

Continuing  
the Legacy...



# Jurisprudentia

The RMC Law Journal

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**Vol. 1, No. 1**  
January 2022

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## On the Cover

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*From left, the old photos were culled from the RMC archives consisting of the following RMC-SOL figures:*

**Justice Leopoldo M. Abellera** (RMC founder)  
Law professors of RMC-SOL, S.Y. 1948-1949  
Alumni of RMC-SOL, class of 1970

*The recent photos on the cover, meanwhile, belong to some of the most formidable law professors who served as faculty members of RMC-SOL as it reopened in 2017:*

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***Jurisprudencia***, Latin for “study of law”, is a student-run law journal of the Rizal Memorial Colleges School of Law which aims to promote legal and academic discourses on Philippine laws and prevailing jurisprudence. It accepts original research papers, essays, book reviews, case notes, and dissertations that embody legal and academic scholarship. Any correspondence regarding the journal should be addressed to the Editorial Board:

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# *Jurisprudentia:*

THE RMC Law Journal

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January 2022

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## About the Editors

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**Sheila Mae T. Cabazares**  
Editor-in-Chief

**Sheila** is a fourth year law student of the Rizal Memorial Colleges - School of Law. She obtained her undergraduate degree of Bachelor of Arts in Anthropology from the University of the Philippines Mindanao and her Master of Arts in Cultural Anthropology, minor in Cognitive Science from North Carolina State University through a Fulbright fellowship. She has authored peer-reviewed articles for national and international journals while serving as a faculty member of the Department of Social Sciences of UP Mindanao. During her third year in law school, she wrote the herein published dissertation entitled "*Jurisprudential Norms without Precedence: Upholding Liberty and Prosperity amid the Obscurity of Laws in the Era of Disinformation Technology*" about the legally perplexing deepfake technology. It was selected as among the Top 12 finalists in the 2020-2021 Dissertation Writing Contest sponsored by retired Chief Justice Artemio V. Panganiban's Foundation for Liberty & Prosperity and chaired by Senior Associate Estela M. Perlas-Bernabe.



**Jubelle Angeli C. Maturan**  
Publishing Editor

**Jubelle** is currently a third year law student of the Rizal Memorial Colleges - School of Law (RMC-SOL). She graduated with a Bachelor of Arts in Political Science, Minor in Philosophy degree from the Ateneo de Davao University in 2015. Jubelle also formerly served as the Editor-In-Chief of Forum Law Journal, the official publication and law journal of the University of Mindanao - College of Law. While in law school, she is also currently employed at the Sangguniang Panlungsod ng Davao, particularly as a Legislative Service Assistant for the Office of Coun. Bai Hundra Cassandra Dominique N. Advincula, 3rd District City Councilor. In this volume, she co-authored "*Redefining Psychological Incapacity: A Review of Landmark Cases*", a case analysis of jurisprudence related to psychological incapacity as a ground for declaration of nullity on marriages.



**Maria Gliceria L. Valdez**  
Publishing Editor

**Ria** is a second year law student of the Rizal Memorial Colleges - School of Law (RMC-SOL). She graduated with a Bachelor of Arts in English, Major in Creative Writing from the University of the Philippines Mindanao last 2016. She is currently an instructor in the Department of Humanities in UP Mindanao and a member of the Davao Writers Guild. She was a writing fellow for national creative writing workshops and has published her poems and essays in several literary journals in the Philippines. In this volume, she co-authored "*Philippine Laws and Issuances During the COVID-19 Health Crisis.*"



**Angeli C. Vidal**  
Publishing Editor

**Angeli** is a fourth year law student of the Rizal Memorial Colleges - School of Law. Her undergraduate degree is Bachelor of Arts in Economics from Xavier University. She is currently the President of the RMC-SOL Paralegal Volunteers. Much like her parents who are both human rights lawyers, she is a strong advocate for paralegal training and paralegal education among law students as well as community service and legal literacy campaigns. In this volume, she co-authored "*Philippine Laws and Issuances During the COVID-19 Health Crisis*", a timely legal discussion on Philippines laws and administrative issuances during the COVID-19 pandemic.



**Nicco B. Acaylar**  
Managing Editor

**Nicco** is a registered nurse, an ESL (English as a Second Language) teacher, online freelance writer and an animal rights advocate. He is a fourth year law student of the Rizal Memorial Colleges - School of Law (RMC-SOL). He obtained his Bachelor of Science degree in Nursing at Andres Bonifacio College, Dipolog City. He was a recipient of a *Certificate of Recognition for Distinguished Leadership Award* for his invaluable service as the pioneering President of the Law Journal Editorial Team of the RMC-School of Law for the academic year 2020-2021. He holds TESOL (Teaching English to Speakers of Other Languages) and TEYL (Teaching English to Young Learners) Certificates from TEACH International English Language School. He is currently the Managing Editor for *Jurisprudentia*, Volume 1, the official law journal of the Rizal Memorial Colleges - School of Law. He is a co-author of *Redefining Psychological Incapacity: A Review of Landmark Cases* of the above-cited journal.

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## Acknowledgment

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The Editorial Board expresses its utmost gratitude to the following:

The Rizal Memorial Colleges – School of Law (RMC-SOL) especially for the formidable leadership of our Dean, **Dean Ramon Edison Batacan**; our very compassionate Assistant Dean, **Atty. Marian Castillo-Pasia**; and our very efficient law school secretary, **Ms. Raquel Saycon-Magallanes**;

The Rizal Memorial Colleges officials, especially **Dr. Lourdes Cabintoy** of the Office of Academic Affairs and **Director Amado Ancla** of the Office of Student Affairs and Alumni Office for the kind assistance in the technical preparation;

The contributors of Volume 1, Number 1 for diligently going through the double-blind review process and the required revisions; the other RMC-SOL students who submitted their respective papers for publication; and our invited layout editor, **Ms. Desiree Gwenn Alcantara**, for sharing with us her technical skills.

Our very responsive faculty adviser, **Prosecutor Robert Michael Razon**, and all the members of the Managing Board S.Y. 2020-2021 of the RMC Law Journal for organizing the very productive Law School Journal week last August 1-6, 2021;

The RMC-SOL Supreme Student Government ably headed by **Mr. Dante Calamba** as incumbent President for facilitating the financial requests of the law school journal; and

All of our esteemed law professors and fellow RMC-SOL students, for fomenting a culture of excellence and camaraderie.

**Pro Deo et Patria** (for God and Country)!

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## Foreword

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*"Before the [Second World] War, there was no college at all in Davao City. High school graduates from Davao either had to stop schooling or go to Manila or Cebu... What a waste of human resources there was in Davao because of the inability of the middle income and low income people to continue their studies."*

*– Justice Leopoldo M. Abellera, RMC founder (Cable Tow, 1978, p. 7)*

On April 5, 1948, a young lawyer, Leopoldo M. Abellera, together with Ireneo D. Benavidez, Jose M. Shotwell, Vicente Casiño, Roque Yulo, and Antonio Buenaventura founded the first law school in Davao City. The Rizal Memorial Colleges, Inc. (RMC), that offered Law as one of its inaugural degree programs, was founded not only with inspirations from the academic achievements of the Filipino polymath Dr. Jose Rizal but also from the national hero's recognition of the nuances brought about by differing socio-economic levels in society. The first RMC President who later served the Court of Appeals, Justice Leopoldo Abellera, viewed the establishment of RMC in Davao City as a means to address the issue on access to quality education among students who cannot afford to study outside of the city after the Second World War.

To this day, the Rizal Memorial Colleges, Inc. – School of Law (RMC-SOL) that was reestablished in 2017 remains true to the vision of Justice Leopoldo Abellera in providing inclusive quality legal education. Keeping a roster of select Faculty while maintaining nominal tuition fee rates, the RMC-SOL continues its mission of helping aspiring lawyers, regardless of socio-economic background, become legal professionals molded through excellence, rooted in service, and driven by justice...Pro Deo et Patria. Simply put, "excellence, service, and justice...for God and Country!"

Thus, even as the Covid-19 public health emergency challenged our educational environment, the RMC-SOL has managed not only to survive, but even to thrive. From a student population of less than a hundred pre-pandemic, as it stands now, our academic community has more than

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## Foreword

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doubled. With the growing student population, students have organized themselves on the basis of similar interests, causes, and advocacies in the pursuit of "excellence, service, and justice...for God and Country!" One of such organizations is the Law Journal Team whose Editorial Board has endeavored to publish this premiere volume of "Jurisprudentia: The RMC Law Journal."

Jurisprudentia, as the term's latin translation "study of law" suggests, aims to promote legal and academic discourses on Philippine laws and prevailing jurisprudence. In addition, this volume, with its theme "Continuing the Legacy," seeks to honor the past and present achievements of the Rizal Memorial Colleges, Inc. and the School of Law as well as the values and principles upon which they are built.

Hence, it is hoped that this and succeeding volumes of Jurisprudentia will not only enhance the abilities of students in scholarly legal inquiry and articulation, but will also inspire them to translate the discourses therein into narratives of relief, remedy, and redemption for the people they seek to serve as members of the legal profession, in the same manner that Justice Leopoldo Abellera was able to address the issue on access to quality education in Davao City.

Our commendations for the RMC-SOL Law Journal Editorial Board!

**Atty. Ramon Edison C. Batacan, LL.M**  
Dean, RMC School of Law

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## Editor's Note

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This volume is an embodiment of the culture of excellence on which RMC-SOL was and is founded.

As the theme "*Continuing the Legacy...*" honors of the past and present achievements of the Rizal Memorial Colleges – School of Law (RMC-SOL), all of the contributions in this volume are written by RMC-SOL students from varying year levels. This collection addresses various issues and sectors in the country: legal preparedness of the Philippines amid the COVID-19 pandemic; indigenous peoples' rights through education; women's rights vis-à-vis abortion; recent jurisprudence on nullity of marriage based on psychological incapacity; and data privacy and data integrity issues in the context of an artificial intelligence-assisted deepfake technology.

Maria Glicería Valdez, a second year student, and Angeli Vidal, fourth year student, co-authored "*Philippine Laws and Issuances During the COVID-19 Health Crisis*" as a legal literacy article. The paper is a timely and relevant discussion on the salient features of some of the key legislative enactments and administrative issuances in the Philippines from 2020 – 2021. A critical assessment of the theoretical and pragmatic strengths and weaknesses of these laws is indeed very important within and beyond the context of a health pandemic.

The article "*Indigenous Peoples' Rights in the Philippines through Educational Assistance Programs: An Insider's Perspective*", meanwhile, was written by Azereth Barton, a fourth year student. Belonging to the Bagobo-Klata indigenous cultural community (ICC) or indigenous people (IP), the author presents an important discussion on the country's educational assistance program for IPs of which she herself was a product. The paper, underpinned by the author's advocacy for the welfare of the indigenous peoples, is a helpful reference about the educational support for IP students, or lack thereof.

With a background in the allied medical field, Rio Michelle Corrales, another fourth year RMC-SOL student, contributed the article entitled "*The Benefits of Legalization of Abortion in the Philippines*". The paper was originally written for an elective class on Gender and the Law in

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## Editor's Note

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RMC-SOL. The author assertively argues for the legalization, not just decriminalization, of abortion in the Philippines, a stance against which the author's religious affiliation is a strong critic. The author elaborates on how legalization of abortion in the Philippines will give rise to more benefits than harm to women, an assertion he supported with a comprehensive review of related literature.

As a case analysis, fourth-year student Nicco Acaylar and third-year student Jubelle Angeli Maturan co-authored "*Redefining Psychological Incapacity: A Review of Landmark Cases*" in response to the recently published Supreme Court decision. In their discussion on the 2021 Tan-Andal v. Andal case, the authors also reviewed pertinent doctrinal ratiocinations of the Supreme Court on psychological capacity from different landmark cases since 1995.

Lastly, an abridged version of my dissertation entitled "*Jurisprudential Norms Without Precedence*": *Upholding Liberty and Prosperity amid the Obscurity of Laws in the Era of Disinformation Technology* is included in this volume. An era predominated by what the paper referred to as "disinformation technology" inevitably needs appurtenant legal discussions on corresponding rights and obligations especially in the domains of data integrity and data privacy. The paper hopes to enlighten readers on how the legal conundrums arising from artificial intelligence advancements such as deepfake could potentially outweigh the purported benefits.

With all of these preliminary discussions, I hope this volume produces more light than heat and the necessary momentum for more informed legal discourses on crucial issues besetting our country.

**SHEILA MAE T. CABAZARES**

Editor-in-Chief

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# Philippine Laws and Issuances During the COVID-19 Health Crisis

Maria Gliceria L. Valdez\* and Angeli C. Vidal\*\*

## Abstract

The 1987 Philippine Constitution emphasizes the responsibility of the State to protect its constituents as embodied in Section 15, Article II which mentions that "The State shall protect and promote the right to health of the people and instil health consciousness among them." Needless to state, it is evident that laws are needed to mitigate and avoid further transmission of those previous pandemics here in the country. With the current medical crisis COVID-19 has brought, the laws of our country must be evaluated to determine how these enactments are well-suited to address the same.

In this view, the paper discusses the salient features of the following laws that address issues in varying sectors and industries of the country: RA 10121 for the Disaster and Risk Management industry; RA 11469, RA No. 11525, and Proclamation No. 929 s. 2020 for the health industry; Joint Memorandum Circular No. 1 Series of 2020 for the social welfare industry; Guidelines on the Adoption of Flexible Work Arrangements stipulated in DA No. 2, Series of 2009, and RA 11165 for the labor industry; BSP Circular 1105-20, RA 11523, and Monetary Board Resolution No. 517 for the finance industry; and DepEd Order No. 007 S. 2020, and DepEd Order No.008 s. 2020 for the education industry.

As different laws and issuances were created to flatten the curve of COVID-19 cases in the country, it is observed that some of these enactments were created merely as reactive solutions rather than pre-emptive actions. Although these laws and issuances could still be repealed, modified, or improved, it is clear that the creation of laws and administrative orders specifically tailored to address the pandemic, whether these issuances are pre-emptive or reactive, must be prioritized by the legislative and executive branches of the government. Indeed, the spirit of bayanihan, the will to carry our country out of this crisis, could be strengthened through legal preparedness.

**Keywords:** COVID-19; legal preparedness; laws during pandemic

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*\*\* Angeli C. Vidal is a fourth-year law student of RMC-SOL and is also a publishing editor for Volume 1 of Jurisprudentia: The RMC Law Journal. She is also the current Chairperson of the RMC-SOL Paralegal Volunteers.*

## A. Introduction

Throughout history, the world has witnessed one pandemic after another, tracing the oldest one to the Plague of Justinian, a plague which spread profusely from Constantinople to Europe, Asia, North Africa and Arabia killing an estimated 30 to 50 million people, almost half of the world's population at that time.<sup>1</sup>

According to Sowards, the disease had coined its name from the infamous ruler of the Byzantine Empire that time, from Justinian, the infamous, and with how this ruler handled this health crisis as "almost its own form of infection."<sup>2</sup> Sowards cited history professor Thomas Mockaitis in the same article, with the latter saying "People had no real understanding of how to fight it other than trying to avoid sick people." This mindset changed when the Black Plague hit Europe in 1347 and "forward-thinking officials" in Venetian-controlled port city of Ragusa decided to isolate newly arrived soldiers to avoid transmission of the virus. It was only in this isolation or quarantine when the number of deaths caused by the plague dwindled.<sup>3</sup>

When COVID-19 struck more than 200 countries, the Philippines was no exception. In a press release by the Department of Health (DOH) last January 30, 2020, a 38-year old female Chinese patient who arrived in the Philippines from Wuhan, China, became the first confirmed case of COVID-19 in the country.<sup>4</sup>

On that same day, the World Health Organisation (WHO) declared the COVID-19 outbreak a public health emergency of international concern (PHEIC). And by March 8, 2020 when Proclamation No. 922 s. 2020 was issued by the President of the Philippines Rodrigo Roa Duterte, declaring a State of Public Health Emergency throughout the Philippines

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<sup>1</sup> Roos, Dave (2021). How 5 of the History's Worst Pandemics Finally Ended.

<sup>2</sup> Sowards, Will (2020). What Was The Plague of Justinian? How One Outbreak Killed 10% of the Population

<sup>3</sup> Supra, Note 1.

<sup>4</sup> Department of Health Press Release (2021). DOH CONFIRMS FIRST 2019-NCOV CASE IN THE COUNTRY; ASSURES PUBLIC OF INTENSIFIED CONTAINMENT MEASURES

brought about by the harms and threats by COVID-19. By March 11, 2020, the World Health Organization (WHO) classified the COVID-19 outbreak as a pandemic and each country around the world must take action in protecting their constituents.

Our own Constitution emphasizes the responsibility of the State to protect its constituents. This is seen in Section 15, Article II of the 1987 Constitution which states that "The State shall protect and promote the right to health of the people and instil health consciousness among them." Also, Section 23 (2), Article II of the Constitution states that "In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof."<sup>5</sup>

Even before the COVID-19 pandemic has reached the Philippines, our country has already experienced several pandemics and endemic over the years such as the Spanish Flu, Severe Acute Respiratory Syndrome (SARS), and HN1N1 (Swine flu). Some of these health crises had similar symptoms with COVID-19 such as fever, coughing, and shortness of breath.<sup>6</sup>

To address SARS, then President Gloria Macapagal Arroyo issued Executive Order No. 201, s. 2003, which assigned powers and roles of government agencies in response to the Severe Acute Respiratory Syndrome (SARS) Contagion. With the appointment of the Secretary of Health as the Crisis Manager for the SARS contagion, the Ninoy Aquino International Airport (NAIA) was put on heightened alert. Thermal scanners were arranged in different entrances to screen temperature of arriving passengers, while those identified to be showing symptoms of SARS were put in isolation areas.<sup>7</sup>

It is indeed evident that laws were needed to mitigate and avoid further transmission of those previous pandemics here in the country. With the current medical crisis COVID-19 has brought, the laws of our country must be evaluated to determine how these enactments are well-suited to address it.

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<sup>5</sup> Sec. 23 (2), Article II. The 1987 Constitution

<sup>6</sup> Pobre, Addie (2020). 3 World Pandemics and Epidemics That Hit the Philippines besides COVID-19, How We Responded, and What We Learned.

<sup>7</sup> Supra, Noted 6.

Furthermore, this paper will talk about salient features of these legislative acts and issuances according to the sectors and issues that they respectively addressed. The laws and administrative issuances herein discussed address the following industries: health, social welfare, finance, labor, and education.

Simply put, this is a summary of the laws and issuances in the Philippines that were created to help address the pandemic and the efficacy of these laws, or lack thereof.

### **RA 10121: Philippine Disaster Reduction and Management Act**

The first law to be discussed in the context of Philippine legislation vis-à-vis a health crisis is not one that was passed during the COVID-19 outbreak, but one dated even before it struck. This law is Republic Act 1021 or the Philippine Disaster Reduction and Management Act which was passed in 2010 or 10 years before the current health crisis.

Through the establishment of the National Disaster Risk Management Framework, RA 10121 aims to provide a comprehensive, all-hazards, multi-sectoral, inter-agency, and community-based approach to disaster risk management. A key feature of the law is the need that disaster risk reduction be integrated into physical and land-use planning, budgeting, infrastructure, education, health, the environment, housing, and other areas.<sup>8</sup>

Other key feature includes the recognition of local risk patterns and trends, the decentralisation of resources and responsibilities, and the encouragement for participation of NGOs, private sectors, community-based organisations, and community members in disaster management. Further, the article calls the approach of this law as 'response-oriented' or 'reactive' as it focused on post-disaster relief rather than mitigation.<sup>9</sup>

Although this law was focused on the disaster impacts on Climate Change and natural calamities such as typhoons, Sec 3. (h) of RA 10121 defines disaster as

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<sup>8</sup> Graham Research Institute on Climate Change and the Environment (2010). Philippine Disaster Reduction and Management Act (RA 10121)

<sup>9</sup> Graham Research Institute on Climate Change and the Environment (2010). Philippine Disaster Reduction and Management Act (RA 10121)

(h) *"Disaster" – a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources. Disasters are often described as a result of the combination of: the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences.*

*Disaster impacts may include loss of life, injury, disease and other negative effects on human, physical, mental and social well-being, together with damage to property, destruction of assets, loss of services, Social and economic disruption and environmental degradation.<sup>10</sup>*

The definition alone could be related to the COVID-19 health crisis as this pandemic caused a "a serious disruption of the functioning of a community... *which exceeds the ability of the affected community or society to cope using its own resources.*" Following the logic that COVID-19 could be treated as a disaster, Sec 3. (j) also defines Disaster Preparedness. The same section of the law also defined the concept of "preparedness."

(j) *"Disaster Preparedness" – the knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to, and recover from, the Impacts of likely, imminent or current hazard events or conditions.*

*Preparedness action is carried out within the context of disaster risk reduction and management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response to sustained recovery. Preparedness is based on a sound analysis of disaster risk and good linkages with early warning systems, and includes such activities as contingency planning, stockpiling of equipment and supplies, the development of arrangements for coordination, evacuation and public information, and associated training and field exercises. **These must be supported by formal institutional, legal and budgetary capacities.**<sup>11</sup> (Emphasis added.)*

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<sup>10</sup> RA 10121. Philippine Disaster Reduction and Management

<sup>11</sup> RA 10121. Philippine Disaster Reduction and Management

Hence, this law should also be considered when dealing with the pandemic as it has established that disaster preparedness must be supported with legal capacities. It can then be safely said that disaster preparedness could be related to legal preparedness.

In an article in the legal blog SAKLAW, Atty. Miranda and Atty. Angkaya-Kuhuta explained legal preparedness as "having the appropriate laws and policies in place to implement measures that prevent further deaths, quickly restore the functions of society, and ensure everyone's rights to health, food, basic services, and representation in decision-making."<sup>12</sup>

The article further discusses the importance of legal benchmarks, describing them as means to ensure that interventions account for disproportionate impacts of crises on women, children, and other vulnerable groups; and that the poorest and most at-risk sectors were not even recipients for proper response actions.<sup>13</sup>

While this law was passed even before COVID-19, it can be seen that our country has done its part in legal preparedness by forming this act although this was not the main law that was used during the COVID-19 outbreak, it could serve as a useful one.

### **Republic Act 11469: Bayanihan Heal as One Act**

Since this national emergency requires expediency in actions to address the needs of the people, the Congress signed the "Bayanihan Heal as One Act (RA 11469)" into a law, thereby granting special temporary emergency powers to the Chief Executive for a more flexible response to the health crisis.

The word "*bayanihan*" is a Filipino term for unity and sense of oneness. It is often portrayed by Filipinos working together to carry bahay kubo or a native nipa hut on their shoulders towards another barangay. This shows a rather symbolic way to show unity and resiliency in the time of crisis.

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<sup>12</sup> Angkaya-Kuhutan, Salma and Miranda, Patricia (2020). Legal Preparedness During "Business Unusual."

<sup>13</sup> Supra, Note 12.

RA 11469 or otherwise known as the "Bayanihan to Heal as One Act" was written into a law last March 23, 2020. One of its primary features is the extended authorized powers to the President, thoroughly discussed in Sec 4 of the said law.

Such powers of the President are authorized by the Congress pursuant to Sec. 23 (2) Art. VI of the 1987 Constitution:

*Sec. 23 (2) In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.<sup>14</sup>*

The special powers granted to the President paved the way to the 8-policy objectives highlighted in Sec. 3 of RA 11469 to further mitigate the outbreak of the Covid-19 medical crisis. Listed below is an overview of the 8-policy objectives of RA 11469:

1. To mitigate and contain the transmission of COVID-19;
2. To immediately mobilize assistance for the provision of basic necessities to families and individuals affected by the enhanced community quarantine, especially the poor;
3. To undertake measures to prevent the overburdening of the country's healthcare system;
4. To immediately provide ample healthcare, including medical tests and treatments, to COVID-19 patients, persons under investigation (PUIs) and persons under monitoring (PUMs);
5. To undertake a recovery and rehabilitation program as well as social amelioration program and other social safety nets to all affected sectors;
6. To ensure adequate, sufficient, and readily available funds to undertake the above-stated measures and programs;
7. To partner with the private sector and other stakeholders in the quick and efficient delivery of these measures and programs; and
8. To promote and protect the collective interests of all Filipinos in challenging times.<sup>15</sup>

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<sup>14</sup> Sec. 23 (2), Art. VI of the 1987 Constitution

<sup>15</sup> RA 11469. Bayanihan Heal as One Act

With these powers granted to the Chief Executive, RA 11469 also requires transparency and accountability as seen in Sec. 5 of the law where the President is required to submit a weekly report to Congress every Monday for as long as the law is in effect. Apart from transparency, Sec. 6 of the Bayanihan Heal as One Act further promotes its effectivity by providing penalties and violations of the law which includes imprisonment of two months or a fine of P10,000 to P1 million or both.<sup>16</sup>

In an article in Platon Martinez Law, a legal blog, it is discussed that local government unit officials, privately-owned hospitals, medical and health facilities including passenger vessels and other establishments, are subject to penalties when they disobey quarantine impositions by the national government. This is in pursuant to Section 6(a) and Section 6(b) of RA 11469.<sup>17</sup>

The article further states that in accordance with Section 6(c) of the Bayanihan Heal as One Act, another penalized act is for “those engaging in hoarding, profiteering, injurious speculations, manipulation of prices and those pernicious practices affecting the supply and distribution of the following basic necessities such as food, clothing, and medical supplies.”<sup>18</sup>

Also worth citing is for banks, and other concerned establishments and agencies to be penalized if they refuse to provide thirty (30) day grace periods required under Sections 4 (aa) and (bb) of the Implementing Rules and Regulations (IRR) of the Bayanihan Heal as One Act.<sup>19</sup>

According to an article by RSM Global, a website for accounting and consultation firms worldwide, these Implementing Rules and Regulations “mandate all covered institutions to implement a 30-day grace period for all loans with principal and/or interest falling due within the ECQ Period without incurring interest, penalties, fees and other charges.” If the President extends the ECQ term, the original 30-day grace period will be automatically extended. Banks, quasi-banks, non-stock savings and loan organizations, credit card issuers, pawnshops, and other credit providing

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<sup>16</sup> Sawadjaan, Aliyya (2020). Simplifying the Bayanihan to Heal as One Act

<sup>17</sup> Platon Martinez Law (2020). “What are the Acts Penalized under R.A. No. 11469 or the “Bayanihan To Heal As One Act” or “Bayanihan Law?” <https://platonmartinez.com/articles/what-are-the-acts-penalized-under-r-a-no-11469-or-the-bayanihan-to-heal-as-one-act-or-bayanihan-law>

<sup>18</sup> *Supra*, Note 17.

<sup>19</sup> Implementing Rules and Regulations of Section 4(aa) of Republic Act No. 11469, Otherwise Known as the “Bayanihan to Heal As One Act”

financial institutions, public or private, under the supervision of BSP, SEC, and CDA, including the GSIS, SSS, and Pag-Ibig Fund, are among the covered institutions.<sup>20</sup>

In a press release dated last April 1, 2020, the Department of Finance (DOF) issued the implementing rules and regulations (IRR) of a provision in the Bayanihan To Heal As One Act, which directs all lenders to give all borrowers a 30-day grace period or extension for payment of all loans, including credit card payments and pawnshop loans, that are due within the enhanced community quarantine (ECQ) period, without slapping interest or any additional charges and fees. Section 3.01 of the said IRR states that all Covered Institutions shall implement a 30-day grace period for all loans with principal and/or interest falling due within the ECQ Period without incurring interest on interest, penalties, fees and other charges<sup>21</sup>

Despite the creation of RA 11469, COVID-19 cases in the Philippines continued to increase, prompting the Congress to sign Republic Act 11494 or the Bayanihan to Recover as One Act into a law on September 11, 2020. Section 2 of RA 11494 states that this law was implemented "In view of unabated spread of the COVID-19 virus and the ensuing economic disruption therefrom" therefore still acknowledging the existence of a continuing national emergency. This was not the first extension of the Bayanihan Heal as One Act as there came another extension of the said law in the form of Republic Act (RA 11519) or the Bayanihan to Recover as One Act (Bayanihan 2) which will expire on June 30, 2021.

On June 2, 2020, House Bill 9538, which proposes to prolong the validity of funding under RA 11519 until December 31, was adopted by the House of Representatives. RA 11519 extends the availability of Bayanihan 2 funds until June 30, 2021 after it lapsed on Dec. 19, 2020.<sup>22</sup>

The Bayanihan law was continuously extended because of the ongoing cases of the health crisis. It just shows how effectivity of laws could be prolonged or shortened when the situation calls for it. With the ongoing surge of COVID-19 cases, it is justified why these laws still had to remain in effect.

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<sup>20</sup> RSM Global Philippines (2020). Implementing Rules and Regulations (IRR) to implement Section 4(aa) of the "Bayanihan to Heal as One Act"

<sup>21</sup> Department of Finance Press Release (2020). "DOF releases Bayanihan Act IRR on 30-day extension for loan payments". <https://www.dof.gov.ph/dof-releases-bayanihan-act-irr-on-30-day-extension-for-loan-payments/>

<sup>22</sup> Gita-Carlos, Ruth Abbey (2020). "Spend Bayanihan 2 funds, Panelo tells gov't offices." <https://www.pna.gov.ph/articles/1144724>

### **Proclamation No. 929 s. 2020: Declaring A State Of Calamity Throughout The Philippines Due To Corona Virus Disease 2019**

On May 26, 2014, then-President Benigno S. Aquino III established the Inter-Agency Task Force (IATF) for Management of Emerging Infectious Disease. The IATF would be composed of the Department of Health (DOH) as its Chairperson, and the Department of Foreign Affairs (DFA), Department of the Interior and Local Government (DILG), Department of Justice (DOJ), Department of Labor and Employment (DOLE), Department of Tourism (DOT), and Department of Transportation and Communications (DOTC) as its members. The inter-agency's very first meeting was called to order six years after its establishment by the Department of Health on January 28, 2020 (Department of Health, n.d.) for the goal of finding recommendations on the management of COVID-19.

By March 16, the President issued Proclamation No. 929 s. 2020, declaring a state of calamity throughout the Philippines due to Corona Virus disease 2019. This proclamation enjoins all government agencies and local government units (LGUs) to render full assistance and cooperation to carry out measures for the Filipino people because despite previous efforts of the government, COVID-19 cases still increased.

Proclamation 929 gave rise to the first imposition of the Enhanced Community Quarantine (ECQ) in Luzon beginning on March 16 at 12 midnight until April 12, 2020. The declaration of the ECQ aims to flatten the curve of rising COVID-19 cases. Of course, this was the first out of many variations and durations of the ECQ in the country throughout the years.<sup>23</sup>

New directives or regulations are issued almost on a daily basis since its declaration. As of 24 March 2020, the general guidelines regarding the ECQ in Luzon, in sum, are as follows:<sup>24</sup>

1. Government offices should operate with skeletal workforces and/or under work from home arrangements;
2. All courts nationwide shall be physically closed and litigants, lawyers, prosecutors, a well as the general public, are hereby advised to first contact the proper court through its hotline, email address, or Facebook account, where it shall be determined if the matter raised is urgent.

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<sup>23</sup> Executive Order No. 168, 2014.

<sup>24</sup> Baclig, Cristina (2021). "DATA: A year of COVID-19 quarantine in PH." <https://newsinfo.inquirer.net/1406213/fwd-data-a-year-of-covid-19-quarantine-in-ph>

- Mandatory home quarantine for everyone covered by the ECQ
3. except certain individuals (employees of establishments allowed to operate, law enforcement and certain public officials, health workers and media) and except for the purpose accessing basic necessities.
  4. Business establishments will be closed except certain businesses, such as: (a) which provide basic utilities and critical services (e.g., water, electricity, internet, telecommunication, gas, garbage collection, funeral services); (b) involved in the production, processing and distribution of basic necessities (e.g., food, pharmacies / drugstores, banks); (c) capital markets (Philippine Stock Exchange will observe shortened trading hours);
  5. Meanwhile, business establishments that are allowed to operate during the ECQ are required to obtain an official IATF ID from the Department of Trade and Industry (DTI). The DTI has extended the filing of application and issuance for IATF ID to 26 March 2020.
  6. Business Process Outsourcing (BPO) and export-oriented establishments shall be allowed to operate provided that employees are to be given temporary housing / shelter or shuttle services by the employer during the effectivity of the ECQ; or to have under work from home arrangements.

According to the amended Omnibus Guidelines issued by the Inter-agency Task Force (IATF) for the Management of Emerging Infectious Diseases, there are specific quarantine statuses which can be imposed in the country. These are the Enhanced Community Quarantine (ECQ), the Modified Enhanced Community Quarantine (MECQ), General Community Quarantine (GCQ), and the Modified General Community Quarantine (MGCQ), with each community quarantine varying the intensity of its protocols according to the surge of cases. The ECQ had the strictest implementation of limitation on movement and transportation of people as well as the regulation of operating industries, provision of food and essential services, and the increased number of uniformed personnel to impose community quarantine protocols. Moreover, the least strict community quarantine is the Modified General Community Quarantine where limiting the movement and transportation of people, as well as the regulation of said operating industries become less necessary.<sup>25</sup>

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<sup>25</sup> Baclig, Cristina (2021). "DATA: A year of COVID-19 quarantine in PH." <https://newsinfo.inquirer.net/1406213/fwd-data-a-year-of-covid-19-quarantine-in-ph>

A press release from the Department of Health dated last May 5, 2020, or a month and a half after the declaration of the first ECQ in Luzon, stated that the country has started to “flatten the curve.” This was according to Health Undersecretary Dr. Maria Rosario Singh-Vergeire who warned Filipinos of an increase in cases when the ECQ is withdrawn and people get complacent about social distancing. However, the ECQ didn’t flatten the curve for that long since it took how many declarations of ECW, GCQ and MGCQ from 2020-2021.<sup>26</sup>

In a study by Talabis, results show that some LGUs were able to reduce the devastation caused by the pandemic because of strong border control, early adoption of lockdowns, development of quarantine facilities, efficient public communication, and monitoring activities. Any country’s readiness for future health emergencies would benefit if these rules were to be standardized. Moreover, the study cited above emphasizes the need of preparedness for emergencies whether health-related or not. Policies, laws, and issuances should not only be reactive to mitigate the situation, but also to be standardized as to be prepared for another similar situation.<sup>27</sup>

### **Republic Act No. 11525: “COVID-19 Vaccination Program Act of 2021”**

On Feb 26, 2021, Republic Act No. 11525, or “An Act Establishing the Coronavirus Disease 2019 (COVID-19) Vaccination Program” was signed into a law.

In an article by the legal blog AccraLaw, it is explained how the said law is used to supplement the efforts of the national government through the efforts of employers to create a COVID-19 vaccination policy in their own respective workplace. In this connection, the Congress recently passed Republic Act No 11525 (RA 11525), or the COVID-19 Vaccination Program Act, to “establish general guidelines for employers who intend to procure and administer their own vaccines for their employees.”<sup>28</sup>

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<sup>26</sup> Department of Health Press Release (May 5, 2020) “PH STARTS TO FLATTEN CURVE; ECQ, PHYSICAL DISTANCING PAY OFF.” <https://doh.gov.ph/doh-press-release/PH-STARTS-TO-FLATTEN-CURVE%3B-ECQ%2C-PHYSICAL-DISTANCING-PAY-OFF>

<sup>27</sup> S. Talabis, D.A., Babierra, A.L., H. Buhat, C.A. et al. (2021). BMC Public Health 21, 1711. “Local government responses for COVID-19 management in the Philippines.” <https://bmcpublikealth.biomedcentral.com/articles/10.1186/s12889-021-11746-0>

<sup>28</sup> De Guzman, Emercio, Valdecantos, Clarence, et. Al. (2021). “A Philippine employer’s guide to legal compliance in the procurement and administration of Covid-19 vaccines.” <https://www.inhouselawyer.co.uk/legal-briefing/a-philippine-employers-guide-to-legal-compliance-in-the-procurement-and-administration-of-covid-19-vaccines/>

The use and delivery of COVID-19 vaccinations purchased by employers is also limited under RA 11525. Employers are banned from selling the vaccines they have purchased. The aforementioned vaccines are only permitted for the use of the procuring employers, who are then obligated to ensure that healthcare workers, older citizens, economic frontline employees, and vital workers receive priority inoculation.<sup>29</sup>

Further, except for claims arising from wilful misconduct and gross negligence, the representatives of an employer who handle the procurement and administration of COVID-19 vaccines are granted immunity from suit and liability for all claims arising out of, related to, or resulting from the administration or use of the COVID-19 vaccines.<sup>30</sup>

Despite the efforts on the vaccination drive, the Congress is still under attack on their proposed bill, House Bill 9252, on mandatory COVID-19 vaccination. Rep. Elpidio Barzaga Jr. of Cavite, chair of the House committee on natural resources, submitted HB 9252 to get "herd immunity" for 100 million Filipinos, based on the 1987 Constitution's "general welfare" section, which indicates that the government is responsible for protecting its population. "No persons who are covered by this Act, as determined by the Department of Health, shall be allowed to enter, convene, or occupy public venues, whether government or privately held," according to the proposed law.<sup>31</sup>

House Bill 9252 alarmed the public, according to a study by Nicky Cardenas, because it sought to require all Filipinos to receive the vaccine for free at any government hospital or health center, except for those who are unfit due to medical conditions. At the moment, the proposed bill is too premature to pass due to the uncertainties and vulnerabilities of the Philippines' COVID-19 vaccination program. Indeed, the national government must encourage the freedom to choose their own brand of

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<sup>29</sup> S. Talabis, D.A., Babierra, A.L., H. Buhat, C.A. et al. (2021). BMC Public Health 21, 1711. "Local government responses for COVID-19 management in the Philippines." <https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-021-11746-0>

<sup>30</sup> Ibid.

<sup>31</sup> Porcalla, Delon. (2021) "House to tackle bill on mandatory COVID-19 vaccination." <https://www.philstar.com/headlines/2021/08/02/2116939/house-tackle-bill-mandatory-covid-19-vaccination>

vaccine since most Filipinos mistrust China's Sinovac.<sup>32</sup>

In a news article by Azer Parrocha, President Rodrigo Duterte was cited to have said in a press conference last November 29, 2021 that he favors mandatory vaccination against COVID-19 if advised by the COVID-19 task force. Further, Duterte acknowledged that a law is needed to mandate Filipinos to receive the COVID-19 vaccine shots, but reiterated that government can also use its police power to compel citizens to get vaccinated against COVID-19.<sup>33</sup>

However, in a follow-up article still written by Parrocha dated December 8, 2021, Onsite workers are not being compelled to get their COVID-19 jabs. Cabinet Secretary Karlo Nograles, the acting presidential spokesperson maintained that there is no IATF resolution compelling anyone to get inoculated against COVID-19.<sup>34</sup>

As the government began its state-wide COVID-19 inoculation campaign for the general public, Senator Francis 'Tol' N. Tolentino believes the Department of Health (DOH) has the authority to oblige parents to vaccinate their children against COVID-19.

In an interview with DZBB, a national radio channel, Tolentino said that under Republic Act No. 10152 or the "Mandatory Infants and Children Health Immunization Act." Apart from those stated in the law, the Secretary of Health can designate which types of "vaccine-preventable diseases" can be covered by required vaccination by a department circular. However, Tolentino also mentioned that there is no need to pass a new law to inoculate children against COVID-19, since constitutional provisions guaranteeing the right to health are considered "self-executive" and do not require any enabling law, according to the Supreme Court (SC) in its 2014 finding in *Imbong v. Ochoa* that it is the State's duty to ensure the welfare of its citizens.<sup>35</sup>

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<sup>32</sup> Cardenas, Nicky. (2021) "Harnessing strategic policy on COVID-19 vaccination rollout in the Philippines." <https://academic.oup.com/jpubhealth/advance-article/doi/10.1093/pubmed/fdab181/6287131>

<sup>33</sup> Supra, Note 31.

<sup>34</sup> Parrocha, Azer (2021). "Palace maintains Covid-19 vaccination not mandatory." <https://www.pna.gov.ph/articles/1162189>

<sup>35</sup> Legacy Senate (Oct. 5, 2021). "DOH can require mandatory COVID-19 vaccination of school children." [https://legacy.senate.gov.ph/press\\_release/2021/1025\\_tolentino1.asp](https://legacy.senate.gov.ph/press_release/2021/1025_tolentino1.asp)

The study of Cardenas concludes with the observation that the government must address a joint coordinated action plan and implementation of strategic policy, reflect on critical loopholes and empower more "centralized multi-faceted delegation to qualified public and private sectors to address lack of sufficient frontline healthcare manpower, healthcare facilities and concrete mobilization through multilateral vaccination rollout".<sup>36</sup>

Meanwhile, the Department of Justice (DOJ) is wary of making the COVID-19 vaccine mandatory, claiming that if an existing legislation on required immunization for minors is altered to include it, there will be "legal wrinkles." In a related article, Justice Secretary Menardo Guevarra told Rappler in a text message: "A law making COVID-19 vaccination mandatory may not be necessary, as more and more people are voluntarily getting themselves vaccinated as vaccine supply becomes more available, and the hesitancy rate has substantially gone down".<sup>37</sup>

With these in mind, it can be deduced that even though there are laws and issuances promulgated to address the rising cases of COVID-19, and that there are special powers granted to the country's chief executive, it is ultimately the concern of the State and its people that will be prioritize in the implementation of policies.

## Laws and Administrative Issuances in the Social Welfare Industry

### Joint Memorandum Circular No. 1 Series of 2020: Implementations of Emergency Subsidy Program/Social Amelioration Program by Department of Social Welfare and Development

In a press release by the Department of Finance (DOF) dated March 3, 2020, Finance Secretary Carlos Dominguez claimed that the DOF dispensed the highest amount for COVID-19 emergency subsidy allotted for social protection program in Philippine history.<sup>38</sup>

This power to allocate the budget amounting to P200 billion came

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<sup>36</sup> Cardenas, Nicky. (2021) "Harnessing strategic policy on COVID-19 vaccination rollout in the Philippines." <https://academic.oup.com/jpubhealth/advance-article/doi/10.1093/pubmed/fdab181/6287131>

<sup>37</sup> Buan, Lian (2021). "DOJ apprehensive about mandatory COVID-19 vaccination." <https://www.rappler.com/nation/doj-guevarra-apprehensive-mandatory-vaccination/>

<sup>38</sup> Department of Finance Press Release. (March 31, 2020). "DOF says COVID-19 emergency subsidy largest social protection program in PHL history." <https://www.dof.gov.ph/dof-says-covid-19-emergency-subsidy-largest-social-protection-program-in-phl-history/>

from the 18th Congress and was granted to President Rodrigo Roa Duterte. This is to favorably alleviate the 18 million low-income households in the country that have lost their sources of livelihood during the said global pandemic. Comprising this total fund are the cash assistance and other kinds of basic commodities needed by Filipinos. With the directive from the Office of the President, all low-income Filipino families in critical socioeconomic status caused by pandemic are given urgent top priority for them to recover as soon as possible.<sup>39</sup>

Part of this subsidy is the Emergency Subsidy Program (ESP) which is being collaboratively implemented by major government units. One of the agencies that helped in materializing this program is the Department of Social Welfare and Development (DSWD). The process and implementations of this effort are embodied in Memorandum Circular 1 series of 2020. The ESP is commonly known to many as the Social Amelioration Program (SAP) popularized by social media.

Furthermore, as cited in this news article, the following section from RA 11469 is hereby included in support of the said program:

*Section 4, paragraph (c) RA 11469 mandates the provision of "an emergency subsidy to around eighteen (18) million low income households: Provided, That the subsidy shall amount to a minimum Php 5,000.00 to a maximum Php 8,000 a month for two (2) months: Provided further, That the subsidy shall be computed based on the prevailing regional minimum wage rates: Provided, finally, That the subsidy received from the current conditional cash transfer program and rice subsidy shall be taken into consideration and in the compilation of the emergency subsidy, as provided for in this Act."*

Included in this news article is the Joint MC 1 Series of 2020. In fact, based on the MC 1, citizens situated in the National Capital Region (NCR) should be allocated P8,000. Meanwhile, those in Regions 3 and 4A would receive P6,500; while those residing in Regions 6, 7, 10 and 11 should be getting P6,000; P5,500 is given to Regions 1, 2 and Cordillera Autonomous Region. The rest of the regions will be given P5,000.<sup>40</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Vitangcol, Al (2020). "Social amelioration program should be for everyone, but in reality it's not." <https://www.manilatimes.net/2020/04/11/opinion/columnists/social-amelioration-program-should-be-for-everyone-but-in-reality-its-not/712356>

Specifically, low-income families with at least one member are the target beneficiaries, given that they fall under certain conditions such as vulnerable/disadvantaged sectors (senior citizens, persons with disabilities, pregnant and lactating women, solo parents, overseas Filipino in distress, indigent indigenous peoples, those within the impoverished threshold, homeless citizens, informal economy workers, and stranded workers.

In order to avail the SAP, the same MC prescribes that a Social Amelioration Card be given to the citizens at the barangay level to record the "family profile, which will be the mechanism for the affected families to access" the SAP.

The principles and guidelines of the ESP or SAP are clearly stated and must not be violated. Having said that, the success of the program varies whether the implementations are effectively situated. For instance, a family in a particular village is required to (1) identify the head of the one's family. It can be even possible that there can be more than one head of the family (e.g., the master of the house, a son/daughter with own family). The next step is to fill out the attached required Census Form for each family, stating the recipient's name, birthdate, type of ID, ID Number of each head of the family. If, for instance, there is an identified senior citizen in the household/ or a person living with disability, one must include their details on the Census Form.<sup>41</sup>

A systematic procedure of performing the guidelines of SAP is by creating a tick-box and letting the claimant check it with regard to the required details needed to be known. Given that, at least, there is one ticked-off box, then the household is entitled to accept the money from SAP. It is important to note that if one ticks off the "kasambahay" box, she should be entitled to a separate SAP, with respect to the provisions of the cited joined memorandum circular.<sup>42</sup>

It could now be deduced that regardless of what the claimant ticked off in the form, every household in the NCR should receive Php 8,000.00. If

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

some circumstances permit a household not to tick off any of the required details in the list, then the family is not eligible to receive any amount. This logic has often become the subject to criticism of the SAP amongst Filipinos. As such, although the law provides for an effective way to address the basic necessities of the poor in this time of medical crisis, the implementation, just like previous mechanisms mentioned in this paper, is considered almost faulty.

## Laws and Administrative Issuances in the Labor Industry

### Guidelines on the Adoption of Flexible Work Arrangements stipulated in DA No. 2, Series of 2009

An advisory released by the Department of Labor and Employment today is geared toward flexible work arrangements for employers and workers in the private sector in implementing considerable working hours and days as one of the preventive measures against the effects brought by financial crisis. Specifically, this is anchored on Department Advisory No. 2, series of 2009. This is to help the workers a coping mechanism and remedy because of the negative impact apparent on the workers' business operations, including the entire economic sector.

In a press release from DOLE dated last January 30, 2009, DOLE Secretary Marianito D. Roque asserted that the advisory should be adapted only by voluntary basis and must have the consent of both labor and management. Further, he urged the employers and workers to consider adopting such arrangements as an acceptable alternative than outright termination of the workers' services instead of total closure of their businesses.<sup>43</sup>

Also clarified by the DOLE Chief, businesses and employees are challenged to develop alternate schemes under any agreement and corporate policy or practice in order to cushion and reduce the impact of workers' income loss while implementing flexible work arrangements.

The following are examples of flexible work arrangements that labor and management may examine:

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<sup>43</sup> Department of Labor Press Release (January 30, 2009). "DOLE advisory on flexible work arrangements out." <https://www.dole.gov.ph/news/dole-advisory-on-flexible-work-arrangements-out/>

1. Compressed Workweek wherein the normal workweek is reduced to less than six days but the total number of work hours of 48 hours per week shall remain. The concept can be adjusted accordingly depending on the normal workweek of the company pursuant to the provisions of Department Advisory No. 02, series of 2004, dated 2 December 2004.
2. Reduction of Workdays wherein the normal workdays per week are reduced but should not last for more than six months.
3. Rotation of Workers wherein the employees are rotated or alternately provided work within the workweek.
4. Forced Leave wherein the employees are required to go on leave for several days or weeks utilizing their leave credits if there are any.
5. Broken-time schedule wherein the work schedule is not continuous but the work hours within the day or week remain.
6. Flexi-holidays schedule wherein the employees agree to avail the holidays at some other days provided there is no diminution of existing benefits as a result of such arrangement.<sup>44</sup>

**Republic Act 11165: Telecommuting—An Act Institutionalizing Telecommuting as An Alternative Work Arrangement for Employees in the Private Sector**

Telecommuting is defined as a "work arrangement that allows an employee in the private sector to continue working from an alternative workplace in their homes with the use of telecommunication and/or computer technologies," according to Republic Act No. 11165 (also known as the "Telecommuting Act," enacted on December 20, 2018).<sup>45</sup>

Private employers may offer a Telecommuting Program to their employees on a voluntary basis and on mutually agreed-upon parameters. Compensable work hours, minimum number of hours, overtime, resting

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<sup>44</sup> Department of Labor Press Release (January 30, 2009). "DOLE advisory on flexible work arrangements out." <https://www.dole.gov.ph/news/dole-advisory-on-flexible-work-arrangements-out/>

<sup>45</sup> Republic Act 11165: Telecommuting—An Act Institutionalizing Telecommuting as An Alternative Work Arrangement for Employees in the Private Sector

days, eligibility to leave benefits, social welfare benefits, and tenure security must all be met in the Telecommuting Program, but they must be less than the minimum labor requirements set by law.<sup>46</sup>

Telecommuting employees, or those who are on a telecommuting work arrangement, are entitled to fair treatment. The employers shall ensure that telecommuting employees are given the same treatment as that of comparable employees working at the employer's premises (on-site), including the right to:

1. Earn a rate of pay, including overtime and night shift differential, and other similar monetary benefits not lower than those provided in applicable laws.
2. Rest days, regular holidays, and special nonworking days.
3. The same or equivalent workload and performance standards as those of comparable workers at the employer's premises, provide that the parties may mutually agree to different performance standards that may be more appropriate given that the location of the employee is not at the premises of the employer.
4. Without additional cost, have the same access to training and career development opportunities as those of comparable workers at the employer's premises, and be subject to the same appraisal policies covering these workers, including the qualification provided on the preceding item.  
Without additional cost, receive appropriate training on the technical equipment at their disposal, and the characteristics and conditions of telecommuting.
6. Have the same collective rights as the workers at the employer's premises, including access to safety and health services when necessary as required by Republic Act No. 11058 and Department Order No. 198, s. 2018, and shall not be barred from communicating with worker's representatives.<sup>47</sup>

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<sup>46</sup> *Ibid.*

Arrangement for Employees in the Private Sector

<sup>47</sup> Republic Act 11165: Telecommuting—An Act Institutionalizing Telecommuting as An Alternative Work Arrangement for Employees in the Private Sector

In the legal blog Philippine e-Legal forum, it is discussed that telecommuting highlights the responsibilities of the employers to the employees in this non-physical mode of working. Employers must also take steps to avoid the telecommuting employee from becoming isolated from the rest of the company's working community by allowing the telecommuting employee to interact with colleagues on a regular basis and having access to the company's regular workspace and information.<sup>48</sup>

Further, employers are responsible for adopting strict precautions to safeguard the privacy of data used and processed for professional purposes by telecommuting employees. The employee, on the other hand, must adhere to the company's data privacy policy and guarantee that personal and proprietary information is always secured and used exclusively in line with the employer's requirements.<sup>49</sup>

For laws and issuance under the labor sector, it is clear that the work flexibility is championed not only to mitigate the COVID-19 cases but also to lessen the hours of exposure of employees who would have to work on-site.

### **Laws and Administrative Issuances in the Finance Industry**

#### **BSP Circular 1105-20, or Guidelines on the Establishment of Digital Banks Accelerating Digital Transformation in the COVID-19 Era Digital Transformation in the Financial Services and Navigating Through the Pandemic**

Even before the crisis, the Bangko Sentral ng Pilipinas (BSP) had been pushing for a digital transformation of the Philippines' financial services because the agency believes that promoting financial technology and digitalization will lead to financial inclusion. BSP Governor Benjamin E. Diokno said in his speech during the ESCOM Webinar that the pandemic "has given us an opportunity to further accelerate the digital transformation of the financial services sector."<sup>50</sup>

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<sup>48</sup> P&L Law (2020). "TELECOMMUTING AND WORK: PRIMER ON THE TELECOMMUTING ACT (REPUBLIC ACT NO. 11165)." [https://pnl-law.com/blog/telecommuting-and-work-primer-on-the-telecommuting-act-republic-act-no-11165/#:~:text=11165%20\(also%20known%20as%20the,location%20other%20than%20the%20regular](https://pnl-law.com/blog/telecommuting-and-work-primer-on-the-telecommuting-act-republic-act-no-11165/#:~:text=11165%20(also%20known%20as%20the,location%20other%20than%20the%20regular)

<sup>49</sup> Ibid.

<sup>50</sup> Bangko Sentral ng Pilipinas Press Release(November 11, 2020). Accelerating Digital Transformation in the COVID-19 Era Digital Transformation in the Financial Services and Navigating Through the Pandemic. <https://www.bsp.gov.ph/SitePages/MediaAndResearch/SpeechesDisp.aspx?ItemId=767>

Because of the pandemic and the continuous lockdowns, more people have shifted to digital payments for their expenses rather than cash payments. Hence, on December 2, 2020, Bangko Sentral ng Pilipinas (BSP) has issued BSP Circular 1105-20, or Guidelines on the Establishment of Digital Banks. Since then, the use of PESONet and InstaPay zoomed exponentially. For the first eight months of 2020, the value of InstaPay rose almost 400 percent, while that of PESONet jumped 100 percent year-on-year. And based on the increase in the number of transactions, InstaPay and PESONet soared by 624 percent and 130 percent, respectively.<sup>51</sup>

With digital financial services emerging as the “new norm,” the BSP proactively builds a regulatory environment that is conducive to digital innovations. Diokno concludes his speech in the ESCOM webinar with the quote “Digitalization is part of the new normal, and the rate and speed of how we get used to it will determine our chances of bouncing back and standing tall and strong again.”<sup>52</sup>

### **RA 11523: An Act Ensuring Philippine Financial Industry Resiliency Against The COVID-19 Pandemic**

Another sector affected by the pandemic apart from the health sector is the finance sector. On February 16, 2021, the Philippines government issued RA 11523 or the Financial Institutions Strategic Transfer (FIST) Act to facilitate banks and financial institutions (FIs) to dispose of their non-performing assets (NPAs) and non-performing loans (NPLs) through transfers to FIST Corporations (FISTC).

The FIST Act is one of the government's top priorities for strengthening the financial sector and allowing banks and financial institutions to lend credit to a wider range of industries, thereby generating much-needed economic growth. Moreover, this act empowers asset management organizations, similar to special purpose vehicles, to collect, dispose of, manage, and operate NPAs acquired from financial institutions.<sup>53</sup>

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> ASEAN Briefing (2021). Philippines Launches FIST Act to Protect Banks and Financial Institutions. [https://www.aseanbriefing.com/news/philippines-launches-fist-act-to-protect-banks-and-financial-institutions/#:~:text=On%20February%202021%2C%20the,to%20FIST%20Corporations%20\(FISTC\).](https://www.aseanbriefing.com/news/philippines-launches-fist-act-to-protect-banks-and-financial-institutions/#:~:text=On%20February%202021%2C%20the,to%20FIST%20Corporations%20(FISTC).)<sup>53</sup>

In addition, value-added tax (VAT), withholding tax, stamp tax, and capital gains tax will not apply to the transfer of NPAs from Fis to a FISTC. Corporations can also take advantage of other advantages, such as reduced rates for appropriate fees.<sup>54</sup>

The outstanding loans of big banks has decreased by 4.5 percent by April 2021. Officials from the Federal Reserve have ascribed the lending drop in part to banks' tightening credit standards in response to an increase in problematic loans. The BSP authorized the law's implementing rules and regulations (IRR) by May 20, 2021, including the procedure for obtaining a certificate of eligibility for targeted nonperforming assets (NPAs) that banks wish to sell. However, the FIST Law is considered as helping to ease banks' concerns about NPL building, which is still relatively low compared to the peak of 17.6 percent in 2002 following the Asian Financial Crisis, as measured by BSP data.<sup>55</sup>

### **Monetary Board Resolution No. 517 April 21, 2021-Extension of Temporary Measures Implemented in the BSP's Rediscounting Facilities**

The Monetary Board approved the continuation of the temporary measure in the rediscounting facilities till the end of 2021 through Resolution 976 published on July 29, according to BSP Governor Benjamin Diokno.

In an article in Philippine Star, Agcaoli wrote that after Luzon was placed under heightened community quarantine, the BSP allowed a temporary reduction in the spread on peso rediscounting loans to zero from March 20 to May 19. As part of measures meant to give banks with the liquidity they need to ensure pricing and financial stability in the midst of the global health crisis, the reduction was extended to July 17 and September 30 last year, and to January 31, April 30, and July 31 this year.<sup>56</sup>

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<sup>54</sup> ASEAN Briefing (2021). Philippines Launches FIST Act to Protect Banks and Financial Institutions. [https://www.aseanbriefing.com/news/philippines-launches-fist-act-to-protect-banks-and-financial-institutions/#:~:text=On%20February%2016%2C%202021%2C%20the,to%20FIST%20Corporations%20\(FISTC\).](https://www.aseanbriefing.com/news/philippines-launches-fist-act-to-protect-banks-and-financial-institutions/#:~:text=On%20February%2016%2C%202021%2C%20the,to%20FIST%20Corporations%20(FISTC).)

<sup>55</sup> Ibid.

<sup>56</sup> Agcaoli, Lawrence (2021). "BSP extends zero spread on rediscounting loans." <https://www.philstar.com/business/2021/08/02/2116874/bsp-extends-zero-spread-rediscounting-loans>

To help qualified banks meet their short-term liquidity needs, Agcaoili describes discounting as a credit facility offered by the BSP to qualified banks with active rediscounting lines, refinancing the loans they give to their clients with relevant documentation from end-user borrowers.<sup>57</sup>

Although response measures last year released P2.21 trillion in additional liquidity into the financial system to mitigate the pandemic's impact, banks continued to reject the central bank's rediscounting loan facilities in the first half, with only one bank approving P4 million in June to fund industrial processing.<sup>58</sup>

## Laws and Administrative Issuances in the Education Industry

### DepEd Order No. 007 S. 2020, DepEd Order No.008 s. 2020

On May 11, 2020, DepEd released DepEd Order No. 007 S. 2020 which announced that the opening of the new school year would be on August 24, 2020 which was in contrast to their usual mid-year opening. This gave them the opportunity to reach its target of enrollees in the public and private schools for School Year 2020-2021. From their original target of 28 million enrollees, DepEd counted a total of 22 million enrollees as of 8:00 AM of July 29, 2020. This outcome was to be expected because of the problems posed by the pandemic (i.e. financial, and others).<sup>59</sup>

In contrast to DepEd's announcement of classes, Duterte vehemently expressed that no student will be allowed to attend school without the availability of a vaccine.<sup>60</sup>

DepEd then issued DepEd Order No.008 s. 2020, on May 28, 2020, which provided the Guidelines of Enrollment for School Year 2020-2021 in the Context of the Public Health Emergency Due to COVID-19. Section 1 of said DepEd Order states that "In its Basic Education Learning Continuity Plan (BE-LCP) titled Learning Opportunities Shall Be Available: The Basic Education Learning Continuity Plan in the Time of COVID-19, DepEd announced a greater emphasis on multiple learning delivery modalities

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> CNN Philippines Staff. (2020) "DepEd hits target number of enrollees, but millions of students seen to be left out." <https://www.cnn.ph/news/2020/7/29/DepEd-enrollees-2020-2021.html>

<sup>60</sup> Tomacruz, S. (2020), March 9). "Duterte suspends classes in Metro Manila March 10-14 coronavirus threat." <https://www.rappler.com/nation/walang-pasok-duterte-declares-class-suspensionsmetro-manila-coronavirus-threat-march-10-14-2020>

such as blended learning, a distance learning, and homeschooling, on top of to replace face-to-face learning modality in order to reduce possible exposure of learners and teachers to COVID-19.”

Alternative learning delivery modalities are the ways teachers have to conduct their classes. Dr. Ramos defines distance learning as “a learning delivery modality where learning takes place between the teacher and the learners who are geographically remote from each other during instruction”.<sup>61</sup> She then describes distance learning further by mentioning three (3) types of this modality: Modular Distance Learning (MDL), Online Distance Learning (ODL), and TV/Radio-Based Instruction.<sup>62</sup>

The first type, Modular Distance Learning (MDL), is done asynchronously as the students are given self-learning modules (SLM)—in print or digital format, whichever is more convenient or applicable for them—and offline resources (i.e. textbooks, activity sheets, E-books, notes, etc.) to achieve learning. Here, the teacher is expected to still monitor, assess, assist and even visit (when safe and applicable) their students just like how it was during face-to-face classes. Parents, guardians, and/or other relatives of the student can also help students with the facilitation of learning when possible.

The second type, Online Distance Learning (ODL), views the teacher both as someone who facilitates and motivates students to actively participate while being geographically remote from each other during instruction. This method allows for synchronous instruction through online platforms that serve as virtual classrooms for the teachers and students. Some of these include, but are not limited to Google Classroom, Zoom, Messenger Video Chat, and Microsoft Teams. The approach requires a stable internet connection and can offer real time learning and communication. Materials are offered online usually through an institution's learning management system (LMS) and students are given opportunities to access them at their convenience.

The third type, TV/Radio-Based Instruction, uses the SLM by converting them into video and radio-script formats for the TV and Radio, respectively.

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<sup>61</sup> Ramos, D. T. (2020, August 5). Learning modalities in the new normal education setting. <https://www.pressreader.com/philippines/sunstar-pampanga/20200805/281663962349944>

<sup>62</sup> Ibid.

Meanwhile, CHED issued CHED Memorandum Order No.04, s. 2020, which dictates the Guidelines on the Implementation of Flexible Learning. The urgent need to explore other learning modalities is mentioned in the rationale of said Order, stating that "as learners are differently situated in terms of time, pace, and place, these options allow customization of delivery modes responsive to students' need for access to quality education. This shall also give students the option to choose the delivery mode most convenient to them as early as the time of their enrollment."<sup>63</sup>

In an article by Joaquin, Biana and Dacela, it was observed that certain HEIs in the country have implemented proactive policies for the continuance of education despite the closure of other institutions. Top universities in the country like De La Salle University (DLSU), Ateneo de Manila University (ADMU), the University of Santo Tomas (UST), and the state-run University of the Philippines, Diliman (UPD) have resorted to online distance learning albeit in not necessarily the same methods. CHED also encourages HEIs to continue offering convenient and alternative modes of learning for on-campus learning.<sup>64</sup>

CHED chair Prospero de Vera, in a webinar organized by the Center for Strategy, Enterprise, and Intelligence on May 21, 2021, said that, "From now on, flexible learning will be the norm. There's no going back to the traditional full-packed face-to-face classrooms. The commission has adopted the policy that flexible learning will continue in school year 2021 and thereafter."<sup>65</sup> He adds that the "old paradigm of face-to-face versus online will now disappear" as higher education institutions would have a "flexible system where universities will mix-and-match flexible learning methods appropriate to their situation".<sup>66</sup>

Many students and groups have also asked for a "academic freeze" as the country tackles the pandemic due to the stress caused by online learning. It was pointed out that the coronavirus shutdown had an impact on household finances, and that many Filipinos don't even have internet connection or access to a computer.<sup>67</sup>

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<sup>63</sup> CHED Memorandum Order No.04, s. 2020

<sup>64</sup> Joaquin, J. B., Biana, H. T., & Dacela, M. (2020). "The Philippine Higher Education Sector in the Time of COVID-19." <https://www.frontiersin.org/articles/10.3389/feduc.2020.576371/full>

<sup>65</sup> Magsambol, B. (2021). "CHED: There's no going back, 'flexible learning will be new norm.'" <https://www.rappler.com/nation/ched-says-flexible-learning-new-norm>

<sup>66</sup> Magsambol, B. (2021). "CHED: There's no going back, 'flexible learning will be new norm.'" <https://www.rappler.com/nation/ched-says-flexible-learning-new-norm>

<sup>67</sup> Ibid.

Michael Beltran, in his article in Nikkei Asia, mentions a nationwide survey, conducted by the coalition Movement for Safe, Equitable, Quality, and Relevant Education (SEQuRe) for primary and secondary public schools to uncover the extent of troubles with distance learning. While issues with internet connection and module availability have slowed schooling for low-income families, the instability of online classrooms is a stumbling block for everyone.<sup>68</sup>

In conclusion with respect to the laws and issuances promulgated for education, it could be seen that these laws prioritize continuity in education, adapting to different ways on how students could still continue their schooling despite some calls for an academic freeze. Although the online platform could be hard to adjust to in regards to the lack of facilities, the actual system of conducting online classes is a difficult paradigm shift to adjust to for teachers, students, and even parents.

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<sup>68</sup> Beltran, M. (2021). "Philippine children are left behind by poor distance learning." <https://asia.nikkei.com/Life-Arts/Life/Philippine-children-are-left-behind-by-poor-distancelearning2>

## Conclusion

**W**hen the COVID-19 outbreak struck more than 200 countries, including the Philippines, each state has exercised their powers in taking measures to protect their citizens. The 1987 Philippine Constitution emphasizes the responsibility of the State to protect its constituents as embodied in Section 15, Article II which states that "The State shall protect and promote the right to health of the people and instil health consciousness among them." Also, Section 23 (2), Article II of the Constitution states that "In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof."

The creation of laws and administrative issuances that are tailored to address national health emergencies could be traced to how the country has responded to Severe Acute Respiratory Syndrome (SARS), and HN1N1 (Swine flu). It is recalled that to address SARS, then President Gloria Macapagal Arroyo issued Executive Order No. 201, s. 2003, which stated the powers and roles of government agencies in response to the SARS Contagion. Thus, it is indeed evident that laws were needed to mitigate and avoid further transmission of those previous pandemics here in the country.

This paper has discussed the salient features of the following laws that address issues in varying sectors and industries of the country: RA 10121 for the Disaster and Risk Management industry; RA 11469, or the, RA No. 11525, and Proclamation No. 929 s. 2020 for the health industry; Joint Memorandum Circular No. 1 Series of 2020 for the social welfare industry; Guidelines on the Adoption of Flexible Work Arrangements stipulated in DA No. 2, Series of 2009, and RA 11165 for the labor industry; BSP Circular 1105-20, RA 11523, and Monetary Board Resolution No. 517 for the finance industry; and DepEd Order No. 007 S. 2020, and DepEd Order No.008 s. 2020 for the education industry.

As different laws and issuances were created to flatten the curve of COVID-19 cases in the country, it is observed that some of these were created just as reactive solutions rather than pre-emptive ones. The

enactment of these laws, issuances relate to the legal preparedness of our country to address pandemics and other national emergencies, and it is through these laws and issuances that Filipinos will have to work as one in mitigating COVID-19 transmissions.

In the Philippines, there are already existing laws that could help with national emergency, even before the COVID-19 outbreak such as the laws in the labor sector and finance sector. As observed, those laws in telecommuting, flexible work arrangement, and BSP's digital finance have less criticism in implementation compared those laws on quarantine and vaccination in the health sector, and the implementation of DSWD's SAP.

Although these laws could still be changed and improved, it is evident that the creation of laws and administrative orders specifically tailored to address the pandemic, whether these issuances are pre-emptive or reactive, must be prioritized by the legislative and executive branches of our government. Indeed, the spirit of *bayanihan*, the will to carry our country out of this crisis, could be strengthened through legal preparedness.

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# Indigenous Peoples' Rights in the Philippines through Educational Assistance Programs: An Insider's Perspective\*

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## Abstract

Education is among the best long-term financial investments that the state can make. It is essential for human and economic development thereby making lack of access to education as one of the contributing factors to poverty and marginalization of certain sectors in the society, especially the indigenous peoples. Education, however, while viewed as an "enabling right" appears to be a privilege rather than a right for most Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) who remain to be among the most vulnerable and marginalized sectors in the country. Thus, the establishment sustainable, reliable, and accessible means of education is a valuable approach for IPs to claim their statutory rights, as well as in their pursuit for self-determination.

The right of indigenous peoples is enshrined in 1987 Philippine Constitution, Indigenous Peoples Rights Act (IPRA), and numerous international human rights instruments. This paper will emphasize that IP communities have the right to be granted and attended with efficient and continuous means for improvement of their economic and social conditions. As the statutes and international law provide, the state shall guarantee the right to ICCs/IPs to government's basic services which shall include education. Moreover, Section 46 (c), Chapter VII of the IPRA elaborated that the National Commission on Indigenous Peoples (NCIP) through the Office of Education Culture and Health (OECH) is mandated to administer and implement all educational assistance programs and other educational rights intended for indigenous peoples in coordination with DepEd and CHED.

Finally, the policies to strengthen the transparency and accountability in the implementation of the program should be established as this will enable the NCIP in meeting the developmental objective of the program and that is, to improve the over-all quality of life and efficiency of the ICCs/IPs thru increased access to educational opportunities.

**Keywords:** Indigenous Peoples (IP); IP education; empowerment right; educational assistance programs

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## Introduction

**E**ducation is one of the best long-term financial investments that the state can make. It is essential for human and economic development that lack access to education and is one of the contributing factors to poverty and marginalized society especially for the less fortunate groups such as the indigenous people.

Education, however, while viewed as an “enabling right” appears to be a privilege rather than a right for most Indigenous Cultural Communities/ Indigenous Peoples (ICCs/IPs) who remain to be among the most vulnerable and marginalized members of citizenry. International Labor Organization (2007). *The Road to Empowerment and Strengthening the Indigenous Peoples Rights Act: Old Ways, New Challenges*.<sup>1</sup> Thus, the establishment sustainable, reliable, and accessible means of education is a valuable approach for IPs to claim their statutory rights, as well as in their pursuit for self-determination.

Article II, Section 22 of the 1987 Philippine Constitution, reiterated in Section 2, Chapter 1 of the Republic Act of 8371 otherwise known as “The Indigenous Peoples Rights Act (IPRA) of 1997”, declares that the state recognizes and promotes the right to the ICCs within the framework of the national unity and development.<sup>2</sup> It is also in the instance that the enactment of the IPRA made it a provision under Chapter V, Section 25 that “Indigenous Peoples have the rights to special measures of their immediate, effective and continuing improvement of their economic and social conditions, and accordingly the State shall guarantee the right of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) to government’s basic services shall include education.”<sup>3</sup>

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<sup>1</sup> International Labor Organization (2007). *The Road to Empowerment and Strengthening the Indigenous Peoples Rights Act: Old Ways, New Challenges*.

<sup>2</sup>Article II, Section 22 of the 1987 Philippine Constitution

<sup>3</sup>Section 25, Republic Act 8371

The foregoing provisions under Chapter VII, Section 46(c) stating that "The National Commission on Indigenous Peoples (NCIP), through its Office on Education, Culture and Health (OECH) is mandated to administer all scholarship programs and other educational rights intended for ICCs/IPs in coordination with the Department of Education (DepEd) and the Commission on Higher Education (CHED)" and ensure that such education services shall be accessible to them. Hence, the implementation of NCIP's Educational Assistance Program (NCIP-EAP).

The National Commission on Indigenous Peoples has six administrative provinces, namely: Davao Occidental, Davao del Sur, Davao City, Davao del Norte, Davao de Oro, and Davao Oriental. The Commission has already spent Php73,609,040.00 for Region XI covering school years 2005-2006 to 2013-2014, and Php27,734,040.00 or about 37.68 percent of the total approved budget for nine consecutive school years was allocated for NCIP-EAP Davao City Province (NCIP-RXI Records). The status and effectiveness of NCIP-EAP implementation in Davao City are the points of inquiry which prompted the researcher to undertake the study. Primary data were gathered among NCIP – EAP graduates from S.Y. 2005-2006 to S.Y. 2013-2014 covering the three (3) congressional districts of Davao City. The survey was conducted in February 2016.

### Definition of Terms

To have a better understanding of this study, the following terms are operationally defined:

*Budget Allocation* refers to the budget allocated for the corresponding grantee slot.

*Criteria* refers to the set of standards by which the applicants are evaluated and selected.

*Documentary Requirements* refers to the documents needed to comply in availing the program.

*Educational Assistance Program (EAP)* refers to the program that aims to provide limited financial assistance to qualified ICC/IP students based on criteria set forth.

*EAP Orientation* refers to the orientation of the grantees on the program and their role during and after the program.

*Educational Assistance* refers to the amount received by the grantees every semester.

*Grantees* refer to the qualified recipients/beneficiaries of the educational assistance Program.

*Indigenous Cultural Communities (ICCs) / Indigenous Peoples (IPs)* refer to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community or communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits.<sup>1</sup>

*National Commission on Indigenous Peoples (NCIP)* the primary government agency responsible for the formulation and implementation of policies, plans, programs to promote and protect the rights and well-being of the ICCs/IPs and the recognition of their ancestral domains and their rights thereto.

*Office of Education, Culture and Health (OECH)* refers to an office of the NCIP which administer all scholarship programs and other educational rights intended for ICCs/IPs.

## Philippine and International Laws on IP Education

Education, under international human rights law is an inalienable human right, not a mere commodity or a service. It is "an empowerment right" and "the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty."<sup>2</sup>

UNESCO has also viewed education as essential although not sufficient for human development and as having cultural, even spiritual benefits.<sup>3</sup> It was further agrees in the World Conference on Education for All that primary education must be accessible to all children to massively reduce illiteracy. Hence, the adoption of the World Declaration on Education for All, which reaffirmed the notion of education as a fundamental human right and urged countries to intensify efforts to address the basic learning needs of all.<sup>4</sup>

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<sup>1</sup> Section 3, Republic Act 8371

<sup>2</sup> United Nations Human Rights (2009). "Annual Report of Committee on Economic, Social and Cultural Rights

<sup>3</sup> Barrett, Angeline (2006). "The Concept of Quality in Education: A review of the international literature on the concept of quality in education." Department for International Development, United Kingdom

<sup>4</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) Publication (1990)

Moreover, the extracted preamble of "World Declaration on Education for All" (UNESCO, 1990), has established the following significant pledges: (a) Recalling that education is a fundamental right for all people, women and men, of all ages, throughout our world; (b) Understanding that education can help ensure a safer, healthier, more prosperous and environmentally sound world, while simultaneously contributing to social, economic, and cultural progress, tolerance, and international cooperation; (c) Knowing that education is an indispensable key to, though not a sufficient condition for, personal and social improvement; and (d) Recognizing that traditional knowledge and indigenous cultural heritage have a value and validity in their own right and a capacity to both define and promote development.

Various theories, organizations, individuals, studies have upheld the importance of education, however, in all regions of the world, a number of people especially children still suffer disproportionately from unequal access to quality education, therefore being robbed of their full human potential and their ability to contribute fully to their own communities and to the wider society.<sup>5</sup>

Philippine Education is constitutional that it was further elaborated in Article II, Section 17 of the Philippine Constitution (1987) that it should make education, science and technology, arts, culture and sports a priority of the State. With this, the State is mandated to provide a system of education for the Filipino children and the youth. The kind of education that is envisioned in the Constitution is "quality education," a "complete, adequate, and integrated system of education relevant to the needs of the people and society," and the State must ensure that all citizens can access this envisioned system of education.<sup>6</sup> In achieving these goals, the Article 14 of 1987 Philippine Constitution mandates the State to provide for a free public elementary and secondary education; provide scholarship grants; student loan programs; subsidies and other incentives to deserving and poor students; to give the highest budgetary priority to education; mandates the State to preserve and enrich the Filipino national culture based on the principles of unity in diversity and free expression; and to protect the rights of indigenous cultural communities, among others.

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<sup>5</sup> McDougall, Gay (2009). United Nations Forum on Minority Issues. United Nation Human Rights. Retrieved from <https://digitallibrary.un.org/record/649643?ln=en>

<sup>6</sup> Article XIV, Sec. 1, and Article XIV, Sec 2 sub-section 1, 1987 Philippine Constitution

The UN Declaration on the Rights of the Indigenous Peoples, among other international human rights law, contains specific provisions on indigenous peoples' rights to education. Article 14 of the Declaration stipulates that "indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination."<sup>7</sup>

Accordingly, the situation of the Philippines' indigenous peoples is a "little-reported tragedy"<sup>8</sup>. In a country that has experienced good economic growth in recent history, the indigenous peoples seem to be a striking exception. Their struggle in life is one of great neglect, erosion of basic human rights, and severe lack of opportunity. Children of ICCs/IPs are destined to live in servitude and poverty because they face discrimination and cannot get an education. Families, despite their best efforts and hard work, cannot afford to send their children to school.

Recognizing education as a necessary means to realize other human rights and fundamental freedoms, educational programs must subscribe to the rights-based approach, which gives primary importance to the principles of participation. Nevertheless, history has evolved, but there are many IP communities that still lacked access to decent basic social services, had limited opportunities to engage in mainstream economy and suffered social, economic and political exclusion or marginalization.<sup>9</sup>

Providing an education for the indigenous people is one of the best ways to create a future full of hope for an entire generation that would otherwise suffer the same fate as their parents. Being educated offers hope and an effective way of rising above the conflict and discrimination that plagues rural areas of the Philippines.<sup>10</sup>

### **Indigenous Peoples' Rights Act (RA No. 8371)**

In the midst of various realities and challenges that the indigenous people are facing, the Philippine indigenous peoples continue to remain hopeful and convinced that a relevant education will empower them to claim, exercise and protect their rights in accordance with their culture and tradition. That is why ensuring a sustainable future for the ICCs/IPs

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<sup>7</sup> United Nations Declaration on the Rights of the Indigenous Peoples (2007).

<sup>8</sup> *Supra*, note 2.

<sup>9</sup> Padilla, Stephen Norries (2012). "An Inclusive Education that Respects Indigenous Cultures". *Philippine Daily Inquirer*.

<sup>10</sup> HOPE International Development Agency. "Building Family Ties. Retrieved from <http://www.hopeinternational.com>

emphasizes the crucial role of education in strengthening the capacities of the indigenous learners/students. It also being highlighted engaging ICCs/IPs in education is important to strengthen cultural integrity and ensure meaningful and sustainable development for the ICCs/IPs.<sup>11</sup>

Furthermore, the right of indigenous peoples to education is primarily enshrined in the Philippines Constitution (1987) which stipulates that the State shall "protect and promote the right of all citizens to qualify education at all levels, and shall take appropriate steps to make such education accessible to all."<sup>12</sup>

The Republic Act No. 8371, otherwise known as "The Indigenous Peoples Rights Act (IPRA) of 1997", also stipulates the right of Indigenous Peoples to special measures for the immediate, effective and continuing improvement of their economic and social conditions, and accordingly, the State shall guarantee the right of ICCs/IPs to government's basic services which shall include education among others.<sup>13</sup>

Subsequently, the IPRA mandates the National Commission on Indigenous Peoples (NCIP), through its Office on Education, Culture and Health (OECH) to administer all scholarship programs and other educational rights intended for ICCs/IPs in coordination with the Department of Education, Culture and Sports (DECS) and the Commission on Higher Education (CHED).<sup>14</sup> It was also in Section 4, Rule VII, Part VI of the Implementing Rules and Regulations (IRR) of Republic Act 8371 also provides for the creation of an Office on Education, Culture and Health (OECH) as the branch of the NCIP tasked for the efficient implementation of the rights of the IPs to educational, cultural, and health-related services as provided in IPRA.

The OECH crafted its IP Education framework with a view to its role as "an enabling partner" for the ICCs/IPs' physical and social well-being ensuring that programs are designed to motivate and blend well with the distinct and highly specific issues faced by ICCs/IPs. The OECH aims to harness, integrate, and harmonize multi-sectoral efforts of all stakeholders in safeguarding the educational, cultural, and health-related rights of

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<sup>11</sup> Kalindogan (2012)."IP Education: Ensuring Sustainable Future for the Indigenous Peoples." The 7th Annual Kalindogan Young Leaders Congress.

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Section 46c, Republic Act 8371

ICCs/IPs.

In fulfilling the mandate of the 1987 Philippine Constitution, the government is taking the lead in providing an opportunity specifically to the youth members of the indigent families to obtain quality educational support that is both relevant and accessible. Various government agencies have established the provisions of scholarship grants to qualified and deserving youths that serve as means to address the problem of poverty and unemployment which hinder authentic development.

In the discussion paper on Student Financial Assistance Programs (StuFAPs) Policies, Procedures and Control Mechanisms emphasized that undergraduate, graduate, and post-graduate scholarships and grants-in-aid (GIAs) implemented by National Government Agencies (NGAs) are generally guided by policies and guidelines for the administration and monitoring of the said subsidies through laws, IRRs, and department issuances.<sup>15</sup>

The main implementers of tertiary scholarships and grants-in-aid in the country under the Government Appropriations Act (GAA) are the CHED, Department of Science and Technology (DOST), and State Universities and Colleges (SUCs) by virtue of approved provisions included in their budgets of funds. CHED supervises and implements its scholarship programs and grants and provides for the rules therefor through CHED Memorandum Orders (CMOs) that are primarily anchored on Republic Act (RA) 7722, otherwise known as the "Higher Education Act of 1994."

Furthermore, DOST is the administrative body for science and technology scholarship programs through Republic Act No. 7687 or "An Act Instituting a Science and Technology Scholarship Program and Other Purposes."

The NCIP EAP anchored in Republic Act (RA) 8371, otherwise known as "The Indigenous Peoples Rights Act (IPRA) of 1997, specifically on Section 25, Chapter V, the NCIP-EAP formally commenced in School Year (SY) 1999-2000 under the banner of the merged Edukasyong Handog ni

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<sup>15</sup> Halili, Riza (2014). "Assessment of Student Financial Assistance Programs (StuFAP) Policies, Procedures and Control Mechanisms." Philippine Institute for Development Studies.

Erap para sa Mahihirap (EHEM) and Katutubong Mag-aaral Priority Courses (KMPC) Scholarship Programs. The NCIP Scholarship Program is available to members of the ICCs/IPs enrolled in the elementary level, high school, vocational, college, as well as post graduate courses. For that school year, the NCIP-EAP covered only the 3rd District of Davao City through the sponsorship of the Congressman of the same District. In the following year, the program was made available for the IP residents of 1st and 2nd Districts of Davao del Sur and it was in S.Y. 2003-2004 that the NCIP began region-wide implementation of the NCIP-EAP including the 1st and 2nd Districts of Davao City.

Through the initiative of some Congressmen in the House of Representatives, specific allocation for the scholarship of members of northern cultural communities in the budget of the defunct Office for Northern Cultural Communities (ONCC) was introduced in Fiscal Year (FY) 1992. The allocation became a regular budgetary appropriation in FY 1995 through the vigorous representation by concerned Congressmen. On the other hand, the defunct Office for Southern Cultural Communities (OSCC) had been apportioning from its regular allocation funds for educational assistance to clientele in its areas of jurisdiction. Moreover, the ONCC and OSCC Regional Offices had successfully worked for cooperation with civic spirited groups, local and foreign, to augment educational assistance initiatives for members of ICCs/IPs.

### **The Indigenous Peoples: Davao City**

The "Indigenous People of Davao" blog cited that Ferdinand Blumentritt mentions fourteen (14) Davao tribes: Ata, Bagobo, B'la-an, Calagan, Culaman, Dulangan, Guianga, Loac, Maguindanao, Mandaya, Manobo, Samal, Sanguil and Tagakaulo. Also mentioned that Malayan ethnology curators at Chicago's Museum of Natural History Fay-Cooper, describes extensively six of Davao's aboriginal tribes: Bagobo, B'la-an, Tagacaolo, Kulaman, Ata, and Mandaya and additional native tribes are identified as Mansaka, Libaon, Mangguan, Matigsalug and Mamanua.<sup>16</sup>

Significantly, there are five major tribes that were assisted by the

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<sup>16</sup> Diaz, Rhey Mark (2015). "DAVAO: It's History, Culture, Politics, Economy and Progress." Indigenous Peoples of Davao retrieved from <http://davaohistoryph.bogspot.com> on February 2016

National Commission on Indigenous Peoples as the agency mandated to protect and promote the rights of the indigenous peoples, namely: Ata, Bagobo-Klata, Bagobo-Tagabawa, Obu-Manuvu and Matigsalog (NCIP – Davao City Provincial Office; City Local Government of Davao).

In the earlier times, the Ata ICCs/IPs lived in the uplands or along the head waters of Salug, Talahawan and Libuganon Rivers. According to Anthropological Studies, they are the least known the of the inhabitants of Mindanao, of unknown origin and appearing to be of the Negrito and Malay fusion. They once lived in frail huts of palm leaves and bark of trees built on top of trees and primarily, hunt for livelihood. The Ata ICCs/IPs also ascribed themselves from the place where they originated which is termed as matig in their native language. For illustration, an Ata from Mapula is a Matigmapula whereas an Ata from Talahawan is a Matigtalahawan.

Originally, the Ata ICCs/IPs inhabited Mapula but when there population increased, they occupied nearby places now known as Paquibato District, Davao City up to certain portions of the Municipality of Sto. Tomas, Davao del Norte. Prior to the influx of the Spanish conquistador, they lived in peace attending to farms, do hunting and gathering in the rivers of Salog (Davao River) and Talahawan (Lasang River). When the Spaniards came, they imposed their religion and hunted their tumahuron (baylan) and detained them such that they were forced to evacuate uplands towards Panabol (now known as Panabo City). Ata ICCs/IPs are peaceful people but can be very brave and stand on their own when provoked. In history, they have stood against groups who tried to conquer them such as the Moros. They have a long history of great Ata leaders who have fought for the safety of their territory.<sup>17</sup>

The territory of the Bagobo-Klata can be found in North by the Davao River, South by the Lipadas River, in the boundary of North Cotabato and Davao City in West, and in the East by Davao City. It was in 2014 that the Bagobo-Klata ancestral domain was formally recognized through CADT No. R11-DAV-0514-168 with a total area of 6,378.0865. It covers the barangays of Manuel Guianga, Sirib, Tamayong, and Tugbok and Calinan Districts all in Davao City.

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<sup>17</sup> NCIP Coffee Table Book 1, Region XI, 2021

The past of the Bagobo-Klata as lived by their ancestors created a community of dreamers and achievers. Even before there were foreign conquerors, the Bagobo-Klata had developed economic and political systems that allowed the people to excel and prosper as individuals. It may be apparent that their ancestral domain is small as to hectarage compared to other ICCs/IPs, they strived to build landmarks not of structures but of achievements of their people.

Klata, as figuratively defined, means vein or life. Descriptively, it came from the word "olat" which means middle. Their ancestors were the original inhabitants of the west part of Davao River's mouth. This is in the middle or crossroads to the ancestral domains of other Indigenous Cultural Communities. This geographic location of territory was potential for trading. The BAgobo-Klatas were considered as the lifeblood of the ancient times commerce in the countryside of Davao City. Klata also means "klat-ang" which is a bamboo stair with a single post at the center. When the stair is removed, this means that the household members were not around. And so it is removed during night time to deceive those with ill intentions.<sup>18</sup>

In 2013, the territory of Matigsalug was formally recognized through CADT No. R10-KIT-0703-0011 traversing Region 10 (Province of Bukidnon), Region 11 (Davao City) and Region 12 (Province of Cotabato).

Since the earliest times, the Magbabaya (God) bestowed every dalupo (community) in the vast mountain ranges of Mindanao with abundant resources from both the land and water, sustaining the needs of people who are skilled farmers, hunters and food gatherers. Among these are the Matigsalug ICCs/IPs. Matig referring to "the place where we come from" and Salug which means river.

Many of the generations of Matigsalug have kept and protected the forests, sanctuaries and streams including the ones in Gumitan. Gumitan was named after the three siblings of Apo Ngabong or Ngabol namely Midtan and Maytan (female twins) and Guro (mal). Apo Ngabong, together with Apo Buyog was the first dweller of the dalupo. Both were highly respected leaders known not only for their riches, but also for their leadership qualities of character, wisdom and bravery.<sup>19</sup>

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<sup>18</sup> Ibid

<sup>19</sup> Ibid

The Obu-Manuvu is longossa nokod ubpo (blood to blood) as a result of intermarriages in divowyon (on the other side). For this reason, language used is almost the same. All the descriptive names of mountains, rivers and creeks were derived from their own dialect including the burial grounds of elders, hunting, sacred sites and medicinal plants. When they are asked of their identity, they would simply remark manuvu koy meaning "I am a manuvu." Manuvu occupies portions of Southern Bukidnon, Northern Cotabato and Northwestern Davao.

The territory of the Obu-Manuvu was formally recognized through CADT No. R11-DAV-1108. They are a sub-tribe of the Bagobo where their compound name Obu-Manuvu is derived from what is ascribed to it by the other two sub-tribes (Bagobo-Klata or Jangan and Bagobo-Tagabawa) and by its self - ascription both ascription being combined together. Originally, the Manuvu of Davao were called Tahaurog (meaning those living along rivers).<sup>20</sup>

"Bagobo" refers to people inhabiting the slopes of Mt. Apo while "Bawa" means South where the word "Tagabawa" was coined. "Tagabawa" refers to those who were the first inhabitants of the southern and eastern slopes of the mountain.

The Ancestral Domain of the Bagobo-Tagabawa stretches from Lipadas River in Davao City to Saguing River in Makilala, North Cotabato. Their territory covers Toril, Sta. Cruz, Digos City, Bansalan heading up to Kidapawan. This would also include the upland and coastal areas in Talomo, Daliao, Darong, Astorga, Sta. Cruz and Digos.

One of the most revered material culture for the Bagobo-Tagabawa would be their traditional attire and accessories because it showcases their creativity and resourcefulness. They are known as the most colorful ICCs/IPs in Davao City because of their attire. Even the Spaniards during colonization mentioned them as one of the most well-dressed natives. The Bagobo-Tagabawa use materials found in their surroundings as part of their ornaments. They are also artistic and love to display colorful accessories over almost all parts of their bodies.

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<sup>20</sup> Ibid

The Bagobo-Tagabawa tie-dyed abaca fibers in deep red, maroon, and black colors using dyes from trees of sikarig, kinarrám and kalawag which are bountiful in Mt. Apo. When the dyed fibers are dry, they weave these fibers into longitudinal strips with geometric designs representing nature and human beings. They also include in the weaving white undyed fibers to provide contrast to the colored ones. The motifs, spaces, and symmetry are recalled from memory. The finished product is called inabúl and these are polished using stones and shells to bring out a special luster and softness to the fabric.<sup>21</sup>

### NCIP Education Assistance Program

Adopted as one of the major programs of the NCIP, the budgetary appropriation for the scholarship grants to IPs was proposed to be retained in FY 1999 by members of the House of Representatives. Initially, the program was recommended for transfer to the Commission on Higher Education (CHED) by the Senate but it was restored in the bicameral session of both chambers of Congress after putting a high premium on the provisions of the IPRA, so that the budgetary appropriation was subsequently included in the General Appropriations Act (GAA) and in fact, it was increased to expand the coverage of the scholarship program nationwide.

The role of implementing agency in the provision of scholarships and educational assistance is vital as it is in this part were recipients could define the degree to which a program is implemented effectively or not. Moreover, agencies are responsible for policy guidance and direction, monitoring and evaluation and the promulgation of rules and regulations.

In the educational assistance offered by various government agencies such as CHED, DOST, DSWD, TESDA and LGUs, the main tasks of offices/agencies involved in the implementation are stipulated in memorandum orders, circulars, guidelines and handbooks. Such that, in CHED Memorandum Order (CMO) No. 13, Series of 2014, the CHED Regional Office (CHEDRO), in the implementation of Student Financial Assistance Programs (StuFAPs), is tasked to create a CHEDRO StuFAPs committee who will oversee the operation and implementation of the program.

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<sup>21</sup> Ibid

The CHEDRO is an arm tasked in promoting the program through visually-aided campaigns to be disseminated online, through department memoranda, as well as through brochures, flyers and other medium of information dissemination. The office also conducts assessments of the submitted documents from all the applicants and thereafter recommends who the qualified applicants are as well as their respective ranks using the selection criteria. It is also their tasks to issue notice of award and contract to qualified applicants based on results of ranking and slot assignment, orient the scholars/grantees/borrowers of their obligations/duties and responsibilities.

Likewise, the office is responsible for the termination of scholars/grants/loans and tasked to submit the required status reports, submits to fund utilization report per semester and will act on requests of scholars/grantees/borrowers for transfer to another school, as well as when grantees defer their enrolment or manifest their intent to shift to another course,, and the like. The CHEDRO will in turn, provide Higher Education Institutions (HEIs) with the approved master list of scholars/grantees/borrowers for proper identification, requires the registrar to provide the necessary documents needed; release financial benefits to scholars/grantees/borrowers following mode of payment, monitors participating HEIs and beneficiaries and submits to CHED-Office of Student Development and Services the updated data on status of scholars/grantees/borrowers and maintain the corresponding updated data base.

Moreover, the Department of Science and Technology (DOST) Science Education Institute (SEI) has several educational scholarship programs to increase the science and technology human resource development in the country. In administering its scholarship programs, the DOST established an advisory committee that is an inter-agency by nature. The committee ensures that its scholarship programs are coordinated and implemented effectively. effective coordination of the program. Withal, it is the aforesaid advisory committee that is tasked for the formulation of guidelines and priorities for the DOST-SEI's scholarship programs and for the criteria in the selection of awardees. Correspondingly, The DOST-SEI takes the lead in monitoring and evaluation of its scholars. A periodic evaluation of the academic performance of the scholars are also conducted by the committee on technical and selection.<sup>22</sup>

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<sup>22</sup> Supra, Note 2

It is consequently indicated in the S&T Scholars Handbook Academic Year (AY) 20014-2015 that the DOST-Regional Offices have been empowered to provide administrative and technical assistance to scholars in the region. As such, it disburses financial assistance, monitors academic performance, and acts on request, appeal, queries, complaints, among other tasks.

Furthermore, stipulated in Section 21 of NCIP Administrative Order No. 5, Series of 2012 is the role of NCIP in the administration of the NCIP-EAP of which it is responsible in accepting application papers filed by the applicants; assist the applicants to comply with the required documents and conducts evaluation and validation of the supporting paper. It shall also prepare and submit semestral physical and financial status report with narrative reports; conduct periodic monitoring of awardees to have information on their progress; do mentoring and counseling to the awardees; facilitates Memorandum of Understanding (MOU) execution and release educational assistance to the grantees. The office also has the responsibility of deciding and implementing decision in cases of disqualification, displacement, discontinuance, deferment and appeals; assists grantees in job placement or entrepreneurship after graduation; and propose amendments or enhancement of the guidelines.

The statistics shown in Student Aid Policy Analysis of Kantrowitz demonstrated that, as a whole, private sector scholarship programs tend to perpetuate historical inequities in the distribution of scholarships according to race. However, the reason of this is not on deliberate discrimination, but rather as a natural result of the personal interests of the scholarship sponsors. The sponsors of scholarships have been observed to have the tendency of specifically choosing for characteristics, activities and talents that interests them distinctly.<sup>23</sup>

Most of the general requirements for student applicants for educational assistance concerns of citizenship, grades of previous school graduated or attended, annual gross income of parents/guardian, commitment of parent/guardian to support the student throughout the study and must avail only one scholarship or financial assistance program if they are availing government scholarship programs. As an example, the

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<sup>23</sup> Kantrowitz, Mark. (2003) "The Distribution of Grants and Scholarships by Race". Student Aid Policy Analysis available at <https://pdf4pro.com/view/student-aid-policy-analysis-the-distribution-of-1af20d.html> on September 2, 2011.

CHED recommends to new college students to enroll in "priority courses" in order to avail of the available financial assistance programs and in order to engage in highly demanded jobs that will alleviate the country's economic standing.<sup>24</sup>

The Discussion Paper on StuFAPs Policies, Procedures and Control Mechanisms of Halili (2014) discussed that DOST-SEI qualifications require the applicants to be part of a certain income bracket group and have exceptional class standing as a control measure that scholarship awardees are only those who are financially meager, talented, and deserving. The law also requires the scholarship to be given to a specific number of scholars per municipality or locality, which is a good control mechanism for greater inclusion.<sup>25</sup>

Meanwhile, the Expanded Students' Grants-In-Aid Program for Poverty Alleviation (ESGP-PA) implemented through Joint Memorandum Circular No. 2014-1 is a collaboration program of State Universities and Colleges (SUCs), CHED, DBM, DSWD and Department of Labor and Employment (DOLE) specifies that the grantees of the program are indigent but highly qualified and competitive students who deserve to be given priority as Pantawid Pamilya beneficiaries. A proviso entails that they must have qualified to enroll in selected SUCs to take up priority programs of CHED and other courses aligned with the government key growth areas.

Likewise, the applicants of NCIP-EAP must qualify the general criteria and the specific criteria which include compliance and submission of the required documents. It is also specified that the applicant must be a bona fide member of an ethno linguistic group in the community, and willingness to sign an undertaking to serve his/her community after completion of his/her studies should there be opportunity and taking priority course needed in his/her community.<sup>26</sup>

Each country's scholarship varies in its selectivity. The application process in financial assistance is complicated but while the process can

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<sup>24</sup> Bacani, Louis. (2014) "CHED Lists In-demand, Priority College Courses Until 2018" retrieved from <https://www.philstar.com/campus/2014/05/26/1307196/ched-lists-demand-priority-college-courses-until-2018> on May 26, 2014.

<sup>25</sup> Supra, Note 3.

<sup>26</sup> Section 5, NCIP-Administrative Order No. 05, S.2012. Guidelines of 2012 on the Merit-Based Scholarship (NCIPMBS) and Educational Assistance (NCIP-EA) Program.

be complicated, the less income and assets a student and/or family has, the simpler it is to apply.<sup>27</sup>

In the case of CHED StuFAPs, student applicants submit their accomplished CHED StuFAPs application directly to the CHEDRO concerned. However, applicants who intend to enroll in SUCs shall directly submit StuFAPs application to the concerned SUCs as stipulated in its Calendar of Activities.<sup>28</sup>

Moreover, even if it is not required in the law or in the IRR of DOST-SEI, all awardees and Notices of Award are posted on website making their procedures transparent and they use control numbers rather than names in screening applications in order to level the playing field and avoid interference from sectors that might want to influence the results of the examination.<sup>29</sup>

The ESGP-PA has likewise created timelines in its JMC No. 2014-1 where activities were laid down with corresponding responsible agencies and schedules on the selection process. The process includes validation of potential grantees and confirmation of its eligibility; conduct of orientation on the guidelines; administration of admission exam; and release of allotment comprehensively directly to the SUCs, orientation of ESGP-PA student-grantees, organization or enhances value formation, remedial or mentoring up to the release of Notice of Cash Allocation (NCA) to the ESGP-PA SUCs.

Consequently, the selection procedure for NCIP-EAP is stipulated in Section 10 of NCIP AO No. 05, S.2012 which starts in the submission of application together with the required documents to the NCIP Provincial Office. It is in the NCIP Provincial Office where the submitted documents of applicants were initially evaluated. The NCIP Provincial Office specifically receives and confirms submitted application for validation and transmittal to the Regional Screening and Selection Committee (RSCC).

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<sup>27</sup> Michael S. McPherson & Morton Owen Schapiro (2002) *The Blurring Line Between Merit and Need in Financial Aid*, *Change: The Magazine of Higher Learning*, 34:2, 38-46, DOI: 10.1080/00091380209601844

<sup>28</sup> CHED Memorandum Order No. 13, Series of 2014, Revised Guidelines for the Implementation of StuFAPs, Effective AY 2014-2015

<sup>29</sup> *Ibid*

The aforesaid committee is responsible in selecting the grantees under oath using the criteria and qualifications embodied in the guidelines. This leads to a master list of endorsed grantees. Then, it is the Commissioner from the Region who will recommend the regional master list to the Commission En Banc (CEB) through OECH, upon notice to the Office of the Executive Director (OED) that it must be included in the CEB agenda.

It is the Commission En Banc therefore which finally decides on the master list and immediately thereafter, from the date of the recommendation of the CEB, the OECH shall cascade the information to the respective Regional Directors. It is the latter who shall cause the fast and efficient notification to the qualified grantees. The Regional Director directs the convening of the awardees by the Provincial Office, as the case may be for the orientation. Notices of orientation should also be furnished to OECH and the concerned Commissioner. The rules on selection and screening are also stipulated in Section 9 of the same administrative order.

### **Other Philippine Laws on IP Education**

The General Appropriations Act (GAA) is among the most crucial legislative enactments that Congress annually passes. The GAA is the law that specifies the annual expenditure program of the national government and all governmental instrumentalities. These expenditure outlines are inclusive of all financed state projects that are supposed to be funded out of government funds for the given cycle. It is the Department of Budget and Management (DBM) who oversees appropriations under the GAA.

Section 16 of RA 8545 (Expanded Government Assistance to Students and Teachers in Private Education Act) orders that the amount needed to implement the programs shall be provided for in the annual General Appropriations Act and that all funds appropriated for the purpose shall be constituted as a trust fund to be administered by the State Assistance Council, which shall be directly and automatically released to the different regional offices of the Department of Education.

JMC No. 2014-1 of SUCs, CHED, DSWD, DBM and DOLE specified that Two Billion Five Hundred Million Pesos (Php 2,500,000,000.00) shall be used for tertiary education (ESGP-PA) of poor but highly qualified and deserving students who belong to an indigent family under the National Household Targeting System for Poverty Reduction (NHTS-PR). It is the

DSWD which identifies these individuals and other informal sector families. Potential student-grantees shall be enrolled in SUCs in course offerings aligned with the priorities of the government.

Likewise, the slot allocation for the NCIP-EAP assistance grant shall be dependent on the approved budget of the program for the current fiscal year. Slots allocation by province shall be decided by the Commission based on the zero based allocation formula as determined based on population size of ICCs/IPs and other development indicators that the Commission, upon advice of the OECH, may deem appropriate for consideration.<sup>30</sup>

Financial aid is classified into two varieties, based on the criteria through which the financial aid is awarded: merit-based or need-based. Those grants or scholarships that are awarded by the college or university and those awarded by outside organizations are merit-based. Typically, merit-based scholarships are typically awarded for outstanding academic achievements. Meanwhile, need-based financial aid is awarded on the basis of the financial need of the student.

The National Postsecondary Aid Survey (NPSAS) revealed that Scholastic Aptitude Test (SAT) scores have an impact on the size of institutional need-based financial aid because students who obtained high SAT score with low family income tends to receive higher institutional need-based grants than those who obtained low SAT scores with low family income. The survey results further posted a conclusion that an institutional need-based awards are less considerate to the need and are instead more considerate to academic value. Hence, with the cost of tuition and other fees that are annually increasing, low-income students tend to find it hard to pay for their education. With the effort to help students in meeting the high costs of tertiary education, more schools have increased their merit-based scholarship grants to students who has outstanding academic position, school organization involvement or has contribution in athletic field.<sup>31</sup>

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<sup>30</sup> Section 13, NCIP-Administrative Order No. 05, S.2012. Guidelines of 2012 on the Merit-Based Scholarship (NCIP-MBS) and Educational Assistance (NCIP-EA) Program.

<sup>31</sup> *Supra*, Note 2.

The state of Columbia has a record of attracting among the most socio-economically diverse undergraduate student populations among peer institutions through commitment to need-blind admissions.<sup>32</sup> As a matter of fact in the United States, need-blind admissions do not consider a student's financial need. There is a college admission policy in which when deciding admission, the admitting institution does not consider an applicant's financial situation. Prior to the recent overhaul in public universities' funding under the Duterte administration, many colleges and universities are unable to offer financial programs to their admitted students to the extent that most of such schools admit all students on a "need-blind basis". This means that they tend to end up not being able to offer the students with sufficient aid for them to meet their needs in pursuing school.<sup>33</sup>

Subsequently, the CHED continues to provide the poor and deserving Filipinos the opportunities to quality higher education as articulated in its Long Term Development Plan provisions for "Access and Equity" as they organized and continued to implement scholarship programs as well as grants-in-aid and loan programs for students in need. The financial benefits for each academic year of StuFAPs is P30,000 for Full Merit Program, P7,500 for Half Merit Program, P15,000 for Private Education Student Financial Assistance (PESFA), P6,000.00 up to P12,000 for Tulong Dunong based on tuition and other fees of HEIs and P15,000 for Study Now Pay Later Plan. The details of qualifications, requirements and procedures were based on CHED Memorandum Order No. 13 Series of 2014.

Under the aforesaid program, the chosen student to receive a grant under the Expanded SGP-PA receives up to a maximum of Sixty Thousand Pesos (P60,000) per academic year or Thirty Thousand (P30,000) as grant per semester. This type of grant is designed to address the expenses of students in terms of tuition and other school fees, academic and extra-curricular expenses; as well as their budget for textbooks; rental expenses for boarding houses; transportation to and from school; clothing allowances; admission/entrance fees; health and other valid related education expenses and support services to complete the student-grantee's degree program.<sup>34</sup>

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<sup>32</sup> Columbia News. (2013) "Columbia News-Financial Aid" retrieved from [https://www.college.columbia.edu/cct/archive/fall13/around\\_the\\_quads1](https://www.college.columbia.edu/cct/archive/fall13/around_the_quads1).

<sup>33</sup> Kiley, K. (2012). "Need and Want" Inside Higher Ed. Retrieved from <http://www.insidehighered.com/news/2012/10/30/colleges-rethink-need-blind-admissions-favor-meeting-need>.

<sup>34</sup> CHED Selection of Expanded Students' Grant-in-Aid Program for Poverty Alleviation (ESGP-PA) per Joint Memorandum Circular No. 2014-1.

The DOST-SEI scholars on the other hand, has privileges to enjoy which includes financial benefits for school fees, book allowance, transportation expenses, clothing allowance, group health and accident insurance and monthly living allowance. The tuition and other school fees is based on the Statement of Account/Bill/Official Receipt. But these incurred expenses should not to exceed P10,000 per semester for students who enrolled in schools with semestral schedule and not to exceed P8,000 per trimester for those enrolled in schools with trimester schedule. For prescribed textbooks and essential school supplies, it is to be released as outright grant at P10,000 per academic year. The transportation expenses cover one actual economy round trip fare per academic year from permanent residence to the place of study (for those studying outside of home province). The amount of P500 earmarked for the Physical Education uniform is part of the grant which the student receives during the first semester but only on their first year only. Monthly living allowance during actual study, for 10 or 11 months' duration of an academic year is given at P4,000 or P5,000 per month.<sup>35</sup>

Section 15 of NCIP Administrative Order No. 05 stipulates that the financial benefit that shall accrue to the grantee shall be P10,000 per semester or tri-mester, which shall be divided into tuition and miscellaneous fees (P8,000) and book allowance (P2,000), provided however, that in the case of insufficiency of funds or any justifiable reason, the NCIP Regional Office may recommend a decrease to the Commission En Banc which when approved shall be implemented accordingly.

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<sup>35</sup> DOST Science Education Institute. S&T Scholars Handbook AY 2014-2015. Available at <https://www.sei.dost.gov.ph/index.php/downloads>.

## CONCLUSION

**E**ducational assistance of various agencies has its' distinctive purpose and bases to adequately deliver its program hence the brief discussion and presentation of NCIP-Educational Assistance Program (NCIP-EAP) objectives and policies. The NCIP-EAP is conceptualized to assist deserving indigenous peoples' youths to pursue appropriate education through financial assistance and facilitation of academic endeavors. Ideally, the financial assistance covers tuition fee, books and living allowance of every individual grantee.

The NCIP-EAP's objective is to primarily invest in human capital by granting educational assistance to deserving indigenous peoples' youth who seek the opportunity and qualify for higher education and to further empower them to become self-reliant and capacitated to meaningfully contribute to the promotion of their well-being, of their communities and to nation-building.

Specifically, the educational assistance program was designed to: (a) make available, accessible, and meaningful educational assistance opportunities to underprivileged but deserving indigenous peoples; (b) to motivate the indigenous peoples' youth who are qualified for the educational assistance to acquire higher degree of education; (c) to develop pride in their culture and traditions and be able to contribute to the recognition and promotion of the rights and well-being of the indigenous cultural communities/indigenous peoples; (d) to encourage qualified indigenous peoples' youth to undergo college education in priority and relevant courses that can be of significant help in their ancestral domains; (e) to develop academically or technically prepared and socially responsible indigenous peoples who can be depended upon as leaders within or outside of their communities and the nation as a whole; (f) to instill to the indigenous peoples to value and appreciate education as liberating and empowering tool in responding to IP community needs; and (g) to provide the indigenous peoples with various skills and capacities to contribute their share to nation-building.

The right of indigenous peoples is enshrined in 1987 Philippine Constitution, Indigenous Peoples Rights Act (IPRA), and numerous international human rights instruments. This paper will emphasize that

IP communities have the right to be granted and attended with efficient and continuous means for improvement of their economic and social conditions. As the statutes and international law provide, the state shall guarantee the right to ICCs/IPs to government's basic services which shall include education.

Moreover, Section 46(c), Chapter VII of the IPRA elaborated that the National Commission on Indigenous Peoples (NCIP) through the Office of Education Culture and Health (OECH) is mandated to administer and implement all educational assistance programs and other educational rights intended for indigenous peoples in coordination with DepEd and CHED.

Finally, the policies to strengthen the transparency and accountability in the implementation of the program should be established as this will enable the NCIP in meeting the developmental objective of the program and that is, to improve the over-all quality of life and efficiency of the ICCs/IPs thru increased access to educational opportunities.

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# The Benefits of Legalization of Abortion in the Philippines

Rio Michelle A. Corrales\*

## Abstract

The paper proposes that abortion should be legalized in the Philippines. Between decriminalization and legalization, it is argued that abortion should be legalized rather than decriminalized as the former provides more benefits than simply removing the penal nature of abortion. Abortion is defined as the termination of pregnancy or the killing of the fetus - a definition that characterizes the attitude of Philippine law toward abortion.

Legalization depends on the legislative to re-interpret Article II Section 12 of the 1987 Constitution as well as how the Supreme Court would adjudicate cases. The provisions of the Revised Penal Code should be repealed in order for the removal of the said restrictions on abortion. Legalization of abortion will provide better health benefits to women because it will mitigate unsafe and often deadly procedures; it will also give women choices or options especially when they are at risk, are victims of rape, or simply bearing an unwanted pregnancy; consequently, the legalization will have positive long-term effects to society especially decreasing criminality and the like.

In fine, the findings of studies from around the world comparing the social situations before and after legalization of abortion clearly show that we will provide more benefits that harm to women.

**Keywords:** *abortion; legalization of abortion; benefits of legalized abortion*

*\* The author is currently a student completing a Juris Doctor degree. Trained in the allied medical field, the author became interested in issues regarding abortion, reproductive health, and health in general in relation to their legal implications. The author's view on the subject matter in this paper diametrically opposes the stance of the majority in the author's religious affiliation and belief.*

## Introduction

**A**bortion is controversial.<sup>1</sup> The poles of contention between prohibition and legalization or decriminalization has been a long-standing debate in the Philippines and has been in the social discourse for decades. While the pundits and legislators are busy defending their standpoints on the issue, many women are suffering daily from health risks and lack of choices which clearly violates the reproductive rights of women.<sup>2</sup>

This paper proposes that abortion be legalized in the Philippines, not just decriminalized, calling for the total lifting of any bans or prohibition on the act. It will explore why legalization is better than decriminalization by defining both concepts in relation to certain acts previously deemed criminal such as prostitution, drug use, and the like. Some studies are explored to show the consequences of legalized abortion in many countries, including the United States since the decision of the US Supreme Court in *Roe v. Wade*.<sup>3</sup>

Abortion is defined in three lenses as medical, legal, and theological (moralistic), all converging into a common line that it is to terminate pregnancy. This common thread resounds the legal basis of prohibition of abortion in the Philippines both as stated in the 1987 Constitution and the Revised Penal Code.

With the definition and legal basis in place, it is to be proposed that the legalization of abortion provides better health benefits to women; will give them access to choices in cases of risks, rape, and unwanted pregnancies, and that; it will provide beneficial consequences to the society in terms of decreased criminality and the like.

## Definition of Terms

Technically, decriminalization and legalization are two different concepts with distinctive characteristics. To understand the two concepts in relation to abortion, it is worth to note how these concepts are being defined in relation to other acts such as drug use, prostitution, and others.

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<sup>1</sup> Kunins, H., & Rosenfield, A. (1991). Abortion: A Legal and Public Health Perspective. *Annual Review of Public Health*, 12(1), 361–382. <https://doi.org/10.1146/annurev.pu.12.050191.002045>

<sup>2</sup> Hussain, R., & Finer, L. B. (2013). Unintended pregnancy and unsafe abortion in the Philippines: Context and consequences. *Issues in Brief* (Alan Guttmacher Institute), 3, 1–8.

<sup>3</sup> Brueggemann, I. (1998). The international impact of *Roe v. Wade*. *Conscience* (Washington, D.C.), 18(4), 19.

The European Monitoring Centre for Drugs and Drug Addiction or EMCDDA explained in a nutshell that Decriminalization:

...takes away the status of criminal law from those acts to which it is applied. This means that certain acts no longer constitute criminal offenses. With regard to drugs, it is usually used to refer to demand; acts of acquisition, possession and consumption. Following decriminalization, it still is illegal to use, possess, acquire or in certain cases import drugs, but those acts are no longer criminal offenses. However, administrative sanctions can still be applied; these can be a fine, suspension of the driving or firearms license, or just a warning. European Monitoring Centre for Drugs and Drug Addiction.<sup>4</sup>

The claim is contrary to the definition that it is "to remove or reduce the criminal classification or status, or to repeal a strict ban on while keeping under some form of regulation"<sup>5</sup> and "the repeal or amendment of statutes which made certain acts criminal, so that those acts no longer are crimes subject to prosecution".<sup>6</sup> Some forms of acts that are decriminalized in many jurisdictions are "certain sexual practices between consenting adults, 'loitering' (hanging out without any criminal activity), or outmoded racist laws against miscegenation (marriage or cohabitation between people of different races) ...there is a considerable movement toward decriminalization of the use of some narcotics (particularly marijuana) by adults".<sup>7</sup>

On the other hand, EMCDDA simply put Legalization as:

...the process of bringing within the control of the law a specified activity that was previously illegal and prohibited or strictly regulated. Related to drugs, the term is most commonly applied to acts of supply; production, manufacture

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<sup>4</sup> European Monitoring Centre for Drugs and Drug Addiction. (2001). Decriminalisation in Europe? Recent Developments in Legal Approaches to Drug Use.

<sup>5</sup> Merriam-Webster.com Dictionary. (n.d.). Decriminalize. In Merriam-Webster Dictionary. Merriam-Webster. Retrieved November 27, 2020, from <https://www.merriam-webster.com/dictionary/decriminalize>

<sup>6</sup> Law.com. (n.d.-b). Decriminalization. Retrieved November 27, 2020, from <https://dictionary.law.com/Default.aspx?selected=450>

<sup>7</sup> Law.com. (n.d.-b). Decriminalization. Retrieved November 27, 2020, from <https://dictionary.law.com/Default.aspx?selected=450>

or sale for non-medical use. Legalization would mean that such activities, and use and possession, would be regulated by states' norms, in the same way that it is legal to use alcohol and tobacco. There can still exist some administrative controls and regulations, which might even be supported by criminal sanctions.<sup>8</sup>

In short, legalization is “the process of making something legal when it was previously illegal”<sup>9</sup> or “making something that was previously illegal permissible by law”.<sup>10</sup> A few examples be given such as legalization of casino gambling refers to making casino gambling lawful; or legalization of assisted suicide refers to making assisted suicide legitimate and lawful, and, logic dictates that legal consequences shall not follow a legitimate act.<sup>11</sup>

At this point, it is clear that the Philippines should legalize abortion rather than decriminalize it. To illustrate why legalization is the better between the two, a study on the legalization of cannabis elucidates that legalization is a process of removing all legal prohibitions against it [cannabis]. The authors, Svrakic et al, further said in that same study that cannabis would then be available to the adult general population for purchase and use at will, similar to tobacco and alcohol.<sup>12</sup> Juxtaposed to abortion, it not only repeals the penal nature of the act but also removes all barriers for its use as option for women. This is a contrast to decriminalization as the act remains illegal such as in cannabis, but the legal system would not prosecute a person for possession under a specified amount<sup>13</sup> or as in the case of abortion would not persecute the woman for abortion. Nonetheless, services and other acts may be the cause for sanctions if violated.

According to a report by Cohen of the Guttmacher Institute in 2009 most jurisdictions legalize abortion rather than decriminalize it:

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<sup>8</sup> European Monitoring Centre for Drugs and Drug Addiction. (2001). Decriminalisation in Europe? Recent Developments in Legal Approaches to Drug Use.

<sup>9</sup> Cambridge Dictionary. (n.d.). Legalization. In Cambridge Dictionary. Cambridge. Retrieved November 27, 2020, from <https://dictionary.cambridge.org/us/dictionary/english/legalization>

<sup>10</sup> Oxford Lexicon. (n.d.). Legalization. In Oxford Lexicon. Oxford. Retrieved November 27, 2020, from <https://www.lexico.com/definition/legalization>

<sup>11</sup> US Legal. (n.d.). Legalization. [uslegal.com](https://www.uslegal.com/definitions/uslegal.com/L/legalization). Retrieved November 27, 2020, from <https://definitions.uslegal.com/L/legalization>

<sup>12</sup> Svrakic, D. M., Lustman, P. J., Mallya, A., Lynn, T. A., Finney, R., & Svrakic, N. M. (2012). Legalization, decriminalization & medicinal use of cannabis: A scientific and public health perspective. *Missouri Medicine*, 109(2), 90–98. PubMed.

<sup>13</sup> *Ibid.*

Throughout Europe, except for Ireland and Poland, abortion is broadly legal, widely available and safe. The United States legalized abortion nationwide in 1973, in part because of the clear evidence that restrictive laws were not ending abortion but were exacting a significant public health toll, notably on lower-income women who could not travel or pay for safe services. Almost immediately afterward, pregnancy-related deaths and hospitalizations due to complications of unsafe abortion effectively ended. The United States was not the first country and has been far from the last to recognize this relationship and move to liberalize its law ...Indeed, the worldwide trend in abortion law has continued to be toward liberalization. And since 1997, another 21 countries or populous jurisdictions have liberalized their laws, including Colombia, Ethiopia, Iran, Mexico City, Nepal Portugal and Thailand.<sup>14</sup>

In a similar vein, a study on the legalization of abortion in Spain also suggests that legalization have better consequential benefits for women rather than restrictive laws as in decriminalization.<sup>15</sup>

### Abortion Defined

As previously mentioned, abortion can be defined based on three lenses. It can be defined or described in a medical, legal or theological (moralistic) standpoint.

As defined first in medicine abortion is a "procedure to end a pregnancy", maintaining that it "uses medicine or surgery to remove the embryo or fetus and placenta from the uterus" and that the "procedure is done by a licensed health care professional".<sup>16</sup> Usually this is called medical abortion where it is done because a woman has some medical conditions or to some extent, she does not want to continue the pregnancy. The medical field also considers miscarriage as abortion albeit spontaneous.<sup>17</sup>

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<sup>14</sup> Cohen, S. (2009). Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide. Guttmacher Policy Review, 4.

<sup>15</sup> Gonzales, L., Jimenez-Martin, S., Nollenberger, N., & Castello, J. V. (2018). The Effect of Abortion Legalization on Fertility, Marriage, and Long-term Outcomes for Women. Barcelona Graduate School of Economics.

<sup>16</sup> US National Library of Medicine. (n.d.). Abortion. Retrieved November 27, 2020, from <https://medlineplus.gov/abortion.html>

<sup>17</sup> Ibid.

Secondly, abortion is defined in the legal sense as “the termination of pregnancy by various means, including medical surgery, before the fetus is able to sustain independent life”.<sup>18</sup> Reyes, citing ancient legal experts said that “Carrara has defined abortion as the willful killing of the fetus in the uterus, or the violent expulsion of the fetus from the maternal womb which results in the death of the fetus”.<sup>19</sup> The latter definition shows the appropriate attitude of the law in the Philippines towards abortion.<sup>20</sup>

Finally, the moralistic definition especially and commonly of the Judeo-Christian tradition calls abortion as tantamount to homicide as it deliberately terminates the life of the fetus.<sup>21</sup> Obviously, this definition represents the overall sentiment of Filipinos who are predominantly Roman Catholic. The said church is active in opposing the legalization of abortion in the country.<sup>22</sup>

All three lenses converge into a common feature that abortion is a termination of pregnancy whether it is a procedure or a felonious act. In the context of Philippine law, the moralistic definition plays an important role in defining abortion and thus continues to prohibit the act.

### Legal Basis of Prohibition in the Philippines

Article II of the 1987 Philippine Constitution states partly in Section 12 that “The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception.”<sup>23</sup> The second statement of this particular Constitutional provision, according to the report by the United Nations Department of Economic and Social Affairs Population Division:

...was crafted by the Constitutional Commission which drafted the charter with the intention of providing for constitutional protection of the abortion ban, although the

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<sup>18</sup> Law.com. (n.d.-a). Abortion. Retrieved November 27, 2020, from <https://dictionary.law.com/Default.aspx?selected=2283>

<sup>19</sup> Reyes, L. B. (2017). *The Revised Penal Code: Criminal Law Book Two Articles 114-367* (19th ed., Vol. 2). REX Book Store.

<sup>20</sup> Upreti, M., & Jacob, J. (2018). The Philippines' new postabortion care policy. *International Journal of Gynecology & Obstetrics*, 141. <https://doi.org/10.1002/ijgo.12452>

<sup>21</sup> Gordon, J.-S. (n.d.). Abortion. Retrieved November 27, 2020, from <https://iep.utm.edu/abortion/>

<sup>22</sup> Ruiz Austria, C. S. (2004). The church, the state and women's bodies in the context of religious fundamentalism in the Philippines. *Reproductive Health Matters*, 12(24), 96–103. [https://doi.org/10.1016/s0968-8080\(04\)24152-0](https://doi.org/10.1016/s0968-8080(04)24152-0)

<sup>23</sup> Republic of the Philippines. (1987). Constitution.

enactment of a more definitive provision sanctioning the ban was not successful. The provision is enumerated among several state policies<sup>24</sup>, which are generally regarded in law as unenforceable in the absence of implementing legislation. The 1987 Constitution also contains several other provisions enumerating various state policies. Whether these provisions may, by themselves, be the source of enforceable rights without implementing legislation has been the subject of considerable debate in the legal sphere and within the Supreme Court.<sup>25 26</sup>

In addition to the Constitutional mandate, abortion in the Philippines is criminalized by law in Articles 256, 258 and 259 of the Revised Penal Code (RPC) of the Philippines provides imprisonment for women who undergo abortion, and for any person who assists in the procedure. In Article 258 of the RPC, imposition of higher prison term on the woman or her parents if the abortion was committed "in order to conceal [the woman's] dishonor".<sup>27</sup>

As to medical abortion, there is no law in the Philippines that authorizes it expressly, in order to save the life of a woman. As it follows, the general provisions which do penalize abortion make no qualifications if the life of the woman is endangered in anyway. It may be contended, although no adjudication of the Supreme Court can be found, that an abortion to save the life of a woman could be considered a justifying circumstance in Article 11 of the RPC for the medical practitioner in fulfillment of a duty, that would bar criminal prosecution.

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<sup>24</sup> These provisions in the 1987 Constitution include but not limited to: the equal protection of "the life of the mother and the life of the unborn from conception" (Section 12, Article II); the affirmation of labor "as a primary social economic force" (Section 14, Article II); the "Filipino family as the foundation of the nation" (Section 1, Article XV); the recognition Filipino as "the national language of the Philippines" (Section 6, Article XVI), and even a requirement that "all educational institutions shall undertake regular sports activities throughout the country in cooperation with athletic clubs and other sectors" (Section 19.1, Article XIV).

<sup>25</sup> The Court in the case of *Pamatong vs. Comelec* has ruled that a provision requiring that the State "guarantee equal access to opportunities to public service" could not be enforced without implementing legislation, and thus could not bar the disallowance of so-called "nuisance candidates" in presidential elections (*Pamatong vs. Commission on E lections*, 427 SCRA 96, April 13, 2004). Nonetheless, in the case of *Oposa v. Factoran* the Court held that a provision requiring that the State "protect and advance the right of the people to a balanced and healthful ecology" did not require implementing legislation to become the source of operative rights (*Oposa vs. Factoran, Jr.*, 224 SCRA 792, July 30, 1993). Any legal challenge to abortion restrictions in the Philippines would actually have to evaluate the legal force given to Section 12, Article II of the 1987 Constitution.

<sup>26</sup> Population Division. (2007). Philippines, Abortion Policy. United Nations, Department of Economic and Social Affairs.

<sup>27</sup> Republic of the Philippines. (1930). Revised Penal Code, Act. No. 3815 as amended.

Ironically, while abortion is prohibited and criminalized in the Philippines, it is revealed in studies after studies that the country has the highest rates of abortion as compared to jurisdictions where it is legal.<sup>28</sup> In 2016, the Department of Health initiated a policy, the *National Policy on the Prevention and Management of Abortion Complications or the new PMAC* policy, to guide the provision of post abortion care in public and private health facilities and promote its integration with other reproductive health program. The policy recognized that there are abortions happening and that because it is prohibited and criminalized, usually the act is made in clandestine and unsafe manner that puts the woman at risk.<sup>29</sup>

### Legal Basis of Abortion in the Philippines

As presented, legalization is better than decriminalization of abortion because legalizing the act would bring more benefits. Decriminalization still imposes some sanctions in connection to the act while legalization would only impose regulation. If abortion would be legalized, there are three benefits or consequences that would be clear; 1. Legalization of abortion would prevent mortality or morbidity for women and better health support; 2. Legalization meant that women have choices to terminate pregnancy especially in situations of risk, or as victims of rape, or of unwanted pregnancy, and; 3. Legalization of abortion would have impact on socio-economic status especially its adverse effect on criminality.

### Better Health Benefits

Since the legalization of abortion in China in 1957 up to the controversial decision of the US Supreme Court in *Roe v. Wade*, and in many other jurisdictions afterwards<sup>30</sup>, it is always a common finding that better health benefits happen to women post-legalization of abortion. In a study focusing on the post legalization health trend in Nepal found that "[a] significant decrease in the incidence of high severity abortions was observed in the period following implementation of the legal abortion policy" and that it concluded that "[r]esults from this study contribute to

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<sup>28</sup> Cohen, S. (2009). Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide. *Guttmacher Policy Review*, 4(2009).

<sup>29</sup> Upreti, M., & Jacob, J. (2018). The Philippines' new postabortion care policy. *International Journal of Gynecology & Obstetrics*, 141. <https://doi.org/10.1002/ijgo.12452>

<sup>30</sup> Cohen, S. (2009). Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide. *Guttmacher Policy Review*, 4(2009).

the literature suggesting a causal link between abortion legalization and improvements in maternal health."<sup>31</sup>

Contrasting the situation to the Philippines where abortion is prohibited and criminalized: "has contributed to the longstanding public health crisis of thousands of preventable maternal deaths each year and one of the highest rates in the world in terms of unsafe abortion. Women who seek medical assistance for complications from unsafe abortion are routinely mistreated and denied proper care".<sup>32</sup>

In addition, Mellisa Upreti, the regional director for Asia at the Center for Reproductive Rights said that "hundreds of women are hospitalized every day for complications from unsafe abortion, yet the government continues to turn a blind eye to the dire need for safe and legal abortion services ...Criminalizing abortion puts women's health and lives at grave risk, and subjects them to further abuse when seeking medical care. The Department of Justice has missed an opportunity to put an end to the human rights violations women are forced to suffer because of the country's blanket abortion ban." <sup>33</sup> Even with the prohibition, abortion is common and is estimated from approximately 560,000 in 2008 to 610,000 in 2012 by the Guttmacher Institute clear showing an increase in incidence.<sup>34</sup> The same institute reported that "[u]nsafe abortion carries significant risks for Filipino women: About 1,000 die each year from abortion complications, which contributes to the nation's high maternal mortality ratio."<sup>35</sup> Consequently, "in countries with highly restrictive laws, it is likely that very few women will be able to access safe abortion even on permitted grounds, as government-assisted services are usually not supported and therefore services are only available to those who can afford to pay the relatively few trained

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<sup>31</sup> Henderson, J. T., Puri, M., Blum, M., Harper, C. C., Rana, A., Gurung, G., Pradhan, N., Regmi, K., Malla, K., Sharma, S., Grossman, D., Bajracharya, L., Satyal, I., Acharya, S., Lamichhane, P., & Darney, P. D. (2013). Effects of abortion legalization in Nepal, 2001-2010. *PloS One*, 8(5), e64775-e64775. PubMed. <https://doi.org/10.1371/journal.pone.0064775>

<sup>32</sup> Center for Reproductive Rights. (2010). *Forsaken Lives: The Harmful Impact of the Philippine Criminal Abortion Ban*. Center for Reproductive Rights.

<sup>33</sup> *Ibid.*

<sup>34</sup> Center for Reproductive Rights. (n.d.). U.N. Committee: Philippines Must Allow Legal Abortion, Improve Access to Contraceptives. *Reproductiverights.Org*. Retrieved November 27, 2020, from <https://reproductiverights.org/u-n-committee-philippines-must-allow-legal-abortion-improve-access-to-contraceptives/>

<sup>35</sup> Hussain, R., & Finer, L. B. (2013). Unintended pregnancy and unsafe abortion in the Philippines: Context and consequences. *Issues in Brief (Alan Guttmacher Institute)*, 3, 1-8.

private doctors."<sup>36</sup> Not to mention the cost for the state to care for post-abortion complications due to unsafe practices, according to Kunins and Rosenfield:

Needless to say, it is a substantial financial burden to address the high cost of treatments when it comes to complications from illegal abortions in poor developing countries. In Nigeria, for example, women with abortion-related complications are said to occupy approximately 60% of acute gynecological beds. Similarly, a study in Latin America found that septic abortion accounts for a disproportionate share of expenditures for transfusions, operating room costs, and total bed-nights.<sup>37</sup>

It is then be argued that prohibiting abortion does not stop it from happening<sup>38</sup> as incidences rise each year than legalizing it. As a result of the ban, women seek unsafe clandestine procedures which would pose risk to their health. The Post-Abortion Care policy of 2012 is a good addition to provide better health benefits to women who have had abortion yet total acceptance of this policy would be an uphill climb if abortion is still penalized and totally prohibited.

### **Access of Women to Choices in Cases of Risks, Rape, and Unwanted Pregnancies**

The question of choice puts the debate into comparing the woman to the fetus. In the Theological point-of-view, our contention is that abortion is tantamount to homicide citing that the fetus is equally the same as the mother. The perspective that a woman does not have choice because the fetus is equal to her was refuted by Wilkson-kastner and Blair, saying that:

The word "abortion" is not mentioned in the Bible, but much in the Bible speaks to the issue. The most obvious passage is from Exodus 21:22-25... A distinction is then made between the penalty that is to be exacted for the loss of the fetus and injury to the woman... the distinction

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<sup>36</sup> Myers, J. E., & Seif, M. W. (2010). Global perspective of legal abortion – Trends analysis and accessibility. *Abortion and Post-Abortion Care - Volume 1*, 24(4), 457–466. <https://doi.org/10.1016/j.bpobgyn.2010.04.002>

<sup>37</sup> Kunins, H., & Rosenfield, A. (1991). Abortion: A Legal and Public Health Perspective. *Annual Review of Public Health*, 12(1), 361–382. <https://doi.org/10.1146/annurev.pu.12.050191.002045>

<sup>38</sup> Shah, I., & Åhman, E. (2009). Unsafe Abortion: Global and Regional Incidence, Trends, Consequences, and Challenges. *Journal of Obstetrics and Gynaecology Canada*, 31(12), 1149–1158. [https://doi.org/10.1016/S1701-2163\(16\)34376-6](https://doi.org/10.1016/S1701-2163(16)34376-6)

made between the woman and the fetus is important. The woman is valued as a person under the covenant; the fetus is valued as property. Its status is certainly inferior to that of the woman... the biblical portrait of a person is that of a complex, many-sided creature with the god-like ability and responsibility to make choices. The fetus does not meet those criteria. When considering the issue of abortion, the one who unquestionably fits this portrait of personhood is the pregnant woman.<sup>39</sup>

The distinction is telling. It now qualifies the woman to have choices whether to keep a "property" or not. In this regard, the definition that abortion is tantamount to homicide is decreased to letting go of a property. In other words, if the perspective of the state be the same as elucidated by Wilkson-kastner and Blair<sup>40</sup>, legalization of abortion is possible. Therefore, a woman who is a victim of rape, had some risk or felt that the pregnancy is unwanted can have a choice to terminate the same.

Hewson argues that:

If one is adamantly opposed to abortion, one is committed to some set of values which requires that women who become pregnant (whether intentionally or unintentionally) must endure the process of pregnancy and birth, no matter how distressing, painful and risky it is for them. The justification given for this is usually based on an abstract notion of the value of "fetal life", rather than on the ground that suffering is morally improving for the women concerned.<sup>41</sup>

Hewson further argued to give more importance to the woman as a mother who should have choices for herself characterizing how difficult pregnancy can be, saying:

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<sup>39</sup> Wilson-kastner, P., & Blair, B. (1985). Biblical views on abortion: An Episcopal perspective. *Conscience* (Washington, D.C.), 6(6), 4–8.

<sup>40</sup> *Ibid.*

<sup>41</sup> Hewson, B. (200<sup>1</sup>). Reproductive autonomy and the ethics of abortion. *Journal of Medical Ethics*, 27(suppl 2), ii10. [https://doi.org/10.1136/jme.27.suppl\\_2.ii10](https://doi.org/10.1136/jme.27.suppl_2.ii10)

Some people argue that it is arbitrary not to bestow "personhood" on a fetus until it is born. They ask rhetorically: What is it about the passage through the vagina that makes such a difference? Of course, if you can only envisage a vagina instead of a woman giving birth, you may have difficulty acknowledging the critical role that a woman plays in giving birth, and why (in turn) society views birth as the critical moment. This is, as much as anything, a mark of respect for women's role in giving birth.<sup>42</sup>

Others would argue that women do not benefit from abortion, but will cause them some problems and difficulty. Nonetheless, studies had shown that consequences are contrary to common beliefs about post-abortion experience. Research found that carrying an unwanted pregnancy to term is more dangerous to a woman's health than abortion.<sup>43</sup> It is also evident in recent studies that abortion does not negatively impact a woman's well-being.<sup>44</sup> Contrary to some claims, abortion does not place women at risk for post-traumatic stress disorder, depression, low self-esteem or anxiety, nor does it increase drug, tobacco or alcohol use.<sup>45</sup>

Abortion restrictions may put a woman's physical and emotional safety at risk. Limited abortion access may result in more women being unable to terminate unwanted pregnancies, keeping them in contact with violent partners. This puts both women and their children at increased risk of violence.<sup>46</sup>

Then it can be said that legalization of abortion will open more avenues for women to have control for their bodies and to reproductive rights. Bere said that "to work for women's right to decide on abortion

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<sup>42</sup> Ibid.

<sup>43</sup> Gerdts, C., Dobkin, L., Foster, D. G., & Schwarz, E. B. (2016). Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy. *Women's Health Issues*, 26(1), 55–59. <https://doi.org/10.1016/j.whi.2015.10.001>

<sup>44</sup> Biggs, M. A., Rowland, B., McCulloch, C. E., & Foster, D. G. (2016). Does abortion increase women's risk for post-traumatic stress? Findings from a prospective longitudinal cohort study. *BMJ Open*, 6(2), e009698. <https://doi.org/10.1136/bmjopen-2015-009698>

<sup>45</sup> Roberts, S. C. M., Delucchi, K., Wilsnack, S. C., & Foster, D. G. (2015). Receiving Versus Being Denied a Pregnancy Termination and Subsequent Alcohol Use: A Longitudinal Study. *Alcohol and Alcoholism (Oxford, Oxfordshire)*, 50(4), 477–484. <https://doi.org/10.1093/alcalc/aggv021>

<sup>46</sup> Upadhyay, U. D., Biggs, M. A., & Foster, D. G. (2015). The effect of abortion on having and achieving aspirational one-year plans. *BMC Women's Health*, 15(1), 102. <https://doi.org/10.1186/s12905-015-0259-1>

requires neither more nor less than a profound belief in the right of women to control their own bodies and to make decisions about their own lives, including whether and when to have children".<sup>47</sup>

### Positive Long-Term Effect on Society

Levitt and Dubner in their popular book entitled *Freakonomics* in 2005 has given us the insight on the long-term effect of legalized abortion to society.<sup>48</sup> The study of Levitt has given the world an idea of the impact of legalizing abortion on crime which since has been largely debated. According to Francois, Magni-Berton, and Weill:

Legalizing abortion is supposed to lead to diminishing crime in two ways. First, it reduces the fertility rate, reducing the proportion of young males in the population, which are generally overrepresented among criminals. Second, it selects non-criminal profiles because mothers abort when they feel that they are unable to raise children under favorable material or emotional conditions. This second version is advocated by Levitt, who expresses it as follows: Unwantedness leads to high crime; abortion leads to less unwantedness; abortion leads to less crime.<sup>49</sup>

In their cross-country investigation across European jurisdictions, Francois, Magni-Berton and Weill concluded that:

... abortion rate has a significant and negative impact on crime rates, specifically, homicide and theft. We also observe support for the impact of legalization of abortion on the reduction of crime when considering different calculations of the accumulation of abortions based on different criteria for the legalization of abortion. Thus, our results are consistent with the findings of Donohue and Levitt (2001) for the US.<sup>50</sup>

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<sup>47</sup> Berer, M. (2002). Making Abortion a Woman's Right Worldwide. *Reproductive Health Matters*, 10(19), 1–8. [https://doi.org/10.1016/S0968-8080\(02\)00010-1](https://doi.org/10.1016/S0968-8080(02)00010-1)

<sup>48</sup> Levitt, S. D., & Dubner, S. J. (2005). *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*. William Morrow.

<sup>49</sup> François, A., Magni-Berton, R., & Weill, L. (2014). Abortion and crime: Cross-country evidence from Europe. *International Review of Law and Economics*, 40, 24–35. <https://doi.org/10.1016/j.irle.2014.08.001>

<sup>50</sup> François, A., Magni-Berton, R., & Weill, L. (2014). Abortion and crime: Cross-country evidence from Europe. *International Review of Law and Economics*, 40, 24–35. <https://doi.org/10.1016/j.irle.2014.08.001>

Further, a study by Whitaker on the effect of legalized abortion to subsequent high-school dropout rate, following in the tradition of the study of Donohue and Levitt concluded that there is:

... positive selection due to legalized abortion but among only one subpopulation, black males. The results seem to point to negative selection in aggregate. As with all social phenomena, abortion availability interacted with evolving economic, cultural, and legal institutions. It was certainly part of a bundle of changing sexual practices and attitudes toward family life. It appears that abortion was used disproportionately by black women in difficult circumstances, and therefore fewer of the women's potential sons became high school dropouts.<sup>51</sup>

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<sup>51</sup>Whitaker, S. (2011). The impact of legalized abortion on high school graduation through selection and composition. *Economics of Education Review*, 30(2), 228–246. <https://doi.org/10.1016/j.econedurev.2010.09.001>

## Conclusion

It is perhaps time for the Philippines to re-examine abortion in the light of benefit than relying on outdated traditions that further side-step the rights of women. From the studies conducted around the world on the effects and consequences of the legalization of abortion it is clear that we can benefit more, especially the women. It is clear from the evident studies that we are doing a favor to our women, contrary to common beliefs about the after-effects of the abortion experience.

Studies in Europe and the United States reveal that legalization of abortion decreases the risk of morbidity and mortality secondary to abortion procedures for women who has access to open, legal and professionally-performed procedures as compared to those who avail of the clandestine unsafe abortion procedures in states where it is otherwise prohibited or penalized. Further studies also show that in states where abortion is legal, criminality also decreases overtime. The beneficial effects of legalization of abortion in different states around the world as indicated in these studies is an indication for rethinking of this legal issue.

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# Redefining Psychological Incapacity: A Review of Landmark Cases

Nicco B. Acaylar<sup>1</sup> and Jubelle Angeli C. Maturan<sup>2</sup>

## Introduction

Aside from the Vatican City, the Philippines is the only state left which does not allow divorce or does not have divorce laws.<sup>3</sup> Our laws on marriage have always been rigid and strictly interpreted. Heavily influenced by the Roman Catholic Church which always advocates for the sanctity of marriage and has always fought hard against its severance, our culture and eventually, our marriage laws do not recognize divorce.<sup>4</sup> No less than our own Constitution advocates for marriage as an inviolable social institution that must be protected by the State.<sup>5</sup> However, the Family Code did provide grounds wherein a marriage can be declared as void *ab initio*, which leads us to petitions for the declaration of nullity of marriages.

Since the Family Code of the Philippines was signed into law in 1987, the existence of psychological incapacity has been used by Philippine courts as one of the grounds for the declaration of nullity of marriages.<sup>6</sup> Specifically, Article 36 of the Family Code provides that “A marriage contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential marital obligations of marriage, shall

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<sup>3</sup> Philippine Commission on Women. Adopting Divorce in the Family Code, available at <https://pcw.gov.ph/adopting-divorce-in-the-family-code-2/>, accessed on January 6, 2022.

<sup>4</sup> Tom Hundley & Ana P. Santos, The Last Country in the World Where Divorce Is Illegal, available at <https://foreignpolicy.com/2015/01/19/the-last-country-in-the-world-where-divorce-is-illegal-philippines-catholic-church/>, accessed on January 7, 2022.

<sup>5</sup> CONST. (1987), art. XV, § 2 (Phil.).

<sup>6</sup> Maria Katrina C. Franco, The Psychological Incapacity to Marry: Key Jurisprudence and Survey of Cases from 1995 to 2019, 46 *IBP JOURNAL* 40, 40 (2021).

likewise be void even if such incapacity becomes manifest only after its solemnization.”<sup>7</sup> The Supreme Court is replete with jurisprudence pertinent to determining psychological incapacity as a ground for annulment, two of which shall be extensively discussed at the latter portion of this case analysis, alongside the subject jurisprudence.

The Supreme Court’s decision in *Leouel Santos v. Court of Appeals* and *Julia Rosario Bedia-Santos*<sup>8</sup> (*Santos v. CA, for brevity*) was the first case that discussed psychological incapacity. Through then Associate Justice Jose Vitug, the Court explained that the Family Code of the Philippines<sup>9</sup> did not give a definite meaning for psychological incapacity. Mainly based on the Canon Laws of the Roman Catholic Church, the deliberations of the Family Code Revision Committee decided to interpret such term on a case-to-case basis. However, the said committee also agreed that in ruling for psychological incapacity, the elements of gravity, juridical antecedence, and incurability must be attendant in the circumstances surrounding the case.<sup>10</sup> Also, the plaintiff has the burden to prove that the incapacity must be incurable and grave enough for the other party not to fulfill his or her marital duties.

Meanwhile, in *Republic of the Philippines v. Court of Appeals* and *Roridel Olaviano Molina*<sup>11</sup> (*Republic v. CA and Molina, for brevity*), the Supreme Court established a strict set of rules to determine psychological incapacity. As penned by then Associate Justice Artemio Panganiban, psychological incapacity is identified as something that is clinically or medically permanent, must be alleged in the complaint, and must be clearly explained in the decision. Also, it is incumbent upon the plaintiff not only to prove the nullity of the marriage, but also the fact that the incapacity is grave enough to rule that the other spouse cannot assume his/her marital duties and that the incapacity is already existing at the time the marriage is celebrated. In this case, expert evidence is imperative to determine psychological incapacity.

However, in the recent years, the Supreme Court had the occasion to deviate from the guidelines set in *Republic v. CA* and *Molina*. The judges

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<sup>7</sup> Family Code, EO 209, as amended (Phil.).

<sup>8</sup> *Santos v. Court of Appeals*, G.R. No. 112019, 240 S.C.R.A. 20 (January 4, 1995) (Phil.).

<sup>9</sup> *Supra*, note 7.

<sup>10</sup> *Supra*, note 8.

<sup>11</sup> *Republic v. Court of Appeals and Molina*, G.R. No. 108763, 268 S.C.R.A. 198 (February 13, 1997) (Phil.).

ruled that such guidelines have become rigid, to the point that applying such guidelines in every case is tantamount to a rejected petition for declaration of nullity of marriage.<sup>12</sup> It also opined that the constant and baseless refusal to procreate via sexual congress of a spouse is a non-fulfillment of marital duties and has been considered as equivalent to psychological incapacity.<sup>13</sup>

Penned by former Chief Justice Lucas Bersamin, the decision of *Valerio E. Kalaw v. Ma. Elena Fernandez*<sup>14</sup> (*Kalaw v. Fernandez*, for brevity), was promulgated on January 14, 2015. This case has modified the Molina ruling. Here, the Court made clear that the Molina guidelines were not totally abandoned because the expert opinions were just given much weight in deciding this case. The Court explicitly ruled that Fernandez, the wife, was indeed psychologically incapacitated. The magistrates also relaxed the previously set forth guidelines. The Court found out that the said guidelines were too rigid and were susceptible to instant trial court rejection. Article 36 of the Family Code should not be interpreted strictly and too literally because the drafters crafted the law to enable some resiliency in its application. The Court should make decisions involving psychological incapacity on a case-to-case basis.

It is likewise noteworthy to discuss the case of *Chi Ming Tsoi v. Court of Appeals* and *Gina Lao-Tsoi*<sup>15</sup> (*Chi Ming Tsoi v. CA*, for brevity). Here, the magistrates ruled that procreating children is one of the essential marital obligations under the Family Code. It is based on the universal principle that having children through sexual cooperation is the basic end of marriage. The senseless and unjust refusal of the man to fulfil the above-cited marital obligation is equivalent to psychological incapacity.

This case also tackles homosexuality which can only be considered as a ground for annulment if there is concealment of this condition prior to the marriage.<sup>16</sup> The reason is obvious. It constitutes fraud, which makes the marriage voidable. The Family Code of the Philippines is explicit that a marriage may be annulled if the consent of one of the parties was obtained by fraud<sup>17</sup>.

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<sup>12</sup> Supra, note 6.

<sup>13</sup> *Chi Ming Tsoi v. Court of Appeals* and *Gina Lao-Tsoi*, G.R. No. 119190, 266 S.C.R.A. 324 (January 16, 1997) (Phil.).

<sup>14</sup> *Kalaw v. Fernandez*, G.R. No. 166357, 745 SCRA 512, (January 14, 2015) (Phil.).

<sup>15</sup> Supra, note 13.

<sup>16</sup> Ibid.

<sup>17</sup> Family Code, Exec. Ord. 209, art. 45, as amended (Phil.).

Twenty-four years after the Santos ruling was promulgated, the Supreme Court, through Justice Marvic Mario Victor F. Leonen, seemed to have rebranded psychological incapacity in several aspects. In *Rosanna L. Tan-Andal v. Mario Victor M. Andal*<sup>18</sup> (*Tan-Andal v. Andal*, for brevity), psychological incapacity does not need to be strictly medically or clinically permanent and incurable anymore. Expert testimonies by medical professionals are not imperative for the Court to rule for psychological incapacity. In a press briefer<sup>19</sup> pertaining to this case, psychological incapacity refers to a personal condition that prevents a spouse to comply with fundamental marital obligations which may have existed at the time of the celebration of the marriage, but only manifested after the wedding ceremonies.

The uncoupling story of Rosanna and Mario Victor was not an ordinary annulment case. It paved the way for Supreme Court to decide on a turnaround. In psychological incapacity cases, who is really the expert witness – medical professionals or the people who witnessed the marital union and its uncoupling? Is it incurable in the medical sense, or in the legal sense? Which side is the better judge to rule psychological incapacity? Were our previous decided cases on psychological incapacity restrictive, rigid and intrusive on our rights to liberty, autonomy, and human dignity, in the words of Justice Leonen?<sup>20</sup>

### ***The Tan-Andal Case: Factual Antecedents***

Mario Victor and Rosanna first met during church activities in 1975 and reconnected in 1995 through childhood friends. Mario Victor courted Rosanna. Rosanna eventually fell in love with Mario Victor. As a result, she agreed to be Mario Victor's girlfriend.

During this period, Rosanna would notice that Mario Victor would allegedly become extremely irritable and moody. Also, she observed that Mario Victor would have difficulty in managing his finances. The latter's siblings would warn Rosanna that their brother was financially incapable of supporting a family. However, Rosanna replied that that she accepted Mario Victor for who he was. In addition, Rosanna already got pregnant with Ma. Samantha in November 1995. Nevertheless, the marriage ensued.

Mario Victor and Rosanna got married on December 16, 1995 at a Catholic church in Makati City. Months after, Rosanna gave birth to Ma. Samantha, the only

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<sup>18</sup> *Tan-Andal v. Andal*, G.R. No. 196359, (May 11, 2021) (Phil.), <https://sc.judiciary.gov.ph/20821/>

<sup>19</sup> Supreme Court of the Philippines. Press Briefer on *Tan-Andal v. Andal*, G.R. No. 196359 (May 12, 2021), <https://sc.judiciary.gov.ph/18420/>.

<sup>20</sup> *Supra*, note 18.

child of the parties. Mario Victor, Rosanna, and Ma. Samantha made a duplex in Parañaque City as their family home, with Rosanna's parents living in the other side of such duplex.

During the lifetime of the marriage, Mario Victor has shown episodes of emotional immaturity, irresponsibility, irritability, and psychological imbalance. Rosanna also found out that Mario Victor is a marijuana user, and eventually, an addict. Due to such addiction, Mario Victor was confined into a drug rehabilitation center twice. He even used the funds of their family business twice to support his addiction, which led to the bankruptcy of the business. He would also neglect Ma. Samantha when the latter got sick of dengue fever and would even expose his daughter to his drug use.

Due to these reasons, Rosanna decided to file a petition for annulment against Mario Victor, using psychological incapacity as a ground. She presented Dr. Valentina Del Fonso Garcia as expert witness. Dr. Garcia diagnosed Mario Victor as someone suffering from narcissistic antisocial personality disorder and substance abuse disorder with psychotic features.<sup>21</sup> Per Dr. Garcia, Mario Victor's diagnosis, coupled by the testimonies of Rosanna, Ma. Samantha, and Jocelyn Genevieve (Mario Victor's sister), rendered Mario psychologically incapacitated to comply with his essential marital obligations to Rosanna. However, upon cross-examination, Dr. Garcia admitted that she did not interview Mario because the latter refused an interview despite several invitations.

In May 2007, the Regional Trial Court ruled that the marriage of Mario Victor and Rosanna is void, on the ground of Mario Victor's psychological incapacity. However, in August 2007, the Court of Appeals reversed the trial court's decision, saying that the marriage is valid and subsisting. It ruled that Dr. Garcia's psychiatric evaluation of Mario Victor is unscientific and unreliable because she diagnosed Mario without interviewing him.

### ***Was there psychological incapacity?***

The main issue in this case is whether the marriage between Mario and Rosanna is void due to psychological incapacity. Simply stated, yes. There is psychological incapacity in this case.

However, what makes this case novel is that the Supreme Court was confronted with a dilemma. Would they change the guidelines laid down by juridical antecedents such as those laid down in *Republic v. Court of Appeals and Molina*, which mainly discussed about psychological incapacity being medically or clinically identified and must be sufficiently proven by experts? Or that of *Santos v. Court of Appeals*, which ruled that psychological incapacity must have juridical antecedence and its root cause medically or clinically permanent?

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<sup>21</sup> Ibid.

How did the Supreme Court decide to rebrand psychological incapacity? In what way will such ground be interpreted?

### ***The Supreme Court's Ruling in Tan-Andal v. Andal***

In a decision penned by Justice Marvic Mario Victor Leonen, the Supreme Court ruled that the marriage between Rosanna and Mario Victor was void ab initio. The Court gave credence to the testimony of expert witness Dr. Valentina del Fonso Garcia, who testified that Mario Victor suffers from narcissistic antisocial personality disorder and substance abuse disorder with psychotic features.<sup>22</sup> As a result of such psychological disorder, Mario Victor was said to be psychologically incapacitated to fulfill his essential marital obligations to Rosanna.

The Supreme Court has provided a set of guidelines in determining the existence of psychological incapacity. First, it is incumbent upon the plaintiff to prove that his or her spouse is psychologically incapacitated to fulfill one's marital obligations. Second, the incapacity must be existing at the time of the celebration of the marriage even if such incapacity becomes manifest only after its solemnization. Third, the plaintiff must prove that the incapacity is a serious illness, excluding episodes of mild characterological peculiarities, mood changes, and occasional emotional outbursts. Lastly, an expert testimony is not a requirement in proving psychological incapacity since such concept is neither a mental incapacity nor a personality disorder that must be proven through expert testimony.<sup>23</sup> The Court already recognized the testimonies of ordinary witnesses such as family members and friends who personally witnessed the personal circumstances of the spouses.

However, there was a caveat. This case overturned the long-standing guidelines of psychological incapacity in Philippine courts. The magistrates made emphasis that psychological incapacity is a legal concept, not a medical concept. It is more of a *personality structure* or dysfunctional acts which will undermine family ties. Consequently, the Court decided that testimonies of ordinary witnesses will already suffice, and expert witnesses are not mandatory.<sup>24</sup>

### ***Psychological Incapacity Before Tan-Andal v. Andal***

Before *Tan-Andal v. Andal*, there were *Republic v. Court of Appeals and Molina*, and *Santos v. Court of Appeals*. And dozens of psychological incapacity cases. The Supreme Court has also written decisions which deviated from the famous Molina guidelines. For us to understand how *Tan-Andal v. Andal* caused a complete turnaround as to how the bench and the bar must now interpret psychological incapacity, one must revisit these two Supreme Court cases and on how they used to determine the presence of psychological incapacity to annul marriages.

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

### *The Santos Case*

The concept of psychological incapacity was first mentioned in the case of *Leouel Santos v. Court of Appeals* and *Julia Rosario Bedia-Santos*<sup>25</sup> (*Santos v. Court of Appeals*, for brevity). While it is true that the Supreme Court did not clearly define the guidelines of psychological incapacity, the ponente in this case also explained that psychological incapacity is a mental incapacity, which prevents a spouse from fulfilling his or her marital duties.

*Santos v. Court of Appeals* was about the uncoupling story of Leouel Santos, a military man, and Julia Rosario Bedia, a nurse. On September 20, 1986, Leouel and Julia Rosario got married and eventually lived with the parents of the wife. Leouel Santos, Jr., their son, was born on July 18, 1987. However, the couple fought a lot, mostly about the frequent interference of Julia Rosario's parents into their marital issues.

Despite Leouel's disapproval, Julia Rosario left for the United States of America in 1988 to work as a nurse. Seven months after Julia Rosario's departure, the couple was able to communicate with each other, and Julia Rosario promised to go back to the Philippines after her contract expiry. Such promise was left unfulfilled. Even if Leouel eventually went to America for a work-related travel, he failed to locate Julia Rosario.

Soon after, Leouel filed a petition for the nullity of their marriage, using psychological incapacity as a ground. Per Leouel, Julia Rosario is psychologically incapacitated when she failed to come home and when she did not communicate with Leouel, despite all of the latter's efforts. Julia Rosario refuted Leouel's claims.

The trial court ruled to dismiss the petition for lack of merit. Consequently, the Court of Appeals affirmed the decision of the lower court. In *Santos v. Court of Appeals*, the issue revolves arounds whether or not psychological incapacity is present in Leouel and Julia Rosario's case.

In this case, the Supreme Court ruled that the circumstances present do not warrant psychological incapacity. In ruling in the negative, the ponente, then Associate Justice Jose Vitug, first explained that the term or the concept of psychological incapacity does not have an express definition under the Family Code of the Philippines<sup>26</sup>. However, based on the deliberations of the Family Code Revision Committee about the matter, it was found out that the Committee decided not to put an exact definition to such concept. This is because psychological capacity has infinite manifestations and this is to prevent the limited applicability of psychological incapacity, under the principle of *ejusdem generis*.<sup>27</sup>

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<sup>25</sup> Supra, note 8.

<sup>26</sup> Supra, note 7.

<sup>27</sup> Supra, note 8.

Psychological incapacity was said to be based on Canon 1095 of the New Code of Canon Law, which provides that those who are unable to assume the essential obligations of marriage are incapable of contracting marriage.<sup>28</sup> Although not having juridical effect, the Court did give credence to the said Canon Law provision.

In addition, then Court of Appeals Associate Justice Alicia V. Sempio-Diy, who is also a member of the Family Code Revision Committee, provided that psychological incapacity must be characterized by gravity, juridical antecedence, and incurability. Also, for psychological incapacity to manifest, the alleged incapacity must be mental (not physical) and must exist at the time of the celebration of the marriage. Also, it must be incurable and grave enough for a spouse being ruled as unable fulfill his or her marital duties.<sup>29</sup>

### *The Molina Case*

Unlike *Santos v. Court of Appeals*, the Supreme Court in *Republic v. Court of Appeals* and *Molina* gave a concrete and strict guideline on how to determine psychological incapacity.

The relevant facts of this case are traced back to April 14, 1985. Roridel Molina married Reynaldo Molina. The union of the two bore a son. A year after, as the couple started to taste the sweetness of marriage, Reynaldo started to show signs of immaturity as a husband.

He exhibited immaturity and preferred to spend more time with his friends, rather than his family. He also depended on his parents for financial support and was not transparent to his wife when it comes to the finances of the family. Aggrieved, Roridel filed a case to the Regional Trial Court (RTC) for the declaration of nullity of marriage based on psychological incapacity which was affirmed by the Court of Appeals (CA).

The crux of the matter revolved as to whether irreconcilable differences and conflicting personality constitute psychological incapacity.

The Supreme Court ruled in the negative. There was no sufficient evidence showing that the psychological defect of Reynaldo, would constitute incapacity. The reason was obvious. The incapacity depicted towards Reynaldo was a mere "difficulty" or just a neglect in the performance of his functions as the husband of Roridel.

If a husband or a wife shows "irreconcilable differences" and "conflicting

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<sup>28</sup> Marriage in Canon Law, Delaware: Michael Glazier, Inc., 1986, 129-130.

<sup>29</sup> *Supra*, note 8.

personalities" with each other, the said traits do not constitute psychological incapacity. The magistrates reiterated that to constitute psychological incapacity, it is indispensable that they must be shown to be incapable of doing so, due to some psychological (not physical) illness. It is crystal clear that the gravity of the problem, juridical antecedence and incurability were not apparent on this case.

In toto, the oft-cited Molina Guidelines as laid down in *Republic v. CA and Molina*<sup>30</sup> are as follows:

- (1) The burden of proof to show the nullity of the marriage belongs to the plaintiff. Any doubt should be resolved in favor of the existence and continuation of the marriage and against its dissolution and nullity...
- (2) The root cause of the psychological incapacity must be (a) medically or clinically identified, (b) alleged in the complaint, (c) sufficiently proven by experts and (d) clearly explained in the decision. Article 36 of the Family Code requires that the incapacity must be psychological — not physical. Although its manifestations and/or symptoms maybe physical. The evidence must convince the court that the parties, or one of them, was mentally or physically ill to such an extent that the person could not have known the obligations he was assuming, or knowing them, could not have given valid assumption thereof...
- (3) The incapacity must be proven to be existing at "the time of the celebration" of the marriage. The evidence must show that the illness was existing when the parties exchanged their "I do's." The manifestation of the illness need not be perceivable at such time, but the illness itself must have attached at such moment, or prior thereto...
- (4) Such incapacity must also be shown to be medically or clinically permanent or incurable. Such incurability may be absolute or even relative only in regard to the other spouse, not necessarily absolutely against everyone of the same sex...
- (5) Such illness must be grave enough to bring about the disability of the party to assume the essential obligations of marriage. Thus, "mild characterological peculiarities, mood changes, occasional emotional outbursts" cannot be accepted as root causes. The illness must be shown as downright incapacity or inability, nor a refusal, neglect or difficulty, much less ill will...
- (6) The essential marital obligations must be those embraced by Articles 68 up to 71 of the Family Code as regards the husband and wife as well as Articles 220, 221 and 225 of the same Code in regard to parents and their children. Such non-complied marital obligation(s) must also be stated in the petition, proven by evidence and included in the text of the decision.
- (7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our court...

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<sup>30</sup> Supra, note 11.

- (8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the state. No decision shall be handed down unless the Solicitor General issues a certification, which will be quoted in the decision, briefly stating therein his reasons or his agreement or opposition, as the case may be, to the petition..

It can be gleaned that the Molina case is silent on the quantum of proof required in nullity cases. While there is an opinion that a nullity case under Article 36 is like any civil case that requires preponderance of evidence,<sup>31</sup> it is immediately apparent now that the magistrates want the plaintiff to prove his or her case using clear and convincing evidence. This is a quantum of proof that ranks higher than preponderant evidence but less than proof beyond reasonable doubt.<sup>32</sup>

### *The Kalaw Case*

In the case of *Valerio E. Kalaw vs. Ma. Elena Fernandez*<sup>33</sup> (*Kalaw v. Fernandez*, for brevity), the petitioner heavily relied on the testimonial evidence of his two expert witnesses. He presented their testimonies concluding that the respondent was psychologically incapacitated. The expert witnesses believed that the wife was psychologically incapacitated for the following reasons. First, she constantly engaged in mahjong sessions with her friends. Second, she was in an adulterous relationship. Third, she constantly visited beauty parlors and mingled with her friends leading to an obvious neglect of their children.

The petitioner's experts testified that the respondent's habits, being constantly performed, could detriment the quality and quantity of time devoted to her duties as wife and mother of their children. They opined that these were valid grounds for psychological incapacity.

With the above-cited grounds, was there psychological incapacity?

The Supreme Court ruled in the affirmative as it granted the motion for reconsideration filed by the petitioner. The Court heavily relied on the expertise of the witnesses in the field of psychology. Thus, an in- depth diagnosis by experts was indispensable to rule that the malady was grave, incurable and had an antecedent.<sup>34</sup>

Conversely, if the totality of evidence presented is sufficient to rule psychological incapacity, then actual medical examination of the person concerned need not be resorted to.

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<sup>31</sup> Antonio v. Reyes, G.R. No. 155800, 484 S.C.R.A. 353 (March 10, 2006) (Phil.).

<sup>32</sup> Spouses Manalo v. Hon. Roldan-Confesor, 290 Phil. 311, 323 (November 19, 1992) (Phil.), as cited in Tan-Andal v. Andal, G.R. No. 196359, (May 11, 2021) (Phil.), <https://sc.judiciary.gov.ph/20821/>

<sup>33</sup> Kalaw v. Fernandez, G.R. No. 166357, 745 SCRA 512, (January 14, 2015) (Phil.)

<sup>34</sup> Supra, note 14.

### *The Chi-Ming Tsoi Case*

In *Chi Ming Tsoi v. Court of Appeals and Gina Lao-Tsoi*<sup>35</sup> (*Chi Ming Tsoi v. CA*, for brevity), the plaintiff and the defendant got married. Unfortunately, the couple didn't engage in sexual intercourse ever since. To know the root cause of the problem, they sought help from a medical practitioner. It was found out that the wife was healthy, normal, and still a virgin. The husband's examination result was kept private.

The plaintiff now asserted that the defendant was impotent and a closet homosexual. In addition, she claimed that the defendant married her just to maintain his residency status in the Philippines and to publicly maintain the appearance of a normal man. The wife was not willing to mend fences with her husband.

The defendant claimed that the marriage should be annulled because of his wife's fault. He assured that there was no defect on his part and that he was not impotent. He admitted that there was no sexual intercourse between the two mainly because his wife avoided him.

The trial court voided their marriage and the Court of Appeals affirmed the decision.

From the facts given, was there psychological incapacity?

Yes, the Court ruled that there was psychological incapacity. Senseless refusal to consummate the marriage is tantamount to psychological incapacity.

The appellant did not deny that he did not have any sexual relations with his wife during their cohabitation. The abnormal unwillingness to consummate marriage is a strong indicative of a serious personality disorder which the Court concluded as an "utter inability to give meaning and significance of the marriage" within the meaning of Article 36 of the Family Code.

For the husband and wife, it is an essential marital obligation under the Family Code to procreate children based on the universal principle that procreation of children through sexual relations is the basic end of marriage. The unjust refusal of a spouse to fulfil the above-mentioned marital obligation is tantamount to psychological incapacity.<sup>36</sup>

### *Comparative Analysis of the Aforementioned Cases*

As to their common ground, all five cases upheld the concept of marriage as an inviolable social institution and the foundation of the family.<sup>37</sup> The reason

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<sup>35</sup> Supra, note 13.

<sup>36</sup> Supra, note 13.

<sup>37</sup> CONST. (1987), art. XV, § 2 (Phil.).

is obvious. Our Constitution and laws treat marriage as a strong pillar to bind family relations. It is also noteworthy that one of the major tenets under the 1987 Constitution is directed to the laws on family, recognizing it as our basic social institution. Marriage is protected by the State and is inviolable; thereby severing marital ties is only done through stringent legal processes. Family and marriage are intertwined and should be protected by the State.<sup>38</sup> Pursuant to this Constitutional provision, the Supreme Court interpreted that the burden of proof to show the nullity of the marriage belongs to the plaintiff. In case of doubt, it should be resolved in favor of the validity of marriage and against its nullity.

In the interest of justice, the *Kalaw* case has relaxed the stringent *Molina* guidelines. The Court found out that the said guidelines were too rigid and would not be entirely applicable to all Filipino couples invoking psychological incapacity as a ground for nullity of marriage.<sup>39</sup> Hence, courts are directed to decide cases involving psychological incapacity on a case-to-case basis. Article 36 of the Family Code should not be interpreted too literally because the drafters intended the law to enable some resiliency in its application.

The *Chi Ming Tsoi* case is a constant reminder that if a wife or a husband unjustly refuses to engage in sexual cooperation with his or her spouse, it is a ground for psychological incapacity. There is a universal principle that procreation of children through sexual relations is the basic end of marriage. Moreover, this case also tackles homosexuality, which is generally not a ground for the annulment of marriage. It can only be considered as a ground if there is concealment of this condition prior to the marriage.<sup>40</sup>

Upon juxtaposing *Tan-Andal v. Andal with Republic v. Court of Appeals* and *Molina*, it is observed that the Supreme Court now categorically abandons the second *Molina* guideline. The Supreme Court reiterated that psychological incapacity is neither a mental incapacity nor a personality disorder that needs an expert opinion as an indispensable requirement. However, it should be borne in mind that there should be proof of the person's enduring aspects of personality, which is also termed as "personality structure", manifesting through clear acts of dysfunctionality undermining the family.<sup>41</sup> The respondent spouse's personality structure must make it impossible for him or her to understand and, more importantly, to comply with his or her essential marital obligations.

An expert opinion on the aspect of the person's personality is unnecessary to prove psychological incapacity. The testimony and opinion of ordinary witnesses, who have been present in the life of the spouses and have observed their behaviors prior the marriage, can be given credence in court. Hence, the knowledge of these behaviors can help the judge discern as to whether one of the spouses is seriously incapacitated to assume his or her essential marital obligations.<sup>42</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> Supra, note 14.

<sup>40</sup> Supra, note 13.

<sup>41</sup> Supra, note 18.

<sup>42</sup> Ibid.

Contemplating on the rulings of *Santos v. Court of Appeals* and *Republic v. Court of Appeals* and *Molina*, the Court is now certain that psychological incapacity under Article 36 of the Family Code is incurable, not medically, but in the legal sense. To be more specific, the incapacity should be so persistent to a specific partner along with the couple's incompatible personality structures. Thus, there is no other remedy but to sever the ties of marriage. There should be a pattern of incongruity of the spouses undermining their obligations of mutual love, respect, and support.<sup>43</sup>

The requirement of gravity, under psychological incapacity, is retained. However, mild characterological peculiarities, emotional outbursts and changes in the mood are excluded. In other words, it must be clearly observed that the incapacity is based on a genuinely serious psychic cause.

Juridical antecedence is still a stringent requirement under Article 36. In other words, the incapacity should exist at the time of the celebration of the marriage, albeit the incapacity shows only after the solemnization of marriage. This is the distinguishing factor of psychological incapacity from divorce. In divorce, the marriage is only severed for reasons, psychological or otherwise, arising after the solemnization of marriage.<sup>44</sup>

The case of *Republic v. Court of Appeals* and *Molina* provides that the essential marital obligations are "those embraced by Articles 68 up to 71 of the Family Code of the Philippines<sup>45</sup> relative to the husband and wife as well as Articles 220, 221[,] and 225 of the same Code relative to the parents and their children."<sup>46</sup> These provisions are reproduced below for reference:

ARTICLE 68. The husband and wife are obliged to live together, observe mutual love, respect and fidelity, and render mutual help and support.

ARTICLE 69. The husband and wife shall fix the family domicile. In case of disagreement, the court shall decide.

The court may exempt one spouse from living with the other if the latter should live abroad or there are other valid and compelling reasons for the exemption. However, such exemption shall not apply if the same is not compatible with the solidarity of the family.

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<sup>43</sup> *Ibid.*, (Peralta-Bernabe, J., concurring).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Supra*, note 11.

<sup>46</sup> *Ibid.*

ARTICLE 70. 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.

ARTICLE 71. The management of the household shall be the right and the duty of both spouses. The expenses for such management shall be paid in accordance with the provisions of Article 70.

ARTICLE 220. The parents and those exercising parental authority shall have with the respect to their unemancipated children or wards the following rights and duties:

(1) To keep them in their company, to support, educate and instruct them by right precept and good example, and to provide for their upbringing in keeping with their means;

(2) To give them love and affection, advice and counsel, companionship and understanding;

(3) To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship;

(4) To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals;

(5) To represent them in all matters affecting their interests;

(6) To demand from them respect and obedience;

(7) To impose discipline on them as may be required under the circumstances; and

(8) To perform such other duties as are imposed by law upon parents and guardians.

ARTICLE 221. Parents and other persons exercising parental authority shall be civilly liable for the injuries and damages caused by the acts or omissions of their unemancipated children living in their company and under their parental authority subject to the appropriate defenses provided by law.

ARTICLE 225. The father and the mother shall jointly exercise legal guardianship over the property of the unemancipated common child without the necessity of a court appointment. In case of disagreement, the father's decision shall prevail, unless there is a judicial order to the contrary.

The rule that the decisions of the National Appellate Matrimonial Tribunal of the Catholic Church of the Philippines on nullity cases pending before secular courts are persuasive in nature, is retained. Without prejudice to the ponente's view on the separation of Church and State,<sup>47</sup> it is observed that Article 36 of the Family Code was lifted from Canon Law. To be more specific, it was derived from

- 1) Those who lack the sufficient use of reason;
- 2) Those who suffer from a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted;
- 3) Those who are not able to assume the essential obligations of marriage for causes of a psychic nature. (emphasis supplied)<sup>49</sup>

Canon 1095 of the New Code of Canon Law.<sup>48</sup> As such, Canon 1095 of the New Code of Canon Law should be considered in interpreting Article 36 and in deciding psychological incapacity cases. Such provision is reproduced below for reference:

Canon 1095. The following are incapable of contracting marriage:

If the Catholic Church voids a canonical marriage, it will only give a persuasive effect. The primordial reason is that the Code Committee has also the intention of solving problems on marriages already annulled by the Catholic Church but still subsisting under our civil law.<sup>50</sup> In the case of *Leonilo Antonio v. Marie Ivonne F. Reyes*, the Supreme Court even reproached the Court of Appeals for failing to consider the prior church annulment of the parties' marriage as indicative of the void nature of the secular marriage. This Court even called the error a "deliberate ignorance."<sup>51</sup>

The above-cited discussions on canonical decisions are not binding on secular courts. The said canonical decisions are just evidence of the nullity of the secular marriage. In the end, it is still the judge who has the sole power to render a decision based on the elements of nullity of marriage under Article 36.

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<sup>47</sup> Justice Leonen's Dissenting Opinion in *In Re. Letter of Valenciano*, Holding of Religious Rituals at the Hall of Justice Bldg. in Q.C., 806 Phi I. 786 (2017), as cited in *Tan-Andal v. Andal*, G.R. No. 196359, (May 11, 2021) (Phil.), <https://sc.judiciary.gov.ph/20821/>

<sup>48</sup> *Supra*, note 8.

<sup>49</sup> Code of Canon Law, available at [https://www.vatican.va/archive/cod-juris-canonici/eng/documents/ciclib4-cann998-1165\\_en.html#TITLE\\_VII](https://www.vatican.va/archive/cod-juris-canonici/eng/documents/ciclib4-cann998-1165_en.html#TITLE_VII), accessed on January 3, 2022.

<sup>50</sup> *Supra*, note 31.

<sup>51</sup> *Ibid*

<sup>52</sup> *Supra*, note 18.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

*Conclusion / Epilogue: Psychological Incapacity Redefined*

Perusing the rulings of the Supreme Court in *Tan-Andal v. Andal*, *Santos v. Court of Appeals*, *Republic v. Court of Appeals* and *Molina, Kalaw v. Fernandez*, and *Chi Ming Tsoi v. CA*, one can observe that the concept of psychological incapacity has evolved from being a novel concept in both Article 36 of the Family Code and in a 1995 Supreme Court case, to a legal and less restrictive concept, replete of guidelines in the present time. All Supreme Court cases have their common grounds, as well as differences in determining psychological incapacity. However, it remains that the painful uncoupling story of Rosanna and Mario Victor was indeed a novel case for the members of the legal profession. It has paved the way for a redefined manner of understanding and ruling on psychological incapacity cases.

The case of *Tan-Andal v. Andal* has caused a major turnaround. Psychological incapacity, when applied in petitions concerning declaration of nullity of marriage, ceased to be a medical concept. Currently, it is now regarded as a legal concept. As a result, the Courts will not require anymore that medical professionals, such as psychiatrists and psychologists, will appear in Court as expert witnesses. The testimonies of ordinary witnesses will already suffice. In layman's terms, the accounts of the people who witnessed the marital union and its uncoupling will already be given credence in ruling for psychological incapacity.

The Supreme Court now clearly establishes a yardstick in deciding cases involving psychological incapacity. The high court put emphasis that there should be clear acts of dysfunctionality present along with the absence of understanding with one's essential marital obligations due to psychic causes. It is then unnecessary to be medically identified. An expert opinion is not an indispensable requirement at present.<sup>52</sup>

Indeed, the previous decided cases on psychological incapacity are restrictive, rigid, and intrusive on our rights to liberty, autonomy, and human dignity.<sup>53</sup> Uncoupling stories will always be bitter and painful, springing from the afterthought that the parties married the wrong person, or that the couple lived in two different and irreconcilable realities.

Twenty-seven years since the promulgation of the *Santos* ruling and thirty-four years after the Family Code of the Philippines was signed into law, the Supreme Court might have realized that it is high time to redefine psychological incapacity in light of the evolution of science, subsequent cases, and other contemporary circumstances.<sup>54</sup> And with that realization, the case of *Tan-Andal v. Andal* redefined how the legal profession understands the concept of psychological incapacity.

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<sup>52</sup> Supra, note 18.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

# “Jurisprudential Norms Without Precedence”: Upholding Liberty and Prosperity amid the Obscurity of Laws in the Era of Disinformation Technology\*

Sheila Mae T. Cabazares\*\*

## Abstract

New-age technology inevitably influences the kind of cases that the courts adjudicate. Advances in artificial intelligence (AI), for instance, created “deepfakes” or high-level simulation of faces and voices which have been egregiously used in manipulating pornographic videos to falsely depict the face of an intended victim. Such AI-enabled disinformation was very recently used by a mother in Pennsylvania to disqualify her daughter’s cheerleading rivals. The dearth of pertinent Philippine laws thus imperils the right of Filipinos to data integrity, among others. Given the statutory mandate that silence, obscurity, or inadequacy of laws should not impede judicial decisions, how then can the judiciary uphold the liberty and prosperity of Filipinos when laws cannot keep up with emerging technologies?

The paper addresses this issue in a two-pronged approach to the precept of “jurisprudential norms without precedence,” a framework primarily drawn from the works of Chief Justice Artemio Panganiban. The academic prong foregrounds the source-norm dichotomy which recognizes the distinction between legal sources and legal norms. And, the pragmatic prong underlines judicial globalization through engaged international dialogues of a judiciary that is attuned with epochal realities. Weaving the prongs together is the liberty-prosperity nexus as a judicial philosophy.

The proposed framework does not only highlight the indispensable role of the judiciary vis-à-vis the inadequacy of laws. It also stresses the challenges that require advocacy and subsidy due to the reticulate nature of law and technology. Hence, enthused public discussions on substantive rights in the context of emerging technologies, such as the right to data integrity, are equally relevant. After all, it takes a village to stimulate and support a judiciary well-adapted in protecting liberty and in nurturing prosperity under the rule of law.

**Keywords:** deepfake; liberty-prosperity nexus; right to data integrity

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*The Court does not lust for the brute power of the executive. Neither does it desire to have the patronage of the legislature. It prays only for courage, integrity and sagacity, for these are its only tools with which to fulfill its work and to deserve the people's trust.*  
- Chief Justice Artemio Panganiban<sup>1</sup>

## I. LAW AND TECHNOLOGY

### A. Introduction

**T**echnological advancements inevitably impact the kind of justiciable controversies presented before the courts especially when emerging technologies make legislative assumptions obsolete.<sup>2</sup> Robinson, Keith. (2018) "Emerging Technologies Challenging Current Legal Paradigms." Minnesota Journal of Law, Science, and Technology, vol. 19, issue 2. The problem is even more apparent in many countries where legislators cannot keep up with the pace of technology.<sup>3</sup> In the Philippines, for instance, Act No. 3815 or the Revised Penal Code have provisions for crimes<sup>4</sup> that remain unchanged since 1932.

To contextualize the legal and theoretical background of this research, this Chapter offers a general discussion on the relation between law and technology and an examination of the legal issues related to the rise of deepfakes. The presentation of research questions, objectives, and limitations proceeds thereafter.

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<sup>1</sup>Panganiban, Artemio. (1999). Leaders by Example. Manila: Supreme Court Printing Press.

<sup>2</sup>Robinson, Keith. (2018) "Emerging Technologies Challenging Current Legal Paradigms." Minnesota Journal of Law, Science, and Technology, vol. 19, issue 2.

<sup>3</sup>Malan, Daniel. (2018) "The law can't keep up with new tech. Here's how to close the gap." World Economic Forum, available at <https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up/>, accessed on March 5, 2021.

<sup>4</sup>See for example Article 247 of the Revised Penal Code on death or physical injuries under special circumstances.

## 1. Law and technology: Regulation and innovation

The relation of law and technology is often construed as adversarial.<sup>5</sup> For some, this is due to the element of regulation.<sup>6</sup> As emerging technologies give rise to a modified or new behavior as well as conflict in rights<sup>7</sup>, regulatory measures to protect and enforce rights become indispensable. However, as technology is viewed to symbolize expansion and growth, regulation is perceived to have a restraining effect which is commonly perceived to impede growth.<sup>8</sup>

Today's technological titans do not necessarily have a consensus when it comes to perceiving technological innovations such as in the field of artificial intelligence. For instance, SpaceX and Tesla CEO, Elon Musk, is pessimistic about advances in robotics as he deemed it detrimental to human laborers who he believes will eventually be replaced by robots.<sup>9</sup> Other technological titans, however, such as business magnate Bill Gates and Facebook founder and CEO Mark Zuckerberg, are enthusiastic about the progress in the aforesaid field.<sup>10</sup> The US AI market seems to agree with the latter as it became a 47-billion dollar industry in 2020.<sup>11</sup>

Technically speaking, however, AI is not a new technology. It emerged in 1956 as the science of making computers intelligent.<sup>12</sup> Modern advances in the field, however, differ as to approach and the level of complexity involved. It was only a few years ago, for example, that advances were made to create humanoid robots and cybernetic enhancements on

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<sup>5</sup>Wiener, Jonathan. (2004) "The regulation of technology, and the technology of regulation." *Technology in Society*, vol. 26, pp. 483 - 500.

<sup>6</sup>Malan, Daniel. (2018) "The law can't keep up with new tech. Here's how to close the gap." *World Economic Forum*, available at <https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up/>, accessed on March 5, 2021.

<sup>7</sup> Belanche, Daniel, Flavián, Marta, and Pérez-Rueda, Alfredo (2020) "Mobile Apps Use and WOM in the Food Delivery Sector: The Role of Planned Behavior, Perceived Security and Customer Lifestyle Compatibility," *12 Sustainability*, No. 10.

<sup>8</sup> *Supra*, note 5.

<sup>9</sup> Umoh, Ruth. (2017) "Why Elon Musk Might Be Right About His Artificial Intelligence Warnings." *CNBC*, August 25, 2017. Available at <https://www.cnn.com/2017/08/25/why-elon-musk-might-be-right-about-his-artificial-intelligence-warnings.html>, accessed on March 3, 2021

<sup>10</sup> Hsu, Jeremy (2009). "Robotic Madness: Creating True Artificial Intelligence." *Live Science*, March 18, 2009, available at <https://www.livescience.com/3407-robot-madness-creating-true-artificial-intelligence.html>. Accessed on March 3, 2021

<sup>11</sup> *Supra*, note 2.

<sup>12</sup> Charniak, Eugene and McDermott, Drew. (1985) *Introduction to Artificial Intelligence*. Boston, Mass.: Addison-Wesley.

humans.<sup>13</sup> The use of a bomb-disposal robot, Packbot, is another example of an advancement in artificial intelligence which is now being used by the US military.

The ramified implications and issues arising from the relation of law and technology force the judiciary to adapt with the dynamics of such interconnection. It is unimaginable after all to expect laws to be on par with the rate of technological advancement.<sup>14</sup> It has been established that it is extremely "difficult to extrapolate the effects of technological change on society."<sup>15</sup> Experts in the 1800s, for example, used to foretell that New York will become inhabitable in the future due to the accumulation of horse manure in the streets from horse carts, in proportion to the growth of its population.<sup>16</sup> Experts at that time cannot be faulted for being unable to anticipate the form of technological advances in the future.<sup>17</sup> The protection and enforcement of legal rights, in this case, lie significantly therefore in judicial decisions.

In the Philippines, a very good illustration for this lamentable gap between law and technology was when Onel de Guzman, the computer science student behind the I LOVE YOU virus, created in 2000 the world's first and considered the most destructive computer virus in history.<sup>18</sup> The virus affected an estimated 45 million machines around the globe with an estimated loss of billions of pounds.<sup>19</sup> Among the well-established institutions affected include the Parliament of the United Kingdom and the Pentagon of the United States.<sup>20</sup>

Since it was only in 2012 when the Philippines enacted its first law against cybercrimes, not a single person was ever prosecuted for the I LOVE YOU virus after the Federal Bureau of Investigation (FBI) tracked down the source of the virus to an apartment in Manila.<sup>21</sup> It was therefore

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<sup>13</sup> *Supra*, note 10.

<sup>14</sup> Drechsler, Wolfgang and Kostakis, Vasilis. (2014) "Should Law Keep Pace with Technology? Law as Katechon." *Bulletin of Science, Technology, and Society*, vol. 34, no. 128.

<sup>15</sup> Lederer, Frederic. (2014) *Judging in the age of technology*. American Bar Association.

<sup>16</sup> *Ibid*.

<sup>17</sup> Tanneeru, Manav. (2009) "Can the Law Keep Up with Technology?" CNN, November 17, 2009. Available at <http://www.cnn.com/2009/>, accessed March 3, 2021.

<sup>18</sup> Landler, Mark. (2000). "A Filipino Linked to 'Love Bug' Talks About His License to Hack". *The New York Times*. , Available at <https://www.nytimes.com/2000/10/21/business/a-filipino-linked-to-love-bug-talks-about-his-license-to-hack.html>, accessed 15 March 2021

<sup>19</sup> White, Geoff. (2020). "Revealed: The man behind the first major computer virus pandemic." Available at <https://www.computerweekly.com/news/252481937/Revealed-The-man-behind-the-first-major-computer-virus-pandemic>, accessed 15 March 2021

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

an unfortunate example of the legal example of the legal maxim *nullum crimen sine lege nulla poena sine lege* (there is no crime except in accordance with a predetermined law).

However, notwithstanding the enactment of the Philippine cybercrime law, threats arising from emerging technologies remain in the context of obscurity or inadequacy of the law and its related statutes. The question therefore still remains: how may the liberty and prosperity of the Filipinos be upheld when laws lag behind threats from emerging technologies?

## 2. Deepfakes and Data Integrity

More engaged discussions on legal rights became inevitable with the advancement in AI through deepfakes which have become prevalent in recent years.<sup>22</sup> Deepfake is an amalgamation of the words 'deep learning' and 'fake'. It is a media, usually a video, produced through an AI-enabled software that allows a computer to "deeply learn" faces, movements, and voices of an individual in order for it to project the same features to another person.<sup>23</sup> With the advent of user-friendly deep learning tools, one need not have to possess advanced technical skills to produce deepfakes.<sup>24</sup> The application of the technology covers images, videos, video games, virtual reality, and will conceivably be applied in movie productions in the near future.<sup>25</sup>



Figure 1: Deepfake manipulation of actor Daniel Craig's facial expressions using another person's facial movements. Source: Panyatham (2020)

<sup>22</sup> Panyatham, Paengsuda. (2020) "Deepfake technology in the entertainment industry: Potential limitations and protections." Carnegie Mellon University, available at <https://amt-lab.org/blog/2020/3/Deepfake-technology-in-the-entertainment-industry-potential-limitations-and-protections>, accessed on March 3, 2021

<sup>23</sup> Ibid.

<sup>24</sup> Verdoliva, Luisa. (2020) "Media Forensics and Deepfakes: An Overview." IEEE Journal of Selected Topics in Signal Processing, vol. 9.

<sup>25</sup> Ibid.

Deepfake became publicly known in 2017 after an infamous post on the social news media Reddit which consisted of AI-manipulated pornographic videos that realistically projected faces of famous celebrities such as Scarlet Johansson, Taylor Swift, and Gal Gadot.<sup>26</sup> In 2019, approximately 14,000 deepfake videos were available online, most of which were accessible in social media sites such as Facebook, WhatsApp, Youtube, and Instagram.<sup>27</sup> This is why academic advocates such as Boston University law professor, Danielle Citron, had characterized deepfake technology as “being weaponized against women.”<sup>28</sup>

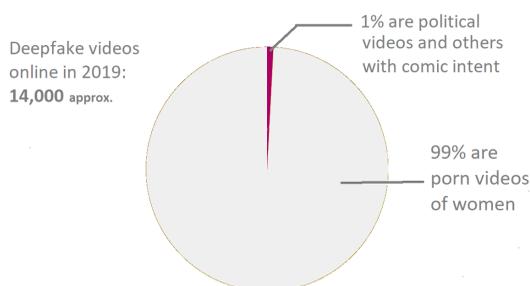


Figure 2: Majority of deepfakes are porn videos of women.  
Source: Panyatham (2020) of Carnegie Mellon University

The other 1% of these deepfake videos in 2019 generally involved male political figures and other famous celebrities whose images were manipulated for humorous intent. Some of the most-viewed videos included former US President Barack Obama's fake speech where he called Donald Trump a “dipshit”<sup>29</sup> and Jon Snow from the TV Show Game of Thrones apologizing to the public for the compromised quality of its highly criticized season finale.<sup>30</sup> Deepfake also manipulates voices hence the added level of persuasiveness.

Even more vexing is the fact that the technology also has mechanisms to evade deepfake detection. Convolutional neural networks (CNN) is one

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Sample, Ian. (2020). “What are Deepfakes – and how can you spot them?.” The Guardian. January 13, 2020

<sup>29</sup> BuzzFeed. (2018) “You won't believe what Obama says in this video!” BuzzFeed Youtube channel. Available at

<https://www.youtube.com/watch?v=cQ54GDm1eL0>, accessed on March 3, 2021

<sup>30</sup> Eating Things Channel. (2019) “Breaking: Jon Snow apologized for Season 8” Eating Things Youtube channel.

Available at <https://www.youtube.com/watch?v=4GdWDoyxvqw>, accessed on March 3, 2021

of the methods used to detect deepfake manipulation.<sup>31</sup> However, by adding a feature referred to as muted “adversarial noise patterns”, the CNN will be unable to detect the manipulation at all. Instead, it will categorize it as pristine.<sup>32</sup> It would therefore become very problematic on the part of the offended party to prove that the video does not represent reality.

It is therefore unsurprising how these technological advances were taken advantage of in violation of others’ legal rights. In fact, as of the writing of this paper, a mother in Pennsylvania made the headlines after using deepfake images and videos against her daughter’s rivals in a cheerleading squad.<sup>33</sup> The intent, according to the prosecutor, was to use the deepfakes in order for the victims to be kicked out of the team. The images involved sexually provocative videos of the victims as well as images depicting drug and alcohol use; nude photos were also deepfaked from summer photos of the victims.<sup>34</sup>

Abuses of publicly accessible AI technology relates to other contemporary cyber-bullying trends in the form of “slut-shaming”<sup>35</sup> and “revenge porn”<sup>36</sup>, both of which negatively affect women. Slut-shaming involves an act intended to humiliate a woman due to an imputed sexual promiscuity on her part hence the labels slut, whore, and other similar terms.<sup>37</sup> These acts are often posted on social media where viewership is certain by the individuals who know the target victim thus increasing the level of humiliation of the latter. On the other hand, revenge porn refers to the act of posting of sexually explicit videos or images on a website as a form of retaliation for a “romantic rebuff.”<sup>38</sup>

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<sup>31</sup> Tolosana, Ruben Vera-Rodriguez, Julian Fierrez, Aythami Morales, Javier Ortega-Garcia. (2020) Deepfakes and Beyond: A Survey of Face Manipulation and Fake Detection, Information Fusion, doi: <https://doi.org/10.1016/j.inffus.2020.06.014>

<sup>32</sup> *Supra* note 21, p. 16.

<sup>33</sup> Bellware, Kim. (2021) “Cheer mom used Deepfake nudes and threats to harass daughter’s teammates, police say.” The Washington Post, available at <https://www.washingtonpost.com/nation/2021/03/13/cheer-mom-Deepfake-teammates>, accessed March 16, 2021

<sup>34</sup> *Supra*.

<sup>35</sup> Van Royen K., Poels K., Vandebosch H., Walrave M. (2018) Slut-Shaming 2.0. In: Walrave M., Van Ouytsel J., Ponnet K., Temple J. (eds) Sexting. Palgrave Studies in Cyberpsychology, Palgrave Macmillan, Cham.

<sup>36</sup> *Supra*, note 18.

<sup>37</sup> Papp, L. J., Hagerman, C., Gnoleba, M. A., Erchull, M. J., Liss, M., Miles-McLean, H., & Robertson, C. M. (2015). Exploring perceptions of Slut-shaming on Facebook: Evidence for a reverse sexual double standard. *Gender Issues*, 32(1), 57-76.

<sup>38</sup> Humbach, John. (2014) The constitution and revenge porn. *Pace Law Review*, vol. 35, issue 215.

As deepfake pornographic videos have increasingly become prevalent, the abuse of the same technology in “slut shaming” and in “revenge porn” is but imaginable. The threat is worsened by the fact that detection of manipulation in deepfake videos can be very challenging. Regulation in the use of such technology indeed becomes imminent.

## B. Research question and thesis statement

Amid the insufficiency, silence, or obscurity of available laws when it comes to emerging technologies such as AI-manipulation of multimedia contents, the enforcement and protection of rights lie with judicial decisions. As Article 9 of the Civil Code of the Philippines provides, the silence, obscurity or insufficiency of the laws should not impede judicial decisions. This leads to the research question of this paper, *viz.*

*How can judicial decisions protect the liberty and nurture the prosperity of Filipinos from abuses of emerging technologies amid the silence, insufficiency, or obscurity of pertinent Philippine laws?*

The paper offers an answer through a two-pronged emphasis on the concept of “jurisprudential norms without precedence” drawn from Chief Justice Artemio Panganiban’s *The Bio-Age Dawns on the Judiciary*. (1) the academic prong foregrounds the source-norm dichotomy which recognizes the distinction of legal norms and legal sources; and, (2) the pragmatic prong which underlines judicial globalization through engaged global dialogues of a judiciary open to international realities.

## C. Objectives of the study

This research aims to carry out the following objectives:

1. To identify legal issues in abuses of the deepfake of artificial intelligence, from the perspective of international laws and Philippine laws;
2. To identify legal issues in abuses of the deepfake of artificial intelligence, from the perspective of international laws and Philippine laws;
3. To offer a two-pronged framework with the aid of the liberty-prosperity judicial philosophy; and
4. To highlight the relevance of judicial globalization in the indispensability of the judiciary in the silence, obscurity, or inadequacy of pertinent laws

#### **D. Significance of the study**

The varied ways through which legal rights may be abused in emerging technologies is innumerable. This dilemma is even made more perplexing by the dearth of updated laws that are supposed to regulate the use of such advancements. The public, meanwhile, is left vulnerable in terms of rights protection and enforcement.

The proposed approach in this paper highlights the role of the courts in protecting the liberty and in nurturing the prosperity of the Filipinos despite the silence, adequacy, or obscurity of Philippine laws vis-à-vis emerging technologies. Taking off from Chief Justice Artemio Panganiban's concept of "jurisprudential norms without precedence," the research provides a framework in support for a judiciary that is well-adapted to protect and enforce rights in the face of technological abuses.

#### **E. Research methodology**

Archival research and content analysis of various documents, manuscripts, and audiovisual materials were employed in this qualitative inquiry. The following materials were used as resources:

1. The primary sources include Philippine laws and Philippine jurisprudence;
2. The secondary sources include foreign case laws, law textbooks, journal publications, online references, and lectures and writings of legal luminaries.

#### **F. Scope and limitation**

The research on the relation of law and technology is focused on the advances in artificial intelligence, specifically the use of deepfakes, to the exclusion of other related kinds of online abuses. The discussion on actual and potential abuses of deepfake technology and its concomitant rights violation are also focused on cybercrime issues rather than the civil aspect thereof.

## II. CYBERCRIME AND DATA INTEGRITY: INTERNATIONAL AND PHILIPPINE LAWS

### A. Classification of cybercrimes

One key problem with "cybercrime" is its lack of universal definition.<sup>39</sup> There are generally two common elements, however, in acts considered as a cybercrime: (1) the use of information and communication technology or ICT and (2) the lack of geographical or physical borders.<sup>40</sup>

Recently, two classifications of cybercrimes are proffered: *cyber-dependent cybercrimes* and *cyber-enabled cybercrimes*.<sup>41</sup> A cyber-dependent cybercrime is one whose commission is only made possible through ICT. On the other hand, a cyber-enabled cybercrime is a traditional, non-technology related crime but was committed through the assistance of ICT.

One distinguishing element therefore between the types of cybercrimes is that they differ in the role of the ICT. With cyber-dependent cybercrimes, the target of the attack is the ICT itself such as a computer network or a computer.<sup>42</sup> On the other hand, the ICT in cyber-enabled cybercrimes is only a tool, not a target; ICT was only used to facilitate the crime.

The "CIA-triad" refers to the rights violated in cybercrimes: *confidentiality, integrity, accessibility*.<sup>43</sup> In terms of confidentiality, the right to make a data private and not available to others without the owner's consent is compromised.<sup>44</sup> Integrity, meanwhile, refers to the right of the owner of a data to ensure that the same will not be subject to any unauthorized alteration or modification. Accessibility, lastly, is the right of a person to have easy and convenient access to publicly available

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<sup>39</sup> United Nations Office of Drugs and Crime (UNODC). (2021) "Cybercrime in brief." <https://www.unodc.org/e4j/en/cybercrime/module-1/key-issues/cybercrime-in-brief.html>

<sup>40</sup> Ibid.

<sup>41</sup> Europol (2018) Internet Organised Crime Threat Assessment (IOCTA) of 2018. <https://www.europol.europa.eu/internet-organised-crime-threat-assessment-2018>

<sup>42</sup> UNODC (2021), *ibid*.

<sup>43</sup> Rouse cited in UNODC (2021), *ibid*.

<sup>44</sup> Ibid.

information.

The aforesaid categories show that deepfake technology abuses relate more closely to the right to data integrity. The abuse may also be cyber-dependent or cyber-enabled since the data can be used as a tool as well as the target. As a cyber-dependent cybercrime, the deepfake technology abuse can be perpetrated through unlawful access to images and videos stored in one's device. The hacked images or videos can then be used as basis for a deepfake video. The act of hacking makes the act a cyber-dependent cybercrime. Meanwhile, the use of the deepfake video itself to the detriment of an individual makes the act a cyber-enabled cybercrime. The hacked images or videos can then be used as basis for a deepfake video. The act of hacking makes the act a cyber-dependent cybercrime. Meanwhile, the use of the deepfake video itself to the detriment of an individual makes the act a cyber-enabled cybercrime.

## B. Data Integrity v. Data Security

The distinction between data integrity and data security is important in examining the ambiguity of a cybercrime law when applied to an emerging technology. The issue could arise, for example, as to which category will an alleged cybercrime fall under for purposes of determining its statutory requisites. This proposal will be further illustrated in Section D under the discussion on cybercrime-related Philippine laws.

Data integrity is not the same as data security.<sup>45</sup> The former relates to accuracy while the latter pertains to privacy.<sup>46</sup> Privacy or confidentiality is separate from integrity, each forming a distinct part of the CIA-triad. With data security, the data is being protected from unauthorized access. The data involved is authentic and is being protected from unauthorized access. In other words, these are data that preclude public access for security and privacy purposes. An example is a person's right to data security over his online bank account details.

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<sup>45</sup> Ibid.

<sup>46</sup> Wang, T., Bhuiyan, M. Z. A., Wang, G., Qi, L., Wu, J., & Hayajneh, T. (2019). Preserving Balance between Privacy and Data Integrity in Edge-Assisted Internet of Things. *IEEE Internet of Things Journal*, 1-1. doi:10.1109/jiot.2019.2951687

On the other hand, violation of data integrity means that the data was altered from its original or pristine form. Its consummation, therefore, does not necessarily involve a secured data. The main issue is that the modified data no longer represents the original. While this may sound straightforward, the distinction actually becomes more real than imagined when it comes to specifically classifying an act under the presently defined cybercrimes. This will be further discussed and illustrated in Section D where an attempt to classify deepfakes under a certain cybercrime will be shown.

In a deepfake technology abuse, data integrity is always an issue, although both rights to data integrity and data security may be compromised at the same time. Both rights may be involved in a case where the manipulated image or video was also unlawfully obtained. When the manipulated image or video, on the other hand, was made public by its owner, the deepfake video using the said image violates data integrity but not data security. Put simply, all deepfake abuses violate data integrity issues but not necessarily data security.

In foreign jurisprudence, data integrity issues are commonly applied to the collection of personal information and the subsequent errors made thereto.<sup>47</sup> For example, when an encoder of a utility company fails to indicate the correct information pertaining to a customer's payment, the customer's data integrity was compromised leading to damages.

The use of information with the intent to unlawfully modify the same is also a form of data integrity issue.<sup>48</sup> The unauthorized manipulation of one's facial map in deepfake abuse clearly falls under this type of data breach. The alteration of the data in the form of a summer get-away photo on social media posted by an unsuspecting teenager, when manipulated to appear as nude, is indubitably a violation of the girl's right to data integrity, among others.

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid

### C. Data Integrity and International Initiatives

This subsection surveys pertinent international laws in relation to the protection of rights in the use of technology, specifically the right to data integrity. It includes a discussion on several initiatives by different international bodies in the context of rights protection against cybercrime.

1. Articles 2, 4, 6, and 7 of the Budapest Convention on Cybercrime
2. ASEAN Declaration to Prevent and Combat Cybercrime
3. Data Protection Regulation
4. Article 3 of the United Nations Convention on the Rights of a Child (UNCRC) of 1989 for the Rights of Children to Special Protection
5. Article 17 of the European Convention on Human Rights (ECHR) for abuse of rights
6. Article 20 of the International Covenant on Civil and Political Rights (ICCPR)
7. The United Nations General Assembly of the Human Rights Council Resolution 38/7 (UN GA HRC/RES/38/7)

It was only in 2018 that the Philippines acceded to the Council of Europe's Convention on Cybercrime also known as the Budapest Convention on Cybercrime.<sup>49</sup> The Convention is a pioneer international treaty that deals with crimes over the internet to be harmonized with domestic laws of its signatories. It entered into force in 2004. To date, it is the only binding multilateral agreement that addresses cybercrime.<sup>50</sup> This is a relevant measure on the part of the Philippines given the fact that Southeast Asian countries, in a 2020 Interpol report, are the key targets of cyberthreats.<sup>51</sup> Russia and China have yet to accede thereto.

As a signatory to the Convention on Cybercrime, the Philippines is mandated to take legislative and administrative measures at the national level to secure specific rights. In relation to the right to data integrity, the Convention defines the following forms of cybercrimes:

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<sup>49</sup> Council of Europe. (2018) Philippines joins the Budapest Convention. <https://www.coe.int/en/web/cybercrime/-/philippines-joins-the-budapest-convention>

<sup>50</sup> Benincasa, Eugenio. (2020) "ASEAN needs to enhance cross-border cooperation on cybercrime." Australian Strategic Policy Institute. <https://www.aspi.org.au/asean-needs-to-enhance-cross-border-cooperation-on-cybercrime/>

<sup>51</sup> INTERPOL. (2020) INTERPOL report highlights key cyberthreats in Southeast Asia. <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-report-highlights-key-cyberthreats-in-Southeast-Asia>

1. Illegal access is "committed intentionally, the access to the whole or any part of a computer system without right."<sup>52</sup> the cyber-dependent form of deepfake abuse will clearly fall herein.<sup>53</sup>
2. Data interference is an act of "damaging, deletion, deterioration, alteration or suppression of computer data without right."<sup>54</sup>
3. Computer-related forgery is the deliberate and unauthorized "input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible."<sup>55</sup>

The Philippines also adopted the ASEAN Declaration to Prevent and Combat Cybercrime has been adopted in 2017.<sup>56</sup> It is the first cybercrime initiative by the ASEAN.<sup>57</sup> It recognizes the significance of mutual assistance in combating against cybercrimes through engaged coordination and cooperation of each member party with different ASEAN bodies.<sup>58</sup> It also mandates close cooperation relevant agencies such as Europol and Interpol for enhanced cyber security.<sup>59</sup> The Declaration, however, does not specify the rights to be protected.

In the European Union, the Data Protection Regulation was enacted to prohibit the transfer of online personal information across borders if the receiving country has not implemented sufficient degree of protection that it required.<sup>60</sup> This right is sometimes referred to as the "right to be forgotten" as the personal information should not be kept, i.e. should be forgotten, if the level of required security in the receiving country is not met. The Data Protection Directive, however, only binds the members of the European Union.

The Rights of Children to Special Protection is provided under Article 3 of the United Nations Convention on the Rights of a Child (UNCRC) of 1989. The special protection for children in the use of the internet is

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<sup>54</sup> Article 4 of the Budapest Convention on Cybercrime:

<sup>55</sup> Article 7, Budapest Convention on Cybercrime

<sup>56</sup> Association of Southeast Asia Nation. Asean Declaration to Prevent and Combat Cybercrime. <https://asean.org/wp-content/uploads/2017/11/ASEAN-Declaration-to-Combat-Cybercrime.pdf>

<sup>57</sup> Benincasa (2021), *ibid.*

<sup>58</sup> ASEAN Declaration to Prevent and Combat Cybercrime (2017) <https://asean.org/wp-content/uploads/2017/11/ASEAN-Declaration-to-Combat-Cybercrime.pdf>

<sup>59</sup> *Ibid.*

<sup>60</sup> Rustad (2016), *ibid.*

straightforward. Given their tender age, they are prone to exploitation, misinformation, and abuse which can interfere with their well-being. In relation thereto, Article 3 of the UNCRC of 1989, or the “well-being clause”, mandates the signatories to provide and ensure the protection and care of the children necessary for their well-being.

The Philippines ratified the UNCRC in 1990. The well-being contemplated in the well-being clause, of course, can take various forms. It should be conceivable that it includes the welfare of children in internet use. As deepfake technology can be used in cyberbullying, legislative and administrative measures that are required by Article 3 of the UNCRC should also contemplate such scenarios.

The protection of vulnerable persons online is also upheld in the European Convention on Human Rights (ECHR) through the European Court on Human Rights has declared as a positive duty of states to ensure the protection of vulnerable persons online, especially children. It calls on its member states to legislate for their welfare as they have to inevitably use the internet. This mandate of the ECHR had been upheld in several European Union cases such as in *Mouvement Raëlien Suisse v. Switzerland*<sup>61</sup> wherein the Court affirmed the restriction against the non-profit Mouvement to conduct online campaigns that promote, among others, genocracy, sensual meditation, and human cloning linked to website of a cloning company. The Court ratiocinated that the combination of all the issues promoted are contrary to public health and moral and may thus be validly interfered with.

In *M.C. v. Bulgaria*<sup>62</sup>, a complaint was filed against the state of Bulgaria for not complying with the ECHR to protect the physical and private well-being of children. The Court held Bulgaria violative of the ECHR for failing to incorporate into its criminal system the protection mandated.

Restriction of online content to protect the right of others is also part of the International Covenant on Civil and Political Rights (ICCPR). As much as freedom of expression is important, restriction of content under certain

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<sup>61</sup> *Mouvement Raëlien Suisse v. Switzerland*, 2012-IV Eur. Ct. H.R. 373

<sup>62</sup> *M.C. v Bulgaria*, (39272/98) [2003] ECHR 646 (4 December 2003)

circumstances such racism and xenophobia is also required to protect the right of others.<sup>63</sup>

Also, the UN General Assembly in 2018 issued the Human Rights Council Resolution 38/7 (UN GA HRC/RES/38/7) for “the promotion, protection and enjoyment of human rights on the Internet.”<sup>64</sup> The resolution reaffirms the International Covenant on Economic, Social and Cultural Rights (ICESC) and the International Covenant on Civil and Political Rights (ICCPR). Among the rights enumerated in the HRC/RES/38/7 is the right from the spread of false information on the internet which are “designed and implemented so as to mislead, to violate human rights and privacy and to incite violence, hatred, discrimination or hostility.”<sup>65</sup> This mandate seems fit for the needed protection against deepfake technology abuses.

Based on the aforecited international laws and treaties, it can be observed that rights protection in relation to ICT is not comprehensive. In some cases, the rights are only implied. Nevertheless, progress was made with the definition of cybercrimes in the Budapest Convention on Cybercrime.

#### D. Data Integrity and Philippine Laws

Below is a list of cybercrime-dependent and cybercrime-enabled statutes in the Philippines arranged in the order of their date of enactment. The succeeding discussion will consider the relevance of each statute to the issue on data integrity, or the lack thereof.

1. R.A. No. 4200 or the Anti-Wire Tapping Law in 1965
2. R.A. No. 8792 or the E-Commerce Act in 2000
3. R.A. No. 9775 or the Anti-Child Pornography Act in 2009
4. R.A. No. 9995 or the Anti-Photo and Voyeurism Act in 2009
5. R.A. No. 10175 or the Cybercrime Prevention Act of 2012
6. R.A. No. 11449 or the Access Devices Regulation Act of 2019

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<sup>63</sup> UNODC (2021), *ibid.*

<sup>64</sup> United Nations Human Rights Council. 38th 65 Session (18 June – 6 July, 2018).

<sup>65</sup>*Ibid.*

Section 1 of the Anti-Wire Tapping Law prohibits “any person, not being authorized by all the parties to any private communication or spoken word, to tap any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept, or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or dictaphone or walkie-talkie or tape recorder, or however otherwise described.”<sup>66</sup> The devices enumerated in the Section immediately suggests the antiquity of the statute. In the case of deepfake technology abuses, the Anti-Wire Tapping Law could apply if the deepfake includes a deepfake voice, which is conceivable. deepfake programs can map one's voice and project it to another person. A deepfake manipulator, however, can easily evade the wiretapping aspect by using data made publicly available, such as public posts of an intended victim on social media.

When it comes to the Access Devices Regulation Act of 2019, which is the new version of its 1998 counterpart, ICT-related violations were committed against the banking system.<sup>67</sup> The law is relevant in cases of automated teller machine hacking or credit card skimming. It is therefore not relevant, in any way, to the disinformation technology issues such as in the case of deepfakes. Neither is the E-Commerce Act in 2000 which deals with electronic documents and electronic signatures. Although both of these laws consider data integrity, neither is relevant nor applicable to the deepfake dilemma which involves multimedia contents.

The Anti-Child Pornography Act, meanwhile, was enacted pursuant to the constitutional mandate upholding “the vital role of the youth in nation-building.”<sup>68</sup> The law involves ICT in terms of the transmission, distribution, or broadcast of child pornography. Mere possession of child pornography is also punishable. Given the fact that majority of the deepfake abuses are in the form of pornographic videos, this law may play a role therein.

However, the aforementioned law is clearly applicable only when the deepfake video involves child pornography. Does a minor's facial map projected on to a porn actress in a pornographic video constitute child pornography? Technically, the deepfake video will not involve a body of the minor nor will she actually be engaged in any sexual act. Section 3

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<sup>66</sup> Section 1, Anti-Wire Tapping Law

<sup>67</sup> Dela Cruz, Abet. (2019) “Was Access Devices Regulation Act reboot really necessary?” The Manila Times. <https://www.manilatimes.net/2019/10/02/opinion/columnists/topanalysis/was-access-devices-regulation-act-reboot-really-necessary/624758/>

<sup>68</sup> Section 13, Article II, 1987 Philippine Constitution

(b) of the Anti-Child Pornography Act defines child pornography as “any representation... of child engaged or involved in real or simulated explicit sexual activities.”<sup>69</sup> Given that the hypothetical minor did not actually engage in any sexual activity, only that her facial features were projected onto the pornographic performer, will the deepfake video fall as child pornography?

The same dilemma may be raised when relating the deepfake issues to the Anti-Photo and Voyeurism Act wherein photo and video voyeurism is defined as an “act of taking photo or video coverage of a person or group of persons performing sexual act or any similar activity or of capturing an image of the private area of a person or persons without the latter’s consent...”<sup>70</sup> Given that the person in the deepfake video did not actually perform the sexual act as depicted in the video but whose facial map was only used to make the actual pornographic performer appear as the victim, will it constitute voyeurism? Another question is whether or not the deepfake processing is an act of “taking” a photo or video. It is not surprising, of course, that the law is not apprised with a technology which emerged eight years after it was enacted.

When it comes to the Cybercrime Prevention Act of 2012, most supporters of the law viewed its benefits in the context of commerce especially when it comes to foreign investment.<sup>71</sup> The said law provides for six categories of cybercrimes. Among which is defined under Section 4 (a) referring collectively to “offenses against the confidentiality, integrity and availability of computer data and systems.”<sup>72</sup> The list of specific offenses enumerated therein exactly resemble those in the Budapest Convention on Cybercrime, only much shorter.

The Philippine version of the Cybercrime Convention copied the verbatim definition of “data interference”, with an added phrase that the same act includes the transmittal of computer viruses. This is consistent with the intent of the framers of the Cybercrime Convention for including data interference as a cybercrime: to protect the “integrity and the proper functioning or use of stored computer data or computer programs.”<sup>73</sup>

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<sup>69</sup> R.A. No. 9775 or the Anti-Child Pornography Act

<sup>70</sup> Section 3, R.A. No. 9995 or the Anti-Photo and Video Voyeurism Act of 2009

<sup>71</sup> Heffron, James Keith. (2014). The Philippine Cybercrime Prevention Act of 2012: To Protect or Destroy? *DLSU Business & Economics Review* 24.1 (2014), pp. 96-103

<sup>72</sup> Section 4 (a), R.A. No. 10175 or the Cybercrime Prevention Act of 2012

<sup>73</sup> Explanatory Note of the Cybercrime Convention, p. 11. Available at <https://rm.coe.int/16800cce5b>, accessed 15 March 2021

Under contemplation, therefore, is the protection of data systems such as computer networks against attacks that will render them either non-functional or dysfunctional, as exactly what happened with the I LOVE YOU virus in 2000. Viewed in the context of pornographic deepfakes, however, the act does not squarely apply; no damage to a computer system is involved at all. Instead, the data was damaged to the detriment not of a computer system but of a natural person. Indeed, this distinction requires more legislative attention.

As to the cybercrime of illegal access, on the other hand, a deepfake video that used publicly available data of an individual such as his or her public photos and videos on social media will not apply. In other words, data integrity in deepfakes may be breached without violating data privacy. As it is, illegal access is clearly linked to data privacy rather than data integrity. Corollarily, in *Vivares v. St. Theresa's College*, the Supreme Court held that "information, otherwise private, voluntarily surrendered by them can be opened, read, or copied by third parties who may or may not be allowed access to such."<sup>74</sup> Necessarily, when a publicly-accessible media was used to create the deepfake, there was no illegal access committed. As the *Vivares* ruling further held, even when the privacy setting of a social media post was modified to "Friends Only," as long as others can tag the photo thereby allowing other people to see it, is not absolutely private.

Perhaps, upon reading all the cybercrimes in the Cybercrime Prevention Act patterned after the Budapest Convention, the closest cybercrime in relation to disinformation technology such as in deepfakes is computer forgery. This pertains to the "*input, alteration, deletion, or suppression of computer data, resulting in inauthentic data* with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible"<sup>75</sup> (emphasis added).

However, in the Explanatory Report of the Cybercrime Convention which reflects the intent of the framers, the crime of computer forgery contemplated therein is a "parallel offense to tangible documents."<sup>76</sup> The

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<sup>74</sup> *Vivares v. St. Theresa's College*, G.R. No. 202666, September 29, 2014

<sup>75</sup> Section 4 (b) (1), Cybercrime Prevention Act

<sup>76</sup> Explanatory Report of the Convention on Cybercrime, p. 18, available at [https://www.oas.org/juridico/english/cyb\\_pry\\_explanatory.pdf](https://www.oas.org/juridico/english/cyb_pry_explanatory.pdf), accessed 5 March 2021

report explained that the provision on computer forgery "covers data which is the equivalent of a public or private document, which has legal effects"<sup>77</sup> (emphasis added). The provision "aims at filling gaps in criminal law related to traditional forgery."<sup>78</sup>

Therefore, an important question is whether images and videos subject to disinformation technology such as deepfakes can be considered as "documents with legal effects." Apparently, based on the Explanatory Report, the Cybercrime Convention contemplates a scenario wherein a document with legal effects is modified in order to change its evidentiary value, only this time it is made electronically rather than on paper. An example would be a digital manipulation of a death certificate to feign one's death. This obviously has legal effects. But if the image or video of the same person was manipulated to make him appear dead, perhaps a deepfake video of a funeral scene with the said person's face superimposed on the actual corpse, does this have the same forgery effect as the former example?

The ambiguity also arises with the definition of "computer data" which, under Section 3 (e) of the Cybercrime Prevention Act of 2012 patterned after Article 1 (a) of the Cybercrime Convention, is defined as "any representation of facts, information, or concepts in a form suitable for processing in a computer system including a program suitable to cause a computer system to perform a function and includes electronic documents and/or electronic data messages whether stored in local computer systems or online."<sup>79</sup> Do images and videos posted online constitute as representation of facts, information, or concepts suitable for processing in a computer system? The herein ambiguity must be read in consonance with the use of the phrase "computer data" in computer forgery and the spirit of the law in defining such crime as manifested in the Cybercrime Convention Explanatory Report.

Nevertheless, the principle of *in dubio pro reo* (when in doubt, for the accused) will apply when it comes to ambiguity of a penal provision. When

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Section 3 (e) of the Cybercrime Prevention Act of 2012 patterned after Article 1 (a) of the Cybercrime Convention

the law is ambiguous, the court must rule in favor of the accused. This is due to the presumption of innocence. Withal, this does not preclude Congress from establishing a rebuttable presumption of guilt, "provided there be a rational connection between the facts proved and the ultimate fact presumed".<sup>80</sup>

The rebuttable presumption of innocence in favor of the accused in this context only further highlights the issue of rights protection on the part of the victim. It therefore remains a quandary as to how the liberty and prosperity of the Filipinos may be protected and nurtured when laws are inadequate, silent, or ambiguous when it comes to rights violation due to emerging technologies such as in AI-enabled disinformation.

### III. "JURISPRUDENTIAL NORMS WITHOUT PRECEDENCE"

**A**mong the epochal implications from the intimate connection between law and technology is the need for a judiciary to be attuned with globalization:

It is obvious that the gigantic strides in life sciences and life technologies will change human behavior and social interaction. That is certain. These resulting alterations will, in turn, require new modes of governance and, for us in the judiciary, *new jurisprudential norms without precedence*.<sup>81</sup> (emphasis added)

This Chapter views "new jurisprudential norms without precedence" as an empowering notion in rights protection where laws are obscure, silent, or inadequate. When laws cannot keep up with technology, the judiciary remains on guard in rights protection and enforcement.

#### A. Judicial Decision-Making: Nature and Approaches

Case law is also referred to as "jurisprudence" which came from the Latin word *juris prudentia*, meaning "the knowledge or science of law."<sup>82</sup> The application of case law in other jurisdictions, includes the following

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<sup>80</sup> Regalado, Florenz. (2008). Remedial Law Compendium, p. 723. Manila: Anvil Publishing.

<sup>81</sup> Panganiban, Artemio. (2003). The Bio-age Dawns on the Judiciary, p. 7. Manila: Rex Bookstore.

<sup>82</sup> Cohen-Tanugi, Laurent. (2016) "Case Law in a Legal System Without Binding Precedent: The French Example." Stanford Law School Traditional Commentary No. 17. Available at <https://cgc.law.stanford.edu/commentaries/17-laurent-cohen-tanugi/>, accessed in March 3, 2021.

functions: (1) "Interpretation" in case of ambiguity of laws as applied in a specific controversy; (2) "Substitution" when the law is silent or obscure; (3) "Adaptation" in case of obsolete laws which have no longer applicable to a certain controversy hence the need for a judicial decision-making which adapts with the contemporary needs of the people; and (4) "Harmonization" where the court observes uniformity in interpreting laws.<sup>83</sup>

In the Philippines, as early as 1935, the Supreme Court distinguished liberal statutory construction and judicial legislation. The former is a legitimate exercise of judicial power while the latter is proscribed given the separation of powers.

"By liberal construction of statutes, courts from the language use, the subject matter, and the purposes of those framing them are able to find their true meaning. There is a sharp distinction, however, between construction of this nature and the act of a court in engrafting upon a law something that has been omitted which someone believes ought to have been embraced."<sup>84</sup>

In relation to this dichotomy, American jurist Jack Day argued in "Why Judges Must Make Law" that legislation is not only an important aspect of making judicial decisions but is contemplated within the framework of common law in order to address societal distress. He however refers to this not as judicial legislation but "judicial creativity."<sup>85</sup> Perhaps the most sensible assertion in the article is Judge Day's claim that only when the necessity and limitations of judicial creativity are recognized will we be able to safeguard the public from "judicial excesses."<sup>86</sup>

One way to recognize these limitations is to examine established modes of interpretation. For example, the Supreme Court, in *Poe-Llamanzares v. Commission on Elections*, juxtaposed originalism with functionalism. An originalist confines an interpretation solely on the text of the Constitution along with the intent of its framers.<sup>87</sup> This approach

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<sup>83</sup> Ibid.

<sup>84</sup> Tañada v. Yulo, G.R. No. L-43575, May 31, 1935

<sup>85</sup> Day, Jack. (1976). "Why Judges Must make Law". Case Western Reserve Law Review, vol. 26, no. 3. Available at: <https://scholarlycommons.law.case.edu/caselrev/vol26/iss3/3>, accessed on 14 March 2021

<sup>86</sup> Ibid, p. 563.

<sup>87</sup> Poe-Llamanzares v. Commission on Elections, G.R. Nos. 221697 & 221698-700 (Concurring Opinion), March 8, 2016

ramifies into textualism and intentionalism. The former is focused on understanding the text through the original public meaning, while the latter is concerned with the intention of the framers.<sup>88</sup> On the other hand, a functionalist interpretation foreground pragmatic considerations such as the efficacy of the law.<sup>89</sup>

These are but only two of the several other common modes of judicial interpretations. Further, the two can be viewed not in contradiction but as complementary. With a functionalist lens, a provision will be interpreted so as to render the law effective. This is ideally coupled with the intent of the framers within the context of originalism.

By not confining interpretative modes in a single school of thought, the Constitution will become a "living constitution" as described by Justice Oliver Wendell Holmes in *Missouri v. Holland*.<sup>90</sup> Further, as Chief Justice Artemio Panganiban described the approach, jurists are viewed as "not mere social technicians and legal automatons. Rather, they are social engineers who courageously fix their gaze on the underlying principles and overarching aspirations of the Constitution to nurture a free and prosperous nation."<sup>91</sup>

Other modes of judicial interpretation include the following: moral reasoning, structuralism, and historical approach.<sup>92</sup> Structuralism is an approach that highlights the structure or relationship between different branches of the government. This was applied in a US case, *Immigration and Naturalization Service v. Chadha*<sup>93</sup>, where the Supreme Court held that power structures embodied in the US Constitution prohibits a "one-house legislative veto."<sup>94</sup>

The historical approach, on the other hand, has been applied in numerous cases. In *Cruz v. Secretary of Environment and Natural Resources*,

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> *Missouri v. Holland*, 252 U.S. 416 (1920)

<sup>91</sup> Panganiban, Artemio. (2014a). "Safeguard Liberty, Conquer Poverty, Share Prosperity." Delivered during the Luncheon Fellowship of the Philippine Bar Association held at the Tower Club, Makati City on March 26, 2014. Available at <https://cjpanganiban.com/2014/03/26/safeguard-liberty-conquer-poverty-share-prosperity-2/>, accessed 7 March 2021

<sup>92</sup> Murrill, Brandon. (2018). Modes of Constitutional Interpretation. Congressional Research Service. <https://fas.org/sgp/crs/misc/R45129.pdf>, accessed on March 8, 2021.

<sup>93</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

<sup>94</sup> Ibid.

for instance, it was held that "pragmatic jurisprudence must come to terms with history."<sup>95</sup> The approach was applied to "correct a grave historical injustice" against the indigenous peoples of the Philippines.<sup>96</sup> The same was applied in *Esso Standard Eastern, Inc. v. Commissioner of Internal Revenue*, where the Supreme Court affirms the relevance of examining legislative history when it comes to resolving doubt and ambiguity in a statute. As a caveat, however, the Supreme Court also emphasized that resort thereto should only be "for the purpose of solving doubt, not for the purpose of creating it."<sup>97</sup>

Academic discussions on the nature of judicial decision-making also involves the debate on whether or not moral arguments are necessary in adjudication. For instance, American jurist Ronald Dworkin argued that the use of moral arguments is necessary in adjudication especially when constitutional rights are involved since provisions granting the same can be abstract.<sup>98</sup> He cited as an example the Due Process Clause where the US Constitution, by not citing specific instances, is viewed to allow the members of the bench to decide as to what circumstances will give rise to such right. The rationale for Dworkin's theory is that the rights ought to be protected cannot be enumerated ahead of the circumstance or controversy hence judicial interpretation may extend it to other matters not specifically cited in the laws<sup>99</sup>.

Other legal luminaries, however, disagree with Dworkin's theory. The US Supreme Court Justice Hugo Black, for instance, asserted that Dworkin's morality-based perspective could lead to a violation of the separation of powers as judges can have the power to invalidate laws enacted by the legislative if it counteracts with their moral beliefs.<sup>100</sup> As articulated in *Griswold v. Connecticut*, Dworkin's morality-based approach

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<sup>95</sup> Cruz v. Secretary of Environment and Natural Resources (Separate Opinion), G.R. No. 135385, December 6, 2000

<sup>96</sup> Ibid.

<sup>97</sup> *Esso Standard Eastern, Inc. v. Commissioner of Internal Revenue*, G.R. Nos. L-28508-9, July 7, 1989

<sup>98</sup> Dworkin cited in Wenz, Peter. (1998) "Dworkin's Wishful-Thinkers Constitution." 20th World Congress of Philosophy, in Boston, Massachusetts from August 10-15, 1998, available at <https://www.bu.edu/wcp/Papers/Law/LawWenz.htm>, accessed March 15, 2021

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

could lead to a dangerous scenario where the legislative branch will be "held hostage to the strongly held moral convictions of the justices of the Supreme Court."<sup>101</sup>

Nevertheless, interpretation inevitably involves judgment. The question therefore is not whether moral judgment is involved in adjudicating cases, rather it is a question of degree.<sup>102</sup> Since the courts are not elected by the people, it is but imaginable that certain issues (e.g. policies for the economy) and substantive rights are better pondered and debated in legislative venues. The question of degree can be addressed by a check and balance system, such as the well-established separation of powers.<sup>103</sup>

In "How Cases are Decided", Chief Justice Panganiban explained that contrary to the practice of US Justices of voting along philosophical leanings, i.e. liberal as opposed to conservative, the Philippine Supreme Court Justices do not necessarily vote based on an ideological line.<sup>104</sup> For Chief Justice Panganiban, the most ideal means of judging cases is on their merit. Further, to be worthy of public trust, the Supreme Court must also be impervious to what Chief Justice Panganiban refers to as the "plague of ship": kinship, relationship, friendship, and fellowship.<sup>105</sup>

## B. Liberty-Prosperity Nexus as a Judicial Philosophy

The liberty-property nexus is a judicial philosophy by Chief Justice Artemio Panganiban since he served as the chief magistrate of the Philippine Supreme Court in 2005. The framework is an embodiment of the indivisibility of two sets of rights as the twin beacons of justice: political liberty and economic prosperity. As Chief Justice Panganiban concisely put it, "justice and jobs; freedom and food; ethics and economics; democracy and development; liberty and prosperity must always go together. One is useless without the other."<sup>106</sup>

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<sup>101</sup> *Griswold v. Connecticut* 381 U.S. 479 (1965)

<sup>102</sup> Wentz, Peter. (1998) "Dworkin's Wishful-Thinkers Constitution." 20th World Congress of Philosophy, in Boston, Massachusetts from August 10-15, 1998

<sup>103</sup> *Ibid*

<sup>104</sup> Panganiban, Artemio. (2015). "How Cases are Made". *With Due Respect*. Philippine Daily Inquirer

<sup>105</sup> Panganiban, Artemio. (2020). "A Supreme Court worthy of public trust". *With Due Respect*. Philippine Daily Inquirer, July 12.

<sup>106</sup> *Supra*, note 105.

The impetus of this framework consists of different significant global events as succinctly outlined by Chief Justice Panganiban in his keynote address entitled "Safeguarding the Liberty and Nurturing the Prosperity of the Peoples of the World."<sup>107</sup> Among which is the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 that upholds the right of the general public to liberty and prosperity. Further, the 1987 Philippine Constitution mandates a "just and dynamic social order that will ensure the prosperity" of the country and its people.<sup>108</sup>

Another impetus of this judicial philosophy were the developments in non-governmental, private sectors mainly through the philanthropic initiatives of financial and civic leaders.<sup>109</sup> The pooling of resources in the war against poverty foregrounds the recognition of the common people's right to economic prosperity.

Equally important is the call for a stable judiciary that steadfastly upholds the rule of law in order to protect and achieve liberty and prosperity of the people. For Chief Justice Panganiban, a "well-functioning judicial system" is one that protects the political liberties of the people and empowers them to assume key roles in the country's economic development.

In view of these impelling forces, the liberty-prosperity nexus as a judicial philosophy is reflective of two important standards of judicial review. First is the emphasis on social justice which Justice J.P. Laurel provided an oft-cited characterization in *Calalang v. Williams*: "the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated."<sup>110</sup> Second is the judicial deference of economic development and prosperity issues to the executive and legislative branches of the government.<sup>111</sup>

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<sup>107</sup> Panganiban, Artemio. (2014b). " Safeguard Liberty, Conquer Poverty, Share Prosperity (Part Three — for the the Business Community), 4th Integrity Summit with the Makati Business Club and the European Chamber of Commerce and Industry, at Dusit Thani Hotel, Makati City.

<sup>108</sup> Section 9, Article II, 1987 Philippine Constitution

<sup>109</sup> Ibid.

<sup>110</sup> *Calalang v. Williams*, G.R. No. 47800 December 2, 1940

<sup>111</sup> *Supra*, note 124.

As Chief Justice Panganiban proffered, the judicial deference to the executive and legislative branches when it comes to economic policies and issues is not, in any way, an abdication of the constitutional duty to determine grave abuse of discretion.<sup>112</sup> No less than the 1987 Philippine Constitution embodies the "activist mandate" in expanding the power of the Court in judicial review as enshrined in Sec. 1, Article VIII of the 1987 Philippine Constitution<sup>113</sup>. The judicial power to decide cases involving allegations of "grave abuse of discretion amounting to lack or excess of jurisdiction."<sup>114</sup> It was a historical product of the decades-long dictatorship of former President Ferdinand Marcos. This expanded judicial review is in contrast with judicial powers in other jurisdictions such as in the US which was only granted impliedly.

Essentially, the relevance of liberty and prosperity as twin beacons of justice can only be achieved under the rule of law. As Chief Justice Panganiban explained, "authoritarian rule was proven to be incapable of producing meaningful long-term economic progress... Indeed, the Filipinos may endure occasional hunger, but they will never tolerate injustice and indignity for long(emphasis added)."<sup>115</sup>

This implies that the framework not only contemplates the means of protecting or giving rise to liberty and prosperity but equally envisions the need to maintain and perpetuate them. The protection and perpetuation of liberty and prosperity form part of the indivisible foundation of the judicial philosophy.

Therefore, viewed in light of the potential human rights violation that could likely be brought about by emerging technologies not yet contemplated by laws, the liberty-prosperity framework in judicial interpretation is highly important. When it comes to data integrity issues, for example, the concern should equally take into account the political liberty of the general public and their economic prosperity. When liberty is deprived, a person loses a valuable ground for economic growth.

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<sup>112</sup> Ibid.

<sup>113</sup>Melencio-Herrera, Ameurfina. (2009). "Perspectives in Judicial Education: Selected Speeches and Writings." *Philja Judicial Journal*, vol. 1, issue 3.

<sup>114</sup> Section 1, paragraph 2, Article VIII, 1987 Philippine Constitution

<sup>115</sup> Supra, note 124.

When it comes to weaponized deepfakes, especially in derogation of women's reputation, at stake are their social and political standing in their respective communities which are intimately connected with their economic access. If a female teacher is sabotaged by an envious co-worker who deepfakes a pornographic video of the former causing her dismissal, the dismissed teacher not only had to grapple with the fact that the deepfake video may hardly be proven as a fake, but she also loses her honor, her livelihood, and all other factors necessary for her well-being.

Necessarily, therefore, amid the gaps between Philippine laws and emerging technologies, victims resort to the judiciary for rights protection and enforcement. This is when the liberty-prosperity philosophy is crucial. The judiciary, in its interpretation, should cogitate proportionately the liberty and prosperity of the complainant in the formulation of new jurisprudential norms without precedence.

#### IV. THE TWO-PRONGED APPROACH

**H**aving established the pertinence of the liberty-property nexus in jurisprudential norms without precedence, this Chapter addresses the key issue of the research: in view of the statutory mandate that inadequacy or silence of laws should not impede judicial decisions, how then can the judiciary protect the liberty and nurture the prosperity of Filipinos amid the paucity of technology-related laws? The two-pronged approach outlined in this Chapter elaborates on Chief Justice Panganiban's call for "new jurisprudential norms without precedence" which highlights on the importance of and the challenges to the judiciary when it comes to adjudicating new-age controversies.

##### A. Academic prong: source-norm dichotomy

Jurisprudential norms must not amount to judicial legislation. Legislation falls within the constitutionally allocated sphere of the legislative branch. If there is inadequacy, obscurity, or silence of laws that protect data integrity issues arising from disinformation technology such as Jurisprudential norms must not amount to judicial legislation. Legislation falls within the constitutionally allocated sphere of the legislative branch. If there is inadequacy, obscurity, or silence of laws that protect data integrity issues arising from disinformation technology such as deepfakes, how

should the line be drawn then between judicial interpretation, or what Judge Day referred to as “judicial creativity,”<sup>116</sup> and judicial legislation?

Hence the relevance of the source-norm dichotomy. This binary approach has two basic tenets. First is the recognition of the distinction between sources of law such as the statutes, jurisprudence, customs and the legal norms which arise from interpretation as a separate source. Second is the recognition of the role of interpretation as an “intermediary between source and norm.”<sup>117</sup>

The “sources of law” are primarily texts from law-making bodies, and by extension, the case law of the Supreme Court of the Philippines in view of Article 8 of the Civil Code of the Philippines. These sources are issued by primary legal authority which are the following: (1) the legislative body in the form of statutes; (2) the judiciary in the form of jurisprudence; (3) administrative agencies through the issuance of Implementing Rules and Regulations; (4) local government units through ordinances; and (5) the President through executive orders and presidential decrees.<sup>118</sup>

It is worth noting that not all decided cases may serve as case law. In fact, it is the Supreme Court itself which may declare so. In *Marcos v. Manglapus*, the Supreme Court held that the ruling therein “should not create a precedent, for the case of a dictator forced out of office and into exile after causing twenty years of political, economic and social havoc in the country and within the short space of three years seeks to return, is in a class by itself.”<sup>119</sup> In other cases, meanwhile, such as in *Philippine Guardians Brotherhood, Inc. v. COMELEC*, the court abandoned a previous ruling on the ground that it is “clearly an erroneous application of the law — an application that the principle of stability or predictability of decisions alone cannot sustain.”<sup>120</sup>

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<sup>116</sup> Supra, note 98.

<sup>117</sup> Shecaira, Fábio. (2014). “Sources of Law Are not Legal Norms,” p. 4. The International Journal of Jurisprudence and Philosophy of Law. <https://doi.org/10.1111/raju.12053>

<sup>118</sup> Ng, Po, and Po. (2007). Legal Research and Bibliography. Manila: Central Books Supply.

<sup>119</sup> *Marcos v. Manglapus*, G.R. No. 88211, September 15, 1989

<sup>120</sup> *Philippine Guardians Brotherhood, Inc. v. COMELEC*, G.R. No. 190529 (Resolution), April 29, 2010

*Apropos*, albeit what law practitioners often referred to as “flip-flopping” decisions in jurisprudence, the supremacy of the Supreme Court as the court of last resort remains. This was pithily articulated in an oft-cited concurring opinion of US Supreme Court Justice Robert Jackson in *Brown v. Allen*: the Supreme Court is not final because it is infallible; it is infallible because it is final.<sup>121</sup> The power of the Supreme Court over all other courts does not necessarily mean that Supreme Court decisions were necessarily wiser than those made by lower courts; rather, it is because the Constitution entitled the Supreme Court “to the last guess on the matter.”<sup>122</sup>

Furthermore, in adjudicating controversies which were yet to be contemplated by legislation and were not yet previously decided by the Court, the judiciary cannot supply or supplant what is missing in law or jurisprudence else it will amount to judicial legislation.<sup>123</sup> Gaps in statutes are to be filled not by the judiciary but by the legislature who, in a democracy, the people elected to do so.<sup>124</sup> On the part of the judiciary, legal norms are formed instead.

Legal norms arise from the application of certain modes of interpretation. Civil law commentator Justice Edgardo Paras refers to this as “judicial customs” which are decisions that the Supreme Court made despite the absence of applicable statutes or customs.<sup>125</sup> When the judiciary make decisions notwithstanding the silence or inadequacy of relevant laws, a textualist legal norm resort to canons of interpretation to address the controversy, whereas non-textualists tend to resort to legislative history.<sup>126</sup> American jurist Frank Easterbrook defends the use of the former over legislative history in the following wise: “Relying on text does the least harm, for the text is visible to everyone, while legislative history can take people by surprise.”<sup>127</sup>

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<sup>121</sup> *Brown v. Allen* - 344 U.S. 443, 73 S. Ct. 397 (1953)

<sup>122</sup> US Senate Committee on the Judiciary. (1969). “Nonjudicial Activities of Supreme Court Justices and Other Federal Judges.” Washington: US Government Printing Office.

<sup>123</sup> Kilusang Mayo Uno v. Aquino, G.R. No. 210500, April 2, 2019

<sup>124</sup> *Supra*, note 134, p. 13.

<sup>125</sup> Paras, Edgardo. (2008). *Civil Code of the Philippines Annotated*, 16th edition. Manila: Rex Bookstore.

<sup>126</sup> Easterbrook, Frank. (2017). “The Absence of Method in Statutory Interpretation.” *The University of Chicago Law Review*, vol. 84, no. 81. Available at [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12684&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12684&context=journal_articles), accessed March 15, 2021.

<sup>127</sup> *Ibid*.

Needless to say, there can be different legal norms that may be reasonably inferred from the same set of legal provision depending on the point of view of a textualist, a pragmatist, or other lenses.<sup>128</sup> This shows that jurisprudential norms without precedence may clearly be set apart from judicial legislation through an emphasis on the modes of interpretation.

The liberty-prosperity framework may then be weaved in the formation of legal norms through a highlight on the interdependence of political liberty and economic prosperity. Specifically, this can be made through an emphasis on social justice as applied in numerous Supreme Court decisions. As the oft-quoted slogan of former President Ramon Magsaysay put: "those who have less in life should have more in law."<sup>129</sup>

Further, in line with the liberty-prosperity paradigm, legal norms are also important in view of deferential interpretation in deciding economic cases that fall within the expertise of the executive and legislative branches. As Chief Justice Panganiban repeatedly holds, adjudication of controversies involving the economy must generally involve judicial deference to the political branches as a means for the judiciary to contribute to economic growth.<sup>130</sup>

The deferential interpretation contemplates exceptions, of course, such as when there is grave abuse of discretion and when human rights and liberty are involved.<sup>131</sup> Thus, in *Tañada v. Angara*, the Supreme Court held that the Constitution "recognizes the need for business exchange with the rest of the world on the bases of equality and reciprocity, and limits the protection of Philippine enterprises only against foreign competition and trade practices that are unfair."<sup>132</sup>

In sum, the source-norm dichotomy recognizes the distinction between legal sources and legal norms. The distinction is relevant in

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<sup>128</sup> Supra, note 134, p. 3.

<sup>129</sup> Del Rosario v Delos Santos, G.R. Nos. L-20589-90, March 21, 1968

<sup>130</sup> Panganiban, Artemio. (2012). "How the Judiciary can Help the Economy." With Due Respect. Philippine Daily Inquirer, September 8. Available at <https://opinion.inquirer.net/36306/how-the-judiciary-can-help-the-economy>, accessed 7 March 2021.

<sup>131</sup> Ibid.

<sup>132</sup> *Tañada v. Angara*, G.R. No. 118295 May 2, 1997

delineating judicial interpretation from judicial legislation. It is through legal norms that the judiciary may adjudicate cases involving emerging technologies. Applying the liberty-prosperity framework, deferential interpretation in economic policies as well as the emphasis on social justice are highlighted. Prescinding from these premises, the academic prong proves that the judiciary can efficiently protect the political liberty and nurture the economic prosperity of the Filipinos amid data integrity issues and other risks brought about by emerging technologies, notwithstanding the silence, obscurity, or inadequacy of Philippine laws.

## B. Pragmatic Prong: Judicial Globalization

In articulating the effects of technological advancements vis-à-vis law and judicial doctrines, Chief Justice Panganiban aptly pointed out that “the need of the hour is to balance national interest with international survival... the specific task is to find out how globalization has affected judicial decision-making on the national level”<sup>133</sup> (emphasis added).

Judicial globalization is also referred to as “world constitutionalism” or “international judicial cooperation.”<sup>134</sup> The phrase was made famous by international lawyer and foreign policy analyst Anne-Marie Slaughter in her book *A New World Order*. Among of the key themes in judicial globalization are as follows: the adoption of international law and foreign jurisprudence in domestic laws; meeting of judges with their foreign counterparts; and mutual cooperation of foreign jurisdictions in cases involving complex international disputes.<sup>135</sup>

The adoption of foreign case law or the so-called “judicial borrowing” is not uncommon in Philippine jurisprudence. Foremost in the reasons therefor is the fact that many of the Philippine statutes were patterned after foreign laws including the 1987 Constitution's Bill of Rights

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<sup>133</sup> Panganiban, Artemio. (2003). “Judicial Globalization.” Lecture delivered by Supreme Court Justice Artemio V. Panganiban before the First Australasia Judicial Educators Forum (AJEF) on February 14,

2003 at the New World Renaissance Hotel, Makati City.

<sup>134</sup> Ibid, p. 4.

<sup>135</sup> Flaherty, Martin. (2011). “Judicial Globalization in the Service of Self-Government”. *Ethics and International Affairs*, vol. 20 , no. 4 , December 2006 , pp. 477 – 503

which substantially resembles the US Bill of Rights. Hence, although not binding, foreign jurisprudence is persuasive in the Philippines. Other countries which also practice substantial judicial borrowing include India, Hong Kong, South Korea, Zimbabwe, and Canada.<sup>136</sup>

An unfortunate juxtaposition, however, leads to a the opposition between judicial globalization and democratic self-government.<sup>137</sup> The latter approach argues that domestic laws are more faithful to the will of the people.<sup>138</sup> It generally appears that siding with one inevitably compromises the other. The binary opposition, however, is not nuanced enough as it creates a simplified black-and-white dichotomy. Judicial globalization need not be viewed as anti-nationalism. Rather, it can be viewed as a form of growth, a kind of nationalism that identifies with a larger, transnational community rather than that which scuffles in isolation.

Another landmark case for judicial globalization is *Tañada v. Angara*. The Supreme Court unanimously ratified the membership of the Philippines in the World Trade Organization thereby adopting its policies in trade liberalization, privatization, and deregulation.<sup>139</sup> At that time, the “Filipino First” economic policy in the 1990s was prevailing. There is, however, a need to “abandon isolationist policies and to embrace the new 21st-century economic doctrines.”<sup>140</sup>

Also pivotal in examining the impetus of judicial globalization was the emergence of human rights following the end of World War II.<sup>141</sup> International human rights law became foundational elements in foreign affairs. Concomitantly, this gave rise to the establishment of transnational organizations such as the United Nations (UN), the European Union (EU), North Atlantic Trade Organization (NATO), World Trade Organization (WTO), among others. International events unmistakably affect laws and judicial decisions such as in the case of terrorism, which is “undeterred by territorial boundaries.”<sup>142</sup> There is therefore a need for a judiciary that is

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<sup>136</sup> Ibid.

<sup>137</sup> Supra, note 150, p. 480.

<sup>138</sup> Supra, note 150.

<sup>139</sup> Supra, note 147.

<sup>140</sup> Supra, note 147.

<sup>141</sup> Supra, note 150.

<sup>142</sup> Panganiban, Artemio. (2002). *Reforming the Judiciary*, pp. 374-375. Manila: Supreme Court Press.

attuned with international best practices.

Further, in the context of paucity, silence, or obscurity of Philippine laws, judicial globalization proves highly relevant in the protection of human rights as it promotes a judiciary that is not reclusive but is instead adaptable with international judicial norms and jurisprudence. With the increasing threats of "global crimes" perpetrated through internet, engagement and cooperation between and among judicial systems become more crucial than ever.

When it comes to international policies for the protection against cybercrimes, for instance, it is evident that European organizations such as the European Union and the Council of Europe have already enacted advanced policies such as the Data Protection Regulation, the pioneering Convention on Cybercrime, and other specific European Data Protection Laws. These anti-cybercrime measures may serve as helpful international and comparative materials, among others, that will contribute in establishing productive transnational judicial meetings and conferences.

Apropos, judicial globalization reinforces the significance of the rule of law. This will not only facilitate improved international consensus through congenial international affairs but also promote a greater judicial stability in the form of a global order founded on the rule of law.<sup>143</sup>

## V. GOING FORWARD: OPPORTUNITIES AND CHALLENGES AMID GAPS BETWEEN LAW AND TECHNOLOGY

### A. Challenge for the Judiciary: International Engagement

International engagement between and among judicial systems is very important especially with the threats of a "globalization of crime."<sup>144</sup> For any judicial system, international cooperation is beneficial in numerous ways such as in the following areas: (1) data exchange; (2) expansion of comparative legal knowledge; (3) access to direct information regarding international legislative and judicial best practices; (4) mutual assessments of necessary reforms, among others.<sup>145</sup>

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<sup>143</sup> Supra, note 150, p. 503.

<sup>144</sup> Soto, Juana. (2019). "Towards a new model of international judicial cooperation." Available at <https://www.elpaccto.eu/en/towards-a-new-model-of-international-judicial-cooperation/>, accessed 15 March 2021.

<sup>145</sup> Ibid.

The perennial issue of clogged dockets may also benefit from judicial engagement. Chief Justice Panganiban cites 3Ms as sources thereof: "men, money and machines."<sup>146</sup> Apropos, as the Chief Justice reiterates in several of his writings, when it comes to the issue on the men of the judiciary, i.e. judges and justices, there are four important INs of an ideal judge: "INtegrity, INdependence, INTelligence and INdustry."<sup>147</sup> All of these four INs play a role in this perennial problem. Of the four INs, international engagement benefits intelligence.

In light of the obsolete nature-nurture debate in cognitive psychology, intelligence is not only about heredity but is also about one's social environment.<sup>148</sup> It may be inferred therefore that intelligence, as one of Chief Justice Panganiban's INs of a good judge, does not contemplate a fatalistic feature but a trait that may be continually developed. And, pragmatically, more exposure and engagement in international trainings and seminars will help expand the judicial knowledge of the men of the judiciary. The significance thereof is important in increasing efficiency especially in adjudicating cases involving new-age technologies. Hence, this can contribute, to a certain degree, in unclogging court dockets.

This also underscores the role of the Philippine Judicial Academy (PHILJA) as the institutionalized training ground for the members of the bench. Among the institution's objectives is to develop "networking and partnership with other institution"<sup>149</sup>. Currently, PHILJA's international engagements includes electronic linkage with the Commonwealth Judicial Education Institute to facilitate exchange of judicial education resources. It also collaborates with international organizations such as the Asian Development Bank (ADB), The Asia Foundation (TAF), and United States Agency for International Development (USAID).<sup>150</sup>

The Supreme Court of the Philippine have also pursued different forms of international engagements. It has been two decades ago when

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<sup>146</sup> Panganiban, Artemio. (2017). "Speeding up quality justice (1)". With Due Respect. Philippine Daily Inquirer, December 24, 2017. Available at <https://opinion.inquirer.net/109696/speeding-quality-justice-1>, accessed 7 March 2021.

<sup>147</sup> Ibid.

<sup>148</sup> Pinker, Steven. (2004). "Why nature and nurture won't go away." *Daedalus*, vol. 133, no. 4, pp. 4-17. Available at <https://dash.harvard.edu/handle/1/3600799>, accessed 15 March 2021

<sup>149</sup> Ibid.

<sup>150</sup> Candelaria, Sedfrey. (2005). "PHILJA Linkages." Delivered at the Ninth Lecture, Chief Justice Hilario G. Davide, Jr. Distinguished Lecture Series, on «The Commitment to Judicial Education - A Presentation;» on September 29, 2005, at San Beda College, Mendiola, Manila.

the pilot modernization and process management project was initiated in collaboration with the American Bar Association and USAID.<sup>151</sup> The project aimed to address the issue on clogged dockets.

Among exemplary feats in this regard is the International Conference and Showcase on Judicial Reforms (ICSJR) in 2005 during the incumbency of Chief Justice Hilario Davide. It was a pioneer initiative in international dialogue dedicated for judicial reform<sup>152</sup> Equally laudable is the Global Forum on Liberty and Prosperity under the leadership of Chief Justice Panganiban. The Forum gathered around 300 jurists, academics and law practitioners from across the globe.<sup>153</sup>

Indeed, the early 2000s proved to be a fruitful period for judicial international engagements. Perhaps the same is both a challenge and an opportunity for the contemporary judiciary. It is an opportunity in the sense that antecedents already exist for emulation and evolution. Among the initiatives worth emulating is the "Justice-to-Justice" and "Judge-to-Judge" Dialogues project, which facilitated intellectual exchanges among judges from different parts of the world.<sup>154</sup>

Among the challenges, of course, is subsidy as these international arrangements can be costly. Nevertheless, the COVID-19 pandemic has so far proven the expediency of the different electronic means of communication. Further, international linkages are also just as important. The aforementioned international activities of the Philippine Supreme Court were made possible in collaboration with different international institutions such as the American Bar Association (ABA), the United Nations Development Program, World Bank, Asian Development Bank, The Asia Foundation, and the Australian Agency for International Development.

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<sup>151</sup> American Bar Association. (2011). "Philippine Supreme Court Launches a Pilot Process Management Project." Available at [https://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/asia/philippines/news/news\\_philippines\\_supreme\\_court\\_launches\\_pilot\\_process\\_management\\_project\\_0111/](https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news_philippines_supreme_court_launches_pilot_process_management_project_0111/), accessed 15 March 2021

<sup>152</sup> Panganiban, Artemio. (2005). "A Celebration of Thanksgiving." Delivered at the Ninth Lecture of the Chief Justice Hilario G. Davide, Jr. Distinguished Lecture Series, 'The Commitment to Judicial Education -A Presentation.»on September 29, 2005, San Beda College, Mendiola, Manila.

<sup>153</sup> Panganiban, Artemio. (2019). "Merging law and economics." With Due Respect. Philippine Daily Inquirer. Available at <https://opinion.inquirer.net/124992/merging-law-and-economics>, accessed 10 March 2021.

<sup>154</sup> Panganiban, Artemio. (2005). "A Transformed Judiciary" Lecture I delivered during the Chief Justice Hilario G. Davide Jr. Lecture Series on October 19, 2005, at the Far Eastern University (FEU) Auditorium.

International judicial cooperation aggressively pursued by other international communities is also worth noting. For instance, jurisdictions within the European Union (EU) exercise numerous forms of judicial cooperation such as mutual recognition of judgments, the transmission of judicial documents between and among EU members, and mutual legal assistance and extradition between and among EU members.<sup>155</sup>

The importance of these international engagements becomes even more glaring in view of the development of different transnational crimes, among which are threats of cybercrimes. Human rights violations through emerging technologies are definitely conceivable in cross-border contexts. Thus the need for a judiciary to be open to international realities.

Moreover, international engagement is also important in nurturing economic prosperity. In *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, Chief Justice Panganiban aptly articulated the economic implications of judicial indifference to international dialogues:

If this Court closed its doors to those international realities and unilaterally set up its own concept of strict technical and financial assistance, then it might unwittingly make the country a virtual hermit -- an economic isolationist -- in the real world of finance.<sup>156</sup>

## B. Challenge for every *Juan*: Technology-mediated Advocacy

While technology may be fairly considered as a source of convenience and efficacy, the public must also be educated as to its corollary threats and potential abuses. There are some who view bioengineering and artificial intelligence as an "existential threat to human kind on a par with nuclear war and climate change."<sup>157</sup> Intellectual figures such as Yuval Noah Harari and technology titan Elon Musk actually share the same perspective.<sup>158</sup> Whether one shares this extremist view or not, the need for advocacy in

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<sup>155</sup> European Commission. (2021). "Types of Judicial Cooperation." Available at [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation\\_en](https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation_en), accessed 15 March 2021

<sup>156</sup> Separate Opinion, Chief Justice Artemio Panganiban, *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, G.R. No. 127882, January 27, 2004

<sup>157</sup> Bethet, Alison. (2019). "Why do emerging AI guidelines emphasize "ethics" over human rights?" Available at <https://www.openglobalrights.org/why-do-emerging-ai-guidelines-emphasize-ethics-over-human-rights/>, accessed 13 March 2021.

<sup>158</sup> *Ibid.* *Supra*, note 13.

human rights and technology is apparent nonetheless.

Advocacy, a form of civic engagement, is often resorted to for lobbying purposes or for influencing political and socio-economic decisions within a system.<sup>159</sup> Further, public participation in the discussion on social issues can be made more efficient today with the use of different social media platforms such as Facebook, Twitter, and Youtube.<sup>160</sup>

Technology-mediated advocacy through social media will also address the commonly perceived indifference of the youth to social issues given that they comprise the majority of the users of social media. In 2020, over 60% of the users of social media in the Philippines are from the ages 18 to 34.<sup>161</sup> This means that social advocacy in relation to issues that concern new-age technology users can easily reach the younger generation if made through social media platforms.

Among the most important functions of social advocacy is to promote awareness and to advocate for substantive rights.<sup>162</sup> In light of the deepfake technology abuses and its concomitant legal issues, advocacy as to the relationship of technology and legal rights is unquestionably relevant. While digital technologies such as those offered by artificial intelligence can clearly provide benefits, social awareness as to their "Trojan horse" nature must also be subject of advocacy.<sup>163</sup>

Advocacy may also be viewed as a proactive way to protecting liberty and nurturing prosperity. With this initiative, the public is involved in the protection of their political rights and in the furtherance of their economic prosperity. This is an empowering thought given that the means and degree of protection and nurturance of the twin beacons of justice is, to a certain extent, in their own hands.

Women, for example, against whom the weaponized deepfakes

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<sup>159</sup> Bowen, Glenn, Nickesia Gordon, and Margaret Chojnacki. (2017). "Advocacy Through Social Media: Exploring Student Engagement in Addressing Social Issues". *Journal of Higher Education Outreach and Engagement*, vol. 21, no. 3, p. 5-31.

<sup>160</sup> *Ibid.*

<sup>161</sup> Statista. (2020). Social media advertising audience profile 2020, by age and gender

<sup>162</sup> London, Manuel. (2010). "Understanding social advocacy: An integrative model of motivation, strategy, and persistence in support of corporate social responsibility and social entrepreneurship." *Journal of Management Development*. Vol. 29 No. 3, pp. 224-245.

<sup>163</sup> Alston, Philip. (2020). "What the "digital welfare state" really means for human rights." Available at <https://www.openglobalrights.org/digital-welfare-state-and-what-it-means-for-human-rights/>, accessed 15 March 2021.

may be used can lobby for more legislative initiatives for the protection of their rights against technology abuses such as in the case of deepfakes. Facilitation thereof may be made more efficient in cooperation with different institutions such as advocacy campaigns of the Philippine Commission on Women. In 2017, the Commission spearheaded an online advocacy initiative, #BilangBabae, to seek, with the aid of different social media platforms, women's perspectives on varied social issues.

Children are also another vulnerable "digital bodies". "Digital bodies" consist of those "whose images, information, biometrics, and other data stored in digital space."<sup>164</sup> Their tender age made them vulnerable to abuses. Their inevitable exposure to online media, especially in view of online classes since the COVID-19 pandemic, makes their digital data more vulnerable to abuses and misapplication. Public awareness as to their rights as embodied in different statutes is important. Further, public international law protect their vulnerability such as in the Rights of Children to Special Protection.

Equally important is the advocacy for cyber-responsibility especially among the youth who are the country's top users of social media applications.<sup>165</sup> These sites present a trove of publicly-shared images and videos of individuals who can, at any given day, be a target of data integrity issues such as in the form of deepfakes. As previously mentioned, disinformation technology such as in deepfakes need not violate data privacy to affect one's data integrity. This is because one's voluntary posts online "can be opened, read, or copied by third parties who may or may not be allowed access to such."<sup>166</sup>

Hence, when an unsuspecting young Filipina, for example, posts digital self-portraits or "selfies" as public posts on Facebook, with quality sufficient to enable AI-enabled learning of her facial maps, a pornographic deepfake video with a hyper realistic imposition of her face thereon may be made. There is therefore a need to educate the public about cyber-responsibility such as the extent of data they may safely share online, especially on social media.

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<sup>164</sup> Sandvik, Kristin. (2019). "Protecting children's digital bodies through rights". Available at <https://www.openglobalrights.org/protecting-childrens-digital-bodies-through-rights/>, accessed 16 March 2021.

<sup>165</sup> Statista. (2020). Social media advertising audience profile 2020, by age and gender

<sup>166</sup> *Vivares v. St. Theresa's College*, G.R. No. 202666, September 29, 2014

By informing the public of the looming threats and their concomitant legal rights and responsibilities, the people can make informed choices and decisions as soon as legal issues arise. In the case of disinformation technology, therefore, and other relevant issues arising from the dearth of pertinent laws that are supposed to protect data integrity of the people online, social advocacy serves as an important and empowering tool. It will not only aid in the resolution but more importantly in the prevention.

## VI. THE INDISPENSABLE: JURISPRUDENTIAL NORMS WITHOUT PRECEDENCE AMID GAPS BETWEEN LAW AND TECHNOLOGY

The impact of technology to the judiciary is indeed paradoxical. On the one hand, technology offers mechanisms to declog court dockets, to streamline court processes for greater efficacy, and to open the courts to public scrutiny thereby upholding transparency for good governance.<sup>167</sup> On the other side of the spectrum are the ramified consequences of technology in the types of controversies that courts adjudicate, as exacerbated by the paucity, obscurity, and silence of the laws appurtenant thereto.

Evidently, new-age technology opens up a Pandora's Box of legal perplexities. As in the case of disinformation technology such as in deepfakes, violation of one's right to data integrity can ramify into several other violation and deprivation of civil and political rights. To illustrate, a successful career woman who decides to leave a dysfunctional relationship could be a victim of a deepfake video in the form of a "revenge porn" by her past lover. Resulting therefrom is her disrepute, public ignominy, and even loss of job or career. The struggle is made worse by the fact that such deepfake video can evade video manipulation detection systems leaving her with no technical means to disprove the video's authenticity. This woman is a microcosm of a society consists of vulnerable "digital bodies" in dire need of protection. However, with the paucity of legislative measures and initiatives in the Philippines to these species of abuses, what remains in the discourse of the Filipino people's liberty and prosperity?

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<sup>167</sup> Panganiban, Artemio. (2013). "Automating the judiciary." *Philippine Daily Inquirer*. Available at <https://opinion.inquirer.net/55129/automating-the-judiciary>, accessed on 10 March 2021.

Hence the indispensable role of the judiciary. Notwithstanding the silence or dearth of laws, the judiciary must remain steadfast on its duty to dispense justice. This predicament alone shows the primal power of the judicial branch: judges and justices could protect the people even at times when the legislators cannot.

The aforesaid power of the judiciary is embodied in jurisprudential norms without precedence. While the legislature cannot be omniscient of all future technologies and their concomitant consequences to the people's rights and obligations, the issues arising from the gap between laws and emerging technologies should not leave substantive rights unguarded. To this end, the paper explicates the importance of jurisprudential norms without precedence in law and technology. The liberty-property nexus as a judicial philosophy and the two prongs that reinforce new jurisprudential norms without precedence substantiate the framework: the source-norm dichotomy (academic prong) and judicial globalization (pragmatic prong).

Jurisprudential norms necessitate judicial interpretation. Withal, judicial interpretation ought not to encroach the constitutional sphere of the legislative branch as to amount to judicial legislation. The source-norm dichotomy is relevant in making distinctions between legal sources and legal norms. Interpretation is an intermediary between legal sources and legal norms, hence the significance of the modes of construction and canons of interpretation. Without which, the judiciary supplants or formulates the law, a task for which the people elected the legislators.

As to the pragmatics, judicial globalization establishes the much needed international linkages for exchanges and development of legal comparative knowledge, mutual assessments through best practices. Judicial globalization also promotes cooperation with different countries in data access and distribution, both required in educating members of the bench. Through international engagements, the judiciary fosters informed and temporally suitable jurisprudential norms.

Chief Justice Panganiban's foundational philosophy of liberty and prosperity weaved the aforesaid considerations together. As an underlying philosophy in forming jurisprudential norms without precedence, the liberty-prosperity paradigm enjoins emphasis on social justice in the dispensation of humanized laws and deferential interpretation of economic

policies. In upholding the indivisibility of political liberty and economic prosperity in this manner, coupled with the two-pronged approach in jurisprudential norms without precedence, the judiciary is poised to transcend gaps between law and technology in the interest and welfare of every *Juan*.

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