal of Advertising, 46:3, 363-376 (2017).

23 Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You Are Looking For*, 16 Duke L. & Tech. Rev. 18 (2017).

24 DPA IRR, § 19 (a) (2).

IV. TAPPING THE NEGLECTED TORT AS A REGULATORY APPROACH TO CONSUMER PROFILING

The application of tort liability for privacy violations caused by consumer data profiling hinges on the data-driven influence on consumer behavior. Unlike contractual liability, which is based on the will or agreement of the parties involved, tort liability is applicable even when there is no pre-existing contractual relationship between the parties. [25]

As established, extensive data collection on a person's consumptive patterns invades privacy because of its self-revealing nature. The invasive nature of consumer profiling does not usually include fault or negligence, to which Philippines torts are often applied. Instead, reference must be made to intentional torts, as businesses use consumer data intentionally and are driven by a specified commercial goal.

Without the adoption of American jurisprudence, there will be no provision of law expressly grounded on intentional tort in the Philippines. The courts then would not have any avenue in recognizing a cause of action for any intentional tort. Prior to the effectivity of the NCC, intentional interferences were not actionable unless they constituted a crime or a separate suit for damages had been afforded to the plaintiff.[26]

Article 26 of the NCC is a notable incorporation of American tort law into the Philippine civil law that pervades the gaps in other kinds of torts. Article 26 of the NCC provides:

> Every person shall respect the dignity, personality, *privacy,* and peace of mind of his neighbors and other persons. *The following and similar acts, though they may not constitute a criminal offense, shall produce a*

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25 New Civil Code, Art. 2176.

26 *Supra* note 2.

> *cause of action for damages, prevention, and other relief*:
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> (1) Prying into the privacy of another's residence:
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> (2) Meddling with or disturbing the private life or family relations of another;
>
> (3) Intriguing to cause another to be alienated from his friends;
>
> (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition. (emphasis supplied)

The list extends to "similar acts" without regard to their nature or whether they constitute a criminal offense. Thus, it can reasonably be inferred that privacy in the digital context is implicit in the provision. Accordingly, a violation of such privacy gives rise to a cause of action for torts.

The interference of a right to be actionable must be "serious and outrageous or beyond the limits of common ideas of decent conduct."[27] Justice Carpio pointed out that the "Invasion of the right of privacy involves four distinct types of tort: (1) intrusion upon the plaintiff's physical and mental solitude; (2) public disclosure of private facts; (3) placing the plaintiff in a false light in the public eye; (4) and the commercial appropriation of the plaintiff's name or likeness."[28]

For this writing, the analysis will focus on the 4th type of tort, which involves the appropriation of the plaintiff's personality for commercial use. In *Flake v. Greensboro News Co*., the use of the plaintiff's picture for an advertisement in a newspaper[29] and the use of the plaintiff's name in the title of the corporation[30] were considered actionable privacy torts.

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27 William L. Prosser, *Privacy,* 48 Cal. L. Rev. 635 (1960).

28 *Supra* note 2.

29 *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

30 *Edison v. Edison Polyform Mfg. Co.*, 73 N.J. Eq. 136, 67 A. 392 (1907).

Accordingly, a privacy tort approach to consumer profiling may be applicable when commercial appropriation of the plaintiff's likeness occurs. "Likeness" in this context may refer to the nonconsensual exploitation of the external indicia of identity.[31]

Decided tort cases in the Philippines mostly pertain to the "external identity" or the manifestations of personhood and physical interference from fault or negligence, such as the liability of registered owners in case of vehicular accidents.[32]

As explained earlier, consumer data profiling implicates a person's inner identity, which is more intimate than any physical interference or likeness.[33] Consumer data profiles "comprise an intimate reflection of identity and self than a mere name or picture."[34] These profiles replicate a person's identity and, when left unfettered, may result in unnerving precision that mimics an individual's core identity.

The privacy invasion resulting from consumer profiling is a consequence of aggregating personal information about an individual and attempting to create a composite that reflects the actual person. This is accomplished by applying sophisticated artificial intelligence modeling to the data to draw inferences about a person's thoughts, values, feelings, and beliefs. It is this nonconsensual conjunction of information and inferences that constitutes the unauthorized profiling of a person's identity.

The privacy tort approach may be a deterrent approach to nonconsensual consumer profiling. Data miners who collect and sell consumer data profiles should do so only with the consent of data consumers. Accordingly, when data is used for profiling purposes that go beyond what was initially consented to

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31 *Supra* note 15.

32 *Mendoza v. Spouses Gomez*, G.R. No. 160110, 18 June 2014.

33 *Supra* note 15.

34 *Id*.

by the consumer, a privacy violation takes place. This is tantamount to an actionable tort.

While the absence of consent is not explicitly delineated as an element in torts, there is no question that the presence of consent negates liability. Accordingly, data profilers only need to obtain the consent of profiling subjects. Yet, how can one fully consent to something that they have very little ability to control? The collection, analysis, and dissemination of data about them are mostly unknown yet widely ubiquitous.

It is noteworthy, however, that not all data collection warrants an actionable tort. The law then should focus on the point at which a data profile is sufficiently comprehensive to capture the plaintiff's identity and use it for purposes beyond his given consent. Hence, when consent is given for a specified purpose, the effect of such consent does not extend to all other purposes.

Online businesses often use the data collected from consenting consumers for multiple purposes, specifically to target more consumers in the future. This process is not specified to consumers who have initially consented to the profiling. When the processing for profiling has multiple purposes, consent should be given for all of them.[35]

Additionally, when data profilers use the "opt-out" option as implicit consent by the consumers, this should also account for commercial appropriation. "Opt-out is the mechanism that places the responsibility on consumers to inform businesses that they do not want their data shared. Without expressing such desire, companies can freely collect and profile an individual's personal data. In most cases, opt-out options are not openly available, and data consumers are often left without any alternatives.

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[35] Recital 32, GDPR.

The foregoing analyses are grounded on the presence of consent at each stage of consumer profiling. *Volenti non fit injuria* (to one who is willing, no wrong is done) is a common law principle at the core of the right to privacy. Consequently, nonconsensual profiling is an actionable privacy tort. This further shows how "consent permeates our law and our lives, especially in the digital context."[36]

V. CONCLUSION

In a data-driven economy where personal information is treated as a commodity, harnessing neglected tort provisions may be the most effective safeguard. The legal narrative has not sufficiently addressed the technical aspect of consumer profiling and its impact on data consumers.

The legal landscape is evolving to address the challenges posed by profiling, and other jurisdictions are recognizing the need to adapt legal frameworks to accommodate its unique aspects.

The nonconsensual commercial appropriation of data for consumer profiling should be considered an actionable privacy tort. Due to its broad application, Article 26 of the NCC pervades tort litigation, yet it remains a "decorative provision" that awaits to be tapped.

This essay has explored the evolution of privacy torts and how such an approach can be used in cases where legal ambiguities exist. It has also analyzed the application of torts in consumer profiling, revealing that the crux of this inquiry lies in its foundational role when rights are at issue in privacy and data protection.

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[36] Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 Washington University L. Rev. 1461 (2019).

Dissenting in *Olmstead v. United States,* Justice Brandeis acknowledged the need to apply the right to privacy in a broader scope, thereby highlighting the importance of updating laws to address the new intrusions to privacy.[37] He further articulated that the right to privacy is the "most comprehensive of rights since it encompasses not only bodily and material protection but also protection over one's feelings and thoughts."[38]

The eloquent prose in *Olmstead* extends to present times. Especially so when society is confronted with a technological proclivity that subtly intrudes on what is personal and valuable.

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37 *Olmstead v. United States*, 277 U.S. 438 (1928). [J. Brandeis, dissenting opinion].

38 *Id.* at 478.

MOBILE MOBILIZATION: EXPANDING THE EXERCISE OF THE CONSTITUTIONAL FREEDOMS OF ASSEMBLY AND ASSOCIATION TO DIGITAL SPACES

Atty. Joevel A. Bartolome[*]

INTRODUCTION

"Ignorant power is a bane!" This quote from Ursula Le Guin's *The Finder* illustrates a character's motivation for teaching a wizard to read. "Illiterate wizards are a curse," he would cry.

To wield power, oblivious to any failure or excess of its grant, is a bane to those subjected to it. Democratic systems are aware of this – and as a form of regaining balance over the disproportionation caused by power, every person became in possession of the right to express grievances and advocate reform as early as 1215.[1] This right to petition the government resulted in a consequent need for collective action.[2] As a democratic state, the Philippines followed suit and recognized "the right of the people peaceably to assemble and petition the government for a redress of grievances"[3] and "the right of the people … to form unions, associations, or societies."[4]

In early 2020, the onset of the COVID-19 pandemic resulted in the imposition of temporary restraints on the freedoms of association and assembly. Quarantine orders were rolled out across the country, with restrictions on movement and

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[1] Constitution Annotated. *Amdt1.10,1 Historical Background on Freedoms of Assembly and Petition*, citing 12 Encyclopedia of the Social Sciences 98, (1934).

[2] *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

[3] Constitution, Art. III, par. 4.

[4] Constitution, Art. III, par. 8.

prohibitions on gatherings as common elements.[5] In the face of these restrictions, face-to-face protests demanding sufficient government aid and protesting the loss of employment[6] have resulted in dismal arrests. The stakes grew even higher when then-President Rodrigo Duterte publicly warned leftist groups and quarantine violators that he would not hesitate to have them arrested, detained, and – if worse comes to worst – shot dead.[7]

This unprecedented situation begs the question – when physical proximity is taboo and gatherings are prohibited, how do communities gather and present a grievance? Filipinos were quick to respond. Calls for action were channeled through online petition platforms. Display pictures in support of various causes were blasted on social media. Forums, strikes, protests, and rallies were conducted online.

With the possibilities presented by technology, it is predictable for governments to introduce measures to protect the exercise of liberties online. It is conceded that Philippine lawmakers have made efforts to draft technology-savvy human rights measures, an example being the Cybercrime Prevention Act of 2012. However, the question of whether the freedoms of assembly and association (hereinafter "FoAA") extend to their exercise online remains a gap yet to be filled. Are all forms of collective actions instituted online covered by the protection of assembly? Are online groups considered protected associations? Is the Constitution, on its own, sufficient to protect the exercise of human rights online, or is there a need to introduce new legislation? These questions, and more, are what this study seeks to address.

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5 Inter-Agency Task Force for the Management of Emerging Infectious, Omnibus Guidelines on the Implementation of Community Quarantine in the Philippines, updated as of 23 September 2021.

6 Franco Luna, *20 arrested at protest in Quezon City during quarantine*, Philippine Star, 1 April 2020; *see also* Nick Aspinwall, *Jeepney Drivers Face Charges Amid Heightened Protest Crackdown in the Philippines*, The Diplomat, 12 June 2020.

7 Darryl John Esguerra, *Duterte warns left, troublemakers vs challenging gov't amid COVID-19 crisis: I will order you shot*, Philippine Daily Inquirer, 1 April 2020.

In light of our Constitution and the transition of freedoms from the streets to the screens, it is reasonable to ask whether what Filipinos do offline is protected when done online. To quote then-US Secretary of State Hillary Clinton: "Cyberspace, after all, is the public square of the 21st century."

CHAPTER ONE: IS THE EXERCISE OF FREEDOM OF ASSEMBLY ONLINE CONSTITUTIONALLY PROTECTED?

THE CONSTITUTION ON THE FREEDOM OF ASSEMBLY

The concept of freedom of assembly has been ingrained in the Philippine Constitution as early as 1935, which provides that "no law shall be passed abridging... the right of the people peaceably to assemble…" The 1973 Constitution and our current framework under Article III, Section 4 of the 1987 Constitution carry on the same set of words. The records of the 1986 Constitutional Commission show that the drafters intended to retain the wordings used in previous Constitutions and to approve the provision as is.[8] Needless to say, the continued acceptance of the aforecited provision by Filipino lawmakers has not provided an opportunity to clearly understand the concept of "assembly" protected by our Constitution.

The provision on freedom of assembly in the Philippine Constitution is a replica of the First Amendment to the United States Constitution. Therefore, we turn to the deliberations of the U.S. Constitutional Commission to clarify the matter.

Based on its jurisprudence, the U.S. considered the right of assembly as an offshoot of the right to petition. The U.S. stated that the right of assembly "is, and always has been, one of the attributes of citizenship under a free government" and that it protects a distinct interest in "holding meetings for peaceable political action."[9] In implementing this provision, the U.S. has

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8 2 Record of the Constitutional Commission, Proceedings and Debates (1986).

9 *Supra* note 2.

taken a rather flexible approach to what it considers a legitimate exercise of the right to assemble. Such consideration has been extended to marches and encampments that request higher wages and benefits, and express grievances regarding public affairs, and union concerns, provided they are not obscene, insulting, or a threat to the Constitution.

PROTECTED "ASSEMBLIES" UNDER PHILIPPINE JURISPRUDENCE

First and foremost, it is important to distinguish between assemblies conducted before the implementation of the Public Assembly Act of 1995 ("PAA") and thereafter. Furthermore, it should be noted that while the PAA was enacted before the 1987 Constitution, it remains the authoritative legislation concerning public assemblies as of writing.

Before PAA, the following activities were recognized as legitimate exercises of the constitutional right to peaceable assembly:

- Gathering of residents to demand the dismissal from office of a municipal officer;[10]
- Conduct of a certification election in the case of labor organizations;[11] and
- Formation of organizations, associations, clubs, committees, or other groups of persons to solicit votes, promote a campaign or propaganda, or advocate for political reforms.[12]

Based on the above-mentioned, it can be inferred that the Supreme Court does not require a specific mode or method of assembling, as it recognizes that assembly can take various forms.

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10 *U.S. v. Filomeno Apurado*, G.R. No. L-1210, 7 February 1907.

11 *Plum Federation of Industrial and Agrarian Workers v. Carmelo Noriel*, G.R. No. L-48007, 15 December 1982.

12 In re: Constitutionality of R.A. No. 4880, *Gonzales v. COMELEC*, G.R. No. L-27833, 18 April 1969.

However, there are common elements required for an activity to be considered an "assembly" protected by the Constitution. These elements are: *a*) the gathering of a group of people; *b*) for a lawful and common cause; and *c*) conducted peacefully.

In 1985, the PAA was enacted with the goal of ensuring the free exercise of the right to assembly. Such law defines public assemblies as "any rally, demonstration, march, parade, procession or any other form of mass or concerted action held in a public place to present a lawful cause; or expressing an opinion to the general public on any particular issue; or protesting or influencing any state of affairs whether political, economic or social; or petitioning the government for redress of grievances."[13] The law expressly excludes from its application religious assemblies, concerted actions arising from labor disputes, and political meetings or rallies during the election campaign period, which it leaves for other agencies to regulate. Moreover, it establishes the national policy of "no permit, no rally" and authorizes peacekeeping authorities to forcibly disperse assemblies found detrimental to public order, public safety, and national security.

Questions arise: must all other assemblies not specifically excluded, to be covered by the right to peaceful assembly, be public? And consequently, must these assemblies, to be characterized as "peaceful," conform with the legal requirements imposed by the PAA?

The 2006 case of *Bayan, et al. v. Executive Secretary Ermita* provides clarity. In this case, the petitioners, composed of protesters and grassroots activists, questioned the constitutionality of the PAA on the grounds that it is an absolute ban on public assemblies.

The Supreme Court ruled that while the PAA refers to all kinds of public assemblies, it does not cover all kinds of gatherings. A reading of the rationale shows that the application

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[13] The Public Assembly Act of 1985, Sec. 3(a).

of the PAA must be limited to "public assemblies" or events that satisfy the following requirements: *a*) assemblies that come in the form of mass or concerted activity; *b*) organized by a body or a group of people with common interests or characteristics; *c*) held in a public place other than a freedom park; and *d*) not about religious purposes, labor disputes, or political activity during the election campaign period. In drafting the PAA, our lawmakers recognized that the "right of the people peaceably to assemble" under the Constitution is broad in the sense that it contemplates both public and – for the lack of a better description – "private assemblies" or those gatherings that fail to satisfy the requirements of a public assembly. It is only reasonable to conclude that what the PAA aims to provide standards for are peaceful, public assemblies only.

The *Bayan* case further explains that the permit requirement is not a prior restraint directed at the right to assemble *per se*. Rather, it is a content-neutral regulation that seeks to regulate the use of public places as to the time, place, and manner of assemblies.

In sum, assemblies in general require only the presence of several people, a lawful, common cause, and peaceful conduct to be constitutionally protected. Once an assembly falls within the definition of "public assemblies," a written permit from the mayor or any official acting on his behalf becomes an additional requirement to make the conduct of such a public assembly valid under the PAA.

"ASSEMBLIES" IN THE ONLINE SPHERE

The Internet has revolutionized human-to-human interaction. This "revolution" has manifested itself through tens and hundreds of online groups and social networks that have become venues for connecting people with common interests and, eventually, for expressing, promoting, and defending these interests.

The question now sought to be answered is whether certain prominent Internet or social media activities – specifically electronic petitions (e-petitions), hashtag activism, and digital striking – are extended the same protection against unlawful curtailment.

For purposes of this discussion, the above-mentioned activities will not be subjected to the permit requirement as provided under the PAA. The PAA only applies to assemblies held in a "public place", which is restrictively defined as "any highway, boulevard, avenue, road, street, bridge or other thoroughfares, park plaza, square, and/or any open space of public ownership where the people are allowed access."[14] We can assume from this definition that the law only considers tangible spaces that are government-owned or open for public use. In contrast, online entities are intangible digital spaces owned by a handful of private companies. Therefore, they cannot be considered "public places" covered by the PAA.

Thus, less stringent requirements of "assemblies" under the 1987 Constitution will be observed. They are reiterated as follows:

1. There has been a gathering of a group of people;
2. It was for purposes of a lawful, common cause;
3. It is conducted peacefully; and
4. Given the uniqueness of the online sphere, an additional requisite - the gathering or any of its stages is conducted on the Internet or using Information and Communications Technology (ICT).

Freedom of assembly through e-petitions

In the early 1990s, people realized that technology had the potential to go beyond mere communication and that it could be used to educate the public regarding pressing social issues and to get the attention of authorities to address concerns and

14 *Supra* note 13, Section 3(b).

suggestions that could influence company regulations, institutional policies, and even legislation. Thus, perhaps the oldest form of online activity related to the freedom of assembly is introduced: the conducting of petitions through online platforms.

Academic researcher Helen Briassoulis summarized how e-petitions come to fruition. Initially, there must be an issue that requires the intervention of the general public. Thereafter, an initiator launches a petition on an online platform and receives signatures over a specific period. When the electronic petition "closes," the number of signatures it received would illustrate its overall appeal, and if successful, would urge the state or private individual being addressed to respond.[15]

Arguably, the most popular site that hosts e-petition is Change.org, having received a total of 673,668,876 signatures worldwide, with 41,000 campaigns launched monthly in 2019.[16] Under the topic "Philippines," the site has hosted 106 petitions covering topics such as human rights, politics, health, environment, education, and culture. One of the most successful Filipino-centric petitions was led by Adrian Lajara in 2015, which requested action against the plan of the Bureau of Customs to impose tighter restrictions on the inspection and taxation of *balikbayan* boxes. Upon reaching 85,950 signatures, the late Senator Miriam Defensor Santiago responded by filing a resolution to call for an inquiry on the matter.[17] Thereafter, the response of public authorities to the signatories' clamor halted the arbitrary inspection of *balikbayan* boxes.

Based on the nature, purpose, and method by which e-petitions are accomplished, they can fall under the category of

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15 Helen Briassoulis, *Becoming E-Petition: An Assemblage-Based Framework for Analysis and Research* (2021).

16 Change.org, *Impact Report* (2019).

17 Change.org., STOP Philippine Customs to Impose Tighter Rules for Balikbayan Boxes, 2015, <https://www.change.org/p/miriam-defensor-santiago-stop-philippine-customs-to-impose-tighter-rules-for-balikbayan-boxes> (visited 2 February 2023).

"assemblies" protected by the Constitution: 1) hundreds to thousands of people or "signatories" gather in one location for a specific activity; 2) the gathering is for the lawful cause of expressing a common grievance or promoting a common cause; 3) the gathering is conducted through peaceful signature-taking, guaranteed by website community policies and content moderation; and 4) the gathering engages the use of ICT instruments (computers, the Internet, etc.) and all of its stages are hosted by an online platform.

Freedom of assembly through hashtag activism

By 2007, digital activism would have a new face through the pound symbol (#).

Chris Messina, an open-source advocate, developed a detailed suggestion to use the pound sign to categorize real-time messages and content posted on the social media site Twitter (now "X"). Although the Twitter founders weren't initially fond of the idea, a user used the "#sandiegofires" tag to accompany his live updates regarding the 2007 San Diego Forest Fires. Eventually, the concept of hashtags gained traction as other users tracked the hashtag for updates and used it to post their tweets on the matter. Its popularity and impact have resulted in other social media giants Facebook and Instagram ultimately adopting hashtags as a content management tool.

More than a content management tool, hashtags have birthed a new method of activism. Since they are ephemeral, hashtags have become a mode for technologically savvy individuals to find like-minded people, share bite-sized information, and raise awareness on specific issues and struggles. Deen Freelon, a political communication expert, identifies hashtag activism as "the consistent and unified use of linguistic cues and symbols, including hashtags, that project a sense of solidarity, coherence, and social presence."[18]

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[18] Deen Freelon, et al, *Quantifying the power and consequences of social media protest. New Media and Society* (2018).

The prevalence of hashtag activism in the Philippines is undeniable. Illustrative is the extensive list of hashtags created during the COVID-19 pandemic, with calls for #StayHomeStaySafe, #FlattenTheCurve, #SocialDistancing, and #ReliefPH at the forefront of trending topics in the country, creating multiple threads of sentiments, complaints, and even calls for donations.

Further, hashtags have become instrumental in the Philippines's May 2022 General Elections. Politician camps, as well as supporters in their individual capacities, have used hashtags to conduct information drives, extend invitations to campaign sorties, and engage public support. This generated a total of 1,203,204 tweets, quote retweets, and replies, and 72,202 valid unique hashtags on X for a period of seven months (October 2021 to April 2022).[19]

Hashtag activism is protected by the constitutional right to assemble. The following elements of "assemblies" are met: *a*) social media users have gathered under one hashtag or thread; *b*) the gathering was to campaign for political or social change; *c*) the gathering is conducted through posting, retweeting, or requoting of tweets and replies, with the same being subjected to community rules on safety, privacy, authenticity, and more; and *d*) all the stages of the gathering are conducted on social media sites employing the use of hashtags.

At its core, activism stems from the freedoms of expression and assembly. Hence, hashtag activism, as a translation of traditional activism in the online sphere, must not be treated differently and must be accorded the same, or – considering the speed and volume of its conduct – an even higher level of protection.

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[19] Briane Paul Samson, *Hashtag wars: Opposing trends on Twitter show online coordination strategies between Marcos, Robredo supporters,* Rappler, 8 May 2022.

Freedom of assembly through digital striking

By 2020, the entire world had shifted as the COVID-19 outbreak became a public health emergency. Naturally, the masses' course of action would be to exercise their freedom of assembly and take their concerns to the streets, but fear of sickness and the risk of arrest rendered physical demonstrations impossible.

Climate activist Greta Thunberg coined the term "digital striking" in 2019 to encourage hybrid participation in Fridays for Future's movement against climate change. The phrase, however, only gained traction during the COVID-19 pandemic. When participating in digital strikes, all that is required is an Internet connection and a social media account. As a result, it has become an alternative way for people to express their concerns and complaints without physical interaction and while following strict stay-at-home orders from the government.

Since digital striking is still in its early stages, it has no fixed method and the activities depend on its lead convenors and participants. The strike can come in the form of posting a photo with signs requesting action or a campaign slogan, using hashtags on social media, mass sharing of graphics, memes, and unity statements, video meetings, online polls, and even the posting of colored overlays to emulate a digital "blackout."

While digital striking initially thrived around environmental circles only, it has also been adopted by labor groups to invoke their right to strike. It is thus reasonably expected to extend to other cause-oriented groups and communities in the coming years.

Digital strikes, when subjected to the requirements for protected "assemblies," fulfill the same: *a*) a group of people, mostly from the same organizations, come together; *b*) their gatherings are in pursuance of organization-based causes, which are often environmental, labor-related, or human rights; *c*) the gathering is conducted through various modes of social media

interactions, with no record of violence, harm, and sedition; and *d*) depending on the type of strike, all or some stages are conducted online.

CHAPTER TWO: IS THE EXERCISE OF FREEDOM OF ASSOCIATION ONLINE CONSTITUTIONALLY PROTECTED?

THE CONSTITUTION ON THE FREEDOM OF ASSOCIATION

Much like the freedom of assembly, the freedom of association has been recognized as an integral right under the 1935 Philippine Constitution. The original provision reads: "The right to form associations or societies for purposes not contrary to law shall not be abridged." The exact wording was carried over under the 1973 Constitution, with an additional provision under a separate article recognizing the right to self-organize in the labor sector.

Unlike the freedom of assembly, the freedom of association is an indigenous constitutional precept. The phraseology used in the 1935 and 1973 Constitutions was based on the proposal of the 1934 Constitutional Convention delegate, Jose P. Laurel.[20] Laurel's proposal was approved upon the view of the Constitutional Convention that the instinct to associate is a basic human drive deserving of a separate provision that guarantees its protection.[21]

Moreover, the provision on association in the 1987 Constitution is not a verbatim copy of the original provision. The deliberations of the 1986 Constitutional Commission[22] reveal an

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20 Joaquin Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary (2009), citing the Journal of the Constitutional Convention of the Philippines (1934).

21 *Id.*

22 *Supra* note 8.

attempt to create a more detailed provision, as the previous provision had been subject to misinterpretations. Member Eulogio Lerum highlighted the contradictions between the Constitution and statutes:

> In the Bill of Rights of the 1935 and 1973 Constitutions, there is a provision that the right to form associations whose purpose is not contrary to law may not be abridged. And yet, in the Labor Code, there is such a provision which prohibits government employees from forming unions; another provision which says that managerial employees and security guards cannot form unions.

Upon careful consideration, the amended provision under Article III, Section 8 of the 1987 Constitution now reads: "The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged." Two notable changes have been made. Firstly, the word "union" was added due to the growing number of unionized workers in the country and the recognition of labor organizations' right to self-organize under the 1973 Constitution. Secondly, the qualifying phrase "including those employed in the public and private sectors" affirmed the eligibility of government employees for union membership.

In addition to the provision mentioned above, the right to association appears two more times in the 1987 Constitution – Article XIII, Section 3 provides for the right to self-organize to achieve favorable working conditions, and Article IX-B, Section 2(5) extends the right to self-organization (but not the right to strike) to government employees, whether performing public or proprietary functions. The multiple iterations of the right to association serve as the Commission's attempt to strengthen human rights and to advocate social justice in the Constitution.

PROTECTED "ASSOCIATIONS" UNDER PHILIPPINE JURISPRUDENCE

The following groups have been recognized as having exercised their constitutional right to form "associations" by the Philippine courts:

- Labor unions[23]
- Lesbian, Gay, Bisexual, Transgender + communities[24]
- Political parties[25]
- The Integrated Bar of the Philippines (IBP)[26]

The examples cited above demonstrate that the freedom of association under the Constitution allows for groups organized for a variety of purposes, including but not limited to those organized for unionizing, advocating special interests, recreation, and exercising profession. The only limitation to the right of association is the phrase "purposes not contrary to law" attached to the constitutional provision.

It should likewise be noted that a group's right to form associations does not automatically grant it legal personality. The 1969 case of the *Philippine Association of Free Labor Unions (PAFLU) v. the Secretary of Labor*[27] established the key difference between the two concepts: the act of registration. In that case, the constitutionality of Section 23 of R.A. No. 875 requiring registration of labor groups was challenged as violative of the right to association.

The Supreme Court upheld the constitutionality of the provision, ruling that registration did not limit the right of association; rather, registration is imposed merely as "a *condition sine qua non* for the acquisition of legal personality … and the

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23 *Victoriano v. Elizalde Rope Workers Union*, G.R. No. L-25246, 12 September 1974.

24 *PAFLU v. Secretary of Labor*, G.R. No. L-22228, 27 February 1969.

25 *Supra* note 12.

26 *In the matter of the Integration of the Bar of the Philippines*, 151 Phil. 132 (1973).

27 *Supra* note 24.

possession of the 'rights and privileges granted by law to legitimate labor organizations'." In effect, a labor group's constitutional right to association is guaranteed without the need for registration. However, to engage its statutory right to be protected against possible abuses and fraud employed by its employer or non-union entities, the group must register and comply with R.A. No. 875.

While R.A. No. 875 has been repealed by P.D. No. 442 or the Labor Code of the Philippines, the latter still requires labor organizations, associations, or groups of workers to register to acquire legal personality. The principle of requiring registration for an association to acquire legal personality is also observed by R.A. No. 9904 for Homeowners' Associations and by the regulations of the Securities and Exchange Commission for self-regulatory organizations and corporations.

To summarize, a review of Philippine jurisprudence reveals that the only requirement for an association to be constitutionally protected is that it pursues a lawful purpose.

MCBRIDE'S CRITERIA FOR "ASSOCIATIONS"

Due to the insufficiency of the standards set out by the Constitution and jurisprudence, a relevant study defining "associations" is looked into.

Publicist Jeremy McBride found it essential to create standards by which gatherings protected by freedom of association can be distinguished from those protected by the freedom of assembly. Therefore, McBride formulated three criteria to determine what constitutes "associations":[28]

a. A group pursues a defined aim;
b. Its existence has a "stability of duration" or a level of permanence;

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[28] Jeremy McBride, International Law on Freedom of Association. *Enabling Civil Society*, pg. 10, 2003.; *see also* Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association* (2003).

c. It has an institutional structure that gives persons comprising it a sense of belonging.

To lend this study structure, the aforecited standards, in conjunction with the standards outlined in the Constitution, will be used in determining protected associations under this study.

"ASSOCIATIONS" IN THE ONLINE SPHERE

The prominence of the Internet and social media platforms has influenced the exercise of the freedom of association in the same way it has affected the freedom of assembly. The invention of email, chat rooms, and discussion boards, as well as social media sites, has afforded individuals the opportunity to create groups with people from all sorts of geographical backgrounds, ranging from tens to millions of members. These groups can be created to foster similar interests, discuss current events, advocate for policy changes or political candidates, or simply make friends.

Since "social media groups," "social networks," and "online communities" are quite similar and only differ in terms of their platforms, they shall be lumped together as "online groups" and will be considered a singular phenomenon.

Online groups will be subject to the McBride criteria and the "purposes not contrary to law" qualification of Article III, Section 8 of the Constitution. In sum, a constitutionally protected "association" must meet the following:

a. A group must pursue a lawful, defined aim;
b. It possesses some "stability of duration" or a level of permanence;
c. It has a formal or informal institutional structure that provides members with a sense of belonging; and
d. In contemplation of being "online" – it is created and exists on a social media platform or anywhere on the Internet.

For purposes of attaining more concrete discussion, the online groups that will be the subject of deliberation are those that exist through the more conventional "Facebook Groups" feature.

Freedom of association through online groups

Activities reminiscent of "associations" existed on the Internet as early as the 1980s. The first "online community" came in the form of real-time online chat groups hosted on sites such as CB Simulator, Internet Relay Chat, and America Online. Online communities later evolved into email lists, multiplayer online games, commercial online services, web-based communities, and eventually, social networks. To date, the most popular social network hosting a "group" feature is Facebook, which introduced the same in its user interface in 2010.

During the COVID-19 pandemic, Facebook Groups served as a platform for sharing community resources, buying and selling items, providing information on donation drives, and more. It is thus necessary to assess whether these communities are merely loose groups or protected "associations."

A scrutiny of its general features shows that Facebook Groups can fall within the purview of protected "associations" under our Constitution. The convergence of the elements is illustrated by the following:

a. Lawful, defined aims - Facebook's current framework shows that a group can be created for any interest or purpose, subject only to its community standards that prohibit violent and criminal behavior, exploitation, bullying and harassment, hate speech, nudity, solicitation of sexual favors, and misinformation.

b. Stability of duration - Facebook Groups can last as long as its administrators keep them online and as long as they comply with community standards. Further, a case study

conducted by the Governance Lab[29] revealed that as of 2020, 1.8 billion people have been using Facebook Groups monthly; with more than half of all Facebook users becoming members of five or more active groups. The figures presented here serve as evidence of the widespread acceptance and durability of online communities.

c. Structure and sense of belonging - Facebook Groups are structured in a way that there is a hierarchy of management divided between two types of roles: moderators and administrators. Moderators can approve or deny membership, posts, and comments. Meanwhile, administrators have the same authority, as well as the extended power to appoint other administrators or moderators and to control the group's privacy settings.

   Moreover, the sense of belonging among members can be determined by the length of their membership in the group and the frequency of their participation. The Governance Lab's case study also found that upon surveying 15,000 Facebook users across 15 countries, 45.60% considered a primarily online group as the most important group to which they belonged, and 35.68% voted for an online-offline group. This shows that Facebook Groups have "provided their members with a strong sense of community and belonging, despite not operating in physical space."[30]

d. Existence on a social media platform or the *Internet* - Facebook Groups are created on the social media site Facebook. These groups can hold their activities solely on the site, or partially by using the features of Facebook Groups to organize and plan their in-person activities.

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29 Beth Simone Noveck, *The Power of Virtual Communitie*s. The Governance Lab (February 2021).

30 *Id.*

In any event, should any specific Facebook Group not satisfy the above-mentioned criterion, there remains the emerging concept of "informal associations" or groups that lack established organizational structures and decision-making procedures. Informal associations contemplate groups spontaneously or voluntarily formed by individuals without having had the opportunity or the intention to institutionalize and continue the association for a long period. Compared to formal associations, these informal associations evolve from the natural needs of humans to interact and are motivated by friendships and personal relationships.[31]

International politics professor Toni Erskine proposes that membership in an informal association allows individuals to become capable of joining purposive action to "address injustices and respond to crises in ways that far surpass what they could achieve if acting on their own," citing "international society," "epistemic communities," "transnational advocacy networks," "communities of practice" and even the collective phrase "the Internet" as examples of informal associations.[32]

In any event, it is posited that online groups that may not meet the criteria for "associations" can still be protected under the Constitution. Since assembly and association are closely related concepts, associations that do not meet the specific requirements for stability of duration, structure, and sense of belongingness can still claim protection under the broader concept of freedom of assembly, as discussed in Chapter One of this study.

CHAPTER THREE: WHAT STANDARDS MUST BE MET TO VALIDLY REGULATE FoAA ONLINE?

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31 Wayne Hoy, *Formal and Informal Organization*, (2018).

32 Toni Erskine, *Coalitions of the Willing and Responsibilities to Protect: Informal Associations, Enhanced Capacities, and Shared Moral Burdens*. Ethics & International Affairs, Cambridge University Press (2014).

STANDARDS FOR THE REGULATION OF FoAA ONLINE

The pronouncement of the Supreme Court in the 1970 case of *Imbong v. Ferrer* bears echoing: "[T]he guarantees of … peaceful assembly … and the right of association are neither absolute nor illimitable rights; they are always subject to the pervasive and dormant police power of the State and may be lawfully abridged to serve appropriate and important public interests."[33] Hence, it is evident that FoAA, in any form it may take, may be regulated when there is a necessity to protect the enjoyment of other people's and the community's rights.

However, it is emphasized that there are no laws at present that address the exercise of FoAA online.

This legislative gap creates the presumption that our legislators may soon create regulations for the conduct of peaceable assemblies in the online sphere. Therefore, it is imperative that our jurisprudence, which discusses the basic principles of allowable restrictions on the FoAA, be examined for guidance.

Clear and present danger test

In 1983, the Supreme Court had to decide on reasonable regulations on the freedom of assembly through the case *JBL Reyes v. Bagatsing*. The case arose when retired Justice Reyes filed a suit for mandamus on behalf of the Anti-Bases Coalition, alleging that Manila City Mayor Ramon Bagatsing unjustly denied the organization's request for a permit to hold a peaceful march and rally. Bagatsing alleged that he received police intelligence reports confirming the plans of subversive or criminal elements to infiltrate or disrupt an assembly attended by a large number of people.

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[33] *Imbong v. Ferrer*, G.R. No. L-32432, 11 September 1970.

The Court ruled for the petitioner and stated that the freedom of assembly must be accorded the utmost deference and respect. Accordingly, any refusal or modification to its exercise must meet the "clear and present danger test" and the permit applicants must be granted the opportunity to be heard.[34] Clear and present danger refers to objective and convincing proof of a substantive evil that the state has the right to prevent, which is further measurable by proximity and degree. The mere assertion of harm, as was in this case, does not suffice.

The fact that the clear and present danger test is the standard for the valid exercise of police power against the freedom of assembly is affirmed by its codification in the PAA. The PAA provides that a permit may only be denied if the public assembly will create a clear and present danger to public order, public safety, public convenience, public morals, or public health[35] or create an imminent and grave danger of a substantive evil.[36]

The clear and present danger test was also found to be the applicable test when assessing restrictions against the freedom of assembly. The Supreme Court, while deciding on the constitutionality of R.A. No. 4880 or the Revised Election Code in the case of *Gonzales and Cabigao v. COMELEC*, posited that the phrase "purposes contrary to law" concerning the constitutional right to form associations is another way of expressing the clear and present danger rule. They stated that "unless an association or society could be shown to create an imminent danger to public safety, there is no justification for abridging the right to form association societies."[37]

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34 *Reyes v. Bagatsing*, G.R. No. L-65366, 9 November 1983.

35 *Supra* note 13, Section 6(a).

36 *Id.*

37 *Supra* note 12.

Strict scrutiny test

The Supreme Court had an encounter with the exercise of FoAA online in the 2021 case of *Calleja v. Executive Secretary*[38] and applied the strict scrutiny test to determine whether the challenged provisions are permissible restrictions on the FoAA.

The petitioners in the *Calleja* case consist of members of partylists, members of Congress, members of socio-civic and non-governmental organizations, members of Indigenous Peoples' groups, journalists, taxpayers, voters, IBP members, students, and academics. Their consolidated petitions challenged the constitutionality of several provisions of R.A. No. 11479 or The Anti-Terrorism Act of 2020 ("ATA"). Particularly relevant is Section 10 on recruitment to and membership in a terrorist organization, which was alleged to violate the FoAA for being vague and broadly worded.

The petitioners alleged that, through Section 10, the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC) had erroneously identified some organizations as Communist Party of the Philippines (CPP) and the New People's Army (NPA) sympathizers based on their social media accounts. This is noteworthy since the Journal of the House of Representatives shows that legislators involved in the drafting of the ATA made note of the effect of social media in allegedly propagating violent ideology, distorted beliefs, and influencing persons to commit terrorist acts.[39]

The assailed provision states the following instances of prohibited membership:

> **Section 10.** Recruitment to and Membership in a Terrorist Organization.
> xxx Any person who shall voluntarily and knowingly join any organization,

[38] *Calleja v. Executive Secretary*, G.R. No. 252578, 7 December 2021.

[39] H. Journal No. 59, at 34, 18th Cong., 1st Reg. Sess. (1-5 June 2020).

> association, or group of persons knowing that such organization, association or group of persons is 1) proscribed under Section 26 of this Act, or 2) designated by the United Nations Security Council as a terrorist organization, or 3) organized for the purpose of engaging in terrorism, shall suffer the penalty of imprisonment of twelve (12) years.[40] (Enumeration supplied for clarity)

The Court found no reason to declare unconstitutional the first and second phrases. However, the justices debated the sufficiency of the third phrase before holding it constitutional in a 6-9 vote, with Chief Justice Alexander Gesmundo delivering the controlling opinion.

Despite the ultimate ruling that Section 10 is constitutional in its entirety, the opinion of the *ponente*, Associate Justice Rosmari Carandang, is worth noting. She cited that since FoAA are fundamental rights, the "strict scrutiny test" must apply. Any phrase used to restrict the FoAA has to be subjected to the highest standard and must show the concurrence of two elements: *a*) that it is necessary to achieve a compelling state interest, and *b*) that it employs the least restrictive means to accomplish such an interest. Carandang, together with five other justices, found the phrase "organized for the purpose of engaging in terrorism" as not having met the second requisite, for the legislature failed to show apparent standards or parameters to determine whether a group is indeed organized to engage in terrorism, thus endangering innocent and protected associations.[41] This observation recognized that the concept of creating a "chilling effect" is not limited to free speech cases but extends to related rights such as FoAA.

It is evident from the discussions in *Reyes, Bayan, Gonzales,* and *Calleja* cases that the Supreme Court considers FoAA a fundamental right subject to regulation to prevent abuse in

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40 The Anti-Terrorism Act of 2020, Section 10, par. 3.

41 *Supra* note 38.

assemblies and associations used for illegality, terrorism, and other extremes. However, any legislation affecting FoAA must satisfy the stringent requisites of the clear and present danger test and the strict scrutiny test. Any provision found vague or overbroad that impinges on innocent, legitimate, and protected assemblies and associations can have its constitutionality challenged and be pronounced void.

CONCLUSION / RECOMMENDATIONS

Article III, Sections 4 and 8 of the 1987 Constitution do not attempt to cast "assemblies" and "associations" into a singular concept. Rather, the words used were chosen with the consciousness that "assemblies" and "associations" take various forms and may evolve. The pronouncements of the Supreme Court likewise affirm the idea that there is no need for observance of a specific, narrow form to come within the shield of FoAA, provided that the purpose pursued is not contrary to law. Upon inspection of the more popular forms of online activities, it can be concluded that the protection afforded by Article III, Sections 4 and 8 extend to activities equivalent or analogous to FoAA conducted through technological means and on the Internet.

The current legislative requirements on FoAA are also found to be outdated. The permit requirement imposed by the PAA applies solely to assemblies that require physical presence in a public space and does not contemplate a digital one. On the other hand, the registration requirements for associations are clarified to be for the purpose of acquiring legal personality only. Hence, there is a glaring gap in legislation concerning FoAA when the rights are exercised digitally.

There is a growing need to forge forward-looking laws or guidelines on online activities to guarantee the effective exercise of these rights in the digital sphere and prevent arbitrary restrictions. These laws and guidelines must take note of the unique characteristics of the Internet and social media. They must allow for extraterritorial application, as the Internet and social media transcend geographical boundaries. They must strictly

define the roles of persons interacting on the Internet and their consequent liabilities in case of any violation. Lastly, they must consider the ephemeral nature of online activities.

As set out by jurisprudential precedents, these laws or guidelines must not have the effect of subjecting FoAA to prior restraint and must surpass both the clear-and-present danger test and the strict scrutiny test to be valid.

For enforcement purposes, it is significant for the government to create close relations with social media providers. By collaborating with them, the government can ensure that the community guidelines provided by these social media sites align with domestic laws and regulations.

To ensure that the effective exercise of human rights is the primary focus of the law, civil society organizations and the Commission on Human Rights must participate in the creation and subsequent enforcement of the law. To address the peculiarities of the Internet and ICT, the Department of Information and Communications Technology must also be consulted. Moreover, it is recommended that the criminal aspect of the proposed law on the online exercise of FoAA align with the provisions and implementing rules and regulations of the Cybercrime Prevention Act, specifically on enforcement and implementation. Consistent with the said Act, the cybercrime units of the National Bureau of Investigation and the Philippine National Police shall be involved in law enforcement. Similar to the current practice, these law enforcement agencies must handle FoAA online with "maximum tolerance" or the highest degree of restraint.

Technology, the Internet, and social media have all become a part of the Philippines's social and political landscape. Their importance is emphasized by the fact that they have become the new ground for the exercise of existing human rights and have birthed new ones. Thus, to ensure that human rights are granted the respect they deserve regardless of the form they take on, they must be recognized, studied, and advocated for.

FROM HAZING TO HARMONY: THE POTENTIAL OF THE LAW TO TRANSFORM INITIATION RITES IN THE PHILIPPINES

Jose Adrian Miguel P. Maestral[*]

Humans are social beings who crave connection and belonging. Even our national heroes joined or formed groups with people who shared a common goal. Joining a club or organization is a common way for many youths to satisfy their social and emotional needs, as well as to develop their camaraderie, competence, and a sense of belongingness.

However, a notorious issue plagues fraternities and sororities: the fatal initiation rites.

In the 1950s-1990s alone, the initiation rites of fraternities have claimed the lives of 17 victims, with the death of the Atenean neophyte Leonardo Villa on 10 February 1991 as a result of the initiation rites of Aquila Legis. This became the turning point that led to the passage of the Anti-Hazing Act of 1995.[1]

In the 2000s, there were an estimated 24 deaths as a result of hazing. During the implementation of the Anti-Hazing Act of 1995, all cases for violations of this Act have been dismissed until the death of Alpha Phi Omega neophyte Marlon Villanueva on 14 January 2006, a student of the University of the Philippines Los Baños in Laguna. Two Alpha Phi Omega members were sentenced to *reclusion perpetua* in a 2015 decision.[2] This was the

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[*] A 2nd year law student at the University of St. La Salle — College of Law. Writing is not new to him as he has experience writing for various publications during his college days. As a boy, he would write down short stories after reading many others, benchmarking ideas and incorporating his own versions. He has also contributed to the USLS Law Journal in the previous volume.

[1] An Act Regulating Hazing and Other Forms of Initiation Rites in Fraternities, Sororities, and Organizations and Providing Penalties Therefor, Republic Act No. 8049 (1995).

[2] *Dungo v. People*, G.R. No. 209464, 1 July 2015.

first and the only case of fraternity members convicted for violation of the Anti-Hazing Act of 1995.

To play it safe, families and lawyers of the hazing victims charge the accused persons with homicide as in the case of the military hazing of Edward Domingo on 10 March 2001 where two cadets of the Philippine Military Academy in Baguio were convicted of homicide by the Baguio City Regional Trial Court. This was the first time a civilian court convicted cadets of the Philippine Military Academy.

From 2010-2019, a total of 15 deaths related to hazing have been recorded. One of these was the death of Tau Gamma Phi neophyte Guillo Cesar Servando, the late nephew of Lasallian brother, Bro. Bong Servando.[3]

From 2020-2023, there are a record of 12 deaths with the 3 most recent victims who were all Tau Gamma Phi neophytes. In fact, the statistics show that most of these reported deaths were victims of the Tau Gamma Phi initiation rites. The Tau Gamma Phi Cebu City Chapter has vowed to abolish paddling or any fraternity-related violence in their initiation rites. Roniel Telebangco, Chairman of Tau Gamma Phi Cebu City Council said during the Open Line News Forum on 21 March 2023 that they will amend their initiation practices following the alleged involvement of members of the Tau Gamma Phi fraternity in the deaths of Adamson University student John Matthew Salilig and University of Cebu-Maritime Education and Training Center student Ronnel Masamoc Baguio.[4]

This fraternity-related violence of inducting recruits into the brotherhood has persisted despite the implementation of the

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3 Marlon Ramos, *Court Orders Trial of 5 Accused in Fatal Hazing of Benilde Student,* Philippine Daily Inquirer, 10 June 2018, <https://newsinfo.inquirer.net/999334/guillo-cesar-servando-fatal-hazing-tau-gamma-phi> (visited 9 January 2024).

4 K.J. Fuentes, *Tau Gamma Phi vows to abolish hazing*. SunStar, 22 March 2023, <https://www.sunstar.com.ph/amp/story/cebu/local-news/tau-gamma-phi-vows-to-abolish-hazing> (visited 9 January 2024).

Anti-Hazing Act of 1995. Seeing that the law proved to be ineffective, former Senator Panfilo "Ping" Lacson authored and sponsored Senate Bill No. 1662 which is known as the Anti-Hazing Act of 2018.[5] It is said that this new law amending the former law shall widen the coverage of hazing to include paddling, whipping, beating, branding, forced calisthenics, exposure to the weather, forced consumption of food, liquor, beverage, drug, and other substance, as well as any other brutal treatment or forced physical activity which would likely adverse the physical and psychological health of the recruit, member, neophyte or applicant. This new law defines hazing as any physical or psychological suffering, harm or injury inflicted on a recruit, member, neophyte or applicant for admission or continuing membership into the fraternity, sorority or organization.[6] Senator Sherwin Gatchalian further explained that compared to the former law, the new anti-hazing law shall not only closely monitor initiation rites but will also prevent hazing once and for all.

As a result, the law against hazing has gained more teeth in creating preventive measures against hazing or any form of abusive initiation rites. The new law has also clearly emphasized that in no case shall hazing be made a requirement for employment in any business or corporation.[7] The new law has become strict that even the two (2) representatives assigned to monitor the initiation rites of these fraternities or sororities can be held liable should they fail to prevent or report such incidents to the authorities.[8]

In the regulation of school-based initiation rites, the organization shall submit a written application to conduct the activity not later than seven (7) days prior to the scheduled date

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5 An Act Prohibiting Hazing and Other Forms of Initiation Rites in Fraternities, Sororities, and Other Organizations and Providing Penalties for Violations Thereof, Amending for the Purpose Republic Act No. 8049, Entitled "An Act Regulating Hazing and Other Forms of Initiation Rites in Fraternities, Sororities, and Other Organizations and Providing Penalties Therefor", Republic Act No. 11053 (2018).

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

7 *Id*. Sec. 3, par. 2.

8 *Id*. Sec. 5.

and should contain details such as the venue, date, names of the applicants, and the manner of how they will be initiated. The application even contains an undertaking that no harm of any kind shall be committed by anybody during the rites. The assigned faculty advisers are strictly screened because the new law provides that the faculty adviser assigned to monitor the rites must be a duly recognized active member, in good standing, of the faculty at the school in which the organization is established or registered. It even specifies that such faculty members must not be members of that fraternity or sorority.[9]

Many people wonder why students still aspire to join these fraternities and sororities despite the casualties. The answer is that such organizations promise lifelong connections and protection, where each member is said to be treated as a sibling.

The next curious question is, despite the existence of anti-hazing laws, why does the culture of violence still exist? The main reason for this is the need of members to avenge their previous experiences of their own initiation venting these angers out on the current neophytes and the cycle of hatred and violence goes on and on.

I suggest that future laws should involve the alumni and leaders of fraternities and sororities. They can change their internal rules and enforce them better. While Section 8 of the Anti-Hazing Act of 2018 requires schools to take more proactive steps to protect and educate their students about the dangers of hazing, they should also consider informing the parents or guardians. Fraternities and sororities should teach their members and neophytes that hazing is wrong and unacceptable. They should find better ways to welcome new members. The government and the law enforcers should implement the laws and regulations to stop hazing and violence. They should also provide counseling and seminars to members and neophytes to prevent them from hurting future applicants, and to make the anti-hazing laws and efforts more effective.

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9 *Id.* Sec. 7.

University of St. La Salle - College of Law
La Salle Avenue, Bacolod City 6100

Published in Bacolod City, Negros Occidental, Philippines 6100

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