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Editor's Note

The law is never alone. It walks with ghosts – the specters of intent, the phantoms of forgotten injustices, the lingering echoes of verdicts that time has yet to vindicate or condemn. It is a body weighed down by memory, by precedent, by the voices that haunt its pages, some carved into doctrine, others lost in the margins.

To study the law is to converse with these ghosts. It is to listen to the murmurs between rulings, to hear the silent screams of those it failed. It is to ask: Whose voice is missing? Whose justice remains undone?

Jose W. Diokno once wrote, *"The superior virtue is not to receive justice, it is to fight relentlessly for it."* But justice, to be real, must be brave enough to face the past.

For the ghosts we walk with are not just remnants—they are reminders. That the law remembers what is recorded, but history remembers what the law refuses to name.

And so, we write—not just to preserve, but to confront.

This issue of the Louisian Law Journal is an invitation—not just to read, but to unearth, to exhume. Within these pages, you will find legal thought that does not merely analyze but interrogates, that does not merely defend but demands. Because law, at its core, is not just a system but a story—a story we are still writing, still revising, still trying to make right.

And if the law must walk with ghosts, then let us be the ones to decide which voices it will finally set free.

Ace Kevin Enriquez Leaño
Editor-in-Chief

With gratitude to Dean Yasmine Lee R. Tadeo of the Saint Louis University School of Law, and to our steadfast advisors, Atty. Marie Mae D. Buliyat and Atty. Maria Lulu G. Reyes, for their enduring wisdom and guidance.

Contents

BRIDGING THE LEGAL DIVIDE IN CHILD MARRIAGE: RESOLVING CONFLICTS BETWEEN REPUBLIC ACT NO. 11596 AND PRESIDENTIAL DECREE NO. 1083

Felmada Camat

ABSTRACT

Child, early, and forced marriage (CEFM) remains a pressing global concern with significant repercussions on the rights, health, and future of children, particularly young girls. In the Philippines, Republic Act No. 11596 (RA 11596)[1] represents a pivotal legal effort to prohibit child marriage, introducing penalties for offenders. However, this national legislation conflicts with Presidential Decree No. 1083 (PD 1083)[2], which permits child marriage in Muslim communities under specific circumstances. This paper examines the legal and practical challenges these conflicting frameworks pose with a focus on child protection in the Philippines. This research seeks to propose pathways to harmonize these laws by analyzing statutory provisions, relevant case law, and comparative studies from countries like Indonesia, Malaysia, and Bangladesh. Key recommendations include raising the minimum marriage age within Muslim communities, instituting strict judicial oversight for exceptions, and launching community-based education programs. Ultimately, this study advocates for a legal framework that upholds children's rights while respecting cultural and religious diversity, ensuring a consistent approach to the protection of minors.

Keywords: *Child Marriage, Republic Act No. 11596, Presidential Decree No. 1083, Muslim Personal Laws, Child Protection, Human Rights, Cultural Diversity, Religious Freedom*

[1] Implementing Rules and Regulations of the Republic Act No. 11596 or "An Act Prohibiting the Practice of Child Marriage and Imposing Penalties for Violations Thereof." 2022. Retrieved June 26, 2024, from https://pcw.gov.ph/assets/files/2022/12/RA-11596-Child-Marriage-Implementing-Rules-and-Regulations.pdf.
[2] Code of Muslim Personal Laws. Republic Act No. 386. 1987. https://www.officialgazette.gov.ph/1987/07/14/republic-act-no-386/.

INTRODUCTION

I. BACKGROUND OF THE STUDY

Children and young people possess the same fundamental human rights as adults, alongside specific rights that acknowledge their unique needs. They are not the property of their parents, nor should they be viewed as mere objects of charity. Instead, children have rights, including the right to choose their lives and futures.

This study thoroughly examines the legal conflicts between RA 11596 and PD 1083, focusing on their implications for child marriage in the Philippines. While RA 11596 represents a progressive initiative aimed at eliminating child marriage in alignment with international human rights standards, PD 1083 introduces a religious and cultural exception that permits Muslim Filipinos to enter into marriages involving minors under specific conditions. This juxtaposition of legal provisions raises critical questions about the effective implementation of child protection laws and the potential for legal inconsistencies to undermine the welfare of vulnerable minors.

The coexistence of these two legal frameworks illustrates a broader tension between modern human rights standards and traditional cultural practices. For instance, RA 11596 was enacted to protect children from the adverse effects of early and forced marriages which often lead to increased school dropout rates, maternal mortality, domestic violence, and poverty. Conversely, PD 1083 was crafted to honor and preserve the cultural and religious practices of Filipino Muslims, recognizing marriage as a sacred institution that can occur at an earlier age according to Islamic customs. This complex dichotomy between safeguarding children's rights and respecting religious freedoms complicates the enforcement of child marriage laws across the Philippines.

Through an in-depth analysis of statutory provisions, jurisprudence, and relevant international treaties, this study aims to unravel the legal, social, and

cultural repercussions of maintaining two divergent legal standards. It will identify duplicates, contradictions, and ambiguities within these laws and assess the practical challenges legal institutions face in attempting to harmonize national child protection laws with cultural norms, particularly in regions with significant Muslim populations.

Furthermore, this study will explore how other countries with similar religious and cultural dynamics address the issue of child marriage. Drawing from international best practices and findings from esteemed global organizations such as United Nations International Children's Emergency Fund (UNICEF) and the United Nations (UN) Human Rights Council, it seeks to highlight solutions from jurisdictions that successfully balanced child protection with cultural and religious autonomy.

In conclusion, this paper proposes legislative reforms and policy recommendations to address the legal contradictions between RA 11596 and PD 1083. The proposed solutions will be grounded in legal, social, and cultural perspectives, ensuring that any amendments to the law reflect the urgent need to protect children from the dangers of early marriage while honoring the rich tapestry of cultural and religious diversity. By doing so, this study aspires to foster a more consistent and equitable legal framework that supports the best interests of minors while cultivating an inclusive community that values cultural diversity and sustainable development.

II. REVIEW OF RELATED LITERATURE

Historical Context

In ancient societies, marriage was not merely a romantic union but a strategic arrangement primarily orchestrated by families, with the fundamental goal of ensuring the continuation of family lines and the production of legitimate offspring. Mark Catwright defined these unions as often less about the individuals

involved and more about the broader implications for family wealth, status, and political alliances[3].

For example, in Ancient Greece, the institution of early marriage was a well-established practice, deeply rooted in societal norms that dictated the roles and expectations of women and men[4]. Girls often married shortly after reaching puberty, typically around the age of 12 or 13, entering into unions that their families often arranged. These marriages secured alliances between families and were viewed as a means to ensure the continuation of the family lineage. Teenage motherhood was not only common but expected, as women were often charged with raising children and managing the household. Boys, too, faced societal pressures to marry in their teens, albeit slightly later than girls[5]. The expectation was that young men would marry once they had reached a certain level of maturity and were prepared to take on household responsibilities. This gendered approach to marriage reflected broader societal norms emphasizing the importance of family, lineage, and economic stability.

Marriage was an essential method in Athens for legitimizing children while protecting family wealth and prestige. Women were commonly married off at a young age, typically in their early teens, to men who were often much older. This age disparity highlighted the societal belief that men should be established in their careers and finances before entering marriage. At the same time, women were expected to fulfill their roles as wives and mothers as soon as they reached puberty. Providing a dowry—a sum of money or property given by the bride's family—was integral to these marital arrangements. It strengthened the relationship between families and protected the bride within the marriage by representing her family's

[3] Cartwright, Mark. "Marriage in the Ancient World." *World History Encyclopedia*, May 23, 2018. https://www.worldhistory.org/article/1157/marriage-in-the-ancient-world/.
[4] Demand, Nancy H. *Birth, Death, and Motherhood in Classical Greece*. Baltimore: Johns Hopkins University Press, 1994.
[5] *Supra.*

position and money. However, it reinforced the idea that women are property to be exchanged rather than individuals with rights and aspirations[6].

In contrast, Sparta's social perspective on marriage highlighted various values. Here, marriage was considered a civic duty, primarily focused on producing strong warriors to serve the state[7]. Spartan women enjoyed a relatively higher degree of autonomy and freedom than their Athenian counterparts. They were urged to engage in physical training and were given more responsibility in managing households while their husbands were often away training for military service. Nevertheless, the expectation to marry and bear children remained a powerful societal norm as the Spartans believed that the strength of the state depended on the quality and quantity of its citizens[8].

Despite these differences, Athenian and Spartan cultures shared a common understanding of marriage as an institution primarily serving familial and societal interests. The individual desires of the young couples involved were often secondary to the strategic goals of their families, reflecting a broader historical pattern where children's rights and voices were marginalized in favor of adult ambitions and societal expectations.

The Roman Empire further entrenched these practices where legal provisions allowed girls to marry as young as 12 and boys at 14. Early marriages were often strategic, aimed at consolidating wealth and power[9]. The legal framework of the time did not account for the individual rights or desires of the young people involved. Instead, the focus remained on family interests and societal expectations.

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[6] Wikipedia contributors. "Women in Ancient Sparta." *Wikipedia*. Last modified February 15, 2024. https://en.wikipedia.org/wiki/Women_in_ancient_Sparta.
[7] *Ibid.*
[8] *Ibid.*
[9] Dahl, Julia V. Child Brides: Global Perspectives and Issues. New York: Global Press, 2010.

As society transitioned into the Middle Ages, the influence of Roman law persisted in England where civil laws continued to permit marriages before the age of 16[10]. This legal endorsement of child marriage further normalized the practice, embedding it into the social fabric of the time. In many cases, the marriage age was dictated by economic considerations, with families seeking to solidify alliances and ensure economic stability through early unions[11].

Similarly, in Imperial China, child marriage was commonplace and often seen as a means to uphold familial honor and continuity[12]. Families arranged marriages for their daughters at a young age, sometimes as early as six or seven, primarily for economic and social reasons[13]. These unions were often predicated on the need to secure family lineage and enhance social standing within the community.

Before the Industrial Revolution, the practice of marrying off women at a young age was commonplace across various cultures worldwide, typically occurring shortly after they reached puberty[14]. This trend persisted well into the 19th century, particularly in societies characterized by predominantly rural populations[15]. In these communities, the expectation that newly married couples would establish their households often led men to delay marriage until they had amassed enough resources to support a family. As a result, adolescent girls were frequently wed to older men who were financially prepared to take on the responsibilities of marriage[16].

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[10] Mousourakis, George. The Historical and Institutional Context of Roman Law. New York: Routledge, 2019.
[11] *Ibid.*
[12] Saito, Osamu. "Marriage, Family, and Gender in Imperial China." Journal of Asian History 30, no. 2 (1996): 123–145.
[13] Zhao, Xiaoyi. Childhood and Adolescence in Early Imperial China. Cambridge: Cambridge University Press, 1997.
[14] Dukakis, Kitty. *Women and Marriage in the Early Modern World.* Boston: Beacon Press, 2017.
[15] Brown, Judith C. *The Rural Family in Pre-Industrial Europe.* New York: Cambridge University Press, 2015.
[16] Crone, Patricia. *Pre-Industrial Societies: Anatomy of the Pre-Modern World.* London: OneWorld Publications, 2015.

Child marriages in the pre-colonial Philippines were deeply woven into the fabric of tribal customs and traditions, with marriage often seen as a means to strengthen familial ties and ensure social stability. For many communities, marriage was not merely about two individuals coming together but forging alliances between clans. The marriage culture, rooted in indigenous practices, reflected the rich diversity of the Philippines' ethnic groups. While the specifics of customs varied across regions, a shared emphasis on arranged marriages, strong family involvement, and community participation persisted throughout the archipelago.

By the 14th century, the winds of change began to blow in the southern islands of Mindanao and Sulu, with Islam making its way to these shores[17]. The rise of powerful sultanates marked a significant chapter in the region's history as Islam became deeply rooted in the cultural and religious identity of these areas. Even today, despite the Philippines being predominantly Christian, parts of Mindanao and Sulu remain bastions of Islamic faith and tradition. How Islam first spread to the Philippines is still a topic of historical debate. Some suggest that it arrived through the intricate networks of Indonesian and Indian merchants who traded goods and shared religious beliefs. Others believe that some Filipino rulers, seeing the advantages of aligning themselves with the powerful Islamic states in Southeast Asia, embraced Islam for political and economic leverage. Still, others propose that Sufi scholars and missionaries traveled to the islands with a spiritual mission to spread the teachings of Islam, planting the seeds of faith that flourished in these lands[18].

Then, in the 16th century, the Philippines encountered yet another profound transformation with the arrival of the Spanish colonizers. The Spanish brought with them Catholicism which soon became intertwined with native traditions. This cultural collision reshaped the social and religious landscape of the islands as Catholicism took root in ways that blended with local practices, shaping the

[17] Strom, Stephanie. *Islam and Society in Southeast Asia.* Singapore: NUS Press, 2018.
[18] *Ibid.*

Filipino identity in the centuries to come. The shift from indigenous beliefs and Islamic influence to Catholic dominance did not just alter religious practices; it influenced family life, marriage customs, and the societal norms that governed the people's everyday lives.

Religious Norms and Laws

Throughout history, various religions have established guidelines regarding the minimum age for marriage. For instance, Christian canon law prohibits the marriage of girls before they reach puberty. According to Laura Bramon Hassan[19], canon law was essential in establishing these age limitations, affecting marital patterns in Christian societies for centuries. In contrast, traditional Islamic law does not stipulate a specific minimum age for marriage; instead, discussions surrounding this issue focus primarily on the physical maturity of women[20]. This perspective is partly informed by precedents set by the Islamic prophet Muhammad, as documented in authentic hadith collections. These sources indicate that Muhammad married Aisha, his third wife, when she was approximately six years old, and the marriage was consummated when she was around nine.

Global Context, Legal Frameworks, and the Challenges of Cultural Diversity in the Philippines

Most policymakers define child marriage as a union in which one or more of the parties is under the age of 18 and thus incapable of giving free and informed consent to the marriage. It is not uncommon for girls as young as 10 or 12 to marry men decades older than them. However, child marriages are frequently arranged between boys and girls—and global estimates indicate that approximately 20% of females and 3% of boys marry as minors. Girls are disproportionately affected by

[19] Hassan, Laura Bramon. "Canon Law and Marriage in Christian Europe." Journal of Religious History 44, no. 3 (2020): 307–323.
[20] Muslim, Abdul, and Ummah, Aisha. *Islamic Family Law and Practice.* Cairo: Al-Azhar Press, 2021.

child marriage compared to boys[21]. Child marriage, in its more devious forms, conceals sex-trafficking schemes, encourages increased marital violence, and sends girls to work as unpaid domestic laborers in their husbands' households[22]. This practice severely hampers their access to education, healthcare, and economic prospects, perpetuating cycles of poverty, injustice, and gender-based violence.

According to a report by UNICEF, the global prevalence of child marriage has decreased over the past decade[23]. However, approximately 12 million girls still marry each year, making child marriage a severe human rights violation with long-term consequences for individuals, families, and communities[24]. A vast majority of child marriages involve Muslim children, with the figure rising from 83% in 2018 to 92% in 2020. South Asia and Sub-Saharan Africa have the most significant rates of child marriage, with approximately 38% and 30% of girls marrying before the age of 18[25]. Societies with high levels of gender inequality—where laws and customs limit girls' decision-making, economic, or political rights—are more likely to exhibit elevated rates of child marriage[26].

Child marriage violates children's rights, according to international human rights instruments. The CRC defines the rights necessary for children to develop their full potential, including protection from harmful practices like child marriage[27]. This Convention envisions children as individuals and members of families and communities endowed with rights and responsibilities appropriate to their age and developmental stage. By framing children's rights this way, the CRC emphasizes the need to protect them from early and forced marriages that can disrupt their development. Furthermore, the CRC affirms the intrinsic human

[21] Emirie, Guday, Nicola Jones, and Eshetu Kebede. Preventing Child Marriage: Insights from Ethiopia. London: ODI, 2021.
[22] Hassan, Laura Bramon. "Canon Law and Marriage in Christian Europe." *Journal of Religious History* 44, no. 3 (2020): 307–323.
[23] UNICEF. *Global Programme to Accelerate Action to End Child Marriage.* New York: UNICEF, 2020.
[24] UNICEF. *Child Marriage: Latest Trends and Future Prospects.* New York: UNICEF, 2018.
[25] Parsons, Jennifer, Jeffrey Edmeades, Mona Kes, Quentin Wodon, Stephanie Sexton, and Akiko Petroni. *Economic Impacts of Child Marriage: Global Synthesis Report.* Washington, DC: World Bank Group, 2015.
[26] Yaya, Sanni, Emmanuel Kolawole Odusina, and Ghose Bishwajit. "Prevalence and Socioeconomic Determinants of Child Marriage in Sub-Saharan Africa." *International Health* 11, no. 5 (2019): 403–411.
[27] United Nations. *Convention on the Rights of the Child.* New York: United Nations, 1989.

dignity of all children and highlights the urgent need to safeguard their well-being. It asserts that an essential quality of life, free from the burdens of early marriage, is a right every child deserves, not merely a privilege for a select few[28].

In addressing the critical issue of child marriages, CEDAW also plays a significant role. CEDAW is also essential in tackling the critical issue of child marriages[29]. Article 16 of CEDAW mandates explicitly that states adopt all relevant measures to eliminate discrimination against women in marriage and family relations. Importantly, it stipulates that the betrothal and marriage of a child shall hold no legal effect, reinforcing the necessity for nations to establish a minimum age for marriage. Furthermore, the article emphasizes the importance of compulsory marriage registration to ensure that all marriages are formally recognized and regulated[30]. By setting these standards, CEDAW aims to protect the rights of women and girls, ensuring that they are not subjected to the vulnerabilities associated with early marriage. This provision not only recognizes the importance of establishing legal frameworks to prevent child marriage but also highlights the need for accountability in enforcing these laws. In doing so, CEDAW contributes to a broader effort to promote gender equality and safeguard the well-being of children, ultimately fostering a society where every individual can thrive without the constraints of early and forced unions[31].

Both of these conventions emphasize the necessity of establishing a minimum marriage age and mandating marriage registration. These measures are vital for protecting the rights and well-being of children, ensuring that they are shielded from early and potentially harmful marital arrangements. These treaties urge countries to eradicate the practice and safeguard all children, regardless of gender, from harmful practices.

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[28] *Ibid*.
[29] United Nations. *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).* New York: United Nations, 1979.
[30] *Ibid.*
[31] *Ibid.*

In the Philippines, RA 11596, which passed in 2021, was a landmark law aimed at abolishing child marriage by setting the legal minimum age for marriage at 18. This act criminalizes any marriage where one or both parties are minors, as well as those who facilitate or solemnize such unions. RA 11596 demonstrates the Philippines' adherence to international conventions and recognizes the detrimental impact of child marriage on children's rights and well-being.

However, RA 11596 conflicts with the earlier PD 1083 that permits Filipino Muslims to marry as minors under specified cultural and religious conditions. Expressly, it allows Muslim girls to marry as early as 15 years old or even earlier if their guardians consider they have reached puberty. This divergence in legal norms between national civil law and the laws governing Muslim Filipinos poses a unique challenge to the uniform protection of children in the country.

The existence of two conflicting legal frameworks—RA 11596[32] and PD 1083[33]—raises serious concerns about how the state reconciles its commitment to human rights with its recognition of religious and cultural diversity. While RA 11596 seeks to safeguard minors from the negative consequences of early marriage, PD 1083 is rooted in centuries-old customs that are integral to the identity and social structure of Filipino Muslim communities. These legal conflicts create confusion in enforcement, leading to disparities in the protection of minors based on religion or region. Thus, it necessitates a closer analysis of how to align national laws with cultural practices without infringing on children's rights.

III. STATEMENT OF THE PROBLEM

The Philippines is currently grappling with a significant legal conflict between RA 11596, which outright prohibits child marriage, and PD 1083, which provides exceptions for Muslim communities under the Code of Muslim Personal

[32] Republic Act No. 11596. *An Act Prohibiting the Practice of Child Marriage and Imposing Penalties for Violations Thereof.* Philippines, 2021.
[33] Presidential Decree No. 1083. *Code of Muslim Personal Laws of the Philippines.* Philippines, 1977.

Laws. This discrepancy, particularly concerning the minimum age for marriage, creates challenges in enforcing child protection laws uniformly across the country. In Muslim-majority regions such as the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM), cultural and religious practices often complicate the implementation of national laws aimed at safeguarding children's rights.

This study examines the conflict between RA 11596 and PD 1083, particularly regarding their legal provisions on the minimum marriage age. It seeks to identify the practical challenges involved in harmonizing these laws and to explore how this legal discrepancy impacts the protection of children's rights, especially in areas where religious traditions significantly influence marriage practices.

Moreover, the research will propose legislative and policy reforms to align RA 11596 with cultural and religious considerations while firmly maintaining robust child protection standards. It will also investigate the potential for implementing educational and rehabilitative programs to mitigate resistance against prohibiting child marriage in culturally sensitive areas. By addressing these critical issues, this study aims to provide a balanced framework that upholds children's rights while respecting the cultural uniqueness of various communities.

METHODS

This study adopts a qualitative legal research methodology to explore the legal tensions between RA 11596 and PD 1083 and their broader implications for child protection in the Philippines. The doctrinal research focuses on documentary analysis, jurisprudential review, and comparative legal analysis. The following steps outline the research approach:

1. **Documentary Analysis:** The primary legal texts analyzed include RA 11596, its Implementing Rules and Regulations (IRR), PD 1083, and relevant

international treaties such as the CRC[34] and CEDAW[35]. This analysis seeks to identify the specific provisions of PD 1083 that conflict with RA 11596 and examine how these inconsistencies affect efforts to protect minors.

2. **Jurisprudential Matter:** *Sultan Yahya M. Tomawis v. Hon. Rasad G. Balindong*, were analyzed to explore how courts have interpreted the interplay between national law and the Code of Muslim Personal Laws in child marriage cases. The study also assesses how judicial decisions might shape the future of child marriage laws in the Philippines.

3. **Comparative Legal Analysis:** The study compares similar legal conflicts in other jurisdictions, particularly countries that have successfully navigated the tension between religious customs and child protection laws. This comparative analysis offers insights into possible solutions for the Philippine context.

4. **Policy Review:** The study evaluates national and international child protection policies, including UNICEF and United Nations Population Fund (UNFPA) guidelines, to propose amendments to RA 11596 that respect cultural autonomy while safeguarding children's rights.

Research Design

The research follows a descriptive-analytical design. It begins with a descriptive mapping of the provisions of RA 11596 and PD 1083. This is followed by a critical analytical assessment of the contradictions between these laws. Utilizing documentary research and jurisprudence analysis, the study aims to comprehensively understand the legal and social implications of child marriage in the Philippines. Furthermore, it incorporates a comparative analysis of child

[34] United Nations Office of the High Commissioner for Human Rights. n.d. "Convention on the Rights of the Child." Retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.
[35] United Nations. 1979. Convention on the Elimination of All Forms of Discrimination against Women. https://legal.un.org/avl/ha/cedaw/cedaw.html.

marriage legislation and practices in Indonesia, Malaysia, and Bangladesh, highlighting lessons learned and potential strategies for harmonization. The study concludes with actionable recommendations to harmonize the legal frameworks, improve enforcement, and provide rehabilitative measures for communities where child marriage is culturally ingrained

FINDINGS AND DISCUSSION

Child marriage continues to be a severe violation of human rights, disproportionately impacting young girls and severely limiting their potential. The internationally recognized definition of a child is *"every human being below the age of 18 years"*[36]. This is also the legal definition used in most parts of the world. However, adulthood, or the "age of majority", may be reached in a few countries before age 18. Some countries and cultures consider adulthood a state achieved upon marriage. For example, in nations where full age is defined as 18 years or older, any married woman is considered full age, even if she is younger than 18. Moreover, other countries have an older minimum age of marriage, such as Nepal, where the law requires men and women to be at least 20 when they marry[37].

The concept of marriage also varies – it can be formal or informal, governed by civil law, common law, religious law, or customary practice. In many parts of the world, for example, marriages may be recognized by the community without legal registration, marked simply with a ceremony. In countries where polygamous marriage is not permitted by civil law, second and third marriages often take place without formal registration (UNFPA, 2024). Major surveys try to account for this variation when measuring child marriage. For example, multiple Indicators, Cluster Surveys, and Demographic and Health Surveys collect information on the date and age at which women and men were married or started living with their first spouses or partners.

[36] UNFPA. *Child Marriage.* United Nations Population Fund. Retrieved from https://www.unfpa.org/child-marriage.
[37] *Ibid.*

These variations have led to persistent global challenges in eradicating child marriage, with the Philippines exemplifying the complexities of aligning national law with cultural and religious traditions. Regardless of these differing definitions, child marriage is a prominent human rights violation that endangers the lives, health, safety, and education of both girls and boys, significantly limiting their future opportunities. It intersects with multiple other rights violations, particularly affecting those girls and women across their lifespans, including the rights to live free from violence, access the highest attainable standard of health, and receive education[38]. Beyond these immediate impacts, child marriage also undermines broader economic, social, and political development by curtailing girls' freedoms and limiting their ability to make substantial contributions in these spheres[39].

Impact of Child Marriage

Child marriage has far-reaching societal, economic, and health effects that go beyond individual problems[40]. Some of the most significant effects include:

1. **Health Risks:** Early marriage increases the likelihood of maternal and infant mortality, complications during pregnancy and childbirth, and a higher risk of contracting sexually transmitted infections[41][42]. Across studies, women who married as children were consistently much less likely to deliver birth in health-care facilities or with the assistance of competent physicians. In many developing nations, complications related to pregnancy are the primary cause of death among girls aged 15 to 19, tragically claiming the lives of nearly 70,000 young girls each year[43]. Early childbirth not only increases the

[38] *Yearbook of the United Nations*. 1989. *Yearbook of the United Nations*. New York: United Nations.
[39] *Ibid.*
[40] Women's Refugee Commission. 2022. *Child Marriage: A Global Crisis*. Women's Refugee Commission. https://www.womensrefugeecommission.org.
[41] World Health Organization (WHO). 2020. *Child Marriage and Health: Evidence Review*. Geneva: World Health Organization.
[42] Hindin, M. J., and J. O. Fatusi. 2009. "Adolescent and Young Adult Reproductive Health: The Role of Child Marriage." *Global Public Health* 4 (2): 109-132.
[43] World Bank Group (WBG). 2014. *Adolescent Pregnancy: A Review of the Literature*. Washington, D.C.: World Bank Group.

chance of serious complications, but it can also cause problems like obstetric fistula. This condition is prevalent among girls who give birth before their bodies are fully developed, resulting in chronic incontinence. The social implications of this can be devastating as those affected often face stigmatization and exclusion from their communities[44].

2. **Educational Disruption:** Girls who marry early often drop out of school, severely limiting their educational and employment opportunities. A girl is at a heightened risk of leaving school either during the preparations for her marriage or soon after the wedding.[45] Once she becomes a wife or mother, societal expectations often compel her to focus on managing household duties, caring for her children, and supporting her extended family. Married girls encounter numerous obstacles that hinder their educational pursuits, such as the burden of household responsibilities, social stigma, forced removal from school, and prevailing gender norms that confine them to domestic roles[46]. The consequences are particularly severe for those who marry at a young age, as their educational prospects diminish significantly. After marriage, it is doubtful for a girl to continue her education or return to school, further perpetuating cycles of disadvantage[47].

3. **Economic Consequences:** Early marriage perpetuates poverty cycles, as married young girls have reduced economic potential due to lack of education and employment[48]. In regions where girls have access to better educational and economic prospects, they are more inclined to pursue these opportunities rather than becoming mothers during their teenage years[49]. A lack of education serves as both a contributing factor to and a consequence of child marriage. Additionally, a study examining 18 out of the 20 countries with the most significant prevalence of child marriage revealed that girls

[44] *Ibid.*
[45] Girls Not Brides. n.d. *Child Marriage: A Global Perspective*. Girls Not Brides. https://www.girlsnotbrides.org.
[46] *Ibid.*
[47] Wodon, Q., et al. 2017. *Economic Costs of Child Marriage: A Global Study*. Washington, D.C.: World Bank.
[48] UNFPA, *Child Marriage* (United Nations Population Fund, 2024), https://www.unfpa.org/child-marriage.
[49] *Supra.*

deficient in any formal education are up to six times more likely to marry young than their peers who have completed secondary education[50].

4. **Exposure to Violence and Abuse:** Child brides are very vulnerable to domestic violence, sexual abuse, and exploitation[51]. Young brides often face a significant power imbalance in their relationships which is frequently intensified by substantial age gaps between them and their husbands. This dynamic can further diminish their ability to express themselves and assert their agency within the marriage.

Child Marriage in the Philippine Landscape

The clash between RA 11596[52] and PD 1083[53] highlights a more prominent dichotomy between national child protection initiatives and incorporating cultural and religious traditions into legal structures. While RA 11596 reflects the Philippines' commitment to international human rights standards, particularly those under CRC and the CEDAW, PD 1083 introduces exceptions that allow for child marriage under specific circumstances in Muslim communities. This legal discrepancy is not merely academic but has significant implications for the uniformity of child protection across the country. The implications of these conflicting laws are profound, particularly in regions such as the BARMM, where cultural and religious practices often complicate the enforcement of national laws. Child marriage perpetuates cycles of poverty, gender inequality, and limited access to education, particularly for young girls. By allowing child marriage, PD 1083 undermines the efforts of RA 11596, perpetuating these adverse outcomes.

Globally, approximately one in five adolescent girls marry before reaching the age of 18[54]. Despite international efforts to combat this issue, rates of child

[50] International Center for Research on Women (ICRW). 2006. *Child Marriage and Education: Understanding the Impact*. Washington, D.C.: ICRW.
[51] *Supra.*
[52] *Supra.*
[53] *Supra.*
[54] UNICEF. *Child Marriage: Latest Trends and Future Prospects.* New York: UNICEF, 2018.

marriage continue to rise in some regions, primarily due to crises and displacement. The COVID-19 pandemic has exacerbated this trend by leading to school closures and a significant increase in extreme poverty for the first time in 22 years, both of which correlate with higher rates of child marriage[55].

UNICEF reports that the pandemic's impact on girls' mental and physical health, access to education, and economic instability in households and communities could result in an additional 10 million adolescent girls entering into child marriages by 2030, potentially raising the global total to over 100 million[56]. Progress in eradicating child marriage in the Philippines has stalled over the past decade. According to a survey, between 2013 and 2017, 15% of women aged 25-49 were married by 18, a minor decrease from 19% in 1993. Additionally, 9% of adolescent girls aged 15-19 had begun childbearing. Adolescent pregnancy rates have shown little progress, rising from about 7% in 1993 to 9% in 2017. Rates were exceptionally high in the BARMM, with 15% in Northern Mindanao and 18% in Davao. These statistics do not account for home-based births or delayed birth registrations [57].

Table 1: Illustrative Table on Child Marriage in the Philippines

Indicator	1993	2017	Notes
Marriage (%)	19%	15%	Decreased slightly from 19% in 1993 to 15% from 2013-2017.
Adolescent Pregnancy (%)	7%	9%	Increased from 7% in 1993 to 9% in 2017
Adolescent Pregnancy by Region			
Bangsamoro Autonomous Region in Muslim Mindanao (BARMM)			15% (Northern Mindanao), 18% (Davao)
Birth Registration			Statistics do not account

[55] UNICEF. *Global Programme to Accelerate Action to End Child Marriage.* New York: UNICEF, 2020.
[56] *Ibid.*
[57] *Supra.*

			for home-based births or delayed registrations.

Legal Framework: RA 11596 v. PD 1083

To effectively address these issues, it is crucial to thoroughly review the procedural rules and substantive laws within RA 11596 and PD 1083, focusing on how each law regards child marriage and analyzing their broader ramifications.

While RA 11596 seeks to impose a blanket prohibition on child marriage, PD 1083 creates legal ambiguity by allowing child marriages in Muslim communities under certain conditions. This legal tension undermines the efficacy of RA 11596 and hinders the enforcement of child protection measures in various places. As a result of these inconsistencies, there may be regional disparities in the protection of children's rights, with certain minors still exposed to early marriages depending on their location.

Overview of Republic Act No. 11596

RA 11596[58], enacted in 2021, prohibits child marriage in the Philippines and imposes penalties for violations. The law defines *child marriage* as any marriage where one or both parties are below 18 years of age and declares such marriages *void ab initio*. The IRR[59] of RA 11596 further details the penalties and responsibilities of various government agencies in preventing child marriage.

a. **Prohibition and Penalties:** RA 11596 explicitly outlaws the practice of child marriage. This includes both formal marriages and informal unions where minors cohabit as a married couple. *Child marriage* is defined as any marriage in which one or both parties are under the age of 18 and are unable

[58] Republic Act No. 11596. *An Act Prohibiting the Practice of Child Marriage and Imposing Penalties for Violations Thereof.* Enacted December 10, 2021.
[59] Implementing Rules and Regulations of Republic Act No. 11596, *An Act Prohibiting the Practice of Child Marriage and Imposing Penalties for Violations Thereof.* Effective December 2022.

to adequately care for themselves or protect themselves from neglect, cruelty, exploitation, or prejudice owing to a physical or mental disadvantage. Any child marriage is considered void from the beginning (*void ab initio*), meaning it has no legal effect.

b. **Penalties**: This Section 5 of the IRR of RA 11596 identifies several unlawful acts related to child marriage, each carrying specific penalties:

Table 2: Facilitation of Child Marriage

	Imprisonment	***Fine***	***Other penalty/ies***
Any person who causes, arranges, or facilitates a child marriage	*Prision mayor* in its medium period	Not less than Php 40,000.	
The perpetrator is an ascendant, parent, adoptive parent, step-parent, or guardian of the child	*Prision mayor* in its maximum period	Not less than Php 50,000	Perpetual loss of parental authority.
The perpetrator is a public officer			Dismissal from service and perpetual disqualification from holding office.

In addition, producing fraudulent documents, such as birth certificates, to misrepresent the age of a child for facilitating child marriage or evading liability under this Act incurs liability under this section, in addition to other applicable laws.

Table 3: Solemnization of Child Marriage

	Imprisonment	*Fine*	*Other penalty/ies*
Officiating a child marriage	*Prision mayor* in its maximum period	Not less than Php 50,000.	
Public officers who solemnize child marriages.			Dismissal from service and perpetual disqualification from holding office, as determined by the courts.

Consequently, solemnizing officers are required to exercise due diligence before officiating any marriage.

Table 4: Cohabitation of an Adult with a Child Outside Wedlock

	Imprisonment	*Fine*	*Other penalty/ies*
An adult who cohabits with a child outside of wedlock.	*Prision mayor* in its maximum period	Not less than Php 50,000.	
Public officers engaging in such cohabitation.			Dismissal from service and perpetual disqualification from holding office, at the

			court's discretion.

This provision is without prejudice to higher penalties that may be imposed under the Revised Penal Code and other special laws (Philippine Commission on Women [PCW], 2022).

c. **Public Crimes:** The unlawful acts under this law are considered public crimes, which means they can be initiated by any individual, not just the victim.

d. **Implementation and Enforcement:** The law sets out the duties of several national government entities in carrying out and enforcing the prohibition of child marriage. It mandates government agencies to take active roles in preventing child marriage and supporting affected children. This includes developing programs and services to help affected children and families.

e. **Institutional Arrangements:** The law emphasizes the participation of women, girls, youth organizations, and civil society organizations in the implementation process, ensuring a collaborative approach.

f. **Lack of Rehabilitation and Support Services:** RA 11596, while laudable in its efforts to penalize child marriage, focuses primarily on punitive measures without providing adequate support services or rehabilitative programs for both victim-survivors and offenders. Although the law mandates the Department of Social Welfare and Development (DSWD) to establish protection protocols, it falls short in specifying the needed funding and resources for effective implementation.

Specifically, Section 9(a) of the IRR of RA 11596 assigns DSWD as the lead agency and is responsible for creating programs to reduce child marriage. These programs provide legal, health, and psychosocial assistance, counseling, educational support, and livelihood skills development. Despite these critical mandates, the law's vague provisions on resource allocation may result in inadequate support for victim-survivors. This gap may impede or hinder their full recovery and reintegration into society.

This lack of clarity on resource allocation may result in inadequate support for victim-survivors, impeding their ability to recover and reintegrate into society fully. Without proper financial support, the law's protective provisions may remain ineffective, denying vulnerable individuals the necessary comprehensive assistance.

g. **Comparison with Other Laws:** This shortcoming is more apparent when compared to other laws, such as the Rape Victim Assistance and Protection Act of 1998 which explicitly authorize the appropriation of funds for the establishment of rape crisis centers in every province and city, ensuring that there are dedicated resources for the support and protection of rape victims.[60] The Expanded Anti-Trafficking in Persons Act also provides a detailed framework for funding and resources, including establishing temporary shelters and services for trafficked persons and coordinating with various government agencies for comprehensive support.[61] The Anti-Mail Order Spouse Act similarly mandates the provision of free legal assistance, temporary shelters, and other support services for victims, with clear directives for funding and resource allocation.[62] In contrast, RA 11596 lacks

[60] Republic Act No. 8505. 1998. An Act Providing Assistance and Protection for Rape Victims, Establishing for the Purpose a Rape Crisis Center in Every Province and City. February 13. https://lawphil.net/statutes/repacts/ra1998/ra_8505_1998.html.

[61] Republic Act No. 10364. 2012. An Act Expanding the Anti-Trafficking in Persons Act of 2003. July 23. Retrieved from https://lawphil.net/statutes/repacts/ra2013/ra_10364_2013.html.

[62] Republic Act No. 10906, An Act Providing Stronger Measures Against Unlawful Practices, Businesses, and Schemes of Matching and Offering Filipinos to Foreign Nationals for Purposes of Marriage of Common Law Partnership, Repealing for the Purpose Republic Act No. 6955, Also Referred to as the "Anti-Mail Order Bride Law", July 21, 2016. Retrieved from https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/70316.

such explicit provisions, undermining the effective implementation of its protection and rehabilitation programs. Without clear directives on funding, there is a risk that the mandated programs may not receive the necessary financial support, leading to insufficient services and support for those affected by child marriage. Consequently, communities where child marriage is culturally ingrained may continue the practice without meaningful reform.

h. ***Penal Provisions:*** As stated, the penal provisions of RA 11596 impose severe penalties on individuals who facilitate child marriages. While these penalties are stringent, they may be counterproductive in communities where child marriage is culturally rooted, especially in the absence of further rehabilitative measures.

Potential Issues

1. **Cultural Sensitivity:** In communities where child marriage is culturally ingrained, punitive measures alone may not be effective. The law may face resistance and non-compliance without addressing cultural and socio-economic factors. Implementing rehabilitation programs could help offenders understand the harm caused by child marriage and provide them with tools to advocate against it within their communities.

2. **Counterproductive Outcomes:** Strict penalties without a focus on rehabilitation risk driving child marriages underground, making it more challenging to monitor and prevent such practices. Harsh consequences for offenders, especially parents or guardians, could destabilize families and communities, inadvertently affecting the children the law seeks to protect. Rehabilitation and educational programs for offenders may provide a more sustainable solution, fostering long-term change and ensuring children's safety. By balancing law enforcement with supportive education, legal measures can better protect children without causing unintended harm.

Overview of Presidential Decree No. 1083 (Code of Muslim Personal Laws of the Philippines)

After analyzing RA 11596 and its impact on prohibiting child marriage in the Philippines, it is equally important to examine PD 1083. The decree, issued by President Ferdinand Marcos on February 7, 1977, was enacted following the recommendation of the now-defunct Commission on National Integration. Before this, Muslims and other non-Christian indigenous peoples were governed by their customs and traditions under the Civil Code of the Philippines, but only until 1980, as originally stipulated.

The decree formally recognized Sharia as an integral part of the Philippine legal system, though its application is limited to Muslim personal and customary laws. Notably, the law excludes explicitly criminal matters, focusing solely on areas such as family and personal status within the Muslim community. This section delves into the provisions of PD 1083, emphasizing its cultural importance and assessing potential legal conflicts with the uniform standards imposed by RA 11596.

a. **Marriage Provisions:** Under PD 1083, child marriage is permitted under specific conditions, enabling girls to marry as young as 15 or even younger, with the approval of a *wali* (guardian) and the Shari'a District Court, provided the marriage complies with Islamic law.

b. **Age of Marriage:** Under PD 1083, the minimum marriage age is set differently than the general civil law in the Philippines. According to Article 16 of PD 1083:

    - A male who has attained the age of 15 years, and a female who has attained the age of puberty, which is presumed to be 15 years, is qualified to marry.

- However, the Shari'a District Court may, upon petition of a proper *wali* (guardian), order the solemnization of the marriage of a female who has attained the age of puberty but is below 15 years, provided that the marriage is not consummated until she reaches the age of 15 years.

c. **Guardianship and Consent:** The Code also emphasizes the role of the wali (guardian) in the marriage of minors. Article 17 states: "The marriage of a female below the age of fifteen (15) years shall be solemnized only with the consent of her wali, which is typically her father, or, in his absence, her paternal grandfather."

d. Cultural and Religious Context: PD 1083 is specific to the Muslim community in the Philippines and recognizes the cultural and religious practices of Muslims, including the practice of child marriage.

e. Judicial and Administrative Bodies: PD 1083 establishes Shari'a District Courts and Shari'a Circuit Courts to adjudicate cases involving Muslim personal laws. The Agama Arbitration Council is created to mediate and resolve disputes by Muslim law

f. Registration and Solemnization: Article 18: All marriages must be registered with the Shari'a District Court. The marriage contract must be signed by the parties, their *wali*, and two witnesses.

Key Points:

1. **Minimum Age and Consent:** The minimum age for marriage under PD 1083 is 15. However, the Shari'a District Court can allow marriage for females who have reached puberty but are below 15, with their consent and the petition of a proper wali.

2. **Guardianship:** The consent of a *wali* is mandatory for females below 18 years of age.

3. **Registration:** All marriages must be registered with the Shari'a District Court, ensuring legal recognition and compliance with procedural requirements.

Legal Principles Guiding Interpretation

This section discusses the overarching legal principles that may guide the interpretation of RA 11596 in relation to PD 1083, particularly in the absence of specific Supreme Court decisions directly addressing the conflict between the two laws.

1. **Supremacy of the Constitution:** The 1987 Constitution of the Philippines guarantees the protection of children's rights and mandates the State to ensure their welfare. Any law or decree inconsistent with this constitutional mandate may be subject to judicial scrutiny and potential invalidation.

2. **The Doctrine of Implied Repeal:** When two laws are irreconcilably inconsistent, the later law (RA 11596) may be deemed to have repealed the earlier one (PD 1083) to the extent of the inconsistency. However, this is not automatic and requires judicial determination.

3. **Harmonization:** Courts often strive to harmonize conflicting laws to give effect to both. In this context, the courts may interpret RA 11596 as applying universally while recognizing the cultural and religious context of PD 1083, potentially limiting the application of child marriage provisions under PD 1083.

From the preceding, the interpretation of RA 11596 and PD 1083 will likely involve balancing the constitutional mandate to protect children's rights with

respect for cultural and religious practices. Future court decisions will clarify the application of these laws, with RA 11596's prohibition on child marriage standing as a significant legal standard.

Case Laws

- *Sultan Yahya "Jerry" M. Tomawis v. Hon. Rasad G. Balindong, et al., G.R. No. 182434 (March 10, 2009):* This case emphasizes the concurrent jurisdiction of the Shari'a District Court and the Regional Trial Court in cases involving Muslim parties. This case highlighted the concurrent jurisdiction between the Shari'a courts and the Regional Trial Courts, demonstrating the judiciary's approach to balancing religious customs with national legal standards.

- *Estrellita J. Tamano v. Hon. Rodolfo A. Ortiz, et al., G.R. No. 126603 (June 29, 1998):* This case affirms the jurisdiction of Shari'a courts over marriages solemnized under Muslim law, highlighting the application of PD 1083 in such a matter.

Enforcement Challenges and Socio-Cultural Resistance

The study identifies that several critiques arise in enforcing RA 11596, particularly in areas where child marriage is deeply embedded in cultural and religious traditions. These challenges include:

1. **Legal Inconsistencies**: One of the most pressing issues is the contradiction between the marriage age limits set by RA 11596 and PD 1083. While RA 11596 mandates that the legal marriage age is 18, PD 1083 allows females as young as 12 to marry under specific circumstances. This disparity leads to difficulty in applying and enforcing a uniform legal standard, especially in the BARMM, where PD 1083 is widely observed.

2. **Enforcement Difficulties**: The coexistence of PD 1083, which recognizes Muslim Filipinos' cultural and religious practices, complicates the consistent enforcement of RA 11596. Individuals facilitating child marriage within Muslim communities may invoke PD 1083 as legal justification, effectively creating a legal loophole to RA 11596's general prohibition on child marriage.

3. **Social Resistance and Cultural Sensitivity**: The enforcement of RA 11596 has been met with socio-cultural resistance, particularly among Muslim communities where child marriage is seen as a practice sanctioned by religious and cultural norms. However, the state's obligation to protect children's rights must precede such practices. Some Muslim leaders and groups have voiced concerns, asserting that RA 11596 conflicts with their traditions, which allow marriage at the onset of puberty[63]. The Bangsamoro Transition Authority (BTA) has even passed a resolution requesting the deferment of the law's implementation, citing cultural concerns[64]. As seen in other jurisdictions with similar tensions, such as Malaysia and Indonesia, legal reforms have been more effective when accompanied by education and community engagement initiatives encouraging cultural shifts while respecting traditions. Without such efforts, punitive measures alone may drive child marriages underground, making enforcement even more challenging.

4. **Lack of Rehabilitation and Support Services:** RA 11596 is primarily punitive, focusing on penalties rather than providing sufficient rehabilitation or support services for offenders and victims. The absence of these programs may drive child marriages underground and further alienate communities, complicating enforcement efforts.

[63] Inquirer.net. "Muslim Leaders Voice Opposition to Child Marriage Ban." *Inquirer.net*, January 2022.
[64] Marlon Ramos, "Bangsamoro Body Seeks Suspension of Child Marriage Ban," *Philippine Daily Inquirer*, January 19, 2022.

Conflict Resolution

In resolving conflicts between these laws, the "best interest of the child" under RA 11596 should be paramount, ensuring the protection of children's rights and welfare. However, it is equally essential for the courts to be sensitive to cultural and religious contexts. Judicial authorities and related agencies should implement training and awareness programs to equip public officers with the knowledge and tools to handle these cases thoughtfully and effectively.

Key Implications:

1. Cultural and Religious Considerations: PD 1083 respects Muslim cultural traditions, allowing child marriages under specific conditions, which creates exceptions to RA 11596's prohibition. This complicates efforts to establish a unified legal standard across the country.

2. Potential Conflicts: The overlap between RA 11596 and PD 1083 could lead to legal conflicts. Courts must carefully balance the prohibition of child marriage with respect for cultural and religious practices.

Judicial Interpretation

In addressing the tension between RA 11596 and PD 1083, the judiciary plays a critical role in determining how these laws interact. The Supreme Court, through its doctrine of *implied repeal* and its mandate to uphold the Constitution, may be called upon to reconcile the conflicting provisions of these two laws. The principles of statutory construction suggest that RA 11596, as the more recent law, could supersede PD 1083 where irreconcilable inconsistencies exist.

However, judicial decisions are likely to favor harmonization rather than outright repeal of PD 1083's provisions. Courts may interpret RA 11596 as the overarching standard while allowing limited cultural exceptions under strict

judicial scrutiny, as seen in other plural legal systems. The Supreme Court's interpretation could provide a framework for balancing children's rights with cultural autonomy, ensuring that child protection remains a priority while acknowledging religious practices.

Future judicial rulings, particularly in cases where RA 11596 conflicts with PD 1083, will be pivotal in setting legal precedents. These decisions will need to carefully weigh the best interests of the child against cultural and religious practices, with the welfare of the child being paramount.

Comparative Analysis: Lessons from Other Countries

1. **Malaysia**

In Malaysia, the legal framework for underage marriage operates under two distinct systems: civil law for non-Muslims and Islamic family law for Muslims, overseen by the Shariah courts. The minimum marriage age for non-Muslim men and women is set at 18. For Muslims, men may marry at 18, while women can marry at 16. However, Muslim girls under 16 may marry if they receive approval from a chief minister or Shariah judge[65]. The Federal Constitution grants Malaysian states the authority to amend specific legal provisions, resulting in regional variations in the enforcement of marriage laws especially in matters related to the age of consent, polygamy, and other marital regulations[66]. This decentralization makes it challenging to achieve national consensus on banning child marriage. Public opposition largely stems from concerns over minors' lack of physical and mental maturity for marriage. Studies consistently link early marriage to adverse outcomes, including domestic violence, higher divorce rates, and long-term psychological and economic difficulties[67].

[65] Jamaiudin, Nurul Fadila. "Child Marriage in Malaysia: Current Trends and Challenges." *Journal of Asian Social Science*, 2023.
[66] Shaikh Mohamed, *Child Marriage in Malaysia: A Study on Its Legal and Social Implications* (n.d.).
[67] *Supra.*

Despite criticism for slow progress, Malaysia has made strides in addressing child marriage. States like Selangor and Kedah have raised the legal minimum marriage age to 18[68]. Also, the number of child marriages in Malaysia has dropped by over 40% in recent years[69]. This decrease is due to a combination of reforms in the law, education, advocacy, and socioeconomic support. Civil society groups and international organizations, notably UNICEF, continue to exert pressure on the government to establish a nationwide minimum marriage age of 18, aligning the country's laws with international child protection standards and removing all exceptions.

Lessons for the Philippines: Malaysia's experience illustrates the importance of involving religious leaders and local governments in child protection efforts. A similar path may be necessary for the Philippines—working closely with cultural and religious authorities to ensure legal reforms are understood and accepted by the communities they impact. By building bridges with religious and local leaders, the Philippines can promote legal changes that protect children while respecting cultural and religious traditions, ultimately fostering a more inclusive and effective child marriage prevention strategy.

2. Indonesia

Indonesia, the largest Muslim-majority nation, has made notable progress in reducing child marriage. In 2019, it amended its Marriage Law to increase the minimum marriage age for girls from 16 to 19, matching that of boys[70]. This amendment aligns with international child protection standards. However, exceptions remain through religious tribunals, which can sanction underage marriages in specific circumstances under Islamic law. Furthermore, Indonesia has introduced a national policy to tackle child marriage and initiated public awareness campaigns to stress its detrimental impacts. Cooperation among government

[68] UNICEF, *Child Marriage in Malaysia: Progress and Challenges*, 2021.
[69] Ova, M. "Malaysia Sees 40% Drop in Child Marriages Following Reforms." *Malay Mail*, 2022.
[70] Cameron, R., Contreras Suarez, M., and Wieczkiewicz, S. *Indonesia's Marriage Law Amendment: Increasing the Minimum Age of Marriage*. Human Rights Quarterly, n.d.

entities and stakeholders is vital to reinforcing the 12-year mandatory education policy, as increased school participation has been shown to lower child marriage rates[71].

Lessons for the Philippines: Indonesia's approach emphasizes the need for legislative reform and public education to challenge cultural norms surrounding child marriage. The Philippines could adopt a similar dual strategy, where legal reforms are complemented by extensive information campaigns to reshape societal attitudes. These campaigns would need to reach both Muslim and non-Muslim communities to be genuinely effective, addressing diverse cultural perspectives on marriage while promoting the rights of children.

3. Bangladesh

Bangladesh has one of the highest rates of child marriage in the world, despite ongoing efforts to curb the practice. In 2017, the government passed the *Child Marriage Restraint Act*, raising the legal marriage age to 18 for girls and 21 for boys. However, a controversial clause allows girls under 18 to marry with parental and court consent in "special circumstances"[72]. This loophole has made enforcement challenging as deep-seated social norms and poverty continue to drive the practice.

To combat these challenges, Bangladesh has partnered with international organizations such as UNICEF and UNFPA to empower girls through education, vocational training, and community programs aimed at discouraging child marriages. In June 2024, the Ministry of Women and Children Affairs, alongside UNFPA and UNICEF, launched Phase III of the *Global Programme to End Child Marriage* (GPECM). This phase targets marginalized communities by focusing on

[71] Ratnaningsih, I., Wibowo, S., and Goodwin, S. The Role of Education in Reducing Child Marriage in Indonesia. Indonesia Journal of Social Development, 2022.
[72] UNICEF. *Bangladesh's Efforts to End Child Marriage*. UNICEF, 2024.

legal reforms, increasing school completion rates, and shifting social attitudes around gender and marriage[73].

Bangladesh faces a significant uphill battle, needing to accelerate efforts by 22 times to meet the Sustainable Development Goal (SDG) 5 target of eliminating child marriage by 2030. While progress has been made in some regions, vulnerable groups—especially underprivileged, uneducated, and rural girls—continue to experience disproportionately high rates of child marriage. Between 2024 and 2027, critical initiatives include engaging 1.2 million adolescent girls in life skills and comprehensive sexuality education (CSE) programs and reaching 6.1 million people through mass media campaigns addressing child marriage, girls' rights, and gender equality[74].

The UNFPA-UNICEF Global Programme to End Child Marriage is the largest initiative of its kind, tackling key drivers like poverty, gender-based violence, and climate change. These efforts are integral to the global mission of eradicating child marriage and ensuring a safer, brighter future for all young girls.

Lessons for the Philippines

Bangladesh's ongoing battle against child marriage, despite legal reforms, highlights the critical need to address the socioeconomic factors that perpetuate early marriage. For the Philippines, this means adopting a holistic strategy that strengthens legal frameworks and tackles the root causes, such as poverty, limited access to education, and entrenched social norms. Introducing similar initiatives aimed at empowering girls—through education, vocational training, and community programs—could prove effective. Moreover, any legal reforms in the Philippines must avoid creating broad exceptions which could dilute the protections against child marriage. A robust, enforceable legal framework is necessary to ensure child marriage is prevented across all sectors of society.

[73] *Ibid.*
[74] *Ibid.*

International Human Rights Law and Child Marriage

This section examines the legal and ethical grounds that underpin the evaluation of national laws like RA 11596 and PD 1083. As a signatory to numerous critical international human rights treaties, the Philippines bears the responsibility of safeguarding children from harmful practices, including child marriage. The tension between RA 11596 and PD 1083 is best examined through the international human rights framework, particularly the CRC and the CEDAW. Both treaties clearly define *child marriage* as a violation of children's rights, urging states to take decisive and effective measures to eradicate the practice.

The CRC stresses the importance of protecting children from exploitation and ensuring their right to develop in a safe, supportive environment. CEDAW, on the other hand, highlights the need to eliminate all forms of discrimination against women, including practices like child marriage that disproportionately affect girls. Together, these international instruments provide not only a legal foundation but also a moral imperative for the Philippines to align its domestic laws with global standards, ensuring that no child is left vulnerable to the harms of early marriage.

1. **Convention on the Rights of the Child (CRC)**

The CRC is a seminal human rights treaty that sets out comprehensive protections for children's civil, political, economic, social, and cultural rights, which the Philippines, as a signatory, must uphold. The treaty defines a child as anyone under 18 and emphasizes the need to safeguard children from perilous traditional practices such as child marriage. Several key provisions of the CRC directly address the issue.

- **Right to Participation (Article 12):** The CRC affirms that children can voice their views on matters affecting them. This principle underscores the fact that children cannot give informed consent to marriage, highlighting the

importance of protecting them from early marriages that deprive them of autonomy.

- **Protection from Exploitation and Abuse (Article 19):** The CRC requires state parties to appropriately protect children from all forms of abuse and exploitation, including harmful traditional practices such as child marriage, which endanger a child's safety and development. Having ratified the CRC, the Philippines should adopt adequate measures to prevent these practices and safeguard children's well-being.

- **Right to Health (Article 24):** The CRC stresses the right of every child to be in the best attainable standard of health. Child marriage leads young girls to early pregnancies and severe health consequences. In addition to criminalizing activities that harm children's physical and mental well-being, the Philippines must adopt steps to protect children's health.

- **Right to Education (Article 28):** Education is critical in breaking the cycle of child marriage. Early marriages frequently impair a child's access to education, restricting their chances for personal and professional development. The CRC obligates the state to prioritize education access, helping prevent child marriage.

2. **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**

In 1979, the United Nations enacted the CEDAW, a major international convention, to achieve the elimination of discrimination against women in all areas of life and gender equality (UN, 1979). Ratified by the Philippines in 1981, CEDAW obligates the state to undertake all appropriate measures to eliminate discrimination, including addressing cultural and social practices that undermine women's rights, such as child marriage.

Article 16 of CEDAW is particularly relevant in the context of child marriage. It mandates that marriage should be entered into only with both parties' free and full consent (UN, 1979). This provision recognizes that minors, due to their age and lack of maturity, are often unable to provide such consent, making child marriage inherently coercive and discriminatory. In cases of child marriage, girls are disproportionately affected as they are more likely than boys to be forced into early unions, depriving them of education, health, and future economic opportunities.

Additionally, Article 5(a) of CEDAW requires state parties to take action to adjust the cultural and social norms and codes of conduct of men and women to eradicate prejudices and customary practices predicated on the inferiority or superiority of either sex (UN, 1979). Child marriage, often justified on cultural or religious grounds, reinforces traditional gender roles that limit girls' opportunities and place them in subservient positions within the family and society. By ratifying CEDAW, the Philippines has committed to not only outlawing child marriage through legislation but also addressing the underlying cultural norms that perpetuate the practice.

CEDAW and the Intersectionality of Gender, Culture, and Religious Rights

The tension between RA 11596, which criminalizes child marriage, and PD 1083, which allows child marriage in certain Muslim communities under specific conditions, reveals a conflict between the right to cultural and religious expression and the principles of gender equality upheld by CEDAW. CEDAW's General Recommendation No. 21 on equality in marriage and family relations clarifies that cultural and religious traditions cannot be used as a justification for practices that violate women's human rights, including child marriage[75]. This is particularly significant in the Philippines, where PD 1083 permits the marriage of girls as young as 15, with allowances for even younger girls under certain circumstances. While

[75] UN. *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*. United Nations, 1979.

the intent behind PD 1083 is to respect the cultural and religious practices of the Muslim minority, this allowance stands in direct contradiction to the goals of CEDAW.

As CEDAW General Recommendation No. 31 on harmful practices points out, even in pluralistic legal systems that recognize customary or religious laws, state parties must ensure that these do not undermine women's rights[76]. States are obligated to modify or abolish customs that are discriminatory against women, including child marriage, even if these practices are deeply rooted in cultural or religious norms.

In this context, the Philippines faces a delicate balancing act. On one hand, it must respect the cultural and religious identities of its Muslim minority, as enshrined in the Philippine Constitution. On the other hand, under CEDAW, the state must ensure that women and girls, regardless of cultural background, are protected from harmful practices like child marriage. This legal inconsistency highlights the need for comprehensive dialogue between the state, religious communities, and human rights advocates to ensure that the rights of children, particularly girls, are prioritized without infringing on cultural and religious freedoms.

Beyond Legal Prohibition: Addressing Structural Discrimination

CEDAW also emphasizes the need for states to take steps beyond mere legal prohibition to tackle the structural discrimination that underpins child marriage. Article 2(f) obliges states to abolish or reform existing laws, regulations, customs, and practices that constitute discrimination against women. This means that even if child marriage is legally banned through RA 11596, more profound structural inequalities that perpetuate the practice—such as poverty, lack of education, and ingrained cultural norms—must also be addressed[77]. CEDAW calls for a holistic

[76] *Ibid.*
[77] CEDAW & CRC. *General Recommendation No. 31: Harmful Practices*. United Nations, 2019.

approach, where legal reforms are accompanied by public awareness campaigns, educational programs, and community engagement efforts to change societal attitudes toward early marriage.

Summary of Expanded Points

- Article 5(a) of CEDAW mandates states to address cultural practices, ensuring that traditions like child marriage do not perpetuate gender discrimination.

- General Recommendation No. 21 emphasizes that religious and cultural practices cannot justify violations of women's rights.

- General Recommendation No. 31 highlights that states must ensure that plural legal systems respect international human rights norms, prioritizing women's rights over customary or religious practices that allow harmful practices like child marriage.

- CEDAW's holistic approach requires both legal and structural reforms, including public education and community engagement, to effectively eliminate child marriage.

Utilizing International Human Rights Standards Against Child Marriage

The CRC and CEDAW establish international frameworks that must be used to address child marriage effectively. These instruments not only identify child marriage as a rights violation but also offer comprehensive guidelines for states to implement preventive measures and safeguard the rights of children and women.

a. **Education and Empowerment:** Education plays a significant role in preventing child marriage. Ensuring access to quality education, especially for girls, enables them to make informed decisions about their future. Educated girls are more inclined to delay marriage, pursue careers, and

contribute to their communities' socio-economic development. Educational initiatives must include campaigns that highlight the detrimental effects of child marriage, fostering a cultural shift that values girls' rights and potential.

b. **Community Engagement and Support:** Engaging communities is essential to changing the cultural norms that perpetuate child marriage. Programs that involve local leaders, parents, and youth in open discussions about the harmful effects of early marriage can significantly influence societal attitudes. Grassroots organizations working to promote children's rights and raise awareness in local communities should be supported as they are integral to creating lasting change.

c. **Legislative Reforms:** To ensure national laws align with international human rights standards, governments must commit to comprehensive legislative reforms that explicitly prohibit child marriage, enforceable through appropriate penalties. Moreover, marriage registration should be compulsory and minimum age laws must be clear and rigorously enforced to prevent violations.

d. **Monitoring and Accountability:** Effective monitoring systems are essential for the successful implementation of anti-child marriage laws. Governments must collect data on child marriage rates to assess the effectiveness of their policies and track progress over time. Partnerships with international organizations such as UNICEF and UNFPA can provide critical support in monitoring efforts and ensuring accountability. Addressing child marriage requires a comprehensive approach that includes education, community involvement, legislative action, and robust monitoring mechanisms. By adhering to the principles enshrined in the CRC and CEDAW, the Philippines and other nations can work toward the eradication of child marriage, ensuring that all children have the opportunity to grow, develop, and reach their full potential. Protecting children's rights is not just a moral

imperative—it is a necessary step toward achieving sustainable development and gender equality.

Harmonizing National Law with International Obligations

Following the discussion on international commitments, we turn now to a crucial internal conflict in Philippine law—the tension between RA 11596, which prohibits child marriage, and PD 1083, which permits it under certain conditions for Muslim communities. This section explores the delicate balance between upholding religious customs and ensuring child protection, a challenge at the heart of this issue.

Tension between National and Religious Laws

The Philippines' legal landscape reflects a deep respect for its diverse cultural and religious heritage. PD 1083 allows Muslim Filipinos to adhere to their religious customs, including the practice of child marriage, under specific circumstances. However, RA 11596 stands in direct opposition, criminalizing all forms of child marriage. This legal inconsistency creates a complex environment for child protection, as PD 1083 introduces exceptions that risk undermining the broader goals of RA 11596. More significantly, it hampers the government's ability to fully meet its international obligations under conventions like the CRC and CEDAW.

Lessons from Malaysia and Indonesia

To better understand how these tensions can be navigated, the experiences of Malaysia and Indonesia offer valuable insights. Like the Philippines, both countries grapple with balancing Islamic law and national obligations to protect human rights. In Malaysia, for example, child marriage remains permissible under Islamic family law, but mounting pressure for reform is pushing the nation toward aligning more closely with international human rights standards. Meanwhile,

Indonesia has raised its minimum marriage age yet continues to wrestle with exceptions rooted in religious customs.

The Philippines could take a similar path, drawing lessons from these neighbors as they reform child marriage laws while respecting religious traditions. Examining these countries' approaches reveals that legal reform must often be accompanied by community engagement to ensure long-term success.

Proposed Amendments to PD 1083

One way forward for the Philippines is to harmonize RA 11596 and PD 1083 through targeted amendments. Raising the minimum marriage age for Muslim Filipinos to 18, in line with RA 11596, could be the first step. However, narrowly defined exceptions might be necessary, subject to rigorous judicial scrutiny. The Shari'ah District Court could serve as the arbiter, determining whether any exceptions genuinely serve the minor's best interests, considering factors such as maturity and voluntary consent.

This approach would safeguard children's rights without entirely dismissing cultural traditions. Importantly, it would also align the Philippines more closely with its obligations under international human rights treaties. Complementary measures, such as education programs and community dialogues, would facilitate the cultural shift necessary for these changes to take root.

1. **International Findings and Best Practices:** We now shift from the legal framework to consider global strategies that have proven effective in addressing child marriage. Various international organizations, including UNICEF, UNFPA, and the UN Human Rights Council, have developed a range of best practices that the Philippines can adapt to its context.

2. **Empowering Girls:** Empowering girls through education and life skills training has emerged as one of the most powerful tools in combatting child

marriage. Take Nepal, for example. Its life skills programs, reaching over 57,000 girls, have given young women the confidence to delay marriage and assert their rights[78]. A similar approach could be implemented in the Philippines, particularly in Muslim-majority areas. Offering education and training programs would equip girls with the tools they need to pursue opportunities beyond early marriage.

3. **Community Engagement:** Deeply ingrained social norms often perpetuate child marriage, making community engagement critical[79]. Successful models from countries like India and Ethiopia show the importance of working closely with local communities to change attitudes toward early marriage (UNICEF, n.d.). In these cases, grassroots involvement has been vital in encouraging families to prioritize education over marriage for their daughters.

   For the Philippines, mobilizing barangay leaders, religious scholars, and other community influencers could be instrumental. These figures who are respected within their communities are well-positioned to advocate for girls' education and highlight the dangers of early marriage. By framing child protection within the context of communal well-being, such initiatives stand a better chance of success.

4. **Cultural Sensitivity:** Efforts to combat child marriage must always consider local customs and traditions. Countries such as Malaysia and Indonesia have made significant strides by involving religious scholars in reform. These scholars have been able to shape public discourse in ways that promote delaying marriage while aligning with Islamic principles of child welfare. The Philippines could take a similar approach, working with Muslim leaders to demonstrate how child protection and delaying marriage align with the

[78] UNFPA-UNICEF Global Programme to End Child Marriage. *Global Programme to End Child Marriage: Annual Report 2023*. United Nations Population Fund (UNFPA) and United Nations Children's Fund (UNICEF).
[79]

values of Islam. This culturally sensitive strategy could foster broader acceptance of reforms among Muslim communities.

5. **Legislative Reform:** Legislative changes are, of course, essential. Raising the legal marriage age to 18 is a necessary first step, but it must be coupled with mechanisms for enforcement. Equally important are justice and support systems for child marriage victims, ensuring that they have access to legal remedies, counseling, and rehabilitation services. UNICEF, for instance, emphasizes the need for robust enforcement alongside legislative change. Without enforcement, laws risk becoming mere symbolic gestures. The Philippines must ensure that its child protection laws are not just on the books but are fully operationalized to safeguard the rights of all children[80].

6. **Integrated Services:** Targeting the core causes of child marriage requires a comprehensive strategy. In Bangladesh, integrated services—including sexual and reproductive health care, social protection programs, and education—have been effective in reducing child marriage rates[81]. Poverty frequently forces families to marry off their daughters early and economic aid programs have proven to be a lifeline in such circumstances. (UNICEF, 2024). The Philippines could incorporate similar services into its programs, ensuring that girls in vulnerable communities receive the resources they need to avoid early marriage.

7. **Data and Research:** Reliable data is crucial for crafting effective policies and programs. Countries like Ethiopia, which have made great strides in reducing child marriage, have relied heavily on data to understand the practice's prevalence and drivers. Accurate data collection also helps to track the success of interventions and make necessary adjustments (UNICEF, 2024). For the Philippines, investing in research, particularly in Muslim-majority areas where child marriage is more common, would be

[80] *Supra.*
[81] *Ibid.*

vital to understanding the issue better and tailoring interventions accordingly.

8. **Adapting Best Practices to the Philippine Context:** While these global strategies provide a useful roadmap, they must be tailored to the unique cultural and religious landscape of the Philippines.

9. **Tailoring Programs to Local Contexts:** Programs designed to empower girls through education can easily be applied in the Philippines. However, community engagement techniques will need to be more culturally sensitive, particularly in Muslim-majority areas like the BARMM. Involving local religious leaders in designing and implementing these programs will ensure that they are seen as community-driven, not as external impositions, thereby increasing their acceptance and sustainability.

10. **Balancing Child Protection and Religious Traditions:** Protecting children's rights while respecting religious customs remains a central challenge. Indonesia's experience shows how collaboration with religious leaders can help bridge this divide. By fostering dialogue with Muslim leaders, the Philippines can seek a solution that respects Islamic traditions while ensuring that children's rights are safeguarded.

11. **Legal and Social Reforms:** Legal reforms alone are not enough—they must be supported by social services that address the deeper causes of child marriage. Raising the marriage age to 18, while necessary, must be paired with economic and educational opportunities for families and healthcare services for young brides. Learning from countries like Bangladesh, the Philippines can introduce economic and educational incentives to help reduce the incidence of child marriage.

CONCLUSION AND RECOMMENDATIONS

Harmonizing national laws with international obligations on child marriage presents a complex challenge for the Philippines where cultural and religious diversity is enshrined in the Constitution. While RA 11596 reflects the Philippines' commitment to international human rights standards, particularly CRC and CEDAW, PD 1083's provisions create room for child marriages to persist, particularly within culturally and religiously sensitive regions like the BARMM.

Drawing lessons from neighboring countries such as Malaysia and Indonesia, the Philippines can move toward a more consistent legal framework by engaging in legislative reforms, judicial oversight, and community-driven education initiatives. By amending RA 11596 and PD 1083 to reflect a unified stance on the minimum marriage age, supported by rehabilitative programs and targeted enforcement, the country can protect its most vulnerable citizens without compromising cultural and religious diversity.

The Honorable Supreme Court will play an essential role in resolving these legal tensions by interpreting how these laws interact, ensuring that children's welfare is prioritized without disregarding cultural or religious practices. Equally important is addressing the socio-economic conditions that contribute to the persistence of child marriage, such as poverty, limited access to education, and entrenched gender inequalities. Comprehensive rehabilitative programs for victims and offenders are essential to fostering compliance with national laws. Moreover, RA 11596 must be strengthened through amendments to include funding and support services provisions, ensuring that resource constraints do not hinder its implementation.

In conclusion, eradicating child marriage in the Philippines requires a multi-faceted approach that prioritizes legal reform, community engagement, and socio-economic support. Such efforts, when combined, can create a legal

environment where all children, regardless of cultural background, are afforded the right to health, education, and a future free from the burdens of early marriage.

Recommendations

To resolve the legal inconsistencies between RA 11596 and PD 1083 and ensure that child protection laws are applied consistently across the Philippines, the following legislative and policy reforms are recommended:

1. **Amend RA 11596 to Include Rehabilitative Programs:** The current framework focuses primarily on punitive measures without adequate rehabilitative programs for victims and offenders. Introducing rehabilitative services—such as counseling, education, and vocational training—will help reintegrate child marriage survivors into society and prevent re-offending.

2. **Amend PD 1083 to Raise the Minimum Marriage Age to 18:** Amendments should ensure that the minimum marriage age is uniformly set at 18 for all citizens, with narrowly defined exceptions subject to strict judicial oversight by Shari'ah courts. These exceptions should only be granted after thorough assessments by social workers, psychologists, and legal experts to ensure the marriage is in the minor's best interests.

3. **Implement Comprehensive Education Programs:** In collaboration with religious leaders and local governments, the state should develop community-based education campaigns that emphasize the harmful effects of child marriage. These programs should change societal attitudes while respecting cultural norms. Similar initiatives in Indonesia and Malaysia have shown success when cultural leaders are involved in advocating for legal reforms.

4. **Clarify Jurisdiction of Shari'ah Courts:** Clear judicial guidelines should be established to delineate the jurisdiction of Shari'ah courts in cases involving

minors. All marriages involving individuals under 18 should be subject to judicial review, ensuring exceptions to the minimum marriage age are granted sparingly and only under exceptional circumstances.

5. **Strengthen Enforcement Mechanisms:** RA 11596's enforcement should be enhanced through targeted training for law enforcement and judicial officers to ensure that child marriage cases are handled sensitively and effectively. Police, social workers, and local authorities should be trained to recognize and address child marriage cases while respecting cultural dynamics.

For a detailed explanation of these recommendations and proposed legislative amendments, please refer to the Recommendations for Harmonization section.

Recommendations for Harmonization

1. **Legislative Amendments**

Table 5: Amendment 1 (Contextual Adaptation Clause for Muslim Filipinos)

Proposed Provision	Explanation
"The minimum age for marriage for Muslim Filipinos shall be 18 years, in accordance with Republic Act No. 11596. However, exceptions may be considered for individuals who are 16 or 17 years old, provided that the marriage is deemed necessary by the Shari'ah District Court and that all conditions under Presidential Decree 1083 are strictly followed.	This amendment aligns the marriage age with the national standard while respecting Islamic traditions. It necessitates strict judicial oversight to prevent exploitation and should be preceded by consultations with cultural and human rights experts to ensure its practical applicability. A phased approach could involve transitional support mechanisms, such as

	educational programs and awareness campaigns, to mitigate the cultural impact of raising the marriage age.

Table 6: Amendment 2 (Transitional Provisions and Support Mechanisms)

Proposed Provision	Explanation
"*The government shall provide comprehensive education and awareness programs in Muslim-majority regions to explain the new legal standards and support communities during the transition. Additionally, social and economic support services shall be available to families affected by the new marriage age requirements.*"	This amendment ensures that the transition to new legal standards is smooth, with educational and support services for families impacted by the changes.

Table 7: Amendment 3 (Enhanced Judicial Oversight)

Proposed Provision	Explanation
"Any marriage involving individuals under the age of 18 in Muslim communities must receive approval from the Shari'ah District Court, which will ensure the marriage is in the best interest of the minor, considering factors such as maturity, education, and the ability to consent freely. A detailed report on the circumstances and the consent of the minor must be submitted before approval."	This amendment strengthens the judicial oversight process, requiring thorough assessment of each case to ensure that any marriage of minors is in their best interests as well as prevent exploitation.

Table 8: Amendment 4 (Continuous Support for Young Brides)

Proposed Provision	Explanation
"The State shall provide continuous support services for young brides, including access to education, health care, and legal assistance, especially in Muslim-majority areas."	RA 11596 and its IRR already address the need for continuous support services for young brides, including access to education, health care, and legal assistance. The law mandates the creation of an enabling social environment and the implementation of various support programs by the DSWD and other government agencies. However, the specific mention of "young brides" and the establishment of programs in "Muslim-majority areas" to address their unique needs is not explicitly stated. The law and its IRR focus broadly on children affected by child marriage without singling out young brides or specific regions. The proposed amendment would add specificity by explicitly mentioning continuous support for young brides and tailored programs for Muslim-majority areas. This could enhance the law's effectiveness in addressing the unique challenges faced by young brides in these communities.

2. **Dialogue and Consultation:** Engage Muslim leaders and communities in meaningful dialogue to ensure that legal changes are embraced and understood within their cultural and religious contexts.

3. **Legal Clarifications:** The Supreme Court should clarify how RA 11596 applies in Muslim-majority regions. Through landmark cases, the Court can address the legal conflicts between the two laws.

4. **Harmonization and Consistency Clause**

Table 9: Amendment 5 (Harmonization and Consistency Clause)

Proposed Provision	Explanation
"In cases of conflict between RA 11596 and PD 1083, efforts shall be made to harmonize the provisions to protect the rights of children while respecting the cultural and religious practices of Filipino Muslims."	This amendment requires the Department of Justice, National Commission on Muslim Filipinos (NCMF), and relevant stakeholders to work collaboratively to ensure that both laws are implemented consistently, while respecting human rights and cultural traditions. It addresses the lack of explicit provisions in RA 11596 and its IRR regarding harmonization with PD 1083 and aims to create guidelines that respect human rights and cultural traditions.

Key Differences:

Table 10: Key differences between RA 11596 and PD 1083

	RA 11596	*PD 1083*
Legal Stance on Child Marriage	Prohibits child marriage entirely and considers it void ab initio.	Allows child marriage under specific conditions within the Muslim community.
Penalties and Enforcement	Imposes strict penalties, including imprisonment and fines, for those involved in child marriages.	Does not impose penalties for child marriage but regulates it within the context of Muslim personal laws.
Scope and Application	Applies universally across the Philippines, regardless of religious or cultural background.	Applies specifically to the Muslim community, recognizing their religious and cultural practices.

Points of Conflict

Table 11: Points of conflict between RA 11596 and PD 1083

Points of Conflict	*RA 11596*	*PD 1083*
Minimum Age for Marriage	Sets the minimum age at 18 years without exception.	Permits marriage for girls as young as 12 (if puberty is attained), with a wali's approval.
Jurisdiction and Cultural Autonomy	Aims to establish a uniform legal standard across the country.	Upholds the cultural and religious autonomy of Filipino Muslims, allowing them to follow Islamic traditions.
Penalties and Enforcement	Imposes strict penalties for facilitating or officiating child marriages.	Provides legal recognition and procedures for marriages according to Muslim personal laws, including those involving minors.

BEYOND CLEAR BOUNDARIES: THE COMPLEXITY OF DISCERNMENT AS AN EXCEPTION TO CRIMINAL EXEMPTION

Shirley Jane F. Malaya

ABSTRACT

The Juvenile Justice Act of the Philippines or Republic Act No. 9344 (RA 9344) increased the age of criminal responsibility of children in-conflict with the law (CICL). Importantly, for minors between the ages 15 years old and 18 years old to be exempt from criminal liability, it must be proven that the minor acted with discernment during the commission of the alleged crime. Yet, despite the seemingly upfront definition, persistent issues and deficiencies within the system need resolution to substantiate the exception to the exemption known as discernment. By looking into psychological instruments and existing legislative and judicial frameworks, this research tested, *first*, whether the said assessment tools and frameworks effectively differentiate if an adolescent acted with discernment or not; *second*, the sufficiency of evidence required to qualify discernment over their acts during the alleged crime to an adolescent under trial; and *third*, the challenges faced by those that assess discernment among adolescents CICLs and those directly involved in addressing the issue. Employing a qualitative research design and the document analysis method, it is discovered that between minor children and young adults, the level of brain maturity directly affects an individual's behavior, thus, brain differences support the presumption that minors lack the intelligence to make them liable for their criminal acts as explained by their neurologic makeup. A finer definition of discernment is propounded, based on case laws adjudicated prior to the implementation of R.A. No. 9344, as a mental state manifested based on the behavior of the accused before, during, and after the

crime and even during trial. *CICL XXX v. People of the Philippines* provide guidelines for the bench and bar on how to appreciate evidence to show discernment and means to achieve some sort of consistency, rendering the CICL accountable for his acts. Finally, social workers, prosecutors, and law enforcement officers play role to initially identity whether a minor has acted with discernment. Their initial findings would determine the minor should be charged in court.

Keywords: *criminal responsibility, adolescent, minors, children in-conflict with the law*

INTRODUCTION

Article XV, Section 3 (2) of the 1987 Philippine Constitution enshrines, "The State shall defend the right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development." This provision reflects the state's commitment to caring for the young generation and minors.

Upholding this commitment, the Congress passed the highly regarded Republic Act No. 9344, also known as the Juvenile Justice and Welfare Act of 2006.[1] The law no longer allow minors of ages 15 years old to 18 years old to benefit from exemption from criminal liability by default, but depending on whether or not they acted with discernment at the time of the commission of the crime, they may be undergo treatment and rehabilitation. Since discernment is crucial in evaluating the extent of an individual's responsibility and culpability, the law ensures that persons who lack *full discernment* due to age are handled appropriately, while those who acted *with discernment* would be held liable but still treated with special care for their minority.

I. REVIEW OF RELATED LITERATURE

Discernment is broadly defined as distinguishing between good and wrong and understanding the consequences of one's acts. In *Criminal Law*, it pertains to a person's cognitive aptitude to differentiate between moral correctness and incorrectness and one's capability to comprehend the repercussions of their conduct. In light of R.A. 9344, discernment refers to a minor between 15 and 18 years old's competence to conceive the nature and implications of their conduct.[2] Thus, to Child in Conflict with the Law (CICLs), an adolescent may be tried for a

[1] An Act Establishing a Comprehensive Juvenile Justice and Welfare System, Creating the Juvenile Justice and Welfare Council Under the Department of Justice, Appropriating Funds Therefore and For Other Purposes, Republic Act No. 9344. (April 28, 2006), (Phil.).
[2] R.A. 9344. *supra* note 2.

crime if it is determined that are capable of making moral judgment calls when they committed the alleged crime.[3] These judgment calls elucidate a minor's ability to comprehend the consequences of their unlawful actions. Yet, on the part of the courts, this is without neglecting the surrounding circumstances in which the minor is involved.

An ongoing global discussion exists on the appropriate age of criminal culpability and the inclusion of discernment in legal processes. The United Nations Convention on the Rights of the Child (CRC), for one, promotes the safeguarding and remediation of minors, emphasizing the need to consider their cognitive and moral growth in judicial proceedings.[4]

In the Philippines, the Juvenile Justice and Welfare Act of 2006[5] provides *conditional exemption* for alleged CICLs. It amended paragraphs 2 and 3 of Article 12 of the Revised Penal Code on exempting circumstances, where persons under 9 years of age or those 9 years of age but below 15 years of age,[6] who are acting without discernment, are exempt from criminal responsibility. Now it provides that adolescent minors aged 15 years and below 18 years may be held criminally responsible if they acted with discernment while committing the criminal acts.

The underlying reason for the exempting circumstance before the amendment is the offender's total lack of understanding and freedom of action, a necessary component of a felony committed either by *culpa* or by *dolus*. The ability to judge the morality of human behavior and determine between a lawful and an illegal act is known as intelligence.[7] Thus, tools that assess the presence of discernment work to ascertain if the minor comprehends the essence and consequences of their acts, therefore affecting the legal remedies they may encounter.

[3] Sigue, Vicente A., and P. B. J. B. "Discernment: The Minds of Children in Conflict with the Law in Bacolod City." *Philippine Legal Research*, January 3, 2020. https://legalresearchph.com/2020/01/03/discernment-the-minds-of-children-in-conflict-with-the-law-in-bacolod-city/.
[4] "The Rights of a Child in Conflict with the Law." *UNICEF, 2007*. Accessed September 21, 2024. https://www.unicef.org/montenegro/media/7931/file/MNE-media-MNEpublication391.pdf.
[5] R.A. 9344. *supra* note 2.
[6] Revised Penal Code, Act No. 3815, as amended (Philippines).
[7] Jerwin Dorado v. People of the Philippines, G.R. No. 216671, October 3, 2016.

Research in the fields of psychology and development has shown that the ability to discern between right and wrong differs according to age and cognitive development. Evidence indicates that younger people, particularly teenagers, may not understand the long-term repercussions of their acts or completely grasp the ethical significance of specific activities.[8] Therefore, the legal system uses psychiatric or psychological evaluations and diversion programs to enhance treatment and programs for CICLs, considering their developmental levels instead of the regular penal sanctions imposed on adults.

Indeed, many previously condemned minors benefited from the passage of the law that increased the age of criminal liability. The law, however, has had equal difficulties in its implementation and interpretation, the provision on discernment being one. This has not escaped public scrutiny as various sectors drum support for the decrease in the age of criminal responsibility from 15 to 12 years. In fact, in 2019, separate bills were passed by the Philippine Senate and the Lower House aiming to amend the Juvenile Justice and Welfare Act by decreasing the minimum age of criminal responsibility (MACR).[9] The Philippine government has intended to resort to this action as a component of its broader strategy to combat crime, where minors have been seen to be involved in grave offenses. On the other hand, advocacy groups for children in the Philippines and abroad have strongly criticized this suggested modification as a breach of children's fundamental rights. Further contending that this strategy poses a significant threat to the lives of children, especially those who are already part of vulnerable communities.[10] Though the proposals did not become law, there is still a call for the lowering of the age of responsibility owing to the growing number of crimes involving minors.

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[8] Cauffman, Elizabeth, and Laurence Steinberg. "(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults." *Behavioral Sciences & the Law 18*, no. 6 (2000): 741–760. https://doi.org/10.1002/bsl.416.

[9] Staff, G. "Bill Lowering Age of Criminal Liability Up for House OK." *National Economic and Development Authority*, January 28, 2019. https://governance.neda.gov.ph/bill-lowering-age-of-criminal-liability-up-for-house-ok/.

[10] Alden, O. "How Much Responsibility Can We Give Twelve-Year-Olds? An Analysis of the Philippines' Proposed Lowering of the Minimum Age of Criminal Responsibility." *Children's Legal Rights Journal* 40, no. 1 (2020): 65. https://lawecommons.luc.edu/clrj/vol40/iss1/7.

The definition of discernment has been clear: it is when, how, and by whom it is determined that creates problems. The Supreme Court, in a very recent decision, has laid out guidelines in the determination of discernment; but whether this has sufficiently addressed the issues surrounding the task remains to be seen.

II. STATEMENT OF THE PROBLEM

This study examined how discernment is evaluated in criminal proceedings in the Philippines which enforces age-based exclusions from criminal liability to elucidate the intricate matter of assessing discernment in child offenders and enhance juvenile justice systems' efficacy and equity. It aims to answer the following questions:

1. What is the Medical and Psychological basis of the exemption of minors from criminal liability and the basis of discernment as an exception to the exemption?
2. What are the legal standards for determining the discernment of minors in conflict with the law set by the courts?
3. Who is initially tasked to determine discernment at the different stages of criminal prosecution when the offender is a minor, and what processes are followed by the persons or institutions accountable for making these decisions?
4. What are the accompanying problems and problematic areas of this procedure of determining discernment of children in conflict with the law in the criminal justice system of the Philippines?

Scope and Delimitation

By looking into juvenile criminal procedures in the Philippine legal framework, this study ascertained the judicial criteria used by courts in examining discernment by looking into methods and techniques for discernment and the

competence required of their authorized evaluators. Methods and techniques include psychological exams, behavioral assessments, and interviews, as with how they are interpreted affecting judicial decisions, and the obstacles and issues associated with these assessment methodologies including variations in their implementation. Competent organizations and persons accountable for these determinations include courts, psychologists, social workers, law enforcement, and prosecutors, along with their credentials are also presented. Gray areas in the absence of established rules for grading discernment was also ascertained.

The study looked into recent guidelines issued by the courts, executive issuances, and implementing rules and regulations by different interagency councils and how they affect the determination of discernment of minors in the initial stages before filing of the case, during the evaluation of the case before filing, and during trial.

This research is limited by its focus on the Philippine juvenile justice system and may not comprehensively reflect international practices or wider regional circumstances. It mostly depends on current case law, established legal frameworks, and recorded processes in the Philippines, thereby limiting the generalizability of conclusions to other legal systems. Furthermore, access to particular case facts concerning children is prevented by privacy legislation, thereby restricting the thoroughness of study in certain areas. The research will concentrate only on the discernment assessment process, excluding larger topics of crime prevention or rehabilitation involving minors.

METHODS

This research employed qualitative *research design,* specifically the *document analysis method* and *thematic analysis.* Bowen (2009) avers that document analysis involves skimming (superficial examination), reading (thorough examination), and interpretation. It involves aspects of content and thematic analysis. *Content analysis* is the process of organizing information into categories related to the problems of

this research. On the other hand, *thematic analysis* is a form of pattern recognition within the data gathered by tallying emerging themes becoming the categories for analysis (Fereday& Muir-Cochrane, 2006). This research involved the review of carefully chosen research papers and publications, court decisions, reference materials that cover the scope of this research inquiry.

RESULTS AND DISCUSSION

A. Scientific Explanation of the Exemption of Minors from Criminal Liability

To understand the importance of the determination of discernment, it is essential to examine the reason behind the exemption of minors from criminal liability and the basis for the exception to the exemption when they acted with discernment.

The Philippines is a signatory to the United Nations Convention on the Rights of the Child (CRC),[11] where arrest, detention, or imprisonment of a child as a form of punishment is only advocated as a last resort. Hence, the Philippines passed R.A. No. 9344 to comply with its obligations. But behind that, science has demonstrated that there is a psychological and neurological basis for this approach.

Recent discoveries in contemporary educational research, neuropsychology, sociology, and criminology indicate substantial disparities between children and adults in several dimensions, including cerebral development. It denotes a process of varying levels of morphological, physiological, and cognitive development of the brain towards maturity. Consequently, the level of cognitive advancement at

[11] *Supra* note 7.

each phase of the process is seen. Cognition attains its complete development in adulthood.[12]

The underdeveloped cognitive functions in children are shown in their behavior:[13]

1. **Impulse control:** Children have less impulse control. They are more excitable and would be less capable of controlling their emotions.

2. **Reward and motivation:** Science shows that when a child is engaged in rewarding behavior, a part of their brain is simultaneously activated. This activity in the brain is more observable in children than in adults.

3. **Emotional Response:** Laboratory studies showed that the control system of basic emotional responses like flight, fight, and desire are not fully mature in young people. That is, the subcortical area, where the reflexive emotional responses are controlled, is more sensitive and brings out intense responses, while the inhibitory anterior portions of the brain for inhibition are less active.

4. **Moral and social perception:** The part of the brain where the moral cognitive processes are still underdeveloped, affecting good behavior and moral reasoning. In effect, the decision to refrain from committing a crime is not the same as that of an adult.

The Philippine Pediatric Society, in opposing the lowering of the age of criminal liability, has succinctly summarized the scientific basis of giving exemption to minors from criminal liability in its statement. Its neuroscientific studies have shown that the brain does not achieve complete maturation until the

[12] Petoft A, Abbasi M, Zali A. Toward children's cognitive development from the perspective of neurolaw: implications of *Roper v Simmons*. Psychiatr Psychol Law. 2022 Feb 21;30(2):144-160. doi: 10.1080/13218719.2021.2003267. PMID: 36950188; PMCID: PMC10026748.
[13] *Id.*

age of 25. The prefrontal cortex of the frontal lobe, responsible for executive processes such as decision-making, planning, and impulse control, experiences significant growth only during adolescence. The growing and immature limbic system in this area facilitates emotional processing; nonetheless, emotions often remain untempered and uncontrolled due to the undeveloped frontal brain. Consequently, decision-making and judgment are often impaired. This indicates that children, although possessing age-appropriate intellect, may make erroneous judgments due to their tendency to act on impulse and emotions rather than rational reasoning. Consequently, children lack the capacity to autonomously regulate and manage their thoughts and emotions, particularly in intricate, stressful, and nuanced circumstances. Discernment on good and evil is not exclusively contingent upon a child's increased access to knowledge via media or the internet. Distinguishing between right and wrong requires intellectual, emotional, and psychological development. This is a significant challenge for minors who are still growing in several dimensions, with limited life experiences and, therefore, a restricted worldview to assimilate and implement their education.[14]

In the United States, a debate was triggered by decisions made by the Supreme Court. In a landmark case of 2005, abolishing the death penalty for minors on the grounds of the inherent immaturity of teenagers was considered a mitigating circumstance.[15] The decision relied on the *amicus curiae* from the American Psychological Association (APA) advocating the findings of developmental science showing the immature nature of the character of minors, hence the need to treat them differently from adults. This position was observed to be apparently in conflict with the position the APA took in an earlier case decided in 1990 on the right of adolescents to decide to terminate pregnancies without the consent of the parents. In its position paper, the APA argued that because adolescents had

[14]Philippine Pediatric Society. *Position Paper of the Philippine Pediatric Society on House Bill 002 or "The Minimum Age of Criminal Responsibility Act.*" n.d.
[15] Roper v. Simmons. 633 U.S., 2005

comparable decision-making skills as adults, there would be no need for adolescents to inform their parents if they decide on an abortion.[16]

Subsequent studies showed that the seeming flip-flop in the stand of the APA was actually based on scientific findings. There is a notable difference between adults and teenagers in their psychological development and their cognitive capacity. In a study, it was discovered that in psychosocial development, minors from 10-16 years of age were almost at the same level. However, comparing the psychosocial development of the age group of 16-17 to the 22 and above group, there was a significant difference. In contrast, when it came to cognitive capacity, there was a remarkable difference between the age group below 16 and the age group above 16. Comparing the age group of 16 to those above, there was no showing of difference in cognitive capacity. Hence, the conclusion is that the psychological development of minors is less mature compared to their cognitive abilities at the age of 16, which is comparable to that of adults.[17]

Following this logic, if a minor can cognitively process what is right and wrong and understand the consequences of his actions when he committed the offense, then the minor shall be held criminally liable for his actions. It is then important to look into how our laws and jurisprudence come to this conclusion when faced with a case.

B. Legal Standards on Discernment and its Determination.

Legal responsibility requires both psychological and physiological development for penal culpability to attach. Responsibility is contingent upon the degree of cognitive and psychosocial development, and ascribing these attributes to a juvenile may be subjective and contentious, even for those approaching full

[16] Steinberg, Laurence, Elizabeth Cauffman, Jennifer Woolard, Sandra Graham, and Marie Banich. "Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA 'Flip-Flop'." *American Psychologist 64,* no. 7 (2009): 583–594. https://doi.org/10.1037/a0014763.
[17] *Id.*

maturity. What then is the extent of responsibility that may be assigned in certain instances?[18]

Supreme Court decisions provide direction on the criteria for determining discernment, as well as the standards and criteria used by courts to evaluate a minor's discernment. Analyzing these instances reveal the important factors to be considered in assessing a child's criminal responsibility. These decisions often discuss the capacity of minors to understand the consequences of their actions, particularly in relation to the Revised Penal Code and the Juvenile Justice and Welfare Act.

In many cases, the Supreme Court has held that "discernment is the mental capacity of a minor to fully appreciate the consequences of his unlawful act.[19] Such capacity may be known and should be determined by considering all the facts and circumstances afforded by the records in each case."[20] These factors include the heinous nature of the offense and the minor's astuteness and craftiness.

In *People v. Hermi Jacinto*, a cunning and shrewd mind was appreciated when the accused chose a dark and isolated place to perpetrate the act and punched the victim to render her helpless.[21] The accused waited for the victim to be alone in the house and was enraged when he was confronted by the victim's friend about raping the victim; this is indicative of knowing that he had done something wrong.[22]

A minor excelling in his academics was found with discernment when the case was reviewed because of the evidence showing the acts he employed to prevent the discovery of his crime. In *Llave v. People of the Philippines*, even his acts after the

[18] Schiopu, Nicolae H. "Discernment Issues in Context of Juvenile Delinquency." *ideas.repec.org, 2020.* https://ideas.repec.org/p/smo/bpaper/005nh.html.
[19] People of the Philippines v. ZZZ, G.R. No. 228828, July 24, 2019.
[20] Madali v. People, G.R. No. 180380, August 4, 2009.
[21] People of the Philippines v. Hermi M. Jacinto, G.R. No. 182239, March 16, 2011.
[22] Robert Remindo y Siblawan v. People of the Philippines, G.R. No. 184874, October 2009. https://lawphil.net/judjuris/juri2009/oct2009/gr_184874_2009.html.

crime of fleeing the scene when he was discovered and finding refuge to prevent arrest are all indications of knowledge that he committed a wrong.[23] The ruling in *Llave* reiterated the earlier decision when the court found that the minor was not exempt from liability when it was shown that he was a 7th-grade pupil, one of the brightest in class, and the cadet corps captain. Likewise, in *People v. Doqueña*, the Supreme Court held that the minor's intelligence was observed when he was testifying during trial.[24]

The legal principle of intent contrasts with the concept of discernment. Emphasis should be given to the clarification that "intent" and "discernment" are two different ideas. Both are the result of an individual's mental processes. Still, intent speaks to the actor's desire, and discernment speaks to the moral value that the individual attributes to the performed act.[25] In other words, intent connotes the design or the determination to commit the crime, and discernment refers to the mental capacity to appreciate right from wrong. These two elements must be proven separately, and the finding of discernment must be explained in the court's decision.[26]

Intent pertains to the mental state of the individual. It refers to one's consciousness to bring about a specific result or outcome. Hence, an accused individual who is insane at the time of the alleged incident cannot possess criminal intent and cannot be held legally accountable for their actions. The absence of criminal intent is due to the illegal behavior being a consequence of a mental disorder. Section 6 of RA 9344 addresses the discernment of minors in-conflict with the law rather than their criminal intent. Children aged 15 to 18 years who are in conflict with the law and are legally considered to have behaved without discernment.[27]

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[23] Niel F. Llave v. People of the Philippines, G.R. No. 166040, April 2006. https://lawphil.net/judjuris/juri2006/apr2006/gr_166040_2006.html.
[24]People of the Philippines v. Valentine Doqueña, G.R. No. 46539, September 1939. https://lawphil.net/judjuris/juri1939/sep1939/gr_46539_1939.html.
[25] Sigue, *supra* note 3.
[26] Dorado, *supra* note 6.
[27]CICL XXX v. People of the Philippines, G.R. No. 238798, March 14, 2023.

Corollary to this is the concept of "premeditation," which may be consistent with discernment. The Supreme Court in *Doqueña* ruled against the argument of the defense that the state of mind of the minor during the commission of the offense and the time he had to meditate on the consequences of his act were not constitutive of discernment but of premeditation, which is not the same.[28] Premeditation could indicate discernment.

In the case of children between the ages of above 15 and 18, it has been established that there is no presumption of discernment. The only time criminal culpability will be attached is when it can be shown that they have acted with judgment. As a result, minority functions as an exemption from the criminal culpability that attaches when an individual commits a crime via *dolo* or *culpa*.[29] The burden of proof is with the prosecution, which must demonstrate that the child acted with discernment beyond any reasonable doubt to remove the presumption accorded to the minor.

Consequently, the case must fail when the prosecution fails to present evidence that the accused minor acted with discernment. His presence at the crime scene and evidence of his alleged participation are insufficient to prove discernment.[30] In the case of *CICL XXX v. People of the Philippines and Glenn Redoquerio,* when the CICL took part in an assault that left the victim with severe wounds, the Supreme Court ruled that there was insufficient evidence to prove that the CICL XXX acted with discernment because conspiracy does not by itself indicate discernment. In another case, the prosecution was deemed to have failed to prove discernment during the cross-examination of the minor when the questions asked were geared

[28] Doqueña, *supra* note 24.
[29] Doqueña, *supra* note 24.
[30] People of the Philippines v. Ruben Estepano, Rodney Estepano, and Rene Estepano, G.R. No. 126283, May 28, 1999.

to prove his participation. Further, the decision of the trial court did not discuss how discernment was appreciated; hence, the earlier conviction was reversed.[31]

In laying down the latest guideline in the determination of the culpability of a minor, the Supreme Court in *CICL XXX*[32] ratiocinated that society has sought to instill the notion of right and wrong from the individual's earliest awareness. As a result, adults strive to adhere to laws and regulations based on the understanding that compliance is appropriate and just, while defiance is improper and penalized. In contrast, minors, with their malleable and developing cognitive abilities, may not possess the same degree of understanding of the concept of right and evil.[33] Therefore, there is a need to develop the system continuously to address minor offenders' culpability properly.

In affirming the conviction of the accused minor, the court denied the defense that discernment was not sufficiently alleged in the information, saying that the failure of the accused to raise the issue at the earliest possible time constituted a waiver of the same. The court, in effect, declared that the lack of allegation that the minor acted with discernment is a defect in form and could be appreciated when proven during trial. This stand taken by the majority was questioned by those who have written their dissent. Further, the lack of discussion on the finding of discernment in the trial court's decision was asserted to have been cured on appeal where the Court of Appeals (CA) laid down the basis of the finding of discernment.[34]

Exercising its power to provide guidance and consistency in treating cases involving minor offenders, the court streamlined the guidelines[35] to be followed by the bench and bar:

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[31]CICL XXX v. People of the Philippines and Glenn Redoquerio, G.R. No. 237334. https://lawphil.net/judjuris/juri2019/aug2019/gr_237334_2019.html.
[32] CICL XXX v. People of the Philippines, G.R. No. 238798, March 14, 2023.
[33] *Id*.
[34] *Id.*
[35] *Id.*

First, the definition of discernment is the capacity of the child to differentiate right from wrong and know the consequences of his actions. This state should be apparent at the time of the commission of the offense.

The second guideline is on who determines discernment and how. A social worker initially conducts the determination of discernment and the final determination is left to the court. The assessment will evaluate the youth's capacity to comprehend the moral and psychological aspects of criminal culpability, the ramifications of the unlawful act, and the extent to which a youngster may be deemed accountable for inherently antisocial conduct. The social worker's evaluation is purely evidentiary and not binding on the court. Ultimately, the court should decide based on evaluating each case's facts and circumstances.

Third, the court clarified who has the burden of proof to prove discernment. A minor is presumed to act without discernment. The prosecution must demonstrate as an independent factor that the purported offense was executed with discernment. To establish criminal liability for a youngster, the prosecution must prove beyond reasonable doubt, by direct or circumstantial evidence, that the individual acted with discernment.

Last is the guideline on how the courts would evaluate the evidence to conclude whether the CICL acted with discernment to be held accountable. In assessing discernment, courts shall evaluate the entirety of facts and circumstances in each case, including: (i) the minor's demeanor, attitude, and behavior before, during, and after the act, as well as during the trial; (ii) the heinous nature of the crime; (iii) the minor's cunning and astuteness; (iv) the minor's statements; (v) the minor's actions before, during, and after the crime; (vi) the type of weapon employed; (vii) the minor's efforts to intimidate a witness; and (viii) the concealment of evidence or the *corpus delicti.*

The majority in *CICL XXX* concluded that the accused acted with discernment based on the totality of the facts and circumstances. First, the gruesome nature of the attack, which happened at dawn by the accused and an unidentified companion, left the victim with bloodied eyes, massive cerebral contusions, and several abrasions. All these led to the victim becoming brain-dead until his demise five years later. Second, cunning and shrewdness are shown by the time of the attack, taking a companion with him and escaping before being caught. Third, the motive of silencing the victim from testifying against him regarding a separate mauling incident involving the accused. Fourth, the accused showed he understood that what he did was wrong when he quit school and left for his hometown when told there would be possible retaliation against him. He also verbalized that he did wrong.[36]

In the dissenting opinion[37] of Senior Associate Justice Leonen, he maintains that the prosecution failed to prove discernment as a separate fact from the other elements of the crime; and unfortunately, though the guidelines are laudable, they were not applied in the same case. He points out that the decision of the trial court failed to discuss the determination on discernment, and the CA merely made a general conclusion of discernment because the attack was at the victim's house and with a companion. The acts that were appreciated by the majority as indicative of discernment were, according to him, not showing an understanding of right from wrong. He also found a biased and unjust conclusion that the petitioner, then a second-year nursing student, had a level of education that would equate to his capacity to discern. [38]

If these arguments and counterarguments are to be read in conjunction with the rules that the court has established, it would seem that the court's obligation to evaluate whether there is sufficient evidence to overturn the assumption that a teenager acts without discernment is still quite subjective. It would be interesting

[36] *Id.*
[37] CICL XXX v. People of the Philippines, G.R. No. 238798 (2023) (SAJ Leonen, dissenting opinion).
[38] CICL XXX, *supra* note 32.

to see how the jurisprudence on this matter would evolve and how the court's decisions would affect not only the final determination by the court but also the initial determination of discernment.

C. Initial Determination of Discernment

a. The Social Worker

Before the case is presented in court for the admission of evidence to establish the potential culpability of a Child in Conflict with the Law (CICL), both the case and the child must undergo administrative procedures before law enforcement, the Local Social Work Office (LSWO), and the prosecutor's office.

The law and jurisprudence have required that discernment be determined, alleged, and proved during trial for the child between above 15 and below 18 year old children for them to be held criminally liable. The responsibility is placed in the hands of social workers who can determine discernment at the initial stages. The prosecution is burdened to prove through evidence; ultimately, the judge makes the final determination based on the evidence presented.[39]

The role of the Social Worker, whether with the Department of Social Work and Development (DSWD) or the LSWO, has been expanded with the passage of R.A. No. 9344. This has been reiterated in the Revised Implementing Rules and Regulations of RA 9344, as amended by R.A. No. 10630 (RIRR).

Law enforcers are tasked to turn over the minor within eight (8) hours of being taken into custody to the Social Worker with notice to the guardian or parents.[40] The Social Worker who receives a child between the ages of above 15 and below 18 years of age is required to make a preliminary assessment of the CICL as to whether they acted with discernment. The Local Social Welfare and Development

[39] *Id.*

[40] R.A. 9344, *supra* note 2. Section 21, paragraph (i), Title V,.

Officer (LSWDO) will review the child's records in accordance with the rules and prepare a report indicating an assessment of the child's discernment within seven working days.[41] The LSWDO report outlines the rationale for determining whether the child acted with discernment and depending on the social worker's findings, the law officer then forwards the child's case for intervention, diversion, or preliminary investigation/inquest.

The discernment assessment tools, created by the DSWD, will be utilized by the LSWDO to evaluate discernment.[42] The Level of Moral Development (LMD) and the Index of Value Judgment (Index) are different tools for this purpose. The LMD consists of open-ended questions in an interview. The social worker then records the child's answers and scores later. The Index is a set of items of day-to-day practices or situations where the child will answer whether these are right or wrong. These tools have been tested for readability and validity. [43]

Additional background information is taken to construct a full picture of the elements impacting the minor's life.

When the findings are that there was no discernment, the child shall undergo intervention proceedings as those who are deemed exempt from criminal liability. In cases of CICL found to have acted with discernment, the next step would depend on the crime charged. If the offense is punishable by six (6) years imprisonment or below, the child shall undergo diversion proceedings before the law enforcers, the barangay, or the prosecutor. If the charge is punishable by imprisonment of more than six (6) years, the case shall be brought to the prosecutor's office for further legal proceedings. If the case is filed, diversion proceedings shall be done by the courts.

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[41] Rule 38b, Revised Implementing Rules and Regulations of RA 9344 as amended by RA 10630 (RIRR), (August 14, 2014).
[42] *Id*., Rule 38c.
[43]Cabral, E. I., A. R. Bala, and Department of Social Welfare and Development. *Self-Instructional Manual on Assessing Discernment: A Manual for Social Workers on Assessing Discernment of Children in Conflict with the Law.* n.d.

This highlights the importance of the findings of the LSWDO because its findings become the deciding factor on whether or not the case is to be filed. Though the examination to test discernment carried out is objective and the evaluation of the answers is guided, it is conceivable that the person who was offended or the person who filed the complaint would disagree with the conclusions of the social worker. A review or re-examination using the same tools would not give out a different result. Therefore, an appeal to the same department would not be of use. The rules did not include specifics about the process of appealing the initial determination of the absence or existence of discernment. The Manual for Prosecutors on Handling CICL, however, does provide information regarding the method and how to proceed.

b. The Prosecutor

The prosecutor's role in determining discernment is a gray area that needs to be addressed, given the requirements of the law that the prosecution is burdened to allege and prove discernment as a separate fact. The rules issued by the Supreme Court and the Juvenile Justice Council are all silent as to the role of the prosecution in the initial determination of discernment.

In the recently issued RIRR of R.A. No. 9344, as amended and the 2019 Revised Rules of Procedure on CICL[44], the Prosecutor's role in the initial determination has been omitted. A similar provision from the old Implementing Rules, providing that if the offended party wants to contest an assessment of absence of discernment, this may be raised in an appropriate case before the prosecutor,[45] was not replicated.

The initial assessment of discernment is rightly given to the expertise of the social workers of the LSWDO so as not to subject the minors to unnecessary

[44] Supreme Court of the Philippines. *A.M. No. 02-1-18-SC*, Section 1. 2019.
[45] Juvenile Justice and Welfare Council. Rules and Regulations Implementing Republic Act No. 9344, Rule 34f. Council Resolution No. 4, Series 2006.

trauma that may further affect his growth and development. However, there is a gap in the law as to where any party shall contest the determination of "no discernment." The removal of the provisions in the RIRR and the rules would now leave the victims of crimes committed by minors without a clear venue to question the finding of "no discernment" by the LSWDO. Further, it is unclear if the removal from the RIRR and rules is inadvertent or intended.

If the internal documents within the DOJ, particularly the Prosecutor's Manual on Handling Cases Involving CICL issued in 2021, would be used to cover the seeming gap, then the prosecutor could decide on appeal and also, in certain cases, determine discernment of the CICL.[46]

During the inquest, when the Law Enforcement Officer (LEO) file with the Prosecutor's office a case involving a minor without any discernment report from the LSWDO, the prosecutor shall dismiss the case and turn over the CICL to the LSWDO for the determination of discernment then either for diversion or intervention, whichever is applicable. In cases where the charge is punishable by not more than six (6) years but where diversion is inapplicable, or no diversion contract is agreed upon, or where there is a violation of such contract by the child or his guardians, the complaint may be refiled before the prosecutor's office and shall undergo the inquest or preliminary investigation.[47]

In cases where the charge is punishable by more than six years after the LSWDO finds that the CICL acted with discernment, the inquest proceeding shall proceed within 24 hours from receipt of the report.[48] If, however, the discernment report shows that the CICL acted without discernment, copies of the report are given to the LEO and the complainant. In the meantime, the CICL shall remain in the custody of the LSWDO for five days if the offended party or the complainant

[46] Department of Justice. *Prosecutor's Manual on Handling Child Related Cases*, Department Circular 47. September 24, 2007.
[47] Department of Justice. *Prosecutor's Manual on Handling Cases Involving Children in Conflict With the Law*, Section 61, par. c. 2021.
[48] *Id.*, Section 61, par. d.

does not contest the finding of absence of discernment.[49] In any event, the complainant or the offended party is given 15 days from receipt of the findings of absence of discernment to file an action or an appeal with the prosecutor's office questioning the findings. Automatic appeal to the prosecutor shall operate if the findings of the LSWDO is "no discernment" when the charge is punishable by *reclusion perpetua*. The LEO shall be responsible in forwarding the records of the case in this situation.[50] If no appeal was made in the 15 day period or the case is not covered by automatic appeal, the LEO shall dismiss the case and the LSWDO shall release the child subject to an intervention program. [51]

In cases of appeal, the prosecutor shall follow the following procedure to determine discernment:

1. To facilitate this evaluation, the prosecutor should mandate that the LEO provide the case documents and hold a clarificatory hearing, allowing the prosecutor to personally evaluate the CICL.
2. If the prosecutor finds it necessary, he or she may, at his or her discretion, request the LSWDO to provide a copy of the case study on the child, if available, or the records of the LSWDO's examination of the child, which support its conclusion regarding the child's lack of discernment.
3. If the child is deemed exempt from criminal liability, the prosecutor shall dismiss the case and order the child's release and the intervention conducted by the LSWDO.
4. If the child should be held liable by virtue of his discernment, the prosecutor shall conduct the inquest proceedings or preliminary investigation if opted to by the CICL.

As the prevailing laws would show, a case involving a CICL shall only reach the prosecutor's office for preliminary investigation if diversion is not applicable or

[49] *Id.,* Section 61, par. f.
[50] *Id.,* Section 61, par. g.
[51] *Id.,* Section 61, par. h.

when it is, but it failed. These situations include when the child is not qualified for diversion when the parties do not agree to diversion, or in other circumstances, the prosecutor deems diversion inappropriate.[52] Before the conduct of preliminary investigation, though, it is required that a certification from the barangay, police, or the LSWDO showing the circumstances stated.[53] The Manual requires a specially-trained prosecutor to handle these cases involving minors; but not all prosecution offices have such personnel. Then, the Prosecutor must file the Information against the child before the Family Court within 45 days from the start of the Preliminary Investigation if there is a finding of probable cause. The Information must allege that the child acted with discernment, which shall be based on the conclusions of the LSWDO.[54]

Cursory reading would show that the proceedings are pretty straightforward from the time the records are brought to the prosecutor with the discernment report showing discernment and the certification that diversion was not successful. However, with the strict guidelines that the court has issued on the twin requirement of allegation and proof of discernment by the prosecution to sustain a conviction, the question arises as to whether it is sufficient to rely on merely the report from the LSWDO. Would it not cause undue harm to the CICL if the case would be filed based on the report but is apparently clear that there is no credible and admissible evidence required by law to prove this?

c. Filing of the case in court

In filing an Information in court, the Rules of Court only require the bare minimum of probable cause.[55] Probable cause is defined as the "existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was

[52] Rule 57, RIRR.
[53] DOJ Manual, *supra* note 41, Section 6w, par. a (3)
[54] RIRR, *supra* Rule 60.
[55] 1997 Revised Rules of Court as amended, (Phil), Section 4, Rule 112.

guilty of the crime for which he was prosecuted."[56] To comply with the law's requirement, it would be enough for the prosecution to rely on the certification issued by the LSWDO that the CICL acted with discernment to file the case. The report is, however, considered merely evidentiary and not conclusive proof during trial.

A recent series of DOJ Circulars have directed the prosecutors to file the Information in court when there is prima facie evidence with reasonable certainty of conviction. Department Circular 16, issued on February 24, 2023, introduced the concept of prima facie case and reasonable certainty of conviction as a quantum of evidence, albeit only in cases cognizable by the Municipal Trial Courts, Municipal Trial Courts, Municipal Trial Court in Cities and Metropolitan Trial Courts.[57] Department Circular 15, dated July 16, 2024 and took effect 15 days after its publication, outlines the Rules on Preliminary Investigation and Inquest Proceedings. This Circular intends to include internal rules for the Department in the exercise of its executive function of investigating and prosecuting crimes.

The quantum of evidence required under the circular in both inquest proceedings and preliminary investigations is prima facie evidence with reasonable certainty of conviction, particularly in cases that are punishable by more than six (6) years imprisonment. It defines prima facie evidence as the amount of evidence that is enough on its own. Without any controverting evidence, it is sufficient to establish the element of the offense; hence, would warrant a conviction beyond reasonable doubt. The prosecutor should also believe that the evidence is admissible, credible, capable of being preserved, and when presented, shall establish the elements of the offense, including the identity of the accused. In coming up with a decision on whether there is reasonable certainty of conviction, the respondent's evidence should also be evaluated by the prosecutor.[58] Hence,

[56]Heirs of the Late Nestor Trio v. Atty. Epifania Obias, G.R. No. 175887, November 2, 2011.
[57] Department of Justice, Guidelines in the Implementation of D.C. 008 and 008-A, s. 2024, on the Assessment of Pending Criminal Cases for Offenses Cognizable by the Municipal Trial Courts, Municipal Trial Court in Cities and Metropolitan Trial Courts, Section 2, (Department Circular: 16), (Phil0, (24, February, 2023).
[58] *Rules on Preliminary Investigations and Inquest Proceedings*, Section 5. Department Circular 15 (Philippines), July 16, 2024.

there is a need for preliminary evaluation on the part of the prosecutor to determine whether there was discernment during the preliminary investigation stage. Though the social worker's determination is evidence to prove the point, the prosecutor, before filing the case, should be allowed to make his or her own determination with deference to the social worker's assessment.

With the increase in the quantum of evidence required before prosecutors can file a case, would the report of the LSWDO that the minor acted with discernment be enough to support prima facie evidence with reasonable certainty of conviction and to hold the minor liable after trial? It is also provided that upon the filing of the information, the prosecutor shall certify, among others, under oath, that there is prima facie evidence with reasonable certainty of convicts of the accused when the case is tried in court based on the available evidence and the presence of testimonial, real or object, and documentary evidence on hand.[59]

In the case where the evidence on hand could prove all other elements of the offense, the prosecutor, with the findings of the LSWDO that the CICL acted with discernment, is ordinarily expected to file the case in court. Once filed, under the Circulars, the prosecutor would, in effect, say that the CICL acted with discernment but based this conclusion only on the findings of the LSWDO and would have to declare this under oath. The only way a prosecutor would be confident to declare under oath that there is prima facie evidence that the CICL acted with discernment is if the office is allowed to determine discernment and use only the findings of the LSWDO as additional evidence.

To be sure, the courts have yet to base their decision to find a CICL liable for an offense solely on the findings of the LSWDO that the minor acted with discernment. In fact, the courts have heavily relied on the evidence, mostly testimonies of witnesses, as to the deportment of the accused before, during, and

[59] *Id.,* Section 15.

after the crime, and even during the trial to conclude whether or not the CICL acted with discernment.

In the dissent of Justice Kho in the *CICL XXX*[60] case, he stated that there was a failure of the prosecution to allege as well as prove that the minor acted with discernment and that the trial court did not actively determine the presence of discernment; hence, the CICL should be acquitted. He points out that the Senate deliberations on the law instruct the prosecution to prove discernment as a separate and specific circumstance. The twin requirement of allegation and proof should be present for the court to appreciate the exception to the exempting circumstance. This goes into the accused's constitutional right to be informed, which could not be waived.[61]

In the case of *People v. Solar,* the accused was convicted of murder by the Regional Trial Court (RTC). The CA affirmed the conviction but downgraded the offense from murder to homicide due to insufficient characterization of the aggravating circumstance of treachery in the Information. The Supreme Court reversed the decision, re-establishing the conviction of Rolando for murder. The Court also laid down guidelines for properly alleging qualifying or aggravating circumstances in criminal complaints to ensure that the accused is sufficiently informed of the cause of the accusation against him. The Supreme Court stated that if an information alleges circumstances that may increase the penalty, the ultimate facts relative to such circumstances must be stated. If the information does not, it may be subject to a motion to quash or a motion for a bill of particulars. However, failure on the part of the defense to avail of these remedies shall be considered a waiver of their right. Alternatively, the prosecutor may sufficiently aver the ultimate fact by referencing the pertinent portions of the resolution finding probable cause.[62]

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[60] CICL XXX v. People of the Philippines, G.R. No. 238798, March 14, 2023. (J. Kho, Concurring and Dissenting Opinion), lawphil.net/judjuris/juri2023/mar2023/gr_238798_2023.html.
[61] CICL XXX v. People of the Philippines, G.R. No. 238798, March 14, 2023. (Concurring and Dissenting Opinion: Justice Antonio T. Kho, Jr), lawphil.net/judjuris/juri2023/mar2023/gr_238798_2023.html.
[62] People of the Philippines v. Rolando Solar, G.R. No. 225595, August 6, 2019.

As a result, it is necessarily inferred that the information should include both an assertion of discernment and an enumeration of the final facts that demonstrate discernment, although the latter condition may be waived. To defend the conclusions in the resolution and the information, the prosecutors need to be able delve further into the child's discernment. This is especially important when the findings are questioned in a motion to quash or a bill of particulars.

The Supreme Court sets strict rules on allegation and proof in this aspect, hence the need to address specific gaps in the regulations for the effective delivery of justice not only for the accused but also for the victims and the state in cases of victimless crimes.

How to determine discernment when the respondent is of age at the time of initial contact?

Clearly, the applicability of the rules on CICL is limited to those below 18 years of age who are accused of having committed a crime in the Philippines. It has no application when the child has reached the age of 18 at the time of initial contact nor to those who are considered "children at risk".[63] Initial contact is defined as the time when the CICL is taken into custody by a LEO or receives a subpoena or summons from the prosecutor for purposes of preliminary investigation or other proceedings.[64] By virtue of the consideration of the environment the child is exposed in, a child classified as a "child at risk" is not charged but dealt with in accordance with law.[65]

This definition and limitation creates a problem when the respondent is already of age at the time of initial contact. When the crime was committed while the respondent was a minor, he shall not be treated as a minor for purposes of

[63] Supreme Court of the Philippines. *A.M. No. 02-1-18-SC*, Section 1. 2019.
[64] *Id*., Section 4(s).
[65] *Id*., Section 4(g).

preliminary investigation, but the information to be filed against him would need to allege that he was a minor and acted with discernment. Considering that the individual is not covered by RA 9344, the LSWDO would refuse to conduct a preliminary assessment of discernment. The prosecutor now would need to evaluate if there is enough evidence to prove the elements of the offense and that the respondent acted with discernment on his own with nary the guidance of the tools available to social workers and relying mainly on the jurisprudence of what the courts have considered acts constituting discernment.

Prosecutors are left with the sword of Damocles hanging over their heads as a result of the change in the policy of the Department of Justice on the quantum of evidence on hand at the filing of cases in connection to the rules of evidence established by the court regarding discernment and the limitation imposed by executive and judicial issuances on the matter.

CONCLUSION AND RECOMMENDATIONS

In fine, discernment is the minor's capacity to comprehend the nature and repercussions of their conduct, and is crucial in evaluating whether the CICL should be held liable for their actions.

The task of assessing discernment in juvenile offenders is, therefore, crucial if justice is to be achieved. There are considerable difficulties in assessing discernment across the pillars of the criminal justice system. Though standards have been set and guidelines laid out to assist those who need to do the task, there are still problems and loopholes in the system that would need to be addressed to be able to give meaning to the exception to the exemption we call discernment.

Exempting minors from criminal responsibility is based on scientific evidence. Professional groups in both the medical and behavioral sciences strongly supported this due to the understanding that children below 18 years of age are still in the developmental stage of their brains and their psychological makeup.

Emphasis is given to the development of the prefrontal cortex, which is responsible for reasoning, impulse control, and understanding the consequences of their actions. This part of the brain fully develops only in the individual's mid-20s. Behavioral scientists would also argue that the emotional responses of minors are described as impulsive, rebellious, and always seeking approval.

Though there have been criticisms about the stand of professional psychologist groups as to the level of maturity of minors depending on the issues, this has been scientifically explained. A person's cognitive development is developed when one reaches 16 years, while psycho-social development is not achieved after 18 years.

The Supreme Court has decided several cases after the passage of R.A. No. 9344 and have ruled that the law has retroactive effect, thus benefiting the accused who have committed an offense during their teenage years. For uniformity, the court has issued guidelines for the bench and bar in the appreciation of discernment, making a CICL liable for his actions:

First, the definition of discernment was reiterated and should be apparent at the time of the commission of the offense.

The second guideline is on who determines discernment and how. The determination of discernment is first conducted by a social worker and then by the court. The social worker's evaluation is purely evidential and not binding for the court. Ultimately, the court decides based on evaluating each case's facts and circumstances. The focus of the evaluation would be the capacity of the CICL to understand the moral and psychological effects of his acts.

Thirdly, the court clarified that the burden of proof to prove discernment is on the prosecution with separate and conclusive evidence.

Last is the guideline on how the courts would evaluate the evidence to conclude whether the CICL acted with discernment to be held accountable. In

assessing discernment, courts shall evaluate the entirety of facts and circumstances in each case.

Even with the guideline, the Justices of the Supreme Court failed to unanimously appreciate the evidence presented as indicative of discernment. Dissenters claimed that the acts were not indicative of discernment but only of intent. The majority also agreed that though discernment had to be alleged, the failure of the defense to timely object constituted a waiver of the right to question. This was opposed by some of the Justices who raised that aggravating and qualifying aggravating circumstances had to be alleged and proven to be appreciated by the court.

If this is an indication of the decisions of the court in the years to come on how the courts will be admitting evidence as separate and direct evidence of discernment, it is expected that seeming contradictions would arise.

The Social Worker conducts the initial determination of discernment with the use of tools designed for the purpose. The LSWDO shall then issue a report of their findings within seven days from the time custody of the CICL is turned over to them. A copy of the finding of no discernment shall be provided to the complainant or the offended party so they can contest the same before the prosecutor.

Here, a problem arises as to whether the internal rules of the DOJ as to how the appeal from the finding of acting without discernment would be considered proper. It was observed that the court decisions, Supreme Court Rules, and recent implementing rules have removed the provisions of the appeal to prosecutor from the rules. It is unclear if it is intentional, thus removing from the office of the prosecutor such task or whether the omission is because it is a matter best left to the National Prosecution Service to promulgate their own rules. Nonetheless, the Manual for Prosecutors gives detailed guides on determining discernment on appeal and during inquest or preliminary investigation when required. However,

despite requiring a specially trained prosecutor to handle the investigation, not all offices have trained prosecutors to handle cases involving minors.

In the review of the laws and rules governing discernment, it became evident that there is a gap that the prosecution needs to fill in again. In the case of respondents who are of age at the time of initial contact, initial contact means the time when the CICL is taken into custody by a LEO or receives a subpoena or summons from the prosecutor for purposes of preliminary investigation or other proceeding. Since the LSWDO do not conduct the discernment examination on adults, they could not issue any report. Again, the Manual for Prosecutors directs the prosecutor to conduct the evaluation of discernment for purposes of filing the case.

The various Department Circulars of the DOJ recently raised the quantum of evidence required for filing certain cases. With this, the prosecutors are left in a quandary whether the report from the LSWDO showing the CICL acted with discernment is enough to support the element of discernment if the case involves a minor. The limitation of the law is that when the CICL has already reached the age of minority, the rule on determination of discernment does not apply. Nevertheless, the fact that the acts were committed with discernment would need to be alleged, the evaluation would be done by the prosecutor. There is no guidance though how this would be done objectively to prevent abuse on the part of the prosecutor.

If the circulars and the decisions of the courts as to the required evidence are to be met for filing the case and for conviction, then the prosecutors need to be allowed to determine the evidence to support discernment from the case's inception but the mandate has to be clear and the procedures streamlined.

Recommendations

Based on the examination of the laws and rules governing the determination of discernment, the following recommendations are proposed to ensure a more just and effective juvenile justice system:

1. The National Prosecution Service should have its mandate strengthened and recognized so that it may conduct its role in deciding discernment in cooperation with social work agencies without fear of reprisal from aggrieved parties.

2. To assist the legal community in comprehending the actions of a minor in relation to their mental and psychological maturity, it is necessary to strengthen the role of social workers and other behavioral science experts in the determination of discernment. Their participation should not only be in the initial phases of the case but also be able to be consulted throughout the entirety of the case as experts in their fields.

3. Guidelines should be laid out to ensure that prosecutors in the conduct of their function in the determination of discernment and the filing of cases are uniform to prevent abuse.

4. Providing social workers, law enforcement, prosecutors, and judges of family courts with the ability to better comprehend the behavior of adolescents via the use of seminars specifically designed to do so.

INTERGENERATIONAL EQUITY IN INTERNATIONAL LAW: WHY IT MATTERS IN PHILIPPINE ENVIRONMENTAL LAW

Jansen T. Nacar

ABSTRACT

This study examines the doctrine of intergenerational equity, its incorporation into international and Philippine environmental law, and its critical role in safeguarding the environment for future generations. Tracing its judicial adoption in the landmark Philippine case *Oposa v. Factoran,* the paper analyzes subsequent jurisprudence, international legal instruments, and critiques against the doctrine. Despite opposition grounded in concerns about the representational rights of future generations and the uncertainty of future preferences, this research argues that intergenerational equity remains a vital framework for environmental governance. The study emphasizes the moral and legal imperative of the present generation to preserve natural resources and ecological balance, ensuring that fundamental human needs such as air, water and food, remain accessible to posterity. It concludes with a strong recommendation to retain and reinforce the doctrine within the Philippine legal system, aligning it with international developments and sustainable development goals.

Keywords: *Intergenerational Equity, Environmental Law, Sustainable Development*

INTRODUCTION

I. BACKGROUND OF THE STUDY

This paper is an attempt to answer whether the social science concept of intergenerational equity as borrowed and espoused judicially in *Oposa vs. Factoran*[1] be retained in the institutions that recognize its significance in taking the proper attitude to all life. In 1993, the Philippine Supreme Court promulgated *Oposa* which greatly shaped the country's direction in environmental law. To prevent more harm to the nation's surviving forests, a group of minors and children, represented by their parents, launched a legal action against the Department of Environment and Natural Resources (DENR) to revoke some timber licensing agreements (TLAs). One notable aspect of the case was that the minors and children filed it on behalf of future generations and themselves. On deciding in favor of the petitioners, the Supreme Court introduced the notion of "intergenerational equity" into the legal discourse as it acknowledged the minors' and children's ability on behalf of future generations.

Fast-forward to 2016, the case of *Juliana vs. United States*[2] cited *Oposa*. *Juliana* involved a set of complainants who are minors (represented by their guardians) and a scientist. The gist of the complaint is the United States government's failure to stop pollution despite several scientific warnings. The Oregon Federal Court denied the government's motion to dismiss. The plaintiffs had properly shown genuine suffering, the court said, and they had proven a link between the government's acts and the claimed damages. The court granted the plaintiff's claims, recognizing their legal standing and stating that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society," drawing on a case that had

[1] G.R. No. 79538, October 18, 1990.
[2] No. 6:15-CV-01517- TC, 2016 WL 6661146 (D. Or. 10 November 2016).

previously been adjudicated in the Supreme Court of the Philippines.[3]

The United States Ninth Circuit Court of Appeals acknowledged the plaintiffs' climate change claims, but it suggested that political actions instead be taken to seek remedies from the government, citing the plaintiffs' absence of legal standing. Supported by various *amicus curiae* briefs, including 24 Congress members, the plaintiffs petitioned for a rehearing. The Oregon Federal Court granted this permission on June 1, 2023, which required the plaintiffs to amend their complaint and proceed to trial. On May 1, 2024, the Ninth Circuit panel again ruled that the plaintiffs lacked standing and ordered the lower court to dismiss the case with prejudice.[4]

Oposa[5] is just one of the many cases that acknowledged the concept of intergenerational equity that requires present generations to preserve their needs without compromising those of the future by leaving more than what they have inherited. *Denmark vs. Norway*[6] involved a case settling the maritime boundary between Greenland and Jan Mayen. Judge Weeramantry of the International Court of Justice (ICJ) recognized the principle of intergenerational equity when he said that:

> A search of global traditions of equity in this fashion can yield perspectives of far-reaching importance in developing the law of the sea. Among such perspectives deeply ingrained therein, which international law has not yet tapped, are concepts of a higher trust of earth resources, an equitable use thereof which extends intertemporally, the "sui generis" status accorded to

[3] See Quising, J. D. F. 2024. "Beyond Oposa: Courts Reinforcing Intergenerational Equity as Customary International Law." *European Law Journal,* 39(3-6): 422-444. https://doi.org/10.1111/eulj.12489. Available online at https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12489?casa_token=M2D42Lchfj4AAAAA%3ASsa5B5UTWJYi8kkxNsp-Z4sNmuEp4DAAal4cDD_pMCY2eU_XrlbUAAN8h9_kLjS3XqDgY5Bauu5Dg8.

[4] Noor, Dharna. "Court strikes down youth climate lawsuit on Biden administration request." *The Guardian*, 3 May 2024, https://www.theguardian.com/us-news/article/2024/may/02/youth-climate-lawsuit-juliana-appeals-court.

[5] *Supra.*

[6] Maritime Delimitation in the Area Between Greenland and Jan Maye (Denmark v. Norway), [1993] I.C.J. Rep. 38.

> such planetary resources as land, lakes and rivers, the concept of wise stewardship thereof, and their conservation for the benefit of future generations. Their potential for the development of the law of the sea is self-evident.[7]

In the *Nuclear Tests case,*[8] the ICJ again recognized the protection of the interests of future generations. The ICJ held:

> [T]he destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilizations and the entire ecosystem of the planet could be a serious danger to future generations." It also held that the environment "represents the living space, the quality of life and the very health of human beings, including generations unborn.[9]

In Hungary v. Slovakia,[10] the ICJ, through Judge Weeramantry, again emphasized the principle of intergenerational equity, which is "the principle of trusteeship of earth resources, [and] the principle of intergenerational rights." In *Neubauer, et al. v. Germany,*[11] a judgment was rendered in favor of the plaintiffs requiring the German state to take climate change actions based on the claim that the rights of future generations were affected. In *PSB, et al. vs. Brazil,*[12] seven (7) Brazilian political parties filed a case against the Brazilian government, accusing it of violating constitutional rights by not implementing the national deforestation policy, thereby harming Indigenous peoples and future generations. Finally, just like in *Juliana vs. United*

[7] Id.
[8] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Test (New Zealand v. France), Order of 22 September 1995, [1995] I.C.J. 288, page 317. Available online.
[9] Id.
[10] Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), [1997] I.C.J. Rep 92. Available online.
[11] Bundesverfassungsgericht [BVerFG] [Federal Constitutional Court], 1 BvR 2656/18 (2021).
[12] PSB et al v. Brazil [2020] Supreme Court ADPF 760.

States, Children of Austria vs. Austria,[13] the complainants, who were born between 2006 and 2015, argued that the Alpine nation's environmental law violated their constitutional rights because it failed to provide them sufficient shielding from the adverse consequences of global warming. The complaint was denied because the action required political, not judicial, intervention.[14]

Oposa has been quoted in several court decisions throughout the years, which has greatly aided in the case's renowned accomplishment as a precedent in Philippine case law. The duty of the present generation to protect our environment for the sake of future generations is a point that the Philippine Supreme Court has emphasized time and time. As a result, there is no denying that Supreme Court decisions after *Oposa* have had an immense impact on environmental laws. These effects include, among other things, confirming the power of local government units' inherent ability to safeguard surviving marine resources and obliging government agencies to perform their obligations under strict judicial inspection.

However, as will be mentioned in this paper, there are views from the judiciary and legal scholars that assail the value of intergenerational equity. A legal scholar asserts that *Oposa* does not hold precedential significance.[15] One Supreme Court justice constantly posits that intergenerational equity cited in *Oposa* violates the preferences of future generations because the present generation has no standing to make decisions for them. These are legitimate observations and based on different philosophical standpoints; yet, as will be argued further, there is no way that moral concerns on the legal standing of the present generations to sue for and on behalf of the future generations should be discounted in law. Environmental concerns should always be resolved within the intersection of human rights and responsibility as articulated in the legal framework of intergenerational equity as first espoused by

[13] Children of Austria vs. Austria [2023] Constitutional Court 123/2023-12.
[14] "Austrian children take government to court over climate." AP News, 21 February 2023, https://apnews.com/article/climate-and-environment-austria-government-germany-lawsuits-19d097e8859528de569a690783207653.
[15] See Gatmaytan-Mango, Dante. 2007. "Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration." *Indiana International & Comparative Law Review* 17(1): 1-28.

Professor Edith Brown Weiss.

II. REVIEW OF RELATED LITERATURE

Rights and responsibilities

Understanding intergenerational equity requires knowing some concepts upon which it is based in law. To begin with, the 'right' to the environment, the 'duty' and 'obligation' to protect it, and the "responsibility" to preserve it are concepts that intertwine with one another.

"Rights" and "responsibilities" are often confused with each other in the environmental protection paradigm. This is because 'rights' entail creation by rules or regulations, and the right-holder gives the other persons the duty or obligation to respect that right, whereas the latter, while it connotes duty or obligation, exists only as a "gap filler, arising in the situation where no duty or obligation exists" or "is integrated with the definition of the right; it alters the nature of the right from within, and originates with the right-holder's moral agency."[16]

This is important because 'rights' operate within the Human Rights framework, which finds itself incompatible with environmental law. Trackman and Gatien[17] posit that there is a whale of difference between the human rights framework, often associated with the individualist nature of human rights, and the scale of environmental law, where responsibility is recognized, that transcends individual

[16] Collins, L. 2006. *The Doctrine of Intergenerational Equity in Global Environmental Governance*. (thesis). University of British Columbia. Pdf available online, p.4.
[17] Trackman, L. and Gatien, S. 2005. *Rights and Responsibilities*. University of Toronto Press. Pdf available online, citing Shelton, Dinah L. 1991. "Human Rights, Environmental Rights, and the Right to Environment." *Stanford Journal of Int'l Law* 28 (103).

choices and state territories.[18] Furthermore, some have argued that human rights are "ineffective at maximizing human welfare in important areas."[19] Finally, ecological ethics[20] castigate the human rights framework for being anthropocentric because it is defined through the human lens and the "human" component thereof. Ecological ethicists likewise posit that the very fact that environmental rights are equated with human rights furthers the divide between the values that they represent. They also construe:

> …environmental rights as belonging to different 'generations of rights' than human rights. They identify human rights with first-generation rights, such as freedom of religion and expression, and with second-generation rights such as those that are directed at social and economic development. They identify environmental rights with third-generation 'solidarity rights,' such as the right to a safe environment.[21]

`Collin's thesis posits that "the doctrine of intergenerational equity integrates the paradigms of rights and responsibilities, transcends the limitations of each paradigm taken separately, and has the potential to function as a universally acceptable framework for global environment governance."[22] In this manner, the human rights framework and the environmental ethics concern converge and are incorporated to

[18] There is a view that democracy and human rights are a part of a neo-colonial strategy designed to perpetuate political and economic hegemony of the former colonial masters, something that directly opposes the values of respect for authority, solidarity, and communal caring. In other words, the human rights framework espouses universalism of rights as against relativism. However, notable philosophers like Amartya Sen claim that "the origin of human rights does not negate its validity, that there is no monolithic Asian culture, that there are many Asian supporters of human rights and civil liberties, and that the Asian values debate was largely stimulated by dictatorial leaders responding to outside criticisms of repressive practices." See Megret, Frederic. 2014. "Nature of Obligations" in Moeckli, Daniel, Shah, Sangeeta and Sivakumaran, Sandesh, eds. *International Human Rights Law.* Oxford: Oxford University Press, pp. 96-118.

[19] Collins, at note 15.

[20] Ecological (or environmental) ethics focuses on determining the values, behavior, and actions that people and society should uphold in their relationships with all living brings and components of the biosphere ("Ecology, Ethics of." n.d. Encyclopedia.com.https://www.encyclopedia.com/education/encyclopedias-almanacs-transcripts-and-maps/ecology-ethics.)

[21] Trakman, L. and Gatien, S., at note 16, p.240.

[22] Collins, at note 15, p.22.

make a "coherent legal doctrine of intergenerational equity, allowing for a reasoned implementation of the principle of environmental fairness to future generations."[23]

Foundations of Intergenerational Equity

Edith Brown Weiss is the author known for advocating intergenerational equity as a legal doctrine.[24] She states the doctrine as follows:

> Each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations. This relationship imposes upon each generation certain planetary obligations to conserve the natural and cultural resource base for future generations and also gives each generation certain planetary rights as beneficiaries of the trust to benefit from the legacy of their ancestors. These planetary obligations and planetary rights form the corpus of a proposed doctrine of intergenerational equity, or justice between generations.[25]

Briefly stated, equity here is distributive justice. A definition of distributive justice is sharing the advantages and costs of cooperating within the society.[26] She takes the approach of John Rawls' theory of distributive justice: that justice can be achieved if each should have an equal right to the widest possible freedoms that do not infringe upon those rights of others, if inequalities in society are structured in such a way that society benefits most the least advantaged individuals and provides access to opportunities for everyone, and if society would be able to distribute

[23] Id, page 24.
[24] For an expanded discussion of her work, please refer to Weiss, E. B. 1989. *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity.* Tokyo: The United Nations University; Weiss. E. B. 1992. "In Fairness to Future Generations and Sustainable Development." *American University International Law Review,* 8(1): 19-26. Pdf available online.
[25] Id., at page 3.
[26] Frischmann, B. 2005. "Some Thoughts on Short Sightedness and Intergenerational Equity." *Loyola University Chicago Law Journal,* 36(2): 456-467. Pdf available online.

according to its ability to save for the succeeding generations.[27]

Three (3) equity challenges that require an intergenerational approach underpin the obligation to protect and preserve the planet. First, the 'conservation of options' is premised on the idea of maintaining a variety of natural and cultural resources so that future generations will have a wealth of options. Second, to ensure that the quality of the Earth is not poorer than what our ancestors have left behind for us, the idea of 'conservation of quality' pushes us to maintain it. Third, to ensure that future generations can continue to enjoy equitable access to the assets that previous generations have left behind, the concept of 'conservation of access' demands that each generation guarantee its members these rights.

Based on her definition, Weiss identifies the following as planetary obligations of the present generation:

1. The duty to conserve resources requires the present generation to conserve all kinds of resources – both renewable and non-renewable;
2. The duty to ensure equitable use, which Weiss defines as "reasonable, non-discriminatory access to the [planetary] legacy"[28] includes two obligations: refraining from infringing on the access rights of other people and assisting others (those who are poor enough) to have reasonable access to these resources;
3. The duty to avoid adverse impacts on the environment stems from the responsibilities of both present generations (as the beneficiaries of the trust) and future generations;
4. The duty to prevent disasters, minimize damage, and provide emergency assistance obligates States to adopt measures for hazardous activities; and
5. The duty to compensate requires those responsible to be held liable for any

[27] For a wider discussion of Rawls' theory of justice, see Rawls, J. 1971. *A Theory of Justice*. Cambridge, MA: The Belknap Press of Harvard University Press; Rawls, J. 1993. *Political Liberalism.* New York: Columbia University Press; Rawls, J. 1999. *Law of the Peoples.* Cambridge, MA: Harvard University Press; and Rawls, J. 2001. *Justice as Fairness: A Restatement.* Cambridge, MA: Harvard University Press.
[28] Weiss, at note 23, at p,55.

environmental damage.

From here, various challenges to the doctrine of intergenerational equity arose. The following section is a brief attempt to summarize the critiques and the corresponding counter-arguments.

Beckerman's critique

Wilfred Beckerman[29] posits that (a) future generations of unborn children or people do not possess any rights; (b) any theory of justice implies the granting of rights to people, and (c) no justice theory framework may offer adequate safeguards for future generations' interests.[30] But he is quick to point out that he is talking about future generations unborn, not those that overlap each other at present. Moreover, he claims that his critique of the unborn generation's lack of rights focuses on legal, not moral, rights. His position is this:

> Indeed, one feature of having ' rights' is that they confer a degree of freedom and power to shape one's own life according to one's own view of what makes life worth living. In other words, they give one choice and freedom to act in pursuit of one's chosen goals. We should not, therefore, prejudge how future generations will want to exercise their choices. The policy that is most consistent, therefore, with respect for the rights that future people will have is one that concentrates on bequeathing institutions that give members of future generations as much freedom in their lives as is compatible with maximum freedom for others.

Beckerman implies that the present generation cannot do anything about

[29] See his prior work: Beckerman, W. and Pasek, J. 2001. *Justice, Posterity, and the Environment.* Oxford: Oxford University Press.
[30] Beckerman, W. 2006. "The Impossibility of a Theory of Intergenerational Justice" in Tremmel, J.C., ed. 2006. *Handbook of Intergenerational Justice.* Edward Elgar Publishing, Inc. Pdf available online.

future generations' choices, and that future generations have no right to speak of them. However, as Warren postulates:

> Our duty to preserve the environment is a duty to the generation that does come into existence, regardless of whether it is the same generation that would have existed had we done nothing.[31]

Tremmel also counters that future generations have 'rights.' Morally, they do have rights. Even in written laws, future generations have 'rights.' The latter is reflected in how society adjusts "according to the changes in the moral convictions within a society."[32]

Present generations cannot choose the preferences of future generations

One compelling challenge to the intergenerational equity doctrine is that the present generation should not impose its preferences on the future generation because we do not know what the future generation wants. For example, we do not know if our children of tomorrow will prefer plastic trees over natural ones. However, it has been counter-argued that under such circumstances, it becomes legitimate for future generations to soon blame their ancestors and hold them responsible for refusing to provide the means for the satisfaction of their basic needs, which reduced the future generations' opportunities for happiness and well-being.[33]

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[31] Warren, M. A. 1982. "Future Generations" in Regan, T. and VanDeVeer, D., eds. *And Justice for All*. Totowa, NJ: Rowman & Littlefield, p.139, cited in Collins, at note 15, at pp.44-45.

[32] Tremmel, J. 2009. *A Theory of Intergenerational Justice*. Foundations for the Rights of Future Generations: Germany, at p.200 Pdf available online. See his earlier work: Tremmel, J.C. 2004. "Is a Theory of Intergenerational Justice Possible? A Response to Beckerman. " *Intergenerational Justice Review 2(6)*, wherein he states: "[F]uture individuals…"have moral rights as soon as mankind [finds] a consensus about that. This becomes more clear when we take a look on how someone gets a legal right. He or she gets it as soon as it is codified by the lawmaker. If the lawmaker would codify rights of future generations, how can anybody renounce that future individuals "have" such rights?

[33] Collins, at note 13, citing Attfield, R. (n.d.). "Environmental Ethics and Intergenerational Equity." In 41 Inquiry 207.

Definition of "future generations"

Weiss used the term "unborn" generations to refer to the 'future generations.' However, the term generation itself is confusing. For Tremmel, the concept of "generations" can mean many different things: family generations, societal generations, or chronological generations.[34] Family generations (or genealogical generations) refer to the "lineage members."[35] Societal generations (social generations, sociological generations, or historic generations) are a homogenous group of individuals with similar beliefs, attitudes, or challenges. Chronological generations can either be chronological-temporal or chronological-intertemporal, meaning that the former can refer to different age groups (like the young, middle-aged, or elderly who live together and coexisting simultaneously), while the latter can refer to all living people at present, indicating that only one generation exists at any given time.

Tremmel then suggests making use of the term "succeeding generations" instead of future generations:

> Close future generations and today's infants and adolescents are materially on an equal level; thus, one should talk about 'succeeding' instead of 'future' generations. In contrast to the term 'future', the term 'succeeding' generations comprises not only unborn generations but also present children and adolescents. By this new wording children and adolescents or their parents would have the right to sue. The clause would then have a level of protection that is concrete and therefore judicially guaranteed.[36]

Spijkers, on the other hand, posits that "[t]o avoid all this confusion, it might be better to avoid the term "generation" altogether and instead speak of present people

[34] Tremmel, at note 31.
[35] Ibid.
[36] Tremmel, at note 31, pp.206-207.

and future people."[37]

Critique by the Intra-Generational Equity

Finally, one view holds that the doctrine of intergenerational equity "undermines the importance of human dignity and the equal worth of all" simply because it treats the present generation as a tool for the future generation's happiness.[38] However, Collins posits that the doctrine of intergenerational equity already acknowledges the rights of the present generations, which serve as the beneficiaries of the so-called planetary trust, to utilize and enjoy its planetary rights.[39] Furthermore, he adds that the doctrine of intergenerational equity may be stronger if it is complemented by Environmental Justice and Common but Differentiated Responsibilities.[40]

International legal instruments on Intergenerational equity

The concern of this section now is the status of intergenerational equity in international law. It will focus only on the relationship of intergenerational equity with international law through a review of relevant legal instruments, beginning with the establishment of the United Nations in 1945.

The UN Charter does not explicitly make reference to intergenerational equity.[41] Its Preamble, however, provides that "we, the peoples of the United Nations, [are] determined to save succeeding generations from the scourge of war." It is not

[37] Spijkers, O. 2018. "Intergenerational Equity and the Sustainable Development Goals." *Sustainability, 10:3836.* www.mdpi.com/journal/sustainability. Pdf available online, page 8.
[38] See Mayeda, G. 2004. "Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law." *Colo. J. Int'l Envt'l & Pol'y 15(29):54-56,* cited in Collins, at note 15.
[39] Collins, at note 15.
[40] Id. The principle of Common but Differentiated Responsibilities (CDR) enunciates the common responsibility to protect and conserve the environment, and that all states should collectively have a share in the conservation of the planet. However, it considers the equitable efforts of States considering their unequal income and contribution to environmental degradation. See Soto, M. V. 1996. "General Principles of International Environmental Law." *ILSA Journal of Int'l & Comparative Law,* 3 (193): 193-209. Pdf available online.
[41] Spijkers, at note 36.

clear whether the Preamble has something to do with balancing the interests of the present and future generations. This is true, considering that a preamble does not create a right or an obligation. The United States Supreme Court, in *Jacobson v. Massachusetts*,[42] explained the nature of a preamble, saying that "it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its departments."

Nevertheless, while it is not a source of right, the preamble is a source of *light*. It may help one to understand the body of the constitution or a charter if there are ambiguous interpretations thereof. In the case of the United Nations Charter, while little may be extorted from its Preamble in relation to intergenerational equity, its words alone helped subsequent legal documents to invoke intergenerational equity.

The 1972 United Nations Conference on the Human Environment in Stockholm adopted the Declaration on the Human Environment.[43] Its introductory portion provides "having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment…" The earth was referred to as the human environment, not as a separate entity. The Stockholm Declaration also provides that:

> *5.* The natural growth of population continuously presents problems for the preservation of the environment, and adequate policies and measures should be adopted, as appropriate, to face these problems. Of all things in the world, people are the most precious. It is the people that propel social progress, create social wealth, develop science and technology and, through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capability

[42] 197 U.S. 11,22 (1905).
[43] Referred to as the 1972 Stockholm Declaration.

> of man to improve the environment increases with each passing day.
>
> 6. A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference, we can do massive and irreversible harm to the earthly environment on which our life and wellbeing depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes.

As can be seen from the wordings of paragraphs 5 ("[o]f all things in the world, people are the most precious") and paragraph 6 ("[t]o defend and improve the human environment for present and future generations), the emphasis of the 1972 Stockholm Declaration was on humans, and not to preserve the environment for its own sake.

The twenty-six (26) principles that attached to the 1972 Stockholm Declaration enlighten us in understanding the context of environmental policies that States should adopt. Principle 1 provides that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 1 mentions the correlative duty of humankind to "protect and

improve the environment for present and future generations."[44] Spijkers posits that although the exact words of "sustainable development" did not appear in the 1972 Stockholm Declaration, there is enough reference to the relationship between the present and future generations.[45]

Moreover, Principle 1 must be understood in relation to the following principles:

> **Principle 2:** The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.
>
> **Principle 3:** The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.
>
> **Principle 4:** Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperiled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.
>
> **Principle 5:** The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

The principles of sovereignty and the obligation not to cause harm as

[44] Stockholm Declaration.
[45] Spijkers, at note 36.

embodied in Principle 21 justify the rights of States to utilize their own resources. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

According to Soto,[46] this duty not to cause harm originated in the *Trail Smelter*[47] case, cited in the 1972 Stockholm Declaration, which stated that under principles of international law . . . no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

However, such duty clearly refers not to intergenerational equity, but to intragenerational equity, because each State has the responsibility not to cause harm to another State.[48] Yet, in all fairness, the 1972 Stockholm Declaration "marked the culmination of efforts to place the protection of the biosphere on the official agenda of international policy and law."[49]

The 1982 World Charter for Nature was an idea of then President Mobutu of Zaire. According to Wood, Jr., that the developing countries, and Zaire in particular, played a key role in the development of the World Charter for Nature. President Mobutu of Zaire originally proposed the idea of the World Charter for Nature to the Twelfth General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN) in September 1975 when the IUCN met in Kinshasa, Zaire.[50]

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[46] At note 38.
[47] UN REPORTS OF INTERNATIONAL ARBITRAL AWARDS, Trail Smelter case (USA v. Canada), 16. April 1938 and 11. March 1941, Volume III pp. 1905-1982.
[48] Spijkers, at note 36.
[49] Wirth, D. A. 1995. "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa." *Georgia Law Review,* vol.29. pp599-653. Pdf available online.
[50] Wood, Jr., H. 1985. "The United Nations World Charter for Nature: The Developing Nations' Initiative to

The World Charter for Nature had little impact on international law and international affairs.[51] It affirmed that it was intended to exert political and moral, but not legal, force on the signatory States.[52] Even its aspirational tones were criticized. As Woods, Jr. puts it, "the various aspirational provisions of the World Charter for Nature set standards that many nations have not yet obtained but for which they should strive."[53]

However, there was a reference to sustainable development in the World Charter for Nature when it stated that:

> Reaffirming that man must acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations.

This was a precursor to the 1987 Brundtland Report, and from this, the concept of sustainable development was introduced.[54] The recurring theme of the 1987 Brundtland Report and the World Charter for Nature was sustainable development, and that the global economy and global ecology were interdependent. The way forward is to make sustainable development, that is, "to ensure that [development] meets the needs of the present without compromising the ability of the future generations to meet their own needs."[55] Attached to this report was the Proposed Legal Principles for Environmental Protection and Sustainable Development, which set the principle of intergenerational equity under Principle 2. Briefly stated, the principle of intergenerational equity here provided that "[s]tates [should] conserve

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Establish Protections for the Environment." *Ecology Law Quarterly,* 12(4): pp.977-996, at p.978 Pdf available online.

[51] Spijkers, at note 36.

[52] Wood, Jr., at note 49.

[53] Id., at p.984.

[54] Spijkers, at note 36.

[55] Brundtland, H. 1987. *Our Common Future.* Oxford University Press: Oxford, for the World Commission on Environment and Development. Pdf available online.

and use the environment and natural resources for the benefit of present and future generations."[56]

Then, on June 3 to 14, 1992, the United Nations Conference on Environment and Development (UNCED), or the so-called "Earth Summit," was held in Rio de Janeiro, Brazil. It was strategically structured by its organizers as a successor to the Stockholm Conference, following the recommendation of the United Nations.[57] At the end of the Earth Summit, the Declaration on Environment and Development (1992 Rio Declaration) was adopted. Principle 1 enunciated the centeredness of human beings in the concern of sustainable development. Principle 2 simply reaffirmed Principle 21 of the Stockholm Declaration, or the principle of sovereignty over natural resources and the obligation not to cause harm. Principle 3 covered intergenerational equity and the right to development.

In the history of drafting principle 3 of the 1992 Rio Declaration, it was originally meant to refer to the right of development. However, developed nations wanted to insert the reference to future generations. The latter prevailed.[58] In September of 2000, the UN General Assembly agreed to come up with the terms of a Millennium Declaration,[59] or a set of goals achievable within a target date. It was a change in the international thinking about how to encourage the progress of developing countries.[60] Paragraph 21 of the Millennium Declaration states that the UN shall spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs.

The 2000 Millennium Declaration attached eight (8) goals, and Goal 7 aimed to ensure environmental stability. Yet, the emphasis of the Millennium Development Goals was on alleviating poverty in the present generation and not on

[56] Id.
[57] Wirth, at note 47.
[58] Spijkers, at note 36.
[59] A/RES/55/2: United Nations Millennium Declaration.
[60] Manning, R. 2009. *DIIS Report. Using Indicators to Encourage Development: Lessons from the Millennium Development Goals.* Danish Institute for International Studies:Denmark. Pdf available online.

intergenerational equity with regard to environmental protection.[61] Nothing also changed when, in 2002, the United Nations Conference on Sustainable Development took place in Johannesburg, South Africa. The 2002 Johannesburg Conference's main achievement was the "expression of a moral position addressing the widening gap between the world's rich and its poor."[62] It integrated intergenerational equity, when it expressed the following:

> 3. At the beginning of this Summit, the children of the world spoke to us in a simple yet clear voice that the future belongs to them, and accordingly challenged all of us to ensure that through our actions they will inherit a world free of the indignity and indecency occasioned by poverty, environmental degradation and patterns of unsustainable development.
>
> 4. As part of our response to these children, who represent our collective future, all of us, coming from every corner of the world, informed by different life experiences, are united and moved by a deeply felt sense that we urgently need to create a new and brighter world of hope...
>
> 25. We reaffirm the vital role of the indigenous peoples in sustainable development.[63]

Yet, "the great failure of Johannesburg was that it produced few signs of that political will or of practical steps to pursue [its] promises."[64] Moreover, when the representatives got to work, the focus in the implementation was on intra-generational, not intergenerational, equity.[65]

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[61] Spijkers, at note 36.
[62] Anderson, J.W. and Morgenstern, R. 2003. *The Future of Sustainable Development: The Johannesburg Conference and What Happens Next.* Resources for the Future: Washington, D.C., p.1. Pdf available online.
[63] 2002 Johannesburg Conference.
[64] Anderson, J.W. and Morgenstern, R., at note 59, at p.3.
[65] Spijkers, at note 36.

In 2013, the UN Secretary General (UNSG) came with a Report on Intergenerational Solidarity and the Needs of Future Generation. 'Intergenerational solidarity' was defined and understood as "social cohesion between generations."[66] Moreover, "in the context of sustainable development, intergenerational solidarity goes beyond the relations among currently living representatives of different generations and embraces future generations, who do not yet exist."[67] The need for intergenerational solidarity was pushed because "[f]uture generations are politically powerless, with the representation of their interests limited to the vicarious concern of present generation."[68] But what does "going beyond the relations" mean?[69] This question has been answered earlier when he posited that it might have been better to avoid the term "generation" and instead use present people and future people.

The final legal instrument that needs to be analyzed in understanding intergenerational equity is the Sustainable Development Goals (SDGs) or the so-called 'Global Goals.' These new goals are contained in a United Nations General Assembly Resolution, entitled "Transforming our World: The 2030 Agenda for Sustainable Development." In its introductory portions, the SDGs state the people's duty "to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations." The beneficiary of this section is the planet Earth. In paragraph 18, the SDGs referred to the present and future generations of people as the beneficiaries of any environmental protection, not the planet itself.

In paragraphs 49 and 50, the SDGs reflect the much-needed relationship between the present and future generations, in order to preserve the environment for the future. Then, in paragraph 53, the SDGs closed it with a clear reference to consequential damages should the present generation fail the future generations.

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[66] 2013 United Nations Secretary General Report on Intergenerational Solidarity and the Needs of Future Generation, paragraph 6.
[67] Id., paragraph 8.
[68] Id., paragraph 5.
[69] Spijkers, at note 36.

> 49. Seventy years ago, an earlier generation of world leaders came together to create the United Nations.
>
> 50. Today we are also taking a decision of great historic significance. We resolve to build a better future for all people... We can be the first generation to succeed in ending poverty; just as we may be the last to have a chance of saving the planet. The world will be a better place in 2030 if we succeed in our objectives.
>
> 53. The future of humanity and of our planet lies in our hands. It lies also in the hands of today's younger generation who will pass the torch to future generations. We have mapped the road to sustainable development; it will be for all of us to ensure that the journey is successful and its gains irreversible (SDGs).

The SDGs presented goals that need to be achieved by the target period of 2030. Goal 6 aims to ensure availability and sustainable management of water for all. Goal 7 is about ensuring access to affordable, reliable, sustainable, and modern energy for all. Goal 13 aims to combat climate change and its impact through urgent actions. Goal 14 is about conservation and sustainable use of the oceans, seas, and marine resources in light of sustainable development. Lastly, Goal 15 aims to protect, restore, and promote sustainable use of terrestrial resources. Yet, not all point out "intergenerational rights." Some provisions of the SDGs contain reference to "intragenerational rights."[70] There are ambiguities in the text of the SDGs. Take, for example, its Preamble, paragraph 8, and paragraph 9:

> **Preamble:** This Agenda is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in

[70] Spijkers, at note 36.

> larger freedom. We recognise that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development. All countries and all stakeholders, acting in collaborative partnership, will implement this plan… They seek to realize the human rights of all…
>
> **Paragraph 8.** We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination.
>
> **Paragraph 9.** We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Thus, the use of the term "human rights" in the Preamble ("[t]hey seek to realize the human rights of all…), in paragraph 8 ("a world of universal respect for human rights"), and in paragraph 9 ("to respect, protect and promote human rights and fundamental freedoms for all") produces more questions than answers.

Does this include international human rights of future generations? Does it not say we ought to promote human rights and fundamental freedoms for all, without distinction of any kind or status? Does the prohibition to make a "distinction of any kind" include the prohibition to discriminate between present and future people? Is

being a future person a "status?"[71]

Taken positively, however, Spijkers posits that the title of the SDGs is all about sustainable development, and all the goals must be interpreted in such a way as to give life to their objectives. In fact, there lies an optimism in the value of international law.[72] In the level of community interests, it is in the normative protection of the environment that contemporary international law has achieved its concern, dealing with the planetary conditions of life, and in the process, combining the conditions of social progress with the concept of sustainable development.[73]

III. STATEMENT OF THE PROBLEM

This short study seeks to answer the following question:

1. What is the significance of intergenerational equity in *Oposa vs. Factoran* in Philippine jurisprudence?
2. Is there a reason for it to be retained in the Philippine legal framework?

IV. OBJECTIVES

The following are the objectives of this research:

1. To identify the various legal pronouncements on intergenerational equity in support of environmental justice; and
2. To analyze arguments for and in support of intergenerational equity.

V. SIGNIFICANCE OF THE STUDY

The research is significant for various reasons: In general, the research will

[71] Id., at p.9.
[72] Id.
[73] Magallona, M. M. 2011. "Landmarks in the Development of Contemporary International Law." *IBP Law Journal,* 36(2 and 3). Pdf available online.

show that law and social science can stand together and that both can harmoniously dance to achieve a common goal in making policies that have social impact. Likewise, the research is important in order for the public to know that social science concepts can influence the legal system.

Social science and legal actors must see the law from different perspectives and interpret it away from the formalist type. The legal framework will show that both law and social science can talk to each other. Social science concepts like intergenerational equity will be able to lend to the legal system certain ideas and make known to them research and studies, which would be of great help to the legal system in general. And actors in the legal system will have to fuse social lens into their perspective, rather than relying on the traditional structure of the law.

METHODS

Methods, materials, scope, and delimitations

This study is fundamentally rooted in the analysis and scrutiny of existing legal instruments pertaining to the concept of intergenerational equity, encompassing both international and domestic sources. It heavily relies on textual examination and analysis of international and domestic legal documents. Additionally, the legal dogmatic approach is used to investigate, scrutinize, and assess these sources in evaluating the current international and domestic laws concerning intergenerational equity.

The analysis and evaluation go beyond the textual examination. The research aims to delve into the connection between the social science concept of intergenerational equity and the legal frameworks that incorporate it. By incorporating this social science concept, this legal research broadens the scope of comprehension of how the law adopts concepts and perspectives pertinent within the context of another discipline.

Because this is document analysis alone, serving as the cornerstone of this study, the researcher will meticulously dissect applicable international and local legal documents to ascertain the importance of intergenerational equity as a concept, if not a legal theory.

For this research, both primary and secondary legal authorities shall be used as sources of data. Primary authority shall be: international legal documents and case law. Intergenerational equity is best understood first by making reference to international legal documents. The primary documents that are utilized are the declarations of the United Nations General Assembly (UNGA), which have reference to intergenerational equity. These instruments make reference to general declarations of principles, and not to ordinary resolutions that the United Nations passes from time to time. The other primary document refers to world conferences, which have reference to intergenerational equity, whether explicitly or impliedly made. On the other hand, secondary authority shall consist of law reviews and journal articles, including publications in social science journals.

In order to know the application of intergenerational equity in Philippine case law, it is necessary to choose the cases that deal with environmental law that make an explicit reference to such a concept. There have been numerous recorded cases decided by the Supreme Court that deal with environmental protection and the assertion of the Filipino's constitutional right to a healthful and balanced ecology. The researcher then simply focuses on the concept of intergenerational equity, first introduced in *Oposa vs. Factoran*. Subsequent cases that cited *Oposa* as a precedent are also included in the analysis, considering that in the legal system, stability is best achieved by recognizing the importance of a precedent. This is known as stare decisis.

This paper will choose cases or judicial opinions that come from the Supreme Court as primary source, then Supreme Court Reports Annotated (SCRA) and Philippine Reports Annotated (PRA) as secondary sources. SCRA (and its electronic counterpart, e-Scra) and PRA are the only known publishers of Supreme Court

decisions in the Philippines. Websites (such as Arellano University's Research Program, which runs the lawphil.net, and ChanRobles.com) are excluded because these are not official publications of the Supreme Court. These are run by private schools and foundations, and oftentimes, they suffer from typographical errors and wrong cataloging.

Only decisions of the Supreme Court are chosen because, just like in other legal systems, what the highest courts interpret becomes part of the law of the land. By part, it is meant to supplement the statutory laws passed by Congress through the court's interpretation. This is but a manifestation of the heart of democracy, which is the principle of checks and balances.

Reported and published decisions cannot fully capture the actual mental processes of the judges who wrote them. However, the decisions the Supreme Court promulgate concerning the use (or non-use) of social science serve as a good platform for the public to gauge the collective thought of the court. Legal arguments are crafted out of the facts presented in the given cases. When the justices of the Supreme Court give their individual views, such a manner adds color to the understanding of the whole case. The public can hope to catch the court's perspective on issues affecting the public, i.e., whether the justices are in support or against a certain issue. Thus, dissenting and concurring opinions of justices are also included in the analysis.

FINDINGS AND DISCUSSION

Intergenerational equity in Philippine environmental law

Before *Oposa,* the Philippine government already adopted the concept of intergenerational equity in Philippine Environmental Policy.[74] Its policies are as follows:

[74] Presidential Decree No. 1151 (1977).

1. To create, develop, maintain, and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other;
2. To fulfill the social, economic and other requirements of present and future generations of Filipinos; and
3. To ensure the attainment of an environmental quality that is conducive to a life of dignity and well-being.

The Supreme Court next held in *Felipe Ysmael, Jr. & Co., Inc. vs. The Deputy Executive Secretary, et al.*[75] that:

> While there is a desire to harness natural resources to amass profit and to meet the country's immediate financial requirements, the more essential need to ensure future generations of Filipinos of their survival in a viable environment demands effective and circumspect action from the government to check further denudation of whatever remains of the forest lands. Nothing less is expected of the government, in view of the clear constitutional command to maintain a balanced and healthful ecology.[76]

The doctrine of intergenerational equity was categorically pronounced only in *Oposa,* as earlier mentioned. 43 minors, represented by their parents and a non-profit organization, sued the government to protect the environment by canceling several timber licenses. The Department of Environment and Natural Resources, through its secretary, filed a motion to dismiss, citing lack of cause of action, the lack of standing of the petitioners, and the fact that the case is political, not justiciable, in nature. The trial court granted the motion to dismiss. The petitioners then filed a petition for certiorari with the Supreme Court to challenge the trial court's dismissal. The Supreme Court considered the issues related to the cause of action, the political

[75] G.R. No. 79538, October 18, 1990.
[76] Ibid.

nature of the case, and the protection of a timber license agreement under the Constitution's non-impairment clause.

It was the Supreme Court's initiative that opened the discussion on the legal standing of the minors to sue the government. It held that:

> This case, however, has a special and novel element. Petitioners, minors, assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature.
>
> Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[77]

The Supreme Court discussed intergenerational equity (albeit it used the word "responsibility") regarding the minor's rights to sue for future generations' benefit in environmental cases. It recognized their personality to sue as a class and their right to a healthful and balanced ecology under the 1987 Constitution. In a separate opinion, Justice Feliciano criticized the decision as it focused on the legal standing in

[77] Oposa, pages 802-803.

a class suit involving children, questioning its necessity since class action implies an inherent interest. Justice Feliciano also noted the broad scope of the "class" encompassing all citizens, suggesting that everyone affected has legal standing. Furthermore, he pondered whether action can be taken on behalf of others without demonstrating governmental inaction first.

What is clear is that *Oposa* shares the view of substantial and distributive justice. Its categorical pronouncement of the doctrine of intergenerational equity is largely based on the fact that it was already adopted by various legal instruments at the time; and since the Philippines adopted international law as part of the law of the land,[78] this doctrine in international environmental law already formed part of Philippine law.

***Oposa* was subsequently cited in several other cases**

Four (4) years after *Oposa,* the Supreme Court ruled in *Tano vs. Socrates*[79] upholding ordinances protecting the environment under the Local Government Code. It held that the local government units have the power to enact laws for the general welfare, emphasizing decentralization and devolution. Here, the Supreme Court cited *Oposa*, positing that the right to a balanced and healthful ecology carries with it the concomitant duty of protecting and conserving the environment for future generations. However, legal standing to sue was not an issue because obviously, the Petitioners, who were charged with criminal offenses before the trial court, sought to nullify the assailed ordinances before the trial could continue. It was unlike *Oposa* where the Supreme Court touched legal standing to sue on behalf of future generations. *Oposa* was merely cited in *Tano vs. Socrates* simply to amplify the constitutional provision on balanced and healthful ecology.

In *Metro Manila Development Authority vs. Concerned Residents of Manila Bay,*[80] the

[78] Article II, Section 2, 1987 Constitution; see also Article II, Section 3, 1935 Constitution; Article II, Section 3, 1973 Constitution.
[79] G.R. No 110249, August 21, 1997.
[80] G.R. Nos. 171947-48, December 18, 2008.

Concerned Residents filed a complaint against several government agencies for neglecting Manila Bay's marine life. Despite testimonies favoring the agencies, the lower court ordered the rehabilitation of the said bay. The Court of Appeals upheld the decision, which was further supported by the Supreme Court when the case went to it. The Supreme Court said that the cleaning of Manila Bay is a ministerial act compellable by writ of mandamus.

In the penultimate paragraph of the decision, *Oposa vs. Factoran* was cited, not to support the legal standing of the residents to sue for and on behalf of the minors in the case, but to emphasize the right of the present generation to a balanced and healthful ecology. This ecological right "need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind, and it is an issue of transcendental importance with intergenerational implications."[81] It would seem, still, that the Supreme Court understood the correct meaning of intergenerational equity by further ruling that "even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible" (ibid). The decision recognized the innate responsibility of the present generation to preserve the environment for future generations.

In the case of *Arigo vs. Swift,*[82] a United States warship damages the Tubbataha Reef, leading to a writ of kalikasan petition filed by the Petitioners against Swift as the Commander of the US 7th Fleet. Respondents argued that the grounds for the petition were moot due to completed salvage operations and pledged monetary compensation by the US government for reef reparation. The Supreme Court discussed minors' and unborn children's legal standing to sue, referencing *Oposa.* The Court cited *Oposa* as a rule on standing to sue, emphasizing the liberalization of standing for minors and future generations in environmental cases based on the

[81] Id.
[82] G.R. No. 206510, September 16, 2014.

principle of intergenerational equity where humans become stewards of nature. It held that:

> The liberalization of standing first enunciated in Oposa, insofar as it refers to minors and generations yet unborn, is now enshrined in the Rules which allows the filing of a citizen suit in environmental cases. The provision on citizen suits in the Rules "collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature.[83]

In *Casino v. Paje,*[84] the Supreme Court ruled against the petitioners, stating that they failed to prove environmental damage from the coal-fired power plant project in Subic. The Supreme Court did not address the issue of petitioners suing in a representative capacity. While there was a dissenting opinion from Justice Leonen that discussed the weight of *Oposa,* the Supreme Court passed upon this issue because it was never raised in the petition. In his separate opinion, Justice Velasco, in defending *Oposa,* argued that Justice Leonen's formula of requiring an "existing and clear legal right or basis" will only mean that the law will apply a strict, if not impossible, condition upon the people invoking their constitutional ecological right. He adopts a less stringent and a more flexible application of allowing the present generation to represent the future generations because anthropogenic activities have uncertain environmental effects "such that it can be predicted or calculated without error, especially if we are talking about generations yet unborn where we would obviously not have a basis for said determination."[85] To require the existence of an "existing and clear legal right or basis" may be a strict, if not impossible, condition upon the parties invoking the protection of their right to a healthful and balanced ecology.[86]

[83] Id., at p.129.
[84] G.R. No. 207257, February 3, 2015.
[85] Id., at p. 244.
[86] Id.

The petitions filed in *Resident Marine Mammals vs. Reyes*[87] challenged a service contract allowing petroleum companies to conduct certain activities in the Tanon Strait. The petitioners, represented by cetacean species and legal guardians, sought protection under existing environmental laws. Government agencies questioned the petitioners' legal standing, arguing it did not apply due to the nature of the involved parties. The Supreme Court referenced the *Sierra Club vs. Rogers C.B. Morton*[88] case of the US Supreme Court, acknowledging the legal personality of natural elements. The Philippine Supreme Court allowed the Petitioners to sue based on intergenerational equity for a balanced and healthful ecology. It held that in *Oposa,* the Supreme Court already allowed the suit to be brought in the name of the future generation based on the concept of "intergenerational responsibility" insofar as the right to a balanced and healthful ecology is concerned. This right to a balanced and healthful ecology need not even be stated in our Constitution "as it is assumed to exist from the inception of humankind, carries with it the correlative duty to refrain from impairing the environment."[89] The dissenting opinion of Justice Leonen shall be discussed in the succeeding paragraphs.

In *Segovia vs. Climate Change Commission,*[90] the petitioner's petition for writs of kalikasan and mandamus to enforce environmental laws like the Climate Change Act and Clean Air Act. They sought to implement the Road Sharing Principle, reduce fuel consumption, promote public transportation, mark road right-of-ways, and allocate Road Users' Tax for road maintenance and safety improvements. The Supreme Court allowed the petitioners to sue despite opposition from government agencies. Legal standing was relaxed, citing *Oposa,* but the Petition was ultimately denied.

In *Zabal, et al. vs Duterte,*[91] a case involving the clean-up of Boracay, the Supreme Court borrowed *Oposa,* not to discuss the legal standing of any party, but to

[87] G.R. No. 180771, April 21, 2015.
[88] 405 U.S. 727.
[89] Resident Marine Mammal, at note 82, at p.547.
[90] G.R. No 211010, March 7, 2017.
[91] G.R. No. 238476, February 12, 2019.

remind the people that "unless the State undertakes its solemn obligation to preserve the rights to a balanced and healthful ecology and advance the health of the people, the day would not be too far when all else would be lost not only for the present generation but also for those to come - generations which stand to inherit nothing but parched earth incapable of sustaining life."[92]

Opposition to intergenerational equity in Philippine environmental law vis-a-vis the moral and legal sensibility of future generations

Perhaps the most visible opposition to intergenerational equity in Philippine environmental law is the consistent dissenting opinions of Justice Leonen in the cases of *Arigo, Casino,* and *Resident Marine Mammals.* In this section, his opinions in these cases will be reproduced and discussed alongside known critiques of intergenerational equity in international environmental law.

In *Arigo*[93]*,* Justice Leonen registered a separate opinion, which included suggesting a review of the propriety of *Oposa* as a doctrine insofar as legal standing is concerned. He stated that in *Oposa,* the minor children represented the unborn in filing a petition to preserve the remaining forests of the country and to prohibit the environment secretary from cancelling all timber licensing agreements. It was not a citizen's suit, but a representative suit. Justice Leonen opined that this *Oposa* pronouncement be reviewed insofar as it allows a nonrepresentative group to universally represent a whole population as well as an unborn generation binding them to causes of actions, arguments, and reliefs which they did not choose. Generations yet unborn suffer from the legal inability to assert against false or unwanted representation."[94]

Citing the Rules of Court, Justice Leonen opined that only parties injured by an act can become the real parties-in-interest. Representatives can sue on behalf of the

[92] *Oposa,* page 713.
[93] G.R. No. 206510, September 16, 2014.
[94] Id., at p.162.

injured party, but only as an agent. As a rule, “a “representative" is not the party who will actually benefit or suffer from the judgment of the case,” and “acting in a representative capacity does not turn into a real party in interest to someone who is otherwise an outsider to the cause of action.”[95] In the case of minors representing the unborn, this faces complications because the representative must specify the injuries suffered by the beneficiary of the right. This is dangerous, Justice Leonen said.

First, they run the risk of foreclosing arguments of others who are unable to take part in the suit, putting into question its representativeness. Second, varying interests may potentially result in arguments that are bordering on political issues, the resolutions of which do not fall upon this court. Third, automatically allowing a class or citizen's suit on behalf of "minors and generations yet unborn" may result in the oversimplification of what may be a complex issue, especially in light of the impossibility of determining future generation's true interests on the matter.”[96]

According to Justice Leonen, decisions of courts regarding the supposed responsibility to protect the future generations by representing them in judicial processes will undermine their ability to decide for themselves and act on their own interests.[97] He found the crucial ramifications through a legal doctrine of *res judicata.* When *Oposa* was decided, it bound future generations by the decision of the court because they were represented by the minor children as petitioners. Their being bound by the ruling in *Oposa* rendered them incapable again of questioning again in future environmental disputes whatever interest they have on the environment. This is because under the doctrine of *res judicata*, a former judgment rendered by a competent court makes it conclusive between the parties and their successors a ruling on their rights within the present and future suits. In this way, suits are not endless. Guided by this accepted legal doctrine, *Oposa* set a dangerous precedent in that by “binding parties who are yet incapable of making choices for themselves, either due to minority or the sheer fact that they do not yet exist,”[98] they can no

[95] Id., at p.174.
[96] Id., at p. 176.
[97] Id.
[98] Id., at p. 178.

longer re-litigate for their rights Justice Leonen ends his opinion on this point in this wise:

> It is my opinion that, at best, the use of the Oposa doctrine in environmental cases should be allowed only when a) there is a clear legal basis for the representative suit; b) there are actual concerns based squarely upon an existing legal right; c) there is no possibility of any countervailing interests existing within the population represented or those that are yet to be born; and d) there is an absolute necessity for such standing because there is a threat of catastrophe so imminent that an immediate protective measure is necessary. Better still, in the light of its costs and risks, we abandon the precedent all together.

He acknowledges *Oposa* because it was decided in a time that "needed to call attention to environmental concerns in light of emerging international legal principles."[99] He admits that while "intergenerational responsibility" is a noble principle, "it should not be used to obtain judgments that would preclude future generations from making their own assessment based on their actual concerns. The present generation must restrain itself from assuming that it can speak best for those who will exist at a different time, under a different set of circumstances."[100]

The same dissenting opinion was again raised in *Casino,* wherein Justice Leonen emphasized that *Oposa* should be abandoned or at least should be limited to situations where (1) there is a clear legal basis for the representative suit; (2) there are actual concerns based squarely upon an existing legal right; (3) there is no possibility of any countervailing interests existing within the population represented or those that are yet to be born; and (4) there is an absolute necessity for such standing because there is a threat or catastrophe so imminent that an immediate protective measure is necessary.

[99] Ibid.
[100] Ibid.

In *Resident Marine Mammals,* Justice Leonen again criticized the majority's decision for potentially undermining legitimate environmental rights as a result of its reiteration of *Oposa,* thus:

> Extending the application of "real party in interest" to the Resident Marine Mammals, or animals in general, through a judicial pronouncement will potentially result in allowing petitions based on mere concern rather than an actual enforcement of a right. It is impossible for animals to tell humans what their concerns are. At best, humans can only surmise the extent of injury inflicted, if there be any. Petitions invoking a right and seeking legal redress before this court cannot be a product of guesswork, and representatives have the responsibility to ensure that they bring "reasonably cogent, rational, scientific, well-founded arguments" on behalf of those they represent.[101]

CONCLUSION AND RECOMMENDATION

One can see clearly that the separate opinions of Justice Leonen closely resemble the critiques of Beckerman, the advocates of the "do-nothing" approach, and the "identity challenge." It must be recalled that those who criticize intergenerational equity contest the idea that future generations have no rights to specific assets (i.e., the environment and its resources). To assume otherwise is to defeat the logic of "X has a right to Y," when in fact, this requires that: first, X as an entity must exist, and second, it must be possible to provide Y. According to Beckerman, "It is logically impossible, as well as physically impossible, for future generations to dedicate the protection of the rights to somebody alive today. Of course, anybody can claim to represent the interests of future generations... But, unfortunately, future generations cannot play any part in selecting their alleged

[101] *Resident Marine Mammals,* page 589.

representatives or in determining what policies they adopt."[102]

The flaw in this argument is rebutted by Tremmel in that people "possess a moral feeling for future generations," and that "due to this feeling[,] we can ascribe moral rights to future generations," thus, making sense that they have 'rights.'[103]

Moreover, is it not that between the present and future (or succeeding) generations, the latter are at a disadvantage? We must admit that the future generations are at the losing end concerning the present generation, which retains the power to decide what quality of life the future generations may face. Besides, to argue that the present generation cannot and must not decide for the future generations because there are differences in preferences is to ignore the "biological bottom line of humans," that even the future generations "will most likely still need to breathe air, drink water, and eat."[104] For people of the present generation to choose to cut all trees or poison all water would make the future generation suffer and force them to cope with the consequences of the present generation's activities. That is simply impossible and cannot be countenanced. The present generation cannot opt to stay away from the business of the future generations.

Recommendations

Thus, the question posed at the beginning of this paper requires an answer that supports the retention of intergenerational equity in Philippine case law. There seemed to be no problem in various jurisdictions around the world that invoked intergenerational equity in environmental cases that were filed in courts. Intergenerational equity has been institutionalized in various countries because people are always demanding the establishment of mechanisms that will represent them in the decision-making process. In democratic countries, the structure of their governments prevents future generations from participating. This is because

[102] Beckerman, at note 28, pp.59-60.
[103] At note 29, page 8.
[104] Collins, at note 135, p.48.

political leaders focus on the present voters (through their votes) to keep them in power. There is no way that political leaders will consider what is best for future generations because the politician's immediate desire is to satisfy the needs of the present citizens. To defeat the defect in the system, there is a need for the institutionalization of intergenerational equity.

Suppose intergenerational equity is more of a moral than a legal concept. Is it proper to leave this to philosophers to debate and ignore any attempt to make it a concrete policy or doctrine for the public to obey?

Is this a case of politics avoiding morality from being legislated, either by the legislature or by the courts? It is not. As Tremmel notes, a written law and a moral obligation are connected but not identical. "In general, the relationship of morality and law can be characterized as follows: First, there are moral commandments, or respectively, obligations, that are not codified; second, there is an intersection between both fields; and third, legal norms may exist that are not moral."[105] Besides, considering that the future generations have 'moral rights,' the present generations must also infuse in their written laws the moral convictions of their society. This is clear when society punishes rape, abortion, murder, and genocide, among others.

Some constitutions around the world have already incorporated the doctrine of intergenerational equity into their provisions.[106] Environmental movements around the world desire more active intervention from legal institutions to ensure that their rights and their future children will be protected. If intergenerational equity is downplayed, and the travails it experienced dismissed as simply rhetorical, then it would not be difficult to imagine a world where there is no specific guidance for the observance of responsibilities towards the environment and the enforcement of rules for its protection and conservation. The same thing applies to

[105] At note 27, page 199..
[106] Article 37 of the Charter Fundamental Rights of the European Union; Article 20a of the German Constitution; Article 41 of the Argentine Constitution; Article 225 of Brazil's constitution; Article 45 and 53 of the Constitution of Spain; Article 19 of Ecuador's Constitution; Article 24 of the Greek Constitution; Article 21 of the Dutch Constitution; Swedish Constitution; and Section 4, Article 73 of the Federal Constitution of the Swiss Confederation.

intergenerational equity, whether the doctrine is found in *Oposa* or the present Rules of Procedure for Environmental Cases.[107] The pronouncement in *Oposa* concerning intergenerational equity, which still carries its practical value—that it has "significantly advanced the meaning and scope of the constitutional right to a balanced and healthful ecology in ways that may be directly

Toolbox on Corporate Climate Litigation held in the Malcolm Theater, University of the Philippines, Diliman. Justice Leonen reiterated that the Supreme Court has plans to amend the present Rules of Procedure on Environmental Cases, particularly the provisions on the writ of continuing mandamus, the requirement of two or more provinces in the writ of kalikasan, and the inclusion of intergenerational equity in legal standing, among other meaningful and useful for present generations in relation to their environmental duty to future generation.

[107] On July 8, 2024, Justice Leonen was the keynote speaker in the Asian Regional Summit and Philippine National Conference on the BIICL Global

COLONIAL MASTER, DEMOCRATIC PRESIDENT, OR ADMINISTRATIVE PREFECT: THE FEASIBILITY OF APPLYING THE PREFECTORAL SYSTEM OF GOVERNMENT IN THE PHILIPPINES

Argylle Pagtailan

ABSTRACT

The prefectoral system of government has gained attention as an alternative governance model because of its regionalized administrative structure where power is decentralized to prefectures or provinces. This study explores the feasibility of implementing the prefectoral system in the Philippines drawing on comparative studies, historical analysis, and contemporary political contexts. Findings suggest that decentralization of power, enhanced local autonomy, and improved regional governance are advantages of the prefectoral system. Factors such as the election of leaders, checks and balances, citizen participation, and protection of individual rights impact the implementation and compatibility of a prefectoral system with democratic form of government. Furthermore, in improving regional governance, findings through a case comparison between existing legal and institutional frameworks of the Cordillera Administrative Region (CAR) and the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) report that the adoption of a prefectoral system are tied with probable challenges including resistance from centralized power structures, the need for robust infrastructure and resources, and the requirement for comprehensive legal reforms. This also considers the implications of the prefectoral system on national unity, the role of national government, and the potential impact on policy-making and decision-making processes. While acknowledging the advantages of decentralization and improved regional governance, it emphasizes the importance of carefully addressing the unique socio-political, cultural and religious contexts, as

well as the several issues that the country faces. The study concludes by suggesting the need for in-depth research and comprehensive stakeholder consultations to determine the viability and potential benefits of adopting the prefectoral system as a way forward for governance reform in the Philippines.

Keywords: *prefectoral system, decentralization, government system.*

INTRODUCTION

The prefectoral system, also known as the provincial system or regionalized governance, is a form of decentralized authority where power is devolved to prefectures or provinces.[1] Under this system, regional entities, led by prefects, are entrusted with significant decision-making authority aiming to address regional disparities, strengthen local administration, and promote effective government control.[2] A growing interest in exploring alternative governance models like the prefectoral system is emerging in the Philippines to address struggles with governance challenges, such as centralized decision-making, limited local autonomy, and uneven development across regions.[3]

To assess the feasibility of applying the prefectoral system in the Philippines, it is crucial to consider both the benefits and the challenges that may arise. On one hand, decentralization of power can foster better regional representation, localized decision-making, and tailored development strategies[4] by tapping into the knowledge and expertise of local leaders. It may also empower local communities, promote accountability, and encourage citizen participation in governance processes.[5]

On the other hand, implementing the prefectoral system in the Philippines must account for disparities in wealth, resources, and infrastructure for equitable distribution of power and resources under a regionalized governance structure. Additionally, addressing deep-rooted issues such as corruption, nepotism, and political rivalries requires robust institutional frameworks and transparent

[1] Yu, J., and X. Gao. "Redefining Decentralization: Devolution of Administrative Authority to County Governments in Zhejiang Province." *Australian Journal of Public Administration*, Wiley Online Library, October 10, 2013.
[2] Trutkowski, C. "An Effective Local Government Office: Developing Personnel Competence to Build Efficient Local Administration." Foundation in Support of Local Democracy, Council of Europe, 2016.
[3] Balisacan, A., et al. *An Overview: The Philippines and Regional Development*. Edward Elgar Publishing Ltd., Ateneo de Manila University Press, 2006.
[4] Goldstein, A., et al. *Primer on Decentralization*. Center for International Private Enterprise, May 11, 2022.
[5] Smoke, P. "Accountability and Service Delivery in Decentralizing Environments: Understanding Context and Strategically Advancing Reform." In *A Governance Practitioner's Notebook: Alternative Ideas and Approaches*, OECD, 2015.

accountability mechanisms. Existing legal and administrative structures, as well as the potential impact on national unity and policy-making processes, must also be carefully considered.

Given these complexities, a comprehensive assessment of the feasibility of the prefectoral system in the Philippines is warranted. This evaluation would encompass an analysis of historical precedents, comparative studies of other countries' experiences with regionalized governance, and an examination of the country's legal and institutional capacity to implement such a system.

I. REVIEW OF RELATED LITERATURE

The prefectoral system of local government, originally developed in France, is a highly centralized system that operates through chains of command. It is hierarchical with lower units taking directives from above. Moreover, the central government appoints prefects who exercise broad powers over local authorities.[6]

Today, the prefectoral system is totally different from its precedent which has been criticized as being dictatorial.[7] In this form of government, the country is divided into prefectures, which are headed by a prefect. A prefecture is an administrative division that typically encompasses a specific geographic area and serves as the central point for governance and public administration. The specific structure and responsibilities of the prefectoral system can vary from country to country and even within different regions of the same country.[8]

Prefects are appointed by the central government and are responsible for overseeing various administrative functions within their respective prefectures.[9] Generally, the prefect is responsible for implementing and enforcing laws and

[6] Morton, C. "The Prefectoral System of Local Government." Virtual Kollage, May 29, 2016.
[7] Id.
[8] OECD. *Understanding Decentralisation Systems*. OECD iLibrary. https://www.oecd-ilibrary.org/sites/53013b71-en/index.html?itemId=/content/component/53013b71-en, 2023.
[9] Benjamin, S. "Japan: Local Autonomy Is a Central Tenet to Good Governance." *ICMA*, March 29, 2022.

regulations, coordinating the activities of various government departments, maintaining public order and security, and representing the central government at the local level[10] but may vary depending on the country and the level of decentralization within the government.

Since the prefectoral system of government is not as widely studied or discussed as some other forms of government, there are only few research papers and scholarly articles on this topic. The availability and extent of research vary depending on the specific region or country that has implemented the prefectoral system or other similar system.

By assessing decentralization and its structures, Ridley (1973) [11] submits that decentralizing the decision-making functions of government can be a solution to problems of decentralization in the French prefectoral system. By looking into the integrated model of administrative decentralization as found in the French prefectoral system, it follows that somewhere between the vertical decentralization and horizontal decentralization, there is a point of overlap where horizontal coordination is imposed on vertical structures. On the other hand, between federalism and prefectural administration, Elazar (1981)[12] finds that the two systems of governance can coexist and can be integrated effectively depending on the specific context and how they are implemented. For example, in a federal system, the regional entities can be organized into prefectures which function as local administrative units. This allows for efficient governance and decision-making at the regional level while still maintaining a federal structure.

Meanwhile, decentralization provides specific solutions for specific problems. In Europe, the Organization for Economic Cooperation and Development (OECD) discovered that the decentralization of Finland, France, and

[10] Council of Europe. *Structure and Operation Report of Local and Regional Democracy: Romania*. Council of Europe. https://rm.coe.int/16807471c6, February 2014.
[11] Ridley, F. "Integrated Decentralization: Models of the Prefectoral System." *SAGE Journals*, March 1973.
[12] Elazar, D. "Is Federalism Compatible With Prefectorial Administration?" *Publius*, Oxford University Press, 1981.

Poland strengthened domestic regional decision-making, each having a different approach on troubleshooting governance problems.[13]

Decentralization also impacts policy-making. In sub-Saharan African countries, decentralization brings about reforms on education, health, and water supply while observing local accountability and financial autonomy thereby achieving improved service provision. In Latin America, decentralization brings devolution of resources to local governments on agricultural policies, infrastructure development, and poverty reduction. It is important in local capacity-building, intergovernmental coordination, and citizen participation.[14]

From a global perspective among cities and local governments, decentralization improves public service delivery, enhanced citizen participation, and local development resulting in improved local democracy.[15] And to problems in governance, decentralized systems benefit service quality and reduce corruption in developing and emerging economies. Decentralization appears to alleviate worse conditions in service delivery, corruption levels, fiscal management, and economic growth without disregarding the importance of appropriate institutional frameworks and capacity-building efforts.[16]

Yet, the authority and strength of decentralized regions in a state may not always be par. Among municipalities in Scandivania, Bjørnå and Jenssen (2006)[17] find that the prefect's authority varies in Scandivanian municipalities—between strong Norwegian and Swedish perfectures and weak Danish prefects. They suggest that this may have something to do with the need for an institution that brings

[13] OECD. *Regionalisation in the Context of Decentralisation Reforms*. OECD iLibrary. https://www.oecd-ilibrary.org/sites/028bf97d-en/index.html?itemId=/content/component/028bf97d-en, 2020.
[14] Brosio, G. *Decentralization and Reform in Latin America*. United Nations Economic Commission for Latin America and the Caribbean, Edward Elgar Publishing Limited, 2012.
[15] United Cities and Local Governments (UCLG). *Decentralization and Local Democracy in the World: First Global Report*. World Bank and UCLG, 2008.
[16] Shah, A., et al. "Decentralising the Public Sector: The Impact of Decentralisation on Service Delivery, Corruption, Fiscal Management and Growth in Developing and Emerging Market Economies: A Synthesis of Empirical Evidence." *CESifo DICE Report*, January 2004.
[17] Bjørnå, H., and S. Jenssen. "Prefectoral System and Central–Local Government Relations in Scandinavia." Wiley Online Library, November 10, 2006.

about cohesion and coordination, and that the authority of the prefecture varies with the character of central-local relations vulnerable to changes in dominant political goals and values. In a prefectoral system, the authority and influence of the prefect must not be overlooked.

Finally and most importantly, In the Philippines, decentralization finds its legal underpinning from the Local Government Code of 1991 (LGC). Brillantes (1987)[18] avers that the LGC decentralized powers and resources to local government units. This affects local service delivery, fiscal management, and citizen participation. Brillantes failed not to discuss oppositions and opportunities associated with the prefectoral system and provided recommendations for improving local governance such as sub-regional planning.

In this study, it is vital to consider that the Philippines is an archipelagic state comprising several regions with varying economic, social, and cultural characteristics, operating under a centralized government. And because the Philippines currently has a unitary system of government, where power is concentrated at the national level, shifting to a prefectoral system would require constitutional considerations and potential amendments to the existing constitution. It would also entail various political considerations. These considerations encompass factors related to governance, power dynamics, political structures, and the overall political landscape.

The rationale behind exploring the prefectoral system in the Philippines lies in addressing several pressing issues. Firstly, centralized decision-making often leads to an imbalance in regional development, with certain areas receiving more attention and resources than others. Secondly, a lack of local autonomy can hinder effective governance and responsiveness to local needs. And lastly, there is a desire

[18] Brillantes, A. "Decentralization in the Philippines: An Overview." *Philippine Journal of Public Administration*, April 1987.

to enhance citizen participation, accountability, and transparency in the decision-making process.[19]

II. SIGNIFICANCE OF THE STUDY

If the prefectoral system is deemed feasible, it could lead to more equitable regional development, increased local participation, and improved governance at the grassroots level. The findings of this study will have significant implications for the future governance and development of the Philippines. It will provide policymakers, stakeholders, and the public with a comprehensive understanding of the prefectoral system's potential advantages and disadvantages. It would eventually help in properly determining the most efficient form of government applicable and the repercussions it has in our country.

III. STATEMENT OF THE PROBLEM AND HYPOTHESES

This study will determine whether the prefectoral system is suitable, practical, and feasible in the Philippines by examining the viability and potential benefits of its implementation through comprehensive background analysis outlining the rationale and possible implications of its adoption.

The specific objectives are:

1. To evaluate the potential advantages and disadvantages of decentralization through the prefectoral system;
2. To assess the impact of implementing the prefectoral system on governance, service delivery, and regional development;
3. To analyze the legal and administrative implications of transitioning to a prefectoral system;

[19] Brillantes, A., and A. Modino. "Philippine Technocracy and Politico-Administrative Realities During the Martial Law Period (1972–1986): Decentralization, Local Governance and Autonomy Concerns of Prescient Technocrats." *Philippine Political Science Journal*, July 1, 2015.

4. To investigate the international best practices and case studies of countries that have successfully implemented similar system; and
5. To identify potential challenges and barriers to the implementation of the prefectoral system in the Philippines.

The following hypotheses are founded:

1. The prefectoral system could lead to improved local governance and public service delivery.
2. The prefectoral system may enhance regional development and reduce disparities.
3. The prefectoral system may face difficulties in its implementation due to logistical complexities.
4. The application of the prefectoral system may face resistance from the general public and it may cause conflicts between the different levels of government.
5. The successful application of the prefectoral system of government will require the use of substantial resources and rigorous capacity-building process.

Scope and Delimitation

This study acknowledges certain limitations, including the need for further in-depth research and analysis. The political, administrative, and cultural context of the Philippines is complex. The application of a prefectoral system of government requires careful consideration of these factors during the study. Additionally, potential contests, such as resistance to change or administrative capacity constraints, may impact the feasibility of adopting the prefectoral system.

METHODS

This paper uses the *doctrinal methodology*, particularly *historical and comparative approach*. This study employs a multi-faceted approach, incorporating desk research and data analysis. The researcher collected, compared and analyzed data about the prefectoral system of government, its feasibility in the Philippines, and the implications of its application. Existing literature, academic research, and reports from international organizations were reviewed to gain insights into the prefectoral system and its potential application in the Philippines. Data on governance structures, regional disparities, and public service delivery were analyzed to support the assessment.

RESULTS AND FINDINGS

International best practices of the prefectoral system of government or similar decentralized systems provide valuable insights that can apprise us the necessary knowledge regarding the implementation and operation of such systems. These international best practices highlight key principles such as local autonomy, citizen participation, regional development focus, cooperative governance, and subsidiarity. While each country's context may differ, examining these practices can inform us the right strategy in implementing the prefectoral system.

A. International Prefectoral Systems of Government or Similar Decentralized Systems and their Best Practices

The term *prefectoral system* is not commonly used to describe a specific system of government. As such, the following countries that were enumerated have implemented decentralized or regionalized systems of government, which share some similarities with the concept of prefectures. They are tabulated below:

Table 1. International prefectoral/regionalized systems of government and best practices.

COUNTRY	PREFECTORAL SYSTEM/ REGIONALIZED SYSTEM	INTERNATIONAL BEST PRACTICES
France	France is known for its administrative divisions called "*dèpartements*" and "*arrondissements,*" which operate under a decentralized system. The prefecture is headed by a prefect, who represents the central government and ensures the implementation of national policies.[20]	France's prefectoral system is often considered a benchmark for decentralized governance. Best practices from France include clear delineation of roles and responsibilities, effective communication between central and local authorities, and a strong emphasis on administrative efficiency and accountability.[21]
Japan	Japan has a system of prefectures, known as "*ken*" or "*to,*" that form the country's regional administrative divisions. Each prefecture has its own elected governor and assembly, responsible for local governance and the implementation of policies within their respective jurisdictions.[22]	Their best practices consist of strong regional planning and coordination, active citizen participation, and effective local service delivery. The system places significant responsibilities on prefectoral governments. This empowers them to address regional needs and promote local development.[23]
South Korea	South Korea is divided into provinces, called "*do,*" and	South Korea's regional developmental focus emphasizes

[20] The Editors of *Encyclopaedia Britannica*. "Prefect: French Political History." *Encyclopedia Britannica*. https://www.britannica.com/place/France/Land, June 7, 2023.
[21] Campo, S., and P. Sundaram. *To Serve and to Preserve: Improving Public Administration in a Competitive World*. Asian Development Bank. https://www.adb.org/sites/default/files/publication/28984/improving-public-administration.pdf.
[22] YABAI Writers. "Regional Differences: A Look into Japan's Prefectures." *YABAI*, May 1, 2017.
[23] Babajanian, B. "Citizen Empowerment in Service Delivery." *ADB Economics Working Paper Series*, Asian Development Bank, June 2014.

	special cities, called "*gwangyeoksi,*" that serve as regional administrative units. The governors or mayors, along with the local councils, govern the provinces or special cities. They handle local affairs and implement policies within their respective jurisdictions.[24]	regional development and balanced growth. The country has invested in developing regional infrastructure, promoting industrial clusters, and implementing local policies to support underdeveloped areas. This approach has helped address regional disparities and fostered economic development across different provinces.[25]
Italy	Italy has a system of regions, called "*regioni,*" that operate under a regionalized system of governance. Each region has its own elected president and council, responsible for regional administration, policy implementation, and managing local affairs.[26]	None
Spain	Spain is divided into autonomous communities called "*comunidades autónomas*" that have varying degrees of self-governance. Each autonomous community has its own government, parliament, and president. This	Spain's autonomous communities offers lessons in regional autonomy and self-governance. Best practices from Spain are the clear delineation of powers between the central government and autonomous communities, fiscal autonomy for regional

[24] McGill University. "South Korea." McGill University School of Computer Science, University Department in Montreal, Quebec.
[25] OECD. "12 Ways Korea Is Changing the World: Regional Development." *OECD.org*, Organisation for Economic Co-operation and Development, October 25, 2021.
[26] Signoretta, P., et al. "Italy." *Encyclopedia Britannica*, June 19, 2023.

	enables them to make decisions on regional matters within the framework of national laws.[27]	governments, and mechanisms for intergovernmental cooperation. Their system aims to accommodate regional diversity and aspirations while maintaining national unity.[28]
Russia	Russia has a federal system and its sub-national units are known as federal subjects. These federal subjects include regions, republics, territories, and other administrative divisions. They have varying levels of autonomy and are responsible for managing local affairs within their jurisdictions.[29]	None
China	China has a system of provinces, autonomous regions, and municipalities. Provinces and autonomous regions are further divided into prefectures which are responsible for local governance, economic development, and public administration.[30]	None

[27] European Union. "Spain." European Committee of the Regions, June 2019.
[28] United Nations. "Aspects of Autonomous Communities of Spain among Issues Discussed by Human Rights Committee." *United Nations*, March 21, 1996.
[29] National Intelligence Council. "Federalism in Russia: How Is It Working?" Federation of American Scientists, February 1999.
[30] China.org. "China's Political System." *China Internet Information Center*. http://www.china.org.cn/english/Political/28842.htm.

Germany	Germany's Federal System includes *Länder* or states with substantial autonomy which demonstrates successful decentralization.[31]	Best practices from Germany include robust intergovernmental cooperation mechanisms, fiscal autonomy for regional governments, and strong local decision-making powers. Their system lays emphasis on cooperative federalism, where federal and state governments work together to address regional needs while maintaining a cohesive national framework.[32]
Canada	Canada's Provincial System offers insights into successful regional autonomy and decentralized decision-making.[33]	Best practices from Canada comprise strong fiscal capacities at the regional level, effective intergovernmental relations, and mechanisms for addressing regional disparities. Their system stresses collaboration and partnerships between the federal government and provinces which ensures regional voices are represented in national decision-making processes.[34]
Switzerland	Switzerland's Cantonal System combines federalism with strong regional autonomy.[35]	Best practices from Switzerland are subsidiarity where decision-making authority is

[31] Fuhr, H., et al. *Federalism and Decentralization in Germany: Basic Features and Principles for German Development Cooperation*. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2018.
[32] Id.
[33] Bradford, N. "Canadian Regional Development Policy: Flexible Governance and Adaptive Implementation." *OECD*, January 23, 2017.
[34] Id.
[35] Linder, W. "Federalism: The Case of Switzerland." Wolf Linder, January 2014.

		delegated to the lowest appropriate level, and a strong emphasis on direct citizen participation through referendums and constitutions. The system promotes a sense of ownership and responsibility among citizens and ensure their active involvement in local governance.[36]
Brazil	Brazil has implemented a prefectoral system called "*prefeitura*." The country is divided into states and municipalities, with each municipality headed by a mayor and council. The mayors, who are directly elected by the local people, have the authority over local matters regarding administration, public services, and development projects.[37]	Brazil's local government highlights the empowerment of local leaders. Their system provides mayors with significant decision-making authority and resources to address local needs and promote development. This approach has helped in enhancing local governance, citizen participation, and responsiveness to local issues.[38]

These are just a few examples of countries that have implemented decentralized or regionalized systems of government. Each country has its own unique characteristics and variations in the implementation of their respective systems. It is important to note that the specific structures and levels of autonomy

[36] Linder, W., and S. Mueller. *Swiss Democracy: Federalism*. Springer Nature, January 21, 2021.
[37] Avellaneda, C., et al. "Mayoral Quality and Municipal Performance in Brazilian Local Governments." *Scientific Electronic Library Online*, December 2017.
[38] Wampler, B. *Expanding Accountability through Participatory Institutions: Mayors, Citizens, and Budgeting in Three Brazilian Municipalities*. Cambridge University Press, 2004.

may vary among these countries, but they all share the common feature of decentralizing power to sub-national units known as prefectures, regions, or similar entities.

B. Prefectoral System and Democratic System of Government in the Philippines

Correspondingly, in implementing the prefectoral system of government in the Philippines, it is imperative to determine the various factors and possible problems to ascertain its feasibility. Here, key aspects of prefectoral system of government vis-à-vis the Democratic form of government, and the current government system in the Philippines are analyzed. The comparison is tabulated below:

Table 2. Comparative table of prefectoral system and democratic system of government.

FEATURE	PREFECTORAL SYSTEM	DEMOCRATIC FORM
Definition	Form of government where power is centralized in a prefect or a group of prefects who are appointed to govern specific regions or administrative divisions.[39]	A system where power is vested in the people, and they exercise it directly or through elected representatives.[40]
Power Distribution	Power is concentrated in the hands of the prefect/s who are appointed by higher authorities, such as the central government. They have significant decision-making authority	Power is distributed among the people through elections and representative institutions. Citizens have the right to vote and participate in decision-making processes, either directly or by electing

[39] Supra note 8.
[40] Annan, K. *Democracy*, Compass Manual for Human Rights Education with Young People, Council of Europe. https://www.coe.int/en/web/compass/democracy.

	and often have control over local administration, law enforcement, and other government functions.[41]	representatives to make decisions on their behalf.[42]
Decision-making Process	Decisions are generally made by the prefect/s or a small group of appointed officials. They have a considerable degree of autonomy in decision-making within their designated regions. The decision-making process tends to be top-down, with limited public participation.[43]	Decisions are made through a participatory and inclusive process. Citizens have the right to express their opinions, engage in public debates, and participate in voting. Elected representatives are accountable to the people and are expected to make decisions based on public interest and consultation.[44]
Accountability and Transparency	The level of accountability and transparency in the prefectoral system can vary depending on the specific jurisdiction. While prefects may be accountable to higher authorities, the system may lack direct accountability to the local population. Transparency may be limited, and decision-making	Accountability and transparency are crucial in democratic systems. Elected representatives are accountable to their constituents and can be held responsible for their actions. Governments are expected to operate transparently, with public access to information, public scrutiny, and mechanisms for checks and balances.[46]

[41] Whitcomb, E. "Napoleon's Prefects." *The American Historical Review*, JSTOR, 1974.
[42] Pansardi, P. "Democracy, Domination and the Distribution of Power: Substantive Political Equality as a Procedural Requirement." *Revue Internationale de Philosophie*, 2016.
[43] Staerklé, C. "Political Psychology." In *International Encyclopedia of the Social & Behavioral Sciences*, 2015.
[44] Lagerspetz, E. "Democracy." In *Encyclopedia of Applied Ethics*, 2012.
[46] Supra note 37.

	processes may not always be publicly accessible.[45]	
Flexibility and Adaptability	This system allows for centralized decision-making and swift implementation of policies. Prefects have the authority to adapt to local needs and circumstances efficiently, without prolonged deliberation or consensus-building.[47]	This form of government often involves more deliberation, negotiation, and consensus-building among various stakeholders. This can lead to a slower decision-making process but allows for greater inclusivity and consideration of diverse perspectives.[48]

In summary, prefectoral systems involve the division of a region into prefectures, each with its own administrative body which typically handles local governance and decision-making. In democratic systems, the power is generally vested in the people, and decisions are made through processes such as elections, representation, and citizen participation. Democratic governance carries principles such as political equality, individual rights, and accountability.

There are also studies and discussions on the compatibility of a democratic form of government with a prefectoral system. The compatibility can vary depending on the specific features and implementation of the prefectoral system within the broader democratic framework. It largely depends on how the prefectoral governments are structured and how they interact with democratic institutions.[49] Some factors that can affect this compatibility include:

1. **Election of Prefectoral Leaders:** In a democratic system, the free and fair election of leaders of prefectoral governments ensures that the people's

[45] Supra note 10.
[47] Supra note 12.
[48] Tschersich, J., and K. P. W. Kok. "Deepening Democracy for the Governance toward Just Transitions in Agri-Food System." *Environmental Innovation and Societal Transitions* 43 (June 2022).
[49] Supra note 46.

voice matters in choosing their local representatives. This enhances democratic accountability and legitimacy.[50]

2. **Checks and Balances:** To ensure a balance of power, it is essential to have mechanisms that prevent the concentration of power solely in the hands of prefectoral leaders. This can be achieved through checks and balances, such as separation of powers, independent judiciary, and oversight bodies, which are crucial elements of democratic governance.[51]

3. **Citizen Participation:** A democratic prefectoral system should provide avenues for citizen participation in decision-making processes. This can be achieved through mechanisms like public consultations, municipal hall meetings, and participatory budgeting, which allow citizens to have a voice in local governance.[52]

4. **Protection of Individual Rights:** A democratic system should ensure the protection of individual rights and liberties, including those of citizens living within prefectures. Safeguarding civil liberties, freedom of expression, and equal treatment under the law are essential aspects of democratic governance.[53]

Thus, the compatibility of a democratic form of government with a prefectoral system depends on the aforementioned factors. When these elements are well-developed and integrated, it is possible to have a democratic prefectoral system where local governance aligns with democratic principles.

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[50] Webb, P., and R. Gibbins. "Functions of Elections." *Politics & Political Systems, Politics, Law & Government*, *Britannica*, September 18, 2024.
[51] James, L., et al. "Checks and Balances: What Are They, and Why Do They Matter?" *The Constitution Unit*, United Kingdom, January 19, 2023.
[52] OECD. *Planning, Implementing, and Evaluating a Citizen Participation Process*. OECD Guidelines for Citizen Participation Processes, 2022. https://www.oecd-ilibrary.org/docserver/7759a39c-en.pdf?expires=1727317781&id=id&accname=guest&checksum=DFDF20AD387A2A51E0650660049E22F3.
[53] OHCHR. "About Democracy and Human Rights." United Nations, Office of the High Commissioner for Human Rights. https://www.ohchr.org/en/about-democracy-and-human-rights.

C. Comparative Case Analysis: Cordillera Administrative Region (CAR) and the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) as Prefectures

To assess whether the prefectoral system of government could actually be implemented in the Philippines, a case analysis is made between the Cordillera Administrative Region (CAR) and the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) as prefectures, focusing on the following key areas: governance, autonomy, political accountability, and development goals.

Table 3. Analysis of prefectoral system in CAR.

	PREFECTORAL SYSTEM	CURRENT SYSTEM	APPLICATION
Governance Structure	The prefect would be appointed by the central government to manage CAR, and they would act as an intermediary between the local government and the central government. The prefect would have authority over both policy implementation and the local	CAR is currently governed by locally elected officials at the provincial, municipal, and barangay levels.[56] It has an administrative regional set-up under the Local Government Code of 1991, where local officials are elected by the people.[57] Under this law, self-governance and local autonomy are granted to the region. National programs are	There will be an effective intergovernmental relations between the national and local government because the prefects would serve as the direct voice of the central government, and he will

[56] Borlaza, G., and M. Cullinane. "Local Government in Philippines, Government and Society, Geography & Travel, Countries of the World." *Britannica*, September 25, 2024.
[57] See Republic Act No. 7160.

	administration in order to ensure that national policies are effectively applied. The best practices in Germany, Canada, and Switzerland can be applied in this case.[54] By implementing their best practices, local governance can be overseen and public order could be maintained.[55]	implemented in partnership with the local officials who retain a large degree of discretion in governing their jurisdictions.[58] For instance, the Cordillera Regional Development Council (RDC) is responsible for planning and coordinating development policies.[59] The elected officials and local representatives work together to develop programs that are more reflective of the region's local needs.	likewise be directly involved locally. In this sense, there is an efficient coordination, paving the way for positive governance.
Autonomy	CAR would have limited local autonomy, as the prefect's main responsibility would be to enforce central government	CAR enjoys a significant level of autonomy under the Local Government Code, with its officials accountable to their local constituents. Elected	CAR's continuing goal is their local autonomy. The application and/or integration of a

[54] Supra notes 32, 34, and 36.
[55] Supra notes 33, 35, and 37.
[58] Id.
[59] Caccam, V. "Cordillera RDC Launches the Cordillera Regional Development Plan 2023-2028." National Economic and Development Authority, Cordillera Administrative Region, Republic of the Philippines, Official Gazette, GOV.PH, June 26, 2023.

	policies. The national government would have stronger control over key functions such as budget allocation, law enforcement, and local administration. Again, Germany's and Canada's decentralized systems can be utilized as an example. Both countries have strong fiscal autonomy for their regional governments.[60]	governors and mayors can create programs suited to the local cultural, economic, and environmental contexts.[61] As CAR is also an administrative region, it is pushing for the creation of an autonomous region that would grant it more self-determination similar to the BARMM. Their fight for autonomy is driven by the Cordillera People's Liberation Army (CPLA) and the Indigenous Peoples of the Cordillera.[62] They assert the region's desire for self-governance in order for them to preserve their culture	prefectoral system of government in the Cordilleras would help them achieve this goal. The best practices of Germany and Canada's system are the perfect models. The current autonomy which CAR presently enjoys could be strengthened through intergovernmental cooperation mechanisms such as federal collaboration between the state and the region.

[60] Supra note 56.
[61] Local Government Academy. *Unpacking the Local Government Code of 1991, Republic Act 7160*. Local Government Academy, Department of the Interior and Local Government for the United Nations – Habitat, United Nations Development Programme. https://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2012/12/UNPACKINGLGC91.pdf.
[62] Buendia, R. "The Cordillera Autonomy and the Quest for Nation-Building: Prospects in the Philippines." *Philippine Journal of Public Administration*, Vol. XXXV, No. 4, October 1991.

		and to protect their natural resources.	
Political Accountability	In a prefectoral system, the prefect is appointed, meaning the local population would have no direct say in their appointment. This could lead to tensions between the central government's agenda and the preferences of the local people. Additionally, it reduces political accountability since the prefect would be accountable only to the central government. France could be used as an example in this case. Their prefectural	CAR's current governance is based on an elective system, where the local officials are directly accountable to the electorate. This fosters political accountability because the officials must prioritize local concerns in order to win the elections and for them to maintain public trust.[64] If CAR was converted into an autonomous region, its leaders could be further empowered to represent local interests without the central government's intervention. This would promote both cultural preservation and self-governance.[65]	Considering that the prefect reports directly to the central government, there is lesser political accountability to the local people. In applying the prefectoral form, we have to borrow France's model which provides efficient communication between the central and local authorities. This way, there is still political accountability to the electorate.

[64] UNDESA. *Responsive and Accountable Public Governance*. 2015 World Public Sector Report, Department of Economic and Social Affairs, United Nations, New York, 2015.
[65] Republic Act No. 8438.

	governors are elected, and there is a clear delineation of their roles and responsibilities.[63]		
Development Goals and Policy Implementation	The prefectoral system allows for more unified policy implementation and possibly more efficient delivery of services. This is because the national policies can be enforced without delays or conflicts between local and national governments.[66] In theory, this could lead to better infrastructure and public service delivery.[67]	Under the current set-up, development in the Cordilleras should specifically address local challenges. Their leaders are aware of the local problems, such as the preservation of indigenous culture and the need for environmental protection. They can create local programs which reflect these needs.[69] However, local inefficiencies and resource constraints sometimes lead to delays or uneven	By applying the prefectoral system, there would be a potential for more streamlined policy implementation. By integrating it with the current system, there is more flexibility for addressing local development challenges and the risks could be avoided by implementing

[63] Supra notes 21 and 22.
[66] Marcou, G. "Regionalisation and Its Effects on Local Self-Government." *Steering Committee on Local and Regional Authorities (CDLR), Local and Regional Authorities in Europe, No. 64*. Council of Europe Publishing, January 1998. https://rm.coe.int/1680748024.
[67] Id.
[69] Camacho, L., et al. "Traditional Forest Conservation Knowledge/Technologies in the Cordillera, Northern Philippines." *Forest Policy and Economics* 22, no. 2 (September 2012).

	Japan and South Korea's government systems are the best examples. Their prefects are crucial for the implementation of nationwide programs for economic development, security, and disaster response, which are uniformly implemented across regions.[68]	implementation of national programs.[70] For instance, CAR faces unique geographical challenges, such as the mountainous terrain and the landslide-prone areas. These problems require locally tailored solutions for infrastructure projects that may not align with national standards.[71]	the best practices of Japan and South Korea's administrative units.

Implementing a prefectoral system in the Cordillera Administrative Region would fundamentally balance local autonomy and central authority. The prefectoral system could enhance the efficiency of policy implementation and enforce national development strategies, and in order to maintain the local autonomy and political accountability of the region, the best practices of other countries could be applied.

However, the current decentralized model allows CAR to maintain a higher degree of self-determination, which is particularly significant, given its history and aspirations for greater autonomy. Considering this, it is unlikely that a prefectoral

[68] Supra notes 24 and 26.
[70] Rood, S. "Summary Report on a Research Programme: Issues on Cordillera Autonomy." *Sojourn: Journal of Social Issues in Southeast Asia* 7, no. 2 (August 1992).
[71] DPWH. "DPWH Delivers Vital Projects in Mountain Region of Cordillera." Department of Public Works and Highways, Republic of the Philippines, Government Links, GOV.PH, March 21, 2022.

system of government would be favorably received. At first glance, this could be seen as a step backward in terms of local self-governance. The existing local governance structure, along with a possible transition to a federal or autonomous region, aligns more closely with CAR's historical and political context. Hence, for the successful implementation of a prefectoral system of government, the aspects of local autonomy and accountability should be aggrandized.

On the other hand, BARMM was established in 2019 as an autonomous region. This region has a unique political structure, with its local government granted with significant self-governance.[72] Comparing the implementation of the prefectoral system in BARMM versus its current governance model provides an insightful perspective on the balance between centralized control and regional autonomy. This is tabulated below:

Table 4. Analysis of prefectoral system in BARMM.

	PREFECTORAL SYSTEM	CURRENT SYSTEM	COMPARISON
Governance Structure	The prefect functions as the primary representative of the national government, ensuring that national laws and policies are implemented consistently and	BARMM has a parliamentary system under the Bangsamoro Organic Law (BOL),[74] granting its local leaders substantial autonomy to enact laws, implement policies, and govern the region. It is led by a Chief Minister who is elected by the	The current system of the BARMM is already decentralized. On top of this, the region already enjoys autonomy, with the locally elected leaders

[72] Abuza, Z., and L. Lischin. "The Challenges Facing the Philippines' Bangsamoro Autonomous Region at One Year." United States Institute of Peace, Washington, DC, June 10, 2020.
[74] Republic Act No. 11054.

	effectively across the region. The prefect has extensive powers in local governance. Spain's autonomous communities are the perfect model for this.[73] Their best practices can be adopted.	Bangsamoro Parliament, with members of parliament also elected by the Bangsamoro people.[75] BARMM has its own executive, legislative, and judicial powers, particularly over matters like education, cultural preservation, social services, and protection of natural resources.[76] For instance, the BARMM government can legislate the operation of the Sharia justice system, economic development programs, and even some aspects of law enforcement.[77]	making decisions to cater to the region's unique cultural, political, and religious needs. In integrating the prefectoral system and by applying Spain's best practices, regional diversity would still be recognized, and at the same time, national unity would be maintained through the presence of the prefects.
Autonomy	In a prefectoral system, autonomy could be curtailed. The prefect would ensure that the	BARMM enjoys autonomy. They have exclusive powers over certain aspects of governance. The region	BARMM has a high level of autonomy. It is allowed to govern its

[73] Supra note 28.
[75] Bangsamoro Transition Authority.
[76] Supra note 75.
[77] Bangsamoro Autonomy Act No. 13 (Bill No. 60).

	national government's policies take precedence over local preferences. To cite an example, in France, although regions have local councils, the prefects can veto local decisions that conflict with national laws or interests.[78]	has the authority to establish its own laws that reflect the cultural and religious uniqueness of the Muslim population in Mindanao. It also manages natural resources, operates educational systems specific to its population, and has a justice system that incorporates the Sharia law.[79] The region's authority over resource management, such as control over energy production, provides economic leverage and reflects its right to self-governance.[80]	territory based on the cultural and religious needs of its people. If the prefectoral system is applied, their autonomy could be diminished. Hence, there should be a careful implementation of this system by utilizing Spain's autonomous regions as a model.
Political Accountability	In a prefectoral system, accountability would primarily	In the current BARMM structure, leaders are directly accountable to the Bangsamoro	Under the current system, there is greater political

[78] Cole, A. "Prefects in Search of a Role in a Europeanised France." *Journal of Public Policy* 31, no. 3 (December 2011).
[79] Rodil, B. *The Lumad and Moro of Mindanao*. Minority Rights Group International Report, British Library Cataloguing in Publication Data, London, UK, July 1993.
[80] Tuminez, A. "This Land Is Our Land." *The SAIS Review of International Affairs* 27, no. 2 (2007).

	flow upward, with the prefect accountable to the national government. This could lead to a disconnect between the local population's needs and the central government's priorities. France's model of government can again be used in this case in order to foster accountability.[81]	people. The Chief Minister and members of the Bangsamoro Parliament are elected through democratic process. This ensures that regional governance reflects the needs of the local people. The region's leaders balance national and local priorities in order to maintain their political rule.[82] During the 2022 elections, representatives of the Bangsamoro Parliament were elected.[83] Their election is reflective of the region's diverse ethnic and cultural communities.	accountability because the local leaders must ensure that the needs of their people are the primary priority. In a prefectoral form of government, there would be lesser accountability to the people. But by applying the best practice of France, together with the autonomous system of Spain, the political accountability could be retained.
Security and Peace Process	A prefectoral system may strengthen the central government's	BARMM's current governance structure emerged from decades of negotiations and conflict resolution	The application of the prefectoral system may strain peace

[81] Supra note 64.
[82] Supra note 78.
[83] Supra note 76.

	ability to maintain law and order in the region by imposing stricter controls and ensuring a uniform approach to security. However, the peace agreements and trust-building efforts between the Bangsamoro people and the central government were achieved through decentralization and autonomy. The reason for this is that centralized systems of governance in conflict-prone areas often face resistance because local groups may see the central government as an occupying	efforts, particularly following the Moro Islamic Liberation Front (MILF) and the Moro National Liberation Front (MNLF) peace agreements.[85] These agreements granted significant autonomy as part of the peace-building process with the local leaders and former rebels. The Bangsamoro Transition Authority (BTA), which included former MILF leaders, played a key role in the transition to autonomous governance. This ensured their participation in the government and this ascertained the	agreements because the reduction in autonomy could provoke unrest and resistance from groups advocating for self-governance. Under the current system, autonomy is the cornerstone of the peace process. It provides former rebel groups with political participation and a stake in governance.

[85] Kovacs, M., et al. "Autonomous Peace? The Bangsamoro Region in the Philippines Beyond the 2014 Agreement." *Journal of Peacebuilding & Development* 16, no. 1 (January 24, 2021).

	force, rather than a partner in peace.[84]	maintenance of regional peace.	
Economic Development and Policy Implementation	A prefectoral system could theoretically bring about more uniform economic development by aligning the region's policies more closely with national development plans. However, it may overlook the local context of BARMM, which has unique economic challenges and opportunities, such as its reliance on agriculture, fisheries, and natural resources. The government systems of Japan	Under the autonomous model, BARMM has the ability to craft local economic policies that reflect its specific needs and priorities. The region has control over its budgeting, natural resources, and agricultural policies, which allows it to develop initiatives that cater to its predominantly rural and resource-based economy. BARMM also benefits from block grants of the central government. Through this, the region is able to fund programs for poverty reduction and infrastructure development.[88]	The current system has high adaptability which allows the region to implement economic policies in accordance to local conditions, while still receiving national funding and support. The best practices of Japan and South Korea could be utilized when implementing a prefectoral system so that regional needs and local development

[84] International Crisis Group (ICG). *Southern Philippines: Making Peace Stick in the Bangsamoro*. International Crisis Group, Manila/Brussels, May 1, 2023.
[88] Bangsamoro Budget Memorandum No. 2022-003. https://mfbm.bangsamoro.gov.ph/wp-content/uploads/2024/08/BBM-2022-003.pdf.

	and South Korea are the best models.[86] Japan has efficient regional planning, plus active citizen participation, which can lead to an efficient local service delivery system.[87]	BARMM's regional government has invested in agricultural modernization and infrastructure projects tailored to its geographical and cultural context. These projects aim to address its high poverty rates by developing sustainable industries.[89]	will not be undermined.

The system of governance in BARMM already balances autonomy with national support. Their current system is suited for the region's historical, political, and socio-economic context. It allows BARMM to address local challenges while preserving political accountability and local autonomy, which are crucial for sustaining peace and development within their jurisdiction.

Implementing a prefectoral system in BARMM may reduce the region's autonomy and likely face resistance because of the fact that the current system is closely tied to the peace processes and the region's aspirations for self-determination. However, the prefectoral system may improve centralized policy implementation, so long as its application would be in line with the region's need for self-governance, cultural preservation, and economic development. This process could be achieved by using the best practices of Spain's autonomous communities and Japan's administrative divisions.

FINDINGS AND DISCUSSION

[86] Supra note 69.
[87] Supra note 24.
[89] Mindanao Inclusive Agriculture Development Project (MIADP). https://www.da.gov.ph/wp-content/uploads/2023/02/MIADP-P173866-ESMF.pdf.

In order to properly adopt the prefectoral system of government, it is important to consider various factors and potential challenges that may arise:

1. **Centralization vs. Decentralization:** The prefectoral system is generally associated with a centralized form of government, where power and decision-making authority are concentrated at the national level. The Philippines currently has a decentralized system with regional and local governments having significant autonomy. Implementing a prefectoral system would require redefining the balance between centralization and decentralization.

2. **Cultural and Historical Factors:** The feasibility of any governance system depends on the specific cultural, historical, and political context of a country.[90] The prefectoral system has its roots in French administrative traditions, and it may not align with the cultural and historical realities of the Philippines. Any system implemented should take into account the unique characteristics and aspirations of the Filipino people.

3. **Administrative Capacity:** Implementing the prefectoral system would require establishing and training a new cadre of prefects and administrative personnel. It would necessitate a robust selection process to ensure qualified individuals are appointed as prefects. Building administrative capacity at all levels would be crucial for effective implementation.

4. **Legal and Constitutional Considerations:** Shifting to a prefectoral system would likely require changes to the Philippine Constitution and legal framework. The legal and constitutional implications of such a change would need to be thoroughly studied and addressed.

[90] UNDESA. *Governance and Development*. United Nations System Task Team, UNDESA, UNDP, UNESCO, May 2012.

5. **Public Acceptance and Political Will:** Introducing a new governance system requires public acceptance and political will. It would involve engaging various stakeholders, including citizens, local governments, and political representatives to ensure buy-in and support for the proposed changes.

A. Centralized vs. Decentralized Government

Centralized government refers to a system in which power and decision-making authority are concentrated at the national or central level. In such a system, the central government has control over most aspects of governance, including policy-making, law enforcement, and resource allocation.[91] The advantages of a centralized government include:

1. Centralized decision-making can lead to uniform policies and regulations across the entire country, promoting unity and consistency in governance.

2. With decision-making power concentrated at the central level, it may be easier to allocate resources based on national priorities and address regional disparities effectively.

3. Centralized governments can respond quickly to emergencies and implement policies without delays caused by coordination with multiple regional authorities.[92]

On the other hand, *a decentralized government* involves distributing power and decision-making authority to regional or local governments, allowing them to

[91] CFI Team. "Centralization." *Corporate Finance Institute*, CFI Education, Inc., July 12, 2020.
[92] Id.

have more autonomy and control over their affairs.[93] The advantages of a decentralized government include:

1. Decentralization allows regional or local governments to have more control over decision-making which allows them to enact policies addressing their local needs.

2. Local authorities are often more aware of the unique challenges and opportunities within their regions which enables them to make more effective and targeted policy decisions.

3. Decentralization can encourage citizen engagement and participation in local decision-making processes. This leads to an increased accountability and responsiveness of local governments.[94]

B. Constitutional Considerations

Shifting to a prefectoral system would require constitutional considerations and potential amendments to the existing constitution. These are:

1. **Amendment process:** The Philippine Constitution outlines the process for amending or revising the constitution.[95] Any shift to a prefectoral system would likely require a constitutional amendment, which typically involves specific procedures, such as approval by the legislature and ratification through a national referendum. The exact process must be followed to ensure the change is legally valid.[96]

[93] Decentralization Thematic Team. "Different Forms of Decentralization." *Center for International Earth Science Information Network*. http://www.ciesin.org/decentralization/English/General/Different_forms.html.
[94] Id.
[95] 1987 Constitution of the Republic of the Philippines.
[96] Id., Art. XVII.

2. **Division of powers:** Shifting to a prefectoral system would involve redefining the distribution of powers between the national government and the newly created prefectural or regional governments. The constitution would need to outline the extent of authority and responsibilities granted to the prefectures, while still maintaining the necessary powers at the national level to ensure unity and coordination.[97]

3. **Role and powers of the central government:** The constitution would need to define the role and powers of the central government in a prefectoral system. This might involve clarifying its authority in areas such as national defense, foreign affairs, monetary policy, and other matters that require centralized decision-making to maintain the integrity of the country.[98]

4. **Creation and powers of prefectures:** The constitution would need to outline the process for establishing and defining the powers of prefectures. This would involve determining the number of prefectures, their territorial boundaries, and the extent of their authority in areas such as local governance, taxation, resource management, and delivery of public service.[99]

5. **Inter-governmental relations:** The constitution would have to address the framework for coordination and cooperation between the central government and the prefectures. This would include mechanisms for resolving conflicts, sharing resources, and ensuring effective governance at both levels.[100]

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[97] Id., Art. XII.
[98] Id.
[99] Supra note 58.
[100] Morgan, P., and L. Trinh. "Frameworks for Central-Local Government Relations and Fiscal Sustainability." *ADBI Working Paper Series*, Asian Development Bank Institute, No. 605, October 2016.

6. **Fundamental rights and freedom:** The constitution would need to safeguard fundamental rights and freedoms of citizens in the context of a prefectoral system. Ensuring that individuals' rights are protected uniformly across all prefectures and preventing any potential discrimination would be important considerations.

C. Political Considerations

Shifting to a prefectoral system of government in the Philippines would involve various political considerations:

1. **Political will and consensus:** Shifting to a prefectoral system would require strong political will and consensus among key stakeholders, including political leaders, lawmakers, and the general public. Building broad-based support and ensuring a smooth transition would be essential for the success of the implementation.

2. **Redistribution of power:** Introducing a prefectoral system would involve redistributing power from the central government to the newly created prefectural or regional governments. Political considerations would include managing the potential resistance or concerns from those who currently hold power at the national level and addressing any fears of marginalization or loss of influence.[101]

3. **Political party structure:** Shifting to a prefectoral system may impact the existing political party structure in the Philippines. Political parties would need to adapt to the new governance framework and potentially reconfigure themselves to align with regional or prefectural interests. The formation and organization of political parties at the regional level would be crucial for effective governance in the prefectoral system.

[101] Yuliani, E. "Decentralization, Deconcentration and Devolution: What Do They Mean?" Interlaken Workshop on Decentralization, Interlaken, Switzerland, April 27-30, 2004.

4. **Election processes:** The transition to a prefectoral system would necessitate revisiting the election process of the Philippines. We would consider how regional leaders or prefects are selected or elected, the establishment of regional political parties,[102] and the impact on electoral dynamics, such as campaigning, party platforms, and voter behavior.

5. **Inter-regional dynamics:** The prefectoral system may create a new dynamic of competition or cooperation among the different regions or prefectures. Political considerations would involve managing potential rivalries. This would ensure equitable development across regions and promote a sense of unity and national identity alongside regional autonomy.[103]

6. **Public perception and education:** Shifting to a new governance system requires public understanding and support. Political considerations would involve effectively communicating the benefits, goals, and implications of the prefectoral system to the general public. Public education and awareness campaigns would play a crucial role in generating public support and minimizing resistance to the change.[104]

7. **Institutional capacity and readiness:** The existing government institutions in the Philippines would need to adapt and build capacity to operate within the prefectoral system. Political considerations would involve assessing the readiness of these institutions to handle the shift in responsibilities and ensuring that they have the necessary resources and capabilities to support the new governance structure.[105]

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[102] Republic Act No. 7491.
[103] Supra note 48.
[104] OHCHR. "About Good Governance." Office of the High Commissioner, United Nations. https://www.ohchr.org/en/good-governance/about-good-governance.
[105] Brillantes, Jr., A., and M. Fernandez. "Restoring Trust and Building Integrity in Government: Issues and Concerns in the Philippines and Areas for Reform." *International Public Management Review* 12, no. 2 (2011).

These political considerations are vital for successful implementation of a prefectoral system. Addressing these factors thoughtfully and inclusively can help ensure a smooth transition and contribute to effective governance and regional development.

D. Interpretation of Comparative Analysis: Decentralization of CAR and BARMM

The comparative analyses between the potential implementation of a prefectoral system in the Cordillera Administrative Region and Bangsamoro Autonomous Region in Muslim Mindanao, versus their existing governance structures, reveal several considerations for implementing governance reforms in their regions.

The first consideration is local autonomy. In regions like CAR and BARMM, local autonomy is vital for political stability and long-term development. The current autonomous or decentralized governance models reflect the needs and aspirations of the people in these regions. Imposing a prefectoral system in CAR can help them achieve their local autonomy through effective intergovernmental relations between the national and local government.[106] But in the case of BARMM, the prefectoral system can diminish their autonomy due to political resistance, and this can disturb the peace processes. In areas with strong cultural and political identities like the BARMM, governance systems should prioritize self-determination and local control over resources, culture, and policy. The prefectoral system may alienate their local people and can undermine the legitimacy of their local leadership.[107]

The next consideration is the regions' political accountability. The comparative analyses emphasize the importance of political accountability in

[106] Rood, S. "Intergovernmental Relations in a Cordillera Autonomous Region." *Philippine Journal of Public Administration* 33, no. 4 (October 1989).
[107] Supra note 85.

governance. In CAR and BARMM, elected leaders are directly accountable to the people. This allows for greater responsiveness to local needs and preferences. The prefectoral system, by contrast, removes this direct line of accountability because the prefects are appointed by the central government. This could be remedied by adopting the decentralized system of France, as well as the autonomous system of Spain. Democratic accountability to the local people is essential for ensuring that governance is aligned with the region's specific needs.[108] A system where leaders are elected by the people fosters trust and by applying a prefectoral system, this trust can be crystalized through intergovernmental cooperation with the state.

Another key take-away in the comparative study is that the local policy implementation will be more efficient. Regions like CAR and BARMM face distinct developmental and economic challenges which require locally-legislated policies. Under the current decentralized systems, both regions can craft policies that cater to their specific economic, cultural, and environmental needs. The prefectoral system can be utilized to address the region's local problems by coordinating it with the national government. Through the prefects, who are the direct voice of the state, solutions can be offered immediately. Good governance requires localized decision-making and effective policy implementation. Policies must be flexible enough to address local challenges, and governance structures should empower regional governments to respond accordingly.[109]

Despite the advantages of integrating the prefectoral system, there could also be disadvantages.

To cite one of the problems, the peace process and historical context are pivotal and must still be considered. In conflict-sensitive areas like BARMM, any shift towards centralized governance could threaten the peace-building efforts.[110]

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[108] Supra note 65.
[109] Masuda, H., et al. "Exploring the Role of Local Governments as Intermediaries to Facilitate Partnerships for the Sustainable Development Goals." *Sustainable Cities and Society* 82 (July 2022).
[110] ICG. "The Philippines: Keeping the Bangsamoro Peace Process on Track." International Crisis Group, Asia, January 30, 2024.

The Bangsamoro Organic Law and the autonomy granted to BARMM are products of decades-long negotiations which reflected the region's aspirations for self-governance. Introducing a prefectoral control would jeopardize the fragile peace and could potentially lead to a renewed conflict.[111] Hence, the governance reform in their region must be sensitive to their historical and political context. Autonomy and power-sharing arrangements are often integral to maintaining peace and stability, and any change in their system must carefully consider the risk of re-igniting tensions.

Another consideration is the implementation of a uniform policy versus local policy flexibility. While a prefectoral system can ensure uniformity in policy implementation across regions, it often comes at the cost of local flexibility. Both CAR and BARMM benefit from the ability to adapt national policies to local contexts, which is especially important in regions with distinct geographic or cultural challenges. The prefectoral system of government, in streamlining governance, could risk sacrificing the adaptability needed for effective local governance. Uniform policy implementation can lead to efficiency, but in diverse regions, local adaptability is equally important.[112] Decentralized systems allow for a more nuanced approach to governance which makes them more effective in addressing regional disparities and local challenges.

More importantly, through the comparative study, it can be inferred that economic development is best driven locally. The ability to control economic policies and resource management is critical for regions like CAR and BARMM. Under the current systems, both regions have the authority to manage local resources, which enables them to prioritize developmental projects that benefit the local population. A prefectoral system could undermine this by making the region dependent on national priorities, and this may not align with local economic needs.

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[111] Batac, M., and M. Bijnen. "Interview: The Struggle for Peace in Mindanao, the Philippines." *GPPAC, The Global Partnership for the Prevention of Armed Conflict*, Hague, Netherlands, February 26, 2019.
[112] Hsueh, S. "Local Government and National Development in South-East Asia." *International Social Science Journal* 21, no. 1 (1969).

Regions should have the power to determine their own economic strategies, particularly in resource-rich areas like BARMM. Local governments are better positioned to understand and address the economic realities of their regions, and governance systems should reflect this.

One last concern is the respect for cultural and religious identity. Both CAR and BARMM have distinct cultural and religious identities that play a critical role in their governance structures. In BARMM, for example, the incorporation of Sharia law and governance that respects Islamic principles is central to the region's identity and autonomy. A prefectoral system that imposes a uniform national structure may not adequately respect or accommodate these local identities which can lead to cultural alienation. Governance systems must be culturally sensitive and must provide space for the expression of local identities. Imposing a one-size-fits-all approach may subvert cultural preservation and lead to social unrest.[113]

To recap, the comparative analyses highlight the importance of autonomy, local accountability, and cultural sensitivity in governance, particularly in regions with distinct historical, cultural, and political contexts like CAR and BARMM. In applying the prefectoral system of government in these regions, best practices from other countries should be adopted in order to enhance their self-governance, improve their accountability, maintain their autonomy, and consider their local flexibility.

Governance systems must be designed to cater to the unique needs of each region. In areas like CAR and BARMM, decentralization and autonomy have proven effective in promoting peace and economic development. Any shift towards a prefectoral system would need to carefully balance national unity with

[113] Deolalikar, A., et al. *Governance in Developing Asia, Public Service Delivery and Empowerment*. Asian Development Bank and Edward Elgar Publishing, Cheltenham, UK, 2015.

local autonomy in order to ensure that the local people will have a meaningful voice in their governance and development.

CONCLUSION AND RECOMMENDATIONS

The Philippines currently has a decentralized system of government, with power devolved to local government units. This decentralization was established to address historical imbalances and promote regional development. The Philippines' decentralized governance structure aims to empower the local government units to manage their local affairs while coordinating with the central government on matters of national importance.

Based on the comprehensive feasibility study conducted on the application of the prefectoral system of government in the Philippines, it can be concluded that there is significant potential for its implementation. This study found several compelling reasons to consider adopting a system with the prefecture offering several advantages for the governance and development of the country. Firstly, implementing the prefectoral system would address the existing regional disparities in the Philippines. By devolving power and resources to the prefectures, it would enable more balanced regional development and would ensure that all areas receive adequate attention and resources for their growth and progress. Secondly, the prefectoral system would enhance local governance and decision-making processes. Empowering prefectures with more autonomy would enable them to respond more effectively to the specific needs and aspirations of their communities. This decentralized approach would foster better accountability, transparency and citizen participation in local governance and would lead to more inclusive and responsive policies.

In addition, this study revealed that the prefectoral system aligns with the global trend towards decentralization and has been successfully implemented in various countries. International best practices and case studies provide valuable

insights and lessons that can be adapted to the Philippine context which increases the likelihood of a successful transition.

It is, however, important to acknowledge that the feasibility of implementing the prefectoral system in the Philippines is not without negative implications. Administrative capacity, legal frameworks, and resistance to change are significant factors that must be addressed. Also, careful planning, resource allocation, and coordination will be necessary to ensure a smooth transition and avoid probable disruptions.

In the potential implementation of a prefectoral system in regions like the Cordillera Administrative Region and the Bangsamoro Autonomous Region in Muslim Mindanao, aligning governance models with their unique socio-cultural, historical, and political contexts is very important. The case studies demonstrate that governance structures greatly influence a region's stability, political legitimacy, and socio-economic development.

In general, the prefectoral system offers benefits such as streamlined policy implementation and enhanced national integration. However, these benefits may not be suitable for regions with strong aspirations for self-governance and distinct cultural identities. The current autonomous models in CAR and BARMM prioritize local autonomy and political accountability. The decentralized model of the prefectoral system should be applied in order for these regions to maintain regional stability, enhance local participation, and address historical grievances.

In both CAR and BARMM, the desire for greater self-determination is rooted in historical struggles for autonomy and cultural recognition. The current governance models provide a framework that respects these aspirations, and integrating the prefectoral system into their current model could enhance their political legitimacy by fostering trust between regional and national governments. However, this can potentially revive tensions, particularly in the BARMM. The governance structure of BARMM is a product of peace agreements aimed at ending

decades of conflict. The autonomy granted to BARMM is not merely an administrative arrangement but a cornerstone of the peace process. The move towards a prefectoral system could disrupt this fragile peace.

The current autonomous frameworks allow the Cordilleras and Muslim Mindanao to craft policies in accordance with their socio-economic and cultural contexts. Not only would the prefectoral system improve intergovernmental relations in these regions, it would likewise promote local development through effective regional planning and active citizen participation. Their local policies would be implemented in coordination with the national government, and this would be achieved through the prefects. This way, local developmental challenges in their area would be addressed accordingly.

Also, the direct election of leaders in CAR and BARMM ensures that regional governments remain accountable to the local populace. This accountability maintains the credibility of regional administrations and ensures the successful implementation of local policies. This aspect is one of the disadvantages of applying the prefectoral system since political accountability could be diluted. Nevertheless, this possibility can totally be avoided if the best practices of different countries are applied.

The findings from the analyses suggest that any consideration of implementing a prefectoral system in regions like CAR and BARMM must be approached with caution. Policymakers must weigh the potential benefits against the risks of undermining regional autonomy. Future governance reforms should prioritize strengthening existing autonomous frameworks, enhancing local capacity for self-governance, and ensuring that national and regional policies are harmonized in a way that respects local identities of the people.

Effective governance in culturally distinct and politically sensitive regions requires more than just administrative efficiency. It necessitates a nuanced approach that balances national interests with local autonomy, respects the

historical and cultural context, and fosters inclusive development and sustainable peace. This research underscores the critical need for governance systems that are adaptive, context-sensitive, and capable of supporting both national unity and regional diversity.

In conclusion, this feasibility study strongly suggests that applying the prefectoral system of government in the Philippines holds great promise for enhancing governance, regional development, and citizen participation. While challenges and limitations exist, they can be overcome through careful planning, stakeholder engagement, and capacity-building initiatives. The adoption of the prefectoral system has the potential to create a more balanced, inclusive, and effective governance structure that meets the diverse needs and aspirations of the Philippines in the years to come.

Recommendations

Only the general constitutional considerations are identified and the specific requirements for shifting to a prefectoral system in the Philippines would depend on the proposed structure and objectives of the system. Any constitutional amendments would need to be carefully deliberated and undergo a rigorous process to ensure the legitimacy and stability of the new governance framework. While comparative studies and analyses of different prefectoral systems and their democratic characteristics provide insights into the compatibility and effectiveness of such systems within a democratic framework, it is worth noting that the specific design and functioning of a prefectoral system can vary across countries, and the level of compatibility with democratic governance can differ accordingly.

Based on the findings, it is recommended that serious consideration be given to its implementation. The potential benefits and advantages of adopting a decentralized system outweigh the challenges which were identified. However, several recommendations should be taken into account. These are as follows:

1. **Pilot Implementation:** Begin with a pilot implementation of the prefectoral system in a select number of regions or prefectures. This phased approach would allow for a comprehensive assessment of the system's effectiveness and the identification of any potential challenges or areas that require adjustment.

2. **Legal and Institutional Reforms:** Establish a legal framework and enact necessary legislation to support the prefectoral system. Clear guidelines on the distribution of power, resource allocation, and coordination between the national and prefectural levels should be defined. Concurrently, build the institutional capacity at the prefectural level to ensure effective governance and administration.

3. **Capacity-Building Initiatives:** Invest in capacity-building initiatives for local government officials and staff to equip them with the necessary skills and knowledge to effectively implement and manage the prefectoral system. Training programs should focus on leadership, policy development, financial management, and citizen engagement to promote effective governance at the prefectural level.

4. **Stakeholder Engagement and Public Awareness:** Conduct extensive stakeholder consultations with government officials, local leaders, community representatives, and citizens to gather input, address concerns, and ensure inclusivity in the decision-making process. Additionally, launch a comprehensive public awareness campaign to educate the public about the benefits, objectives, and processes of the prefectoral system in order to foster support and understanding.

5. **Monitoring and Evaluation:** Establish a robust monitoring and evaluation framework to assess the progress, outcomes, and impacts of the prefectoral system. Regular assessments should be conducted to

gauge the system's effectiveness, identify areas of improvement, and ensure accountability and transparency in governance at all levels.

6. **Learn from International Best Practices:** Research successful case studies and best practices from countries that have implemented similar decentralized systems. Adapt and tailor these experiences to the Philippine context, taking into consideration the cultural, social, and economic factors to maximize the potential benefits of the prefectoral system.

7. **Flexibility and Adaptability***:* Recognize that the prefectoral system may require adjustments and refinements based on the specific needs and characteristics of the Philippines. Adopt a flexible approach that allows for continuous learning, feedback mechanisms, and necessary modifications as the system evolves over time.

By taking these recommendations into account, the feasibility of applying the prefectoral system in the Philippines can be maximized. The prefectoral system has the potential to create a more balanced, inclusive, and effective governance structure that addresses regional disparities, enhances citizen participation and fosters sustainable development across the country.

Ultimately, whether a centralized or decentralized form of government is ideal for the Philippines depends on various factors, including the country's unique context, socio-political dynamics, and the preferences of its citizens. Both systems have their advantages and disadvantages, and striking the right balance between centralization and decentralization is crucial to ensure effective governance and promote equitable development.

PATENT PROTECTION OF IP PROCESSES AND INVENTIONS: THE NEED FOR A *SUI GENERIS* LAW OR EXCEPTION IN THE PHILIPPINES TO PROTECT TRADITIONAL KNOWLEDGE THROUGH PATENT

Ma. Angelica Grace Aban, Anna Victoria Biala, Michelle Capistrano, Regina Paula Eugenio, Klaire Gabrielle Sanchez

ABSTRACT

While the recent memorandums of agreement have been actively promoted by the Intellectual Property Office of the Philippines with the Integrated Bar of the Philippines as well as the National Commission on Indigenous Peoples of the Philippines as a tool to protect the intellectual creation of indigenous groups, these initiatives are insufficient to fully address the needs of patent protection over inventions stemming from traditional knowledge. The conventional intellectual property safeguards expressed under Republic Act No. 8293 or the Intellectual Property Code of the Philippines do not address the demands of indigenous communities as the individualistic nature of IP protection is in stark contrast with the communal characteristic that makes up traditional knowledge. As such, there is a necessity to amend or create a *sui generis* law specifically protecting and implementing patent protection over indigenous inventions.

Keywords: *Patent Law, Indigenous People's Rights, Intellectual Property Code, Sui Generis Protection*

INTRODUCTION

Traditional knowledge is knowledge, know-how, skills, and practices developed, sustained, and handed through generations within a community, often forming part of its cultural or spiritual identity. It can be found in a wide variety of contexts, including agricultural, scientific, technical, ecological, and medicinal knowledge, as well as biodiversity-related knowledge.[1]

Innovations based on traditional knowledge may benefit from patent, trademark, and geographical indication protection or be protected as a trade secret or confidential information. However, traditional knowledge as such - knowledge that has ancient roots and is often oral - is not protected by conventional intellectual property (IP) systems.

The rationale for protecting traditional knowledge is composed of moral, social, economic, and environmental aspects that endeavor to safeguard the interests of Indigenous People. The protection of traditional knowledge in the moral sense is predicated on the notion that IPs should have the right to use their own traditional knowledge free from exploitation and commercialization. It bears economic and social importance as IPs rely on traditional knowledge as their livelihood. The harnessing of traditional knowledge redounds to the benefit of the national economy especially for traditional knowledge-related goods that are also considered a lucrative source of revenue. In the environmental aspect, recorded and observed traditional methods of farming and environmental conservation and preservation have been discovered to enhance biodiversity.

Intellectual Property issues involving traditional knowledge can be addressed through two (20 options: through defensive and positive protection. Defensive protection involves implementing strategies to prevent third parties from gaining illegitimate and unfounded rights over traditional knowledge. For

[1] World Intellectual Property Organization. "Traditional Knowledge." Accessed March 24, 2025. https://www.wipo.int/tk/en/tk/.

this approach, the World Intellectual Property Organization has developed a toolkit to provide practical assistance to traditional knowledge holders on documenting the same. Conversely, positive protection focuses on empowering IPs through the prevention of unauthorized use and active exploitation of traditional knowledge by the originating community itself.[2]

While innovations rooted in traditional knowledge may qualify for intellectual protection, several prerequisites must be satisfied first in order for an invention to be patentable. Under the Intellectual Property Code (IPC) of the Philippines, there must be a patentable subject matter, novelty, an inventive step, and industrial applicability. Notably, novelty is paramount, necessitating that the invention be genuinely new. Further complicating things is the First-to-File Rule under Section 29 of the same Code, where if two or more persons made an invention separately and independently of each other, the law dictates that the right to the patent shall belong to the person who filed an application for such invention, or where two or more applications are filed for the same invention, to the applicant who has the earliest filing date or, the earliest priority date.[3]

Furthermore, under Section 31, those who file for a patent in another country and want to file a similar patent in the Philippines may benefit from the right of priority if: (a) the local application expressly claims priority; (b) it is filed within twelve (12) months from the date the earliest foreign application was filed; and (c) a certified copy of the foreign application together with an English translation is filed within six (6) months from the date of filing in the Philippines.[4]

This framework, combined with the fact that getting a patent is costly and time-consuming, often leads to Indigenous People being unable to safeguard their traditional knowledge. The individualistic nature of Philippine IP laws contravenes the concept of communal intellectual rights. This is evidenced by the fact that

[2] *Ibid.*
[3] Republic Act No. 8293 (Intellectual Property Code of the Philippines), as amended, Section 29.
[4] Republic Act No. 8293 (Intellectual Property Code of the Philippines), as amended, Section 31.

patent protection is limited to 20 years, including labor-intensive inventions, while the existence of indigenous intellectual creations, passed down from generation to generation, far exceeds such protection. While in recent times, there have been memorandums of agreement (MOAs) pushed for by the Intellectual Property Office of the Philippines (IPOPHL) to support Indigenous Cultural Communities (ICCs) and Micro, Small, and Medium Enterprises (MSMEs) in protecting traditional intellectual property rights,[5] these MOAs do not clearly define the legal rights over the intellectual creations of the IPs. As an example, while the IPOPHL encourages handloom weavers to protect the intellectual property of their original designs and inventions, arguing that patent protection is akin to ownership of land, it is still unclear if different lengths and processes for patent protection is applicable to by-products of traditional knowledge since the circumstances encompassing conventional IP rights do not fit the protection required by resulting inventions from traditional knowledge.[6] To emphasize further, while IPOPHL encourages handloom weavers to protect their intellectual property over the designs, creations, and processes, Chamlette Garcia of the Industrial Design Examining division of the IPOPHL qualified that while IPs may protect their designs based on the provisions of the IPC, the protection is available only *"if the product is new and original"* that will give the owner the exclusive right to exclude others from exploiting the patented product.[7] Such qualification is not in line with the characteristics of what is meant to be protected by patent over indigenous designs as they cannot be considered as new and original since the technique is passed down within the community, and to exclude others would mean to negate the communal rights that are provided for by law under the IPRA.

Meanwhile, in the international scene, negotiations for an international legal

[5] Intellectual Property Office of the Philippines (IPOPHL). "IPOPHL, IBP Bat for IP Rights of Indigenous Cultural Communities and MSMEs." February 9, 2023. Accessed March 24, 2025. https://www.ipophil.gov.ph/news/ipophl-ibp-bat-for-ip-rights-of-indigenous-cultural-communities-and-msme.

[6] Romero, Jasmin. "Patent Your Work, IPOPHL Advises Handloom Weavers." ABS-CBN News, October 24, 2022. Accessed March 24, 2025. https://news.abs-cbn.com/life/10/24/22/patent-your-work-ipophl-advises-handloom-weavers.

[7] Dyquiangco, Excel. "IPOPHL Advises Patents for Handloom Weavers." Asia IP Law, November 18, 2022. Accessed March 24, 2025. https://www.asiaiplaw.com/article/ipophl-advises-patents-for-handloom-weavers.

instrument are currently ongoing within the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. In addition, several countries have developed *sui generis* legislation to specifically address the positive protection of traditional knowledge.[8] Hence, to better serve and protect the rights of indigenous groups over traditional knowledge in the Philippines, there is a need to reconsider and potentially amend IP regulations in the country through its own sui generis legislation.

Existing policies

The legal framework governing the intellectual property rights of Indigenous Peoples is grounded in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The UNDRIP is a landmark international instrument that recognizes and protects the inherent rights of Indigenous Peoples. Article 11 of the legislation provides:

> **Article 11:** Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.
>
> States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of

[8] WIPO (n 1) 4.

their laws, traditions and customs.

This article asserts the right of IPs to practice and revitalize their cultural traditions, customs, and languages. The provision likewise underscores the obligation of the States to recognize and respect the rights of IPs to safeguard and transmit their cultural practices to future generations. Additionally, Article 24 of the UNDRIP emphasizes the right of IP to the highest attainable standard of physical and mental health:

> **Article 24:** Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
>
> Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Furthermore, Article 31 of UNDRIP addresses the rights of IPs to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and expression of culture, intellectual property rights, enabling them to control and benefit from using their cultural knowledge and creations:

> **Article 31:** Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora,

> oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

This provision emphasizes the crucial role of intellectual property laws in safeguarding IPs unique contributions. It emphasizes the need to safeguard and respect their intellectual property rights, enabling them to control and benefit from using their cultural knowledge and creations.

R.A. No. 8371: Indigenous Peoples' Rights Act

The Indigenous Peoples' Rights Act (IPRA Law) of the Philippines, enacted in 1997, serves as a cornerstone for the protection and promotion of the rights of the IPs. The following provision of IPRA addresses fundamental aspects of Indigenous Peoples' autonomy, rights, and traditional knowledge.

Section 29 underscores the recognition of the inherent right of ICCs and IPs to self-governance:

> **Section 29:** Protection of Indigenous Culture, Traditions and Institutions. - The State shall respect, recognize and protect the right of ICCs/IPs to preserve and protect their culture, traditions and institutions. It shall consider these rights in the formulation and application of national plans and policies.[9]

The provision empowers Indigenous communities with the autonomy to shape their destinies and contribute to the governance of the nation by

[9] Sec. 32, Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997).

participating in decision-making processes.

Section 32 of the IPRA provides for the Protection of Community Intellectual Property:

> **Section 32:** Community Intellectual Rights.- ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.

This provision does not only refer to ancestral domains and ancestral lands. The Implementing Rules and Regulations of the IPRA provide the following:

> The ICCs/IPs have the right to own, control, develop and protect the following:
>
> a. The past, present and future manifestations of their cultures, such as but not limited to, archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties;
>
> b. Science and Technology including, but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and

scientific discoveries; and

c. Language, Music, Dances, Script, Histories, Oral Traditions, Conflict Resolution Mechanisms, Peace Building Processes, Life Philosophy and Perspectives and Teaching and Learning Systems.

In partnership with the ICCs/IPs, the NCIP shall establish effective mechanisms for protecting the indigenous peoples' community intellectual property rights along the principle of first impression first claim, the Convention on Biodiversity, the Universal Declaration of Indigenous Peoples' Rights, and the Universal Declaration of Human Rights.[10]

Section 34 recognizes the unique contributions of IPs to the cultural and intellectual heritage of the Philippines. It focuses on preserving and protecting traditional knowledge systems and practices, affirming the rights of IPs.

Section 34: Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies.- ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems

[10] National Commission on Indigenous Peoples. Administrative Order No. 1, Series of 1998: Rules and Regulations Implementing Republic Act No. 8371, Otherwise Known as "The Indigenous Peoples' Rights Act of 1997."

> and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

The provision emphasizes the importance of safeguarding traditional knowledge ensuring indigenous communities retain authority over their innovations and intellectual property. Despite the existence of both international and national legal frameworks, traditional knowledge remains inadequately protected in the Philippines. The Intellectual Property Code of the Philippines does not currently include provisions explicitly addressing the protection of traditional knowledge. The absence of it underscores a critical gap in the legal infrastructure.

I. REVIEW OF RELATED LITERATURE

Patent System in the Philippines

Act No. 3134, also known as "An Act to Protect Intellectual Property," was the first intellectual property law passed in the Philippines in 1924.[11] In 1947, Republic Act No. 165 came into effect, establishing a Patent Office under the executive provision of the Department of Justice. The Philippines became a signatory to the convention which established the World Intellectual Property Organization, which took effect in the 1980s.[12]

The 1987 Philippine Constitution provided protection for intellectual property under Article XIV, Section 13, which states: "The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the

[11] Intellectual Property Office of the Philippines (IPOPHL). "The Intellectual Property System: A Brief History." Accessed March 24, 2025. https://www.ipophil.gov.ph/news/the-intellectual-property-system-a-brief-history/
[12] *Ibid.*

people, for such period as may be provided by law."[13] On June 6, 1997, Republic Act No. 8293, otherwise known as the "Intellectual Property Code of the Philippines" (IPC), was passed into law, which created the Intellectual Property Office of the Philippines (IPOPHIL).[14] To date, the IPC is the governing law with regard to the enforcement and protection of intellectual property rights in the country.

The Philippines is a signatory to patent treaties such as the Patent Cooperation Treaty, Paris Convention for the Protection of Industrial Property Rights, Agreement on Trade-Related Aspects of Intellectual Property Rights, and Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure.

The Patent Cooperation Treaty makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application.[15] Such an application may be filed by anyone who is a national or resident of a PCT Contracting State.

The Paris Convention for Protection of Industrial Property applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications, and the repression of unfair competition.[16] This international agreement was the first major step taken to help creators ensure that their intellectual works were protected in other countries.[17]

The Agreement on Trade-Related Aspects of Intellectual Property Rights establishes minimum standards for the availability, scope, and use of seven forms

[13] Philippine Constitution (1987), art. XIV.
[14] Republic Act No. 8293 (Intellectual Property Code of the Philippines). (1997, June 6). Republic Act No. 8293: Intellectual Property Code of the Philippines. Official Gazette. https://www.officialgazette.gov.ph/1997/06/06/republic-act-no-8293/.
[15] World Intellectual Property Organization (WIPO). "Patent Cooperation Treaty (PCT)." Accessed March 24, 2025. https://www.wipo.int/treaties/en/registration/pct/.
[16] World Intellectual Property Organization (WIPO). "Paris Convention for the Protection of Industrial Property." Accessed March 24, 2025. https://www.wipo.int/treaties/en/ip/paris/.
[17] *Ibid.*

of intellectual property: copyrights, trademarks, geographical indications, industrial designs, patents, layout designs for integrated circuits, and undisclosed information (trade secrets).[18] It spells out permissible limitations and exceptions in order to balance the interests of intellectual property with interests in other areas, such as public health and economic development.[19]

The Budapest Treaty mandates all states party to the Treaty are obliged to recognize microorganisms deposited as a part of the patent procedure, irrespective of where the depository authority is located.[20] In practice, this means that the requirement to submit microorganisms to each and every national authority in which patent protection is sought no longer exists.[21]

Indigenous Peoples Perspectives on Patents

The benefit of patent rights is that they are recognized and enforceable, but the cost of obtaining and maintaining them is high. In other countries, IPs have formed partnerships with companies with the financial resources and expertise to patent and commercialize chemical substances and drugs that originate from traditional knowledge of plants.[22]

Similarly, indigenous knowledge may not be commonly used by national patent offices as a measure of novelty and inventive ingenuity when examining patent applications by non-aboriginals. Examiners primarily use electronic databases, such as Chemical Abstracts, to search for novelty. Indigenous knowledge is not normally searched because it is less readily accessible. If a patent is sought

[18] United States Patent and Trademark Office (USPTO). "Trade Related Aspects of IP Rights." An Agency of the Department of Commerce. February 11, 2021.
[19] *Ibid*.
[20] World Intellectual Property Organization (WIPO). "Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure." Accessed March 24, 2025. https://www.wipo.int/treaties/en/registration/budapest/.
[21] *Ibid.*
[22] Brascoupe, Simon, and Endemann, Howard. "Intellectual Property and Aboriginal People: Working Paper." 1999. Accessed March 24, 2025. https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ip_aboriginal_people.pdf.

for an invention based on traditional knowledge, which is widely known among Aboriginal people, the users of this knowledge may need to alert the Patent Office that the patented technology is not novel. Another concern raised by IPs is that applicants for patents are not required to publicly identify the source of traditional knowledge or of genetic resources used in inventions. Some IPs have suggested that patent applicants be required to show that prior informed consent was obtained if a patent application is based on indigenous knowledge.[23]

Substantial ambiguity surrounds the application of patent law to the traditional knowledge of IPs. Should an ICC seek a patent for an innovation rooted in their traditional knowledge, a myriad of uncertainties emerges regarding the fulfillment of patent criteria such as novelty, inventive ingenuity, and utility. The intricacies become particularly pronounced when considering whether traditional knowledge, inherently communal in nature, aligns seamlessly with the individualistic parameters typically associated with patent standards.

What is *sui generis*?

In Latin, *sui generis* means “a special kind”. In intellectual property rights, the term refers to a special form of protection regime outside of the known framework. It becomes a necessary regime since it is specially tailored to meet a specific need, which could be applied to traditional knowledge since the existing forms of intellectual property regimes are based on the Western concept.[24]

In the international context, other countries have put *sui generis* regimes in place. A few notable examples would be Costa Rica, Peru, Thailand, and Venezuela.

In Costa Rica, a law on biodiversity that recognizes traditional knowledge provides recognition and protection over knowledge, practices, and innovations of

[23] *Ibid.*
[24] Wekesa, Moni. "What Is Sui Generis System of Intellectual Property Protection?" 2006. Accessed March 24, 2025. https://atpsnet.org/wp-content/uploads/2017/05/technopolicy_brief_series_13.pdf.

indigenous peoples and local communities related to the use of components of biodiversity and associated knowledge under the common denomination of *sui generis* community intellectual rights. Notably, the mere existence of cultural knowledge and practice in the country does not require prior declaration, explicit recognition, nor official registration.[25]

A draft of the *sui generis* system, which recognizes ownership, rights, and appropriations of Indigenous People to traditional knowledge, was undertaken in Peru. The draft provided for the presence of "knowledge licensing contracts" being entered into by Indigenous Peoples and also covered the concept of "prior informed consent" for knowledge that is not in the public domain. The said draft even went further regarding the indigenous communities receiving 0.5% of sales from the products developed based on traditional knowledge. However, this was widely resisted by local communities as it was said to be incompatible with their understanding of resource rights, so it remains to be under consultation.[26] Although the process has been tedious, what is notable in the efforts of the Peruvian government is the involvement of the indigenous community in the drafting of the policy. The participation of the Andean Community (the Indigenous group of Peru) has been the first practical experience of the Indigenous Peoples being directly involved in the negotiation of contractual agreements to protect their rights over traditional knowledge.[27]

Furthermore, the "Thai Traditional Medicinal Intelligence Act" aims to protect the medicinal procedures concerned with diagnosis, therapy, treatment or prevention or promotion and rehabilitation of the health of humans or animals, which would also include traditional Thai massage and the production of Traditional Thai drugs and the invention of medical devices based on knowledge or text passed on from generation to generation. The wide scope of the said act

[25] Article 82, Law No. 7788 of April 30, 1998 on Biodiversity cited in Wekesa
[26] Tabin, B., and Krystyna Swiderska. "Speaking in Tongues: Indigenous Participation in the Development of a Sui Generis Regime to Protect Traditional Knowledge in Peru." December 2001. Accessed March 24, 2025. https://www.iied.org/sites/default/files/pdfs/migrate/9059IIED.pdf.
[27] Thailand. Thai Traditional Medicinal Intelligence Act, secs. 3 and 21. Accessed March 24, 2025.

included the right to register for protection of the inventor of the formula of the Thai drugs, being a developer or the inheritor of the formula on traditional drugs. [28]The act further established the "Thai Institute of Thai Traditional Medicine" and the "Thai Traditional Knowledge Developing Fund," from which the country and the right holders have both received substantial revenue from the use of traditional knowledge.[29] The Constitution of Venezuela prohibits the registration of patents on resources and ancestral knowledge, which are the collective intellectual property of the Indigenous People and include knowledge, technology, and innovations.[30] As such, the traditional knowledge belonging to Indigenous Peoples is protected from exploitation by a third party or another entity as it cannot be patented.

In China, the protection of Intangible Cultural Heritage (ICH) under the Patent Law of the People's Republic of China chiefly concerns traditional arts and crafts, medical knowledge, and other forms of traditional knowledge.[31] Their patent law provides for active protection and early-warning protection. As long as the ICH item meets the criteria in China's current patent law, then active protection applies. The early-warning protection refers to the establishment of databases and the use of prior technology as a weapon of defense to prevent plagiarists from meeting the criteria of novelty and creativity when they are filing for patents.[32] This kind of protection seeks to forestall illegal use of ICH by other countries or individuals. With this, China has created multiple databases on knowledge of traditional Chinese medicine and other subjects, effectively protecting their traditional knowledge against plagiarism.

The above models for *sui generis* systems integrated into the different countries' legislation are applications of positive protection strategies preventing the unauthorized use of the traditional knowledge of the local communities. The

[28] https://www.wipo.int/tk/en/databases/tklaws/articles/article_0024.html.
[29] Id. at 25, p.12.
[30] Venezuela. 1999 Constitution of Venezuela, art. 124.
[31] Lin, Q., and Z. Lian. "On Protection of Intangible Cultural Heritage in China from the Intellectual Property Rights Perspective." MDPI, November 23, 2018. Accessed March 24, 2025. https://www.mdpi.com/2071-1050/10/12/4369.
[32] *Ibid*.

model applied in Thailand even goes as far as applying the active exploitation of the traditional knowledge by the originating community themselves since the production of the medicinal products only belongs to the right holder of the formula.

Although the Philippines recognizes traditional knowledge in its Constitution, the specific provision[33] therein has not yet been specifically materialized in the current IP Law of the Philippines, which poses the need for a sui generis system for the protection of indigenous knowledge, cultures, traditions, and other practices of cultural communities in the Philippines.

FINDINGS AND DISCUSSION

The need for a *Sui Generis* System

The Intellectual Property Office (IPO) does not have the authority to address issues concerning traditional knowledge systems and practices. Still, the IPC states that provisions under Section 22.4 "shall not preclude Congress to consider the enactment of a law providing sui generis protection of plant varieties and animal breeds and a system of community intellectual rights protection."[34]

This section explicitly states that Congress may consider a *sui generis* law to protect the said subject matters. Given this, it is important that traditional knowledge is given similar priority–for instance, by providing an exception to the novelty requirement in obtaining patent protection or by enacting a *sui generis* law in favor of traditional knowledge.

There is a need to provide an exception for how traditional knowledge is to be given protection because of how some aspects of traditional knowledge

[33] Philippine Constitution (1987), art. XIV, sec. 17.
[34] Asian Patent Attorneys' Association (APAA) Emerging IP Rights Committee. "Philippines Group Report." 2016.

contravene the conventional protection afforded under the IPC. As mentioned, there can only be patent protection for inventions that pass the novelty test, which cannot be applied to inventions from traditional knowledge, as traditional knowledge consists of inventions that have been passed down from one generation to another. Additionally, a patent's primary purpose for protection is to afford investors the right to exclude in order to encourage creators to invest in making inventions, which is not in line with traditional knowledge that does not really concern itself primarily with commercial success, as traditional creations are also imbued with cultural, moral and spiritual considerations.

As discussed above, a *Sui Generis* System accommodates the unique characteristics of its subject matter. However, according to a WIPO survey, there is no international consensus on implementing a *Sui Generis* System to safeguard traditional knowledge. Some countries believe current intellectual property (IP) standards are sufficient for traditional knowledge protection, while others have adopted specialized *Sui Generis* Systems specifically tailored for traditional knowledge, based on a survey by the Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge, and Folklore.[35]

Arguments in favor of a *Sui Generis* System for Traditional Knowledge

Meanwhile, advocates for a *Sui Generis* System emphasize that the current IP mechanisms are inadequate to protect traditional knowledge due to the distinct characteristics of traditional knowledge. Among these is the fact that traditional knowledge is often collectively owned by groups or tribes, and thus, there is no identifiable inventor. This concept of collective ownership runs counter to the existing IP environment, where inventions are typically attributed to individual or juridical entities. Another important distinction is that traditional knowledge is not commercial in nature, unlike conventional intellectual properties. Since our patent

[35] Romero. "Sui Generis System for Traditional Knowledge." 2005. Retrieved from https://www.redalyc.org/pdf/824/82400609.pdf.

law predominantly focuses on commercial inventions, this non-commercial nature of traditional knowledge supports the argument that there must be a different set of protection and incentives beyond traditional patent rights. Lastly, traditional knowledge is mostly passed down orally and places little to no emphasis on having tangible documentation, which sharply contrasts with the documentary and disclosure requirements in patent law.

Aside from these distinctions, securing a patent is costly and time-consuming, posing a challenge to Indigenous Communities who want to protect their traditional knowledge. For instance, while annual patent fees are due upon the expiration of four years from the date of application, and a grace period may be given, the annual fees increase during this period. This, combined with the complex patent application process, often makes patent protection inaccessible to indigenous groups.

CONCLUSION AND RECOMMENDATION

In conclusion, despite efforts to protect the intellectual creations of IPs, there remains a significant gap in addressing patent protection for inventions derived from traditional knowledge. The IPC of the Philippines falls short of meeting the needs of ICC due to the individualistic nature of intellectual property protection. The existing legal frameworks, both international and national, lack specific provisions addressing the protection of traditional knowledge in the Philippines. The IPC does not provide the necessary mechanisms to safeguard the collective and cultural nature of traditional knowledge.

Thus, to truly uphold the rights of indigenous communities, a new approach is needed to ensure that the unique attributes and nuances of traditional knowledge receive proper recognition and protection.

Given these challenges, it is imperative to consider the establishment of a *sui generis* law tailored to protect and implement patent protection. On a positive note,

several countries such as Costa Rica, Peru, Thailand, Venezuela, and China have adopted *sui generis* systems through legislation. The Philippines should explore creating a *sui generis* system to safeguard the rights of indigenous communities.

SURROGACY: ADOPTION OF A LEGAL FRAMEWORK ON SURROGACY IN THE PHILIPPINES

Vanessa B. Tayaban

ABSTRACT

Surrogacy is a gift of modern medicine to those who need it and a catalyst of complex human rights violations for those with ill will.

Surrogacy is an Assisted Reproductive Technology (ART), a medical procedure wherein a sperm and egg cell are fertilized through a laboratory procedure to produce an embryo. The embryo is then implanted in the uterus of a female who agrees to carry the fetus up to full term and relinquish all parental rights in favor of the commissioning or intended parents. It is a gift of science for someone who is infertile or has no ability and capacity to carry a baby into full term.

The increase in infertility cases caused the widespread practice of surrogacy. It served its purpose to add a family member to the commissioning parties and, at the same time, caused different problems. In Europe and the United States, the authorities had to regulate surrogacy to address conflicting claims for parental rights and custody. Asia lagged in taking an active stance in regulating surrogacy, such that the absence of a clear legal framework resulted to several problems: lack of informed consent due to low level of education and poverty-driven choices, commodification and exploitation of women and children, nationality, and filiation issues of the surrogate child and women and children trafficking.

Each jurisdiction has a different legal framework. Some countries allow

surrogacy liberally, some allow it with restrictions, and some do not have express laws to address it. Initially, Asian countries did not have laws to regulate surrogacy. However, when developing countries became "surrogacy hubs," the authorities either prohibited it through an express law or through the provisions of the anti-trafficking laws.

In the Philippines, surrogacy has been practiced for several years. While contemporary issues involve Filipinos who have been trafficked to act as surrogates, there are also Filipinos who benefitted from surrogacy. The absence of a law expressly prohibiting or regulating it provided a friendly environment for surrogacy. However, the civil law of the Philippines does not recognize parentage through surrogacy, and filiation is based on who gave birth to the child. There is no specific framework to determine the rights and obligations of the parties involved and to ensure the best interest of a surrogate-born child.

Keywords: *Surrogacy, Assisted Reproductive Technology, Philippine Family Law, Commercial Surrogacy*

INTRODUCTION

Surrogacy is a medical practice wherein commissioning parties or intended parents contract another woman to give birth to a child.[1] The word "surrogate" came from the Latin word "Subrogare" (to substitute), meaning "appointed to act in the place of." As a substitute, the surrogate mother bears the child of another person/s instead of the intended mother. Surrogacy is an arrangement wherein, after the birth of a child, the child is given to the commissioning parents.[2]

There are different kinds of surrogacy depending on the source of the sperm and egg and the purpose of surrogacy. Surrogacy may be classified as "traditional" if the woman who carries the embryo is the source of the egg, while it is "gestational" if the woman who carries the embryo has no genetic connection. [3] Moreover, surrogacy is "commercial" if the surrogate mother is paid, while it is "altruistic" if she receives nothing from the intended parents.[4]

The use of surrogacy as a reproductive practice is increasing, often hailed as an advancement in the world of reproductive medicine.[5] There are some jurisdictions where surrogacy is legal.[6]

Due to the rise of infertility affecting pregnancy worldwide, surrogacy has been considered as one of the medical solutions.[7] On the other hand, the appropriateness of surrogacy has been questioned due to corresponding legal and ethical considerations.[8]

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[1] Surrogacy Special Rapporteur on the sale and sexual exploitation of children, https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy (last visited on October 25, 2022).
[2] Insight into Different Aspects of Surrogacy Practices, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262674/ (Last visited on October 26, 2022).
[3] World Health Organization, Infertility, https://www.who.int/health-topics/infertility#tab=tab_1.
[4] *Ibid.*
[5] Supra note 1.
[6] International Fertility Group, Best Countries for Surrogacy: All that Intended Parents Need to Know, https://ifg-ivf.com/blog/best-countries-for-surrogacy-all-that-intended-parents-need-to-know.html
[7] Supra note 3.
[8] Saxena, Pikee, et al. "Surrogacy: Ethical and Legal Issues." Indian Journal of Community Medicine. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3531011/.

The objectives of this study are the following:

1. To understand the concept and practice of surrogacy, its advantages and disadvantages, as well as the legal problems related thereto;
2. To understand the legal framework of other jurisdictions that allow surrogacy and the corresponding legal issues; and,
3. To assess the legal framework of the Philippines in relation to surrogacy and provide additional reference to Congress in providing measures that will protect all parties to surrogacy.

The findings and discussions of this study are divided into three major parts. The first part discusses detailed information about surrogacy, its advantages and disadvantages, as well as the legal problems and actual legal cases related to it. The second part presents the different legal frameworks on surrogacy or the absence thereof in different jurisdictions. It includes a comparison of the different legal frameworks adopted to regulate the practice of surrogacy. The third part is an assessment of the Philippine problems related to surrogacy and a discussion on how the present legal framework in the country addresses these.

I. BACKGROUND OF THE STUDY

Surrogacy is an Assisted Reproductive Technology (ART) wherein the baby is carried by a woman for other people, the intended parents. Surrogacy is an important fertility treatment, wherein the advent of *in vitro* fertilization (IVF) has made motherhood possible for women without a uterus, with uterine anomalies preventing pregnancies, with serious medical problems, or with other contraindications for pregnancy, to achieve motherhood through the use of embryo created by themselves or donor and transferred to the uterus of a gestational carrier. This technique has also made it possible for gay couples and single men to achieve fatherhood by having an embryo created with their sperm

and a surrogate mother.[9]

Surrogacy is of two types: traditional and gestational. Traditional (genetic/partial/straight) surrogacy is the result of artificial insemination of the surrogate mother with the intended father's sperm, making her a genetic parent along with the intended father. Gestational surrogacy (host/full surrogacy) is defined as an arrangement in which an embryo from the intended parents or from a donated oocyte or sperm is transferred to the surrogate uterus. In gestational surrogacy, the woman who carries the child has no genetic connection to the child.[10]

Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives a financial reward for her pregnancy. If the surrogate receives money for the surrogacy arrangement, it is considered commercial. And if she receives no compensation beyond reimbursement of her medical and other pregnancy-related expenses along with the insurance coverage for her, it is referred to as altruistic.[11]

The concept of surrogacy appears new, but was recorded thousands of years ago, as shown in the Bible. Although the practice of surrogacy at present is different from how it was done in ancient times, the concept of bearing the child of someone is not novel. It is believed that the first known recorded traditional surrogacy is found in the Book of Genesis when Sarah, who was infertile, asked her servant to bear her child with Abraham.[12] Traditional surrogacy had also been practiced by the Babylonians as a way of preventing couples who could not bear their own children from divorcing. The more advanced type of surrogacy through artificial insemination took place in the 1770s when Dr. Hunter instructed his patient, who was suffering from hypospadias, to inseminate his wife with his sperm

[9] Supra note 2.
[10] Supra note 3.
[11] Supra note 3.
[12] THE HOLY BIBLE, Genesis 16:2, at https://www.bible.com/bible/111/GEN.16.2.NIV (last accessed June 19, 2019).

through a syringe. Artificial insemination gradually gained transactions which led to the establishment of sperm banks in 1964 in the United States. Thereafter, several legal issues arose in relation to the practice. At present, each State in the US has its own laws for surrogacy.[13]

Over time, the practice of surrogacy has grown. At present, there are notable events that took place in this field of reproductive medicine. In 2006, a woman who received an in vitro fertilization (IVF) gave birth at the age of 66. In 2008, a grandmother agreed to carry her grandchild at the age of 56. In 2012, the total number of in vitro fertilization (IVF) babies was 5 Million. In 2019, the oldest surrogate, at the age of 74, gave birth.[14]

Even in Greek Mythology, surrogacy was mentioned in the story of Semele. Semele was pregnant when she died. Zeus took the fetus and placed it inside his thigh. Thereafter, he gave birth to Dionysus.[15]

Several countries allow international surrogacy, facilitating individuals or couples seeking assisted reproductive technologies of surrogacy programs within their borders. It is crucial to note, however, that surrogacy laws and regulations can vary significantly from one country to another. Some countries may allow only altruistic surrogacy. Here are some popular destinations where surrogacy is legal or highly popular: Ukraine, Georgia, the United States, Canada, Spain, Colombia, Mexico, India, Laos, and the Philippines.[16]

In the Philippines, the most known case of surrogacy where a Filipino was the one who commissioned the surrogacy involves the perfume tycoon Joel Cruz. He is the father of two sets of twins, who were born to Russian surrogates. The

[13] Creative Family Connections. "History of Surrogacy." Creative Family Connections. https://www.creativefamilyconnections.com/blog/history-of-surrogacy/#:~:text=How%20long%20has%20surrogacy%20been,Sarah%20and%20her%20husband%2C%20Abraham.
[14] Id.
[15] New World Encyclopedia. "Dionysus." October 21, 2017. https://www.newworldencyclopedia.org/entry/Dionysus.
[16] Supra note 6.

children hold both Philippine and Russian passports.[17]

Assisted Reproductive Technology (ART) of the kind mentioned is now regarded as a standard, mainstream medical intervention. While such treatment is now regarded by most as ethically and morally uncontroversial, our society is confronted with many ethical and moral dilemmas as a result of ART and the advances in scientific knowledge associated with reproductive techniques. Who should be entitled to access ART? Should prospective parents be able to select the sex or, indeed, any other physical characteristics of their child? Should pre-implantation genetic manipulation be permitted if this could have positive medical outcomes for an existing child of the parents? Should the offspring be entitled to information about their genetic origin? As scientific advances make more options available, these and other challenging issues will need to be addressed and resolved by our community and lawmakers. The fact that ART and rapid advances in scientific knowledge give rise to difficult ethical and moral dilemmas has not meant that we, as a community, have sought to deny infertile couples access to ART.[18]

The rights of the surrogate mother, genetic parents, and commissioning parents are determined by law. The Philippines is sorely lacking laws and legislation to regulate ART and surrogacy. Without legal parameters, “the profit-driven industry is largely unregulated, as it simply shifts to new countries when one tightens its regulations.” Without laws, human rights are at the mercy of market forces.[19]

Although not all countries allow surrogacy, we live in a globalized world. Citizens from a jurisdiction where surrogacy is not allowed can easily go to another jurisdiction where they can engage a surrogate mother. This cross-border

[17] Aguiling-Pangalangan, Elizabeth. "Parents and Children: When Law and Technology Unbundle Traditional Identities." Libpros. https://libpros.com/wp-content/uploads/2019/06/final-paper-lp-lecture-adoptionsurrogacy.-6.2019.pdf.
[18] Willmott, Lindy. "Surrogacy: Art’s Forgotten Child." UNSW Law Journal, 2006. https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/29-2-7.pdf.
[19] Supra note 17.

surrogacy poses legal problems.[20]

II. STATEMENT OF THE PROBLEM

This study aimed to understand the concept of surrogacy as a scientific reproductive procedure, its advantages and disadvantages, as well as the legal problems related to the said medical practice. It further aimed to assess the legal frameworks of other jurisdictions that allow surrogacy. It sought to explore a legal framework for the efficient regulation of the practice of surrogacy in the Philippines. As such, the study sought to address the following specific problems:

1. What is surrogacy? The following sub-questions shall be addressed:
    a. What is the scientific basis of surrogacy?
    b. What are the advantages and disadvantages of surrogacy?
    c. (c) What are legal problems related to surrogacy?

2. What are the legal frameworks adopted by different countries to regulate the practice of surrogacy in their jurisdiction?
3. How does the Philippine legal framework regulate surrogacy and the problems related to it?

Scope and Delimitation

This study focused on surrogacy and the legal issues related to it. It primarily discussed the legal problems arising from surrogacy and did not include ethical issues. While the different kinds of surrogacy based on the source of the embryo have been presented, the word surrogacy as used in this study pertains to gestational surrogacy wherein the embryo was formed from the sperm and egg cell of the intended parents and implanted in the uterus of another woman, the surrogate mother. Meaning, the surrogate mother has no genetic connection with

[20] Igadera Gonzalez, Noelia. "Legal and Ethical Issues in Cross-Border Gestational Surrogacy." ScienceDirect. https://www.sciencedirect.com/science/article/pii/S001502822030248X.

the baby.

METHODS

The study used descriptive exploratory research. Data were gathered through the systematic study and investigation of information through written literature and articles that are related to the topic. In addition, journals and websites that correspond to this study were also read and analyzed. With the gathered data and information, a process of discussion has been done to explore how the practice of surrogacy is regulated in the Philippines.

FINDINGS AND DISCUSSION

I. The concept of surrogacy

Surrogacy refers to an arrangement in which a woman agrees to carry an embryo in her womb[21] with the intention of relinquishing all parental rights in favor of the intended parents or commissioning parents.[22]

The parties to a surrogacy arrangement are the following:

1. **Intended Parents/Commissioning Couple:** These refer to the people who asked another woman to carry their child with the intention of assuming parental rights over the child as their own after birth.

2. **Genetic Parents:** These refer to the female where the egg cell was taken and the male who provided the sperm that was used to fertilize the egg; they may be the same with the intended parents.

[21] Black's Law Dictionary, 10th ed. (2014), 1674.
[22] Science Direct. "Surrogacy." ScienceDirect. https://www.sciencedirect.com/topics/medicine-and-dentistry/surrogacy#:~:text=In%20gestational%20surrogacy%2C%20an%20embryo,altruistic%20surrogacy%20or%20commercial%20surrogacy.

3. **Surrogate Mother:** The female who allows herself to get pregnant with an embryo which she may or may not have genetic connection, with the intention of letting the baby be the child of the intended parents or commissioning couple.

A. The scientific basis of surrogacy

A.1.The natural process of pregnancy

The important parts of the body of a female involved in pregnancy are the ovaries, fallopian tubes, and the uterus. The ovaries are part of the hypothalamic-pituitary-ovarian axis, a complex system that affects female hormones and menstruation. The ovaries are organs where ova or egg cells are produced and developed. The ovaries are connected to the uterus through the fallopian tube. The uterus is an organ within the pelvis. The layers of the uterus are affected by the hormonal changes in the body of the woman. During the follicular phase, the uterine lining proliferates with the increase in estrogen level to prepare the uterus for any implantation. During the luteal phase, the progesterone hormones rise, stimulating the secretory changes in the uterine lining. If the egg cell produced in the ovary is not fertilized with sperm, the estrogen and progesterone levels fall, causing the uterine lining to slough off during menstruation. If the egg cell produced in the ovary is fertilized with sperm, an embryo is formed and will be implanted in the uterus.[23]

[23] Jain, Meaghan. "Assisted Reproductive Technology (ART) Techniques." National Center for Biotechnology Information, June 7, 2023.

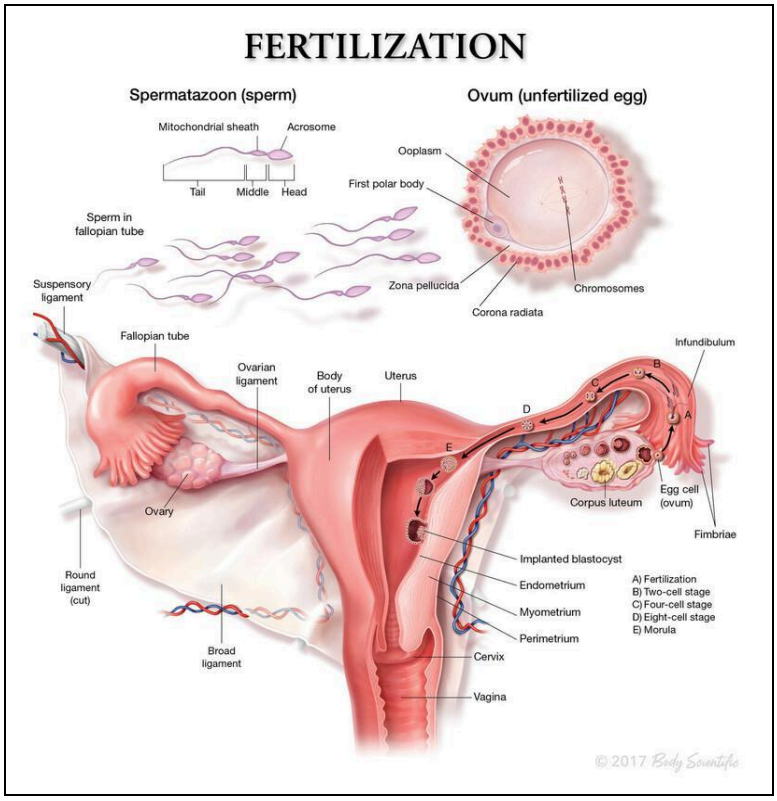

Figure 1. Fertilization in the Female Reproductive System[24]

The illustration above has two parts. The first part shows how a sperm naturally fertilizes an egg cell. Fertilization is the process by which a sperm cell from the male fuses with an egg cell from the female. The second part at the lower portion of the illustration shows what happens after fertilization. After the sperm fuses with the egg in the fallopian tube, the fertilized egg or zygote is formed. The zygote turns into an embryo. which undergoes rapid cell division and develops into a ball of cells called a morula. The morula moves into the uterus, where it attaches itself into the uterine lining; this is called implantation. The embryonic development starts until the fetus develops into a full-term baby inside the uterus.[25]

[24] "Fertilization in the Female Reproductive System." LabXchange. https://www.labxchange.org/library/items/lb:LabXchange:f5ec612c:lx_image:1

[25] Oliver, Rebecca, et al. "Embryology, Fertilization." National Center for Biotechnology Information, April 17, 2023. https://www.ncbi.nlm.nih.gov/books/NBK542186/.

The embryo contains the genes from the sperm and the egg cell that fused. The embryo carries the DNA blueprint that results from the combination of the sperm, which contains the genetic information of the male, where the sperm came from, and the genetic information of the female where the egg cell was taken. The development of the fetus into a baby and a human person will be in accordance with the DNA blueprint from the parents.[26]

A.2. Surrogacy as an Assisted Reproductive Technology (ART)

The very purpose of surrogacy is for a person to have a child without the need for that person to carry the fetus in the womb. The most common cause of why commissioning couples avail of ART is infertility. Infertility is a worldwide health issue that adversely affects the ability of millions of people to reproduce. It affects both males and females. Between 48 million couples and 186 million individuals have infertility. It is a disease of the reproductive system that prevents the fertilization of eggs and successful development of the fetus in one's uterus.[27]

Some females could not get impregnated or could not carry a fetus in their womb due to different reasons, including the absence of a uterus, history of obstetrics hysterectomy or gynecological indications such as cervical cancer or endometrial cancer, significant structural abnormalities such as small unicornuate uterus, T-shaped uterus, or multiple fibroids with failed fertility treatment attempts also constitute indications. There are also women, who even if their reproductive systems are healthy, have health issues that prevent their bodies from carrying a fetus to full term. Some of these medical conditions are heart or renal diseases. Women who suffer from repeated miscarriages likewise avail of surrogacy as a solution for any uterine disorder. Further, same-sex couples or single individuals who want to be parents to a child with whom they have a genetic

[26] "Genetics Overview." Access Medicine.https://accessmedicine.mhmedical.com/book.aspx?bookID=2977#249763260.
[27] Supra note 3.

connection likewise avail of this medical procedure.[28]

Not all commissioning parents avail of surrogacy due to infertility. There is a rise in the number of "social" surrogacies whereby the commissioning couple has work or activities that will be adversely affected if they take a time off during pregnancy or if their bodies undergo changes not suitable for their career. These commissioning parents are usually celebrities and models.[29]

ART is used to aid in achieving pregnancy conception in individuals who are having difficulty getting pregnant in the natural course of things. It involves any fertility-related treatments in which the eggs of a woman or embryos are manipulated. ART does not include the mere assisted insemination of sperm into the female's reproductive system or fertility procedure, which does not include the harvesting of a female's egg from the ovaries.[30]

ART has been used to facilitate pregnancy for infertile couples for several years. Techniques used include artificial insemination, in vitro fertilization, gamete intra-fallopian transfer, and zygote intrafallopian transfer. Depending on the technique used and the circumstances of the couple, the parents may or may not be genetically related to their offspring.[31]

The common method of ART used for surrogacy is in vitro fertilization (IVF). In the process of IVF, the egg cell and the sperm are fertilized in a culture medium in the laboratory. In some countries, the egg cell and sperm cell had to be subjected to genetic testing to rule out any genetic abnormality. Most often, if more than one embryo was formed, the other embryos were frozen for future use. After fertilization, the embryo chosen is implanted into the uterus of the surrogate

[28] Patel, Nayana Hitesh, et al. "Insight into Different Aspects of Surrogacy Practices." National Center for Biotechnology Information.
[29] "Having a Child Doesn't Fit into These Women's Schedule: Is This the Future of Surrogacy?" The Guardian. https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy.
[30] Supra note 24.
[31] Supra note 18.

mother. Depending on the circumstances of the parties involved, there are other procedures conducted for the fertilization of the embryo and successful development of the embryo into a full-term baby.[32]

A.3. Kinds of surrogacy

Surrogacy can be classified based on different categories with respect to the genetic make-up of the embryo, payment, and place where the process is conducted and completed. Based on the genetic make-up of the embryo, surrogacy is classified as traditional and gestational. In traditional surrogacy, the egg cell used comes from the surrogate mother, which is fertilized by inseminating sperm. The sperm may be provided by the intended father or another sperm donor. On the other hand, in gestational surrogacy the surrogate mother has no genetic connection to the baby. The embryo used is the fusion of the egg cell of another female and the sperm of a male who may be the commissioning couple or genetic parents.[33]

Based on the existence of compensation, surrogacy may be classified as commercial or altruistic surrogacy. A surrogacy is commercial if the surrogate mother is compensated for her services and altruistic if there is no compensation but only reimbursement of medical expenses.[34]

With respect to the place where the procedure is conducted, surrogacy may be classified as domestic or international. Surrogacy is domestic if the procedure is conducted in the country of the commissioning parents, where usually surrogacy is allowed by law. It is international when the country of the commissioning couple does not have a clear regulation on surrogacy, so they travel to another jurisdiction where their rights are defined and protected.[35]

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[32] Supra note 24.
[33] Honandar, Yessenia. "Inheritance Rights of a Child Born from a Surrogate Mother According to Indonesian Law." ARPG Web. https://arpgweb.com/pdf-files/jssr5(2)424-430.pdf.
[34] Ibid.
[35] Supra note 34.

B. The advantages and disadvantages of surrogacy

B.1. Benefits of surrogacy

The commissioning parents derive numerous benefits from surrogacy. Notwithstanding fertility issues, spouses or a person who wants to be parents to a child carrying their genes can be able to fulfill these through surrogacy. Surrogacy creates relationships. Commissioning parents develop meaningful bonds with the surrogate mother. Intended parents are often able to be involved in their surrogate's pregnancy, attending key appointments and being present for important milestones, including embryo transfer and birth. Surrogacy has a higher rate of success in protecting commissioning parents from several heartbreaks due to miscarriages.[36]

The commissioning couple or intended parents have different backgrounds; they can either be a husband and wife, same-sex couple, or a single parent who is ready to start a parent-child relationship. Notwithstanding diversity among the intended parents, they all have one desire: to build a family. Surrogacy gives a light of hope to infertile individuals. Those who are not allowed to adopt for failure to meet the qualifications for adoptive parents are able to have their own child through surrogacy. While surrogacy is not without its challenges for intended parents, it is often the answer to years of hard work and frustration for hopeful couples and individuals who have tried unsuccessfully to add to their families.[37]

In compensated surrogacy, the surrogate undergoes advanced health care and hefty compensation. The surrogate mother likewise derives benefits from the arrangement. In an altruistic surrogacy, the surrogate mother experienced a deep sense of pride and satisfaction that she was able to help another. Surrogacy is a

[36] The Challenges and Rewards of Surrogacy for Everyone Involved." Southern Surrogacy. https://www.southernsurrogacy.com/surrogacy-information/the-challenges-and-rewards-of-surrogacy-for-everyone-involved

[37] "Benefits of Surrogacy for Everyone Involved." Surrogate.com. https://surrogate.com/about-surrogacy/surrogacy-101/benefits-of-surrogacy-for-everyone-involved/.

rewarding gift. Most women who choose surrogacy do so to give back to another family. It takes a special, compassionate person to become a surrogate. A surrogate can walk away from the experience with a deep sense of pride and satisfaction that they were able to help another family in the most selfless way possible. In commercial surrogacy, the surrogate mother receives economic benefits. In exchange for her service, the surrogate mother receives compensation, which is usually high and will enable her and her family to achieve financial goals.[38]

Surrogacy is economically helpful to surrogates who do not have a source of living. The compensation in surrogacy is appealing to poor families because it is way higher than the regular wage that they can derive from their usual work. For some, one surrogate pregnancy equals five years of income for many poor Indian women. In developing countries, the compensation can be used for important household needs such as buying a house, payment of tuition fees, and educational needs of children, or medical expenses.[39]

B.2. Disadvantages of surrogacy

Surrogacy is expensive, and the commissioning parties pay for the procedure, the medical team and the facility to be used. In commercial surrogacy, the commissioning parties need to pay the agreed compensation for the services of the surrogate.[40]

The surrogate mother experiences various physical and emotional challenges because the pregnancy causes major changes in the body, commitment for a period of time, and strict compliance with the regulations imposed by the medical team and the commissioning parties.[41] The surrogate mother is likewise exposed to different complications. There is also an increased risk for antenatal

[38] Supra note 37.
[39] Suryanarayanan, Sheela. "Poverty and Commercial Surrogacy in India: An Intersectional Analytical Approach." Digital Commons, April 4, 2023.
[40] Supra note 37.
[41] Supra note 37.

and neonatal complications because of the manipulated process.[42] The surrogate mother experiences psychological distress in relinquishing her child to the commissioning parents. This creates complications in the relationship of the parties if the agreement among them is not followed.[43]

The medical risks associated with surrogacy affect the mother and the child because the pregnancy is induced and scientifically manipulated.[44] It was reported that women impregnated through surrogacy have a higher risk for obstetric problems as compared to normal pregnancies. There is an increased chance for surrogates to undergo cesarean surgery and have increased blood sugar, abnormal blood pressure, and placenta previa. It is important to examine the health status of the surrogate before doing the procedure. In addition, the mental health of the surrogates has likewise been affected, such that most surrogates experience depression exacerbated by exposure to social humiliation, anticipation of stigma, or insufficient support during pregnancy.[45] The emotional toll of giving up a child with whom a birth mother might have developed an intimate connection could cause the birth mother psychological harm.[46]

The surrogate mothers reported that they experienced a decrease in their body's ability to perform work. They associated this change in the body with the various medical procedures and hormones done into their bodies. Excessive hormone therapy caused the surrogate to experience changes and pain even after birth. The implantation of the embryo was painful and intrusive. They experienced bodily intrusion during surrogacy due to the constant procedures conducted on them as compared to normal pregnancies.[47]

Since surrogates need to remain for almost a year in a surrogate house, the

[42] Supra note 24.
[43] Supra note 18.
[44] Surrogacy. Better Health. https://www.betterhealth.vic.gov.au/health/healthyliving/surrogacy#bhc-content.
[45] Supra note 40.
[46] Rahim, Hannah. "Regulating International Commercial Surrogacy." Petrie-Flom Blog, March 18, 2024. https://blog.petrieflom.law.harvard.edu/2024/03/18/regulating-international-commercial-surrogacy/
[47] Supra note 40.

surrogates admitted that their absence from their homes resulted in their husband's infidelity. Some of them also had to tag their children at the surrogate house because no one would take care of them. The arrangement in surrogacy causes problems in the surrogate's families.[48]

C. Legal problems related to surrogacy

C.1. Lack of informed consent due to low level of education and poverty-driven choices of surrogates

This lack of informed consent occurs on the part of the surrogate. Even though a woman gives consent to a surrogacy arrangement, she would not know exactly the impact of the procedure and pregnancy on her body in advance unless the pregnancy and delivery are completed.[49]

Most women who agree to be surrogates are not well-educated and do not have sufficient knowledge to make informed consent before they agree to the arrangement. In India, a study showed that 38% never attended school, and the rest completed only up to secondary schooling. The surrogates were either homemakers or engaged in informal works.[50]

Some surrogates, even with knowledge on the risk involved, agree to whatever terms of the surrogacy arrangement because of their need for money. In India, it was found that women were being forced into surrogacy by their husbands or fathers. Women were also reportedly being implanted with up to four embryos and then told to undergo selective abortions if that led to a multiple pregnancy.[51]

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[48] Supra note 40.
[49] European Network of Migrant Women. "What is Surrogacy: Exploitation and Commodification of Women's Bodies." November 25, 2020. https://www.migrantwomennetwork.org/wp-content/uploads/EN-Surrogacy-statement.pdf.
[50] Supra note 40.
[51] "The Dark Side of Cambodia's Surrogacy Boom." The New Humanitarian, July 4, 2016. https://deeply.thenewhumanitarian.org/womenandgirls/articles/2016/07/04/the-dark-side-of-cambodias-surrogacy-boom.

A low-level education prevents the surrogate from fully understanding the consequences of surrogacy. They experience difficulty in understanding the terms of the contracts, which are usually in English, and they do not also retain a copy of the contract as evidence of what they agreed to. These matters reduce their capacity to bargain for more favorable and fair terms and conditions.[52]

In a study conducted, surrogates disclosed that they were constrained to accept whatever surrogacy arrangement because of the prodding of their own husbands, who were alcoholic and unemployed. They were forced by their husbands to be surrogates to pay off debts regardless of the terms of the surrogacy agreement.[53]

Most surrogate women who agree to rent their bodies and receive compensation for the pregnancy are the poorest, most destitute, vulnerable, and, often, migrant women. This is all the more reason to affirm that free and informed consent does not exist in surrogacy, as it does not exist in prostitution.[54]

The money derived from surrogacy has the psychological effect of forcing women who are in dire need to accept surrogacy when if given other options for equal compensation, they would not choose to engage as surrogates. The power dynamic arises between the commissioning parties from high-income countries and the poor women from developing countries.[55]

C.2. Commodification and exploitation of women and children

Surrogacy involves an arrangement for the use of a female's uterus to bear a child intended for others. Since surrogacy involves human bodies, surrogacy is a form of commercializing a person's body, which should not be a valid subject of commerce. It is violative of the principle that human bodies should not be

[52] Supra note 40.
[53] Ibid.
[54] Supra note 50.
[55] Supra note 47.

commercialized. The fact also that a human body produced is subjected to an arrangement commercializes a person. The child is considered a commodity because, at the very beginning of the contract, the parties agree that the baby will be handed over to the intended parents.[56]

The surrogates became breeders, and their bodies were assessed and classified as regular products in accordance with race, capacity to produce quality babies, and the qualifications demanded by the commissioning parents. This racialized body market treats women's “body space” as “risky,” “polluting,” and “discardable.” Women of higher caste and fairer skin were paid more for the surrogacy. When the commissioning parties impose specific qualifications of the body of the surrogate, these reduce women’s bodies as interchangeable commodities. The surrogate’s bodies who come from developing countries were valued at a lower compensation than those with fairer skins.[57]

Surrogacy purports to legalize practices that violate the international prohibition on the sale of children.[58] Abusive practices in the context of surrogacy are well documented. Sex offenders take advantage of this arrangement. Disabled babies have been abandoned. Excess infants were sold or abandoned. This commercialization of babies has been observed in trafficking schemes leading to baby-farming schemes. Even in purportedly well-regulated commercial surrogacy jurisdictions, some parties abuse the arrangements. In California, two surrogacy attorneys conspired with traffickers to use gestational carriers to create an inventory of unborn babies that they would sell for thousands of dollars.[59]

Every jurisdiction has a different take on surrogacy. Most of the surrogates for commercial surrogacy are recruited from developing countries where surrogacy has been banned due to previous abuses in relation to the said

[56] Supra note 50.
[57] Supra note 40.
[58] United Nations, General Assembly. "Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography, and Other Child Sexual Abuse Material." https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement.
[59] Ibid.

arrangement. This results in a cross-border gestational surrogacy. The surrogates are then transported to another jurisdiction where the rights of the parties under the law are clear and favorable to the commissioning parties.[60]

Commercial surrogacy has also been criticized for treating children as commodities because a child is created with the intention of being "sold" for a woman's financial gain. Commercial surrogacy can risk children being born into uncertain family situations. For instance, in Taiwan, a surrogate and the intended parents could not agree on the amount of compensation, so their baby girl was left with no parents and put up for adoption.[61]

C.3. Nationality and filiation issues of the surrogate child

The nationality of a child is questioned usually when the commissioning parties or intended parents bring the surrogate-conceived child to their country. Before a person crosses borders, identification papers should be presented. A minor must be accompanied by parents. However, if the surrogate child's passport or documents had not been secured, the nationality of a child is questioned usually when the commissioning parties or intended parents bring the surrogate-conceived child to their country. Before a person crosses borders, identification papers should be presented. A minor must be accompanied by parents. However, if the surrogate child's passport or documents had not been secured.

Additional problems will occur when the surrogate child arrives in the country of domicile of the intended parents if they want the child to be legally recognized and registered as their own child. The nationality and filiation of the child, as well as the child's entitlement to benefits, will depend on the national legislation of the country of domicile of the intended parents.[62] Some jurisdictions

[60] Supra note 20.
[61] Supra note 47.
[62] Supra note 20.

require a genetic link with at least the intended parent and other matters to prove filiation. If none of the commissioning parents were the source of the egg cell or sperm used, then they would face legal problems if they wanted to be recognized as the parents.[63]

If the commissioning parties are same-sex couples whose union has not been legalized yet in their country of domicile, the filiation with the surrogate child will be subject to legal scrutiny. They might have to undergo adoption, depending on the national laws. They need to undergo legal procedures for the recognition of their parental rights over the child. Similar problems will arise if the country of the commissioning parents does not have specific laws that regulate the rights and obligations of parties to surrogacy.[64]

Data on surrogacy cannot be established accurately because most parties involved in said arrangement conceal the data. The registration of the surrogate child depends on the decision of the parties involved. The deprivation of the surrogate child of the relevant and true information about his identity has a lifetime impact on the child and the future generations. Knowledge of one's identity affects a person's physical, psychological, cultural, and spiritual development.

A problem with surrogacy may result in children being stateless. When the surrogate children are abandoned for one reason or another, if the jurisdiction where they are born does not recognize them as their citizens for lack of proper identification, these children will remain stateless and abandoned; they will not even be eligible for adoption.[65]

In the United Kingdom, a same-sex couple engaged the services of a surrogate mother. One of them was the source of the sperm used to fertilize two

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[63] Ibid.
[64] Ibid.
[65]Lamberton, Emma. "Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children." JPIA, May 1, 2020. https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children.

eggs implanted in the surrogate mother. After the birth of the twins, the surrogate mother changed her mind and refused to acknowledge the rights of the intended parents due to a dispute in the reimbursement of expenses. The intended parents had to go to court to establish their rights over the surrogate children.[66]

An issue in the determination of legal parenthood in surrogacy has different consequences.[67] The United Nations Convention on the Rights of the Child provides that a child must be registered immediately after birth, and every child has a right to a name, to acquire nationality and to be cared for by parents to prevent children from becoming stateless.[68]

C.4. Women and children trafficking

Sale and trafficking of children born through surrogacy are occurring, especially in international surrogacy arrangements, because of the absence of standards of protection implemented by different states. Although there is a contract signed by all parties prior to the conduct of the procedure, the relinquishment of the child in favor of the commissioning couple or parties is tantamount to sale of a child. The identity and family relations of a child cannot be for sale.[69]

During the 37th session of the Human Rights Council on March 6, 2018, it was stated that surrogacy has been used as another mode of selling children. If surrogacy is seen from a child's perspective, it is essential to assess commercial surrogacy as it constitutes the sale of children. It was also discussed that since there are different laws in every jurisdiction, the best interest of the child should always be the deciding factor in determining the rights of surrogate-born children. A warning was made regarding the multibillion-dollar business arising from the

[66] Surrogacy Law UK: Surrogate Mother Refuses Access to Twin Girls. Bishop & Sewell. https://www.bishopandsewell.co.uk/2020/01/14/surrogacy-law-uk-surrogate-mother-refuses-access-to-twin-girls/.
[67] Konecna, Hana, et al. "Issues in Determining Parenthood in Surrogacy." De Gruyter, May 10, 2019. https://www.degruyter.com/document/doi/10.1515/humaff-2019-0011/html?lang=en.
[68] Ibid.
[69] UNICEF. "Key Considerations: Children's Rights & Surrogacy." https://www.unicef.org/media/115331/file.

increasing demand and profit made out of surrogacy. This market resulted in the rise of brokers that trafficked pregnant surrogate women from jurisdictions prohibiting surrogacy to jurisdictions where surrogacy is allowed or where the law is silent about it.[70]

C.5. First controversial cases in relation to surrogacy

In 1987, the watershed Baby M case became controversial. A New Jersey couple entered into an agreement with Whitehead to be the surrogate mother. The embryo used as Whitehead's egg cell fertilized with the sperm of the commissioning husband. After birth, Whitehead, as the surrogate mother, refused to relinquish parental rights over the child. The commissioning parents went to Court, but the latter favored the surrogate mother and upheld her rights as the mother of the child.[71]

In 1993, however, the state Supreme Court ruled in favor of the genetic or commissioning parents in the case of *Johnson v. Calvert*. The commissioning parents were the genetic parents; their embryo was carried to full term by Anna Johnson, the surrogate mother. The surrogacy was completed in California. After birth, the surrogate sued the commissioning parents and demanded to be recognized as the parent of the child. The Court upheld the contract and ruled in favor of the commissioning parents.[72]

In another case, surrogate mother, Helen Beasley, the 26-year-old British woman, acted as a surrogate mother for a couple from California. The embryo was the fusion of the husband's sperm cell and the egg cell of another donor. One of the agreements in the contract states that if there are multiple fetuses, the others will be aborted provided the commissioning couple decides before the end of the

[70] United Nations Human Rights. "Surrogacy and the Sale of Children," March 6, 2018. https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy-and-sale-children.
[71] Blum, Lesley. "Landmark Fertility Cases." ABC News. https://abcnews.go.com/Nightline/story?id=128652&page=1.
[72] Ibid.

12th week of pregnancy. The surrogate mother got pregnant with twins, but the commissioning couple requested for the selective abortion only on the 13th week of pregnancy. The surrogate mother refused because it was already risky on her part. The commissioning couple cut all communication and refused to acknowledge the twins. The surrogate mother sued the commissioning couple; this was, however, dismissed when third parties volunteered to adopt the twins.[73]

In a 1998 case in California, a couple engaged a surrogate to carry an embryo which was not genetically connected to them. Before the birth of the child, the couple divorced. The husband refused to acknowledge parental obligations over the child because he did not have a genetic link with the child. The Court ruled that even if the couple divorced and even if they did not have a genetic link with the child, the intention of the parties is controlling in determining the obligation of the parties. The divorced commissioning parties were directed by the Court to comply with their obligations as parents, including support.[74]

In another case involving baby Gammy, who was born with Down syndrome and a congenital heart condition, the surrogate mother was Thai, while the genetic parents/commissioning couple were Australian. After the birth of the twins, the commissioning parents took the healthy baby and left baby Gammy under the care of the surrogate mother. There were conflicting claims as to whether the Australian parents abandoned baby Gammy. In a court case, the Judge ordered that the twins remain in the environment and family where they have been since birth.[75]

Another case of surrogacy that caught the attention of the world was the legal battle that the genetic father of baby Manji had to endure before he was able to bring home his child in Japan. The embryo used was the fusion of the sperm cell and egg cell of a Japanese couple, which was implanted in a surrogate mother in

[73] Ibid.
[74] Ibid.
[75] "Baby Gammy: Surrogacy Row Family Cleared of Abandoning Child with Down Syndrome in Thailand." ABC News, April 14, 2016. https://www.abc.net.au/news/2016-04-14/baby-gammy-twin-must-remain-with-family-wa-court-rules/7326196.

India. Before the birth of the baby, the Japanese couple had marital problems. When the husband went back to India to secure custody over baby Manji, he experienced difficulty due to the political and social unrest in India. The case went up to the Supreme Court; it was ruled that the Japanese husband had parental rights over Baby Manji, and he was granted authority to bring the child to Japan.[76]

II. Legal framework of some jurisdictions in relation to surrogacy

Science keeps on evolving, including reproductive medicine. Medical advancement introduced reproductive opportunities, like surrogacy. It is often said that the law is having difficulty keeping up with developing technologies and practices.[77]

The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries engage in commercial international surrogacy in developing countries.[78] National laws governing surrogacy vary across a spectrum from prohibitionist to permissive.[79] In the absence of surrogacy-specific laws, surrogacy arrangements are often completed using pre-existing laws governing parentage, termination of parental rights, and adoption. Those jurisdictions that have legislated more explicitly on surrogacy vary in the degree of comprehensiveness and clarity. The absence of clear and comprehensive laws addressing surrogacy can lead to unregulated commercial surrogacy developing with accompanying exploitative practices.[80]

Intending parents often travel from jurisdictions prohibiting commercial surrogacy, such as Australia, France, or Italy, to jurisdictions permitting commercial surrogacy and then seek to return with surrogate-born children to their home jurisdiction. Such travel intentionally evades prohibitionist laws and

[76] Baby Manji Yamada vs Union of India & Anr., Supreme Court of India, WRIT PETITION (C) NO. 369 OF 2008.
[77] Supra note 59.
[78] Ibid.
[79] Ibid.
[80] Ibid.

creates dilemmas for the jurisdictions involved. [81]

Today, surrogacy is not officially allowed in Austria, Bulgaria, Denmark, Finland, France, Germany, Italy, Malta, Norway, Portugal, Spain, Sweden, Lithuania, People's Republic of China, Japan, Brazil, and Argentina. Altruistic, but not commercial, surrogacy is allowed in Belgium, Denmark, the Czech Republic, the Netherlands, the UK, Canada, and Australia.[82] At present, surrogacy is legal in Greece and in Israel (legal with state approval). Ukraine, Russia, and California (USA) permit commercial surrogacy, while in many states of the USA, only altruistic surrogacy is acceptable.[83]

Ukraine maintains a comparatively liberal approach to surrogacy, underpinned by a legislative framework established since 1997 that delineates procedural guidelines and legal ramifications. The country allows commercial and altruistic surrogacy. The Ukrainian surrogacy law provides that the parents of the child will be the genetic parents, and their names will be the ones indicated on the birth certificate. The manner of conception will not be indicated in the document. The genetic or biological parents will be recognized by law as the parties with parental rights and custody without the need for any action. A surrogate mother does not have the personality to sue the intended parents in court for parental rights over the child. Only married couples (man and woman) who have fertility issues, regardless of citizenship, may contract surrogacy arrangements. Only clinics with special permits from the state may conduct the procedure.[84]

The surrogacy law in Georgia is similar to Ukraine in the sense that surrogacy arrangements are considered enforceable contracts. The law recognizes

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[81] Ibid.
[82] Ellenbogen, Adrian, et al. "Surrogacy – A Worldwide Demand: Implementation and Ethical Considerations." Grem Journal. Last modified October 27, 2022. https://gremjournal.com/journal/02-2021/surrogacy-a-worldwide-demand-implementation-and-ethical-considerations/.
[83] Ibid.
[84] Zolotarev, Alexander Ivanovich. "Where Is Surrogacy Legal in Europe?" NCCCONline, October 14, 2024. https://nccconline.org/blog/article/where-is-surrogacy-legal-in-europe#:~:text=In%20such%20countries%20as%20Poland,surrogacy%20services%20outside%20their%20country.

the genetic parents as the parents of the child and whose names will be indicated in the child's birth certificate. This makes it easier for commissioning parties to secure travel documents and bring the child out of the country.[85]

In the Czech Republic, surrogacy is not expressly prohibited. Since there is no law recognizing it, the rights of the parties are not delineated, and the terms of the surrogacy contract are not enforceable. Once the intended parents try to register the child, the registry of birth will report the same to the police for questioning. The intended parents may only acquire parental rights over the child through adoption. The surrogate mother cannot receive monetary benefits because this is considered as entrusting a child to another person, which is considered as a crime and punishable by imprisonment.[86] This situation is similar in Belgium that does not prohibit surrogacy but does not recognize the validity of a surrogacy contract. The intended parents need to adopt the child before acquiring parental rights over the child.[87]

In Spain, surrogacy contracts are not allowed. However, when a child is born out of surrogacy, the courts will act to protect the best interest of the child. The intended parents may be allowed to adopt the child. This prompted Spanish citizens to engage surrogates outside their country and created additional problems detrimental to the child.[88]

Altruistic surrogacy is allowed and expressly regulated in Canada, the United Kingdom, Portugal, Denmark, New Zealand, Brazil, and Australia.

Bulgaria, France, Germany, Italy, Portugal, Taiwan, and Spain prohibit all

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[85] Ibid.
[86] Gestlife. "Surrogacy in Czech Republic." Gestlife. https://www.gestlife.com/surrogacy-in-czech-republic.php#:~:text=the%20CZECH%20REPUBLIC-,There%20is%20no%20surrogacy%20law.,it%20does%20not%20prohibit%20it.
[87] Supra note 85.
[88] Klev and Vera International Firm. "Surrogacy in Spain." Klev Vera, June 19, 2022. https://www.klevvera.com/blog/surrogacy-in-spain/.

forms of surrogacy.[89] In Mexico, there is no federal regulation, but surrogacy is promoted. The Supreme Court of Mexico legalized surrogacy.

The United States does not have a federal law regulating surrogacy; each State has its own laws. US States that allow surrogacy with case precedence upholding surrogacy arrangements are Connecticut, Delaware, the District of Columbia, Maine, New Hampshire, New Jersey, Nevada, and Washington. Some US States allow surrogacy but with a degree of restriction: Iowa, where there is no express law; Idaho, which allows it only if the egg and sperm come from couples; Montana has no law on surrogacy; Nebraska has a law allowing commercial surrogacy only but no express prohibition on altruistic surrogacy; New York allows surrogacy provided either one of the intended parents is a resident; Tennessee law allows surrogacy but requires the surrogate mother to waive rights before the intended parents assume parentage and custody; Vermont do not support pre-birth orders but court orders protecting children after birth have been issued; Virginia allows only gestational surrogacy agreement but with restrictions.[90] The US States that do not allow surrogacy are Nebraska and Louisiana. California is the most friendly State for surrogacy.[91]

In 2012, the Russian Health Ministry issued 2012 an Order allowing surrogacy even to single common-law marriage couples and single women who wanted to be parents. The birth is registered with the Civil Registry Office in the names of the genetic parents by showing the medical certificate about the surrogacy arrangement.[92]

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[89] Reuters. "Which Countries Allow Commercial Surrogacy?" Reuters, April 6, 2023. https://www.reuters.com/world/which-countries-allow-commercial-surrogacy-2023-04-05/.
[90] Sensible for Loving Families. "Surrogacy in the United States." Sensible Surrogacy, 2022. https://www.sensiblesurrogacy.com/surrogacy-in-the-united-states/#:~:text=Is%20surrogacy%20in%20the%20United,are%20considered%20%E2%80%9Csurrogacy%20friendly%E2%80%9D.
[91] Brilliantbeginning. "What is the Best State for Surrogacy in the US?" Brilliant Beginnings. https://brilliantbeginnings.co.uk/most-surrogacy-friendly-us-states/#:~:text=California%20is%20known%20as%20one,be%20more%20expensive%20than%20elsewhere
[92] Nova Clinic. "Legal Regulation of Surrogate Motherhood Program." Accessed March 27, 2025. https://nova-clinic.us/legal-regulation-of-surrogate-motherhood-program/

The Surrogacy (Regulation) Act of 2021 prohibits commercial surrogacy. Only altruistic arrangements where women acting as surrogates do not receive any monetary remuneration or compensation are allowed. Further, it allows only gestational surrogacy where Assisted Reproductive Technologies (ARTs) such as In-Vitro Fertilisation (IVF) are used to induce the surrogate pregnancy. It also laid down age and other criteria for both the people intending to be parents through surrogacy and those who could act as surrogates. Only married couples and ever-married single women (widowed or divorced) can seek surrogacy. The intending parents additionally have to produce a "certificate of essentiality" that attests to medical indications that justify the use of gestational surrogacy. The Rules necessitated the use of their own gametes by intending parents.[93]

South Korea, Hong Kong, Malaysia, Thailand, and India regulate surrogacy through national laws that expressly ban it or explicitly set the parameters for its legality. On the other hand, China, Indonesia, Cambodia, Macau, and Taiwan regulate surrogacy through administrative regulations, while other Asian countries instead issue rules governing practices related to surrogacy, such as Singapore's regulation of Assisted Reproduction Centres and Japan's guidelines for OB-GYN practitioners. Some countries in Asia have not addressed the issue but, when presented with the problem, look to anti-trafficking and other criminal laws, i.e., Thailand and Laos, or apply general provisions on contracts and family law, i.e., the Philippines. There is partial recognition of surrogacy in some countries in two different senses. In Malaysia and Myanmar, surrogacy is legal or illegal, depending on the parties' religion. For the most part, however, the distinction is between altruistic and commercial surrogacy, with an evident preference for the former.[94]

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[93] Banerjee, Sneha. "On Surrogacy, Indian Law Goes a Step Further — but Not Far Enough." Indian Express, February 29, 2024.
https://indianexpress.com/article/opinion/columns/on-surrogacy-indian-law-goes-a-step-further-but-not-far-enough-9187014.

[94] Aguiling-Pangalangan, Elizabeth. "Parents and Children: When Law and Technology Unbundle Traditional Identities." Libpros.
https://libpros.com/wp-content/uploads/2019/06/final-paper-lp-lecture-adoptionsurrogacy.-6.2019.pdf.

III. Adoption of a legal framework to regulate surrogacy

A. Surrogacy in the Philippines

In an article published by ABS-CBN, a Filipina surrogate mother and a surrogate agent were interviewed without disclosing their names. At the age of 27, Nora (not her real name) became the surrogate mother for an American couple. In 2016, she saw a Facebook group page for surrogate mothers. When she tried to join, the facebook administrator did not accept her. Thereafter, she was contacted by another Filipina residing abroad, wh asked her if she was still interested in being a surrogate mother for Php 500,000. This was a big amount for her, considering the financial status of her family. She said it was an easy decision, so she signed the contract. They had to fly to Greece for the implantation of the embryo of the commissioning parents. The facebook page where she tried to join is just one of the social media pages and several links about surrogacy in the Philippines. Tags "wanted baby makers" or "wanted surrogate mothers" were used. The person who recruited Nora was the one administering the Facebook group initially, contacted by Nora. She recruited Nora together with another Filipino. The recruiter is a Filipina who has been living in Greece, where surrogacy is legal; she has been recruiting Filipinas since 2010. Based in Greece where surrogacy is legal, Georgina has been recruiting Filipina surrogates since 2010. She transports the surrogate mothers to Greece for embryo transfer because medical clinics in the Philippines do not perform the implantation of embryos not related to the surrogate mother.[95]

In 2017, Filipinos were intercepted by police authorities at the airport. Upon investigation, they were bound overseas to be surrogate mothers. They were hired to travel to Cambodia to bear children for foreigners from Australia. Despite a ban in Cambodia, surrogacy has been practiced, and poor Filipinos have been targeted

[95] Reyes. "Wanted: Surrogate Mothers." ABS-CBN News. https://news.abs-cbn.com/specials/wanted-surrogate-mothers.

for the said activity because of poverty-driven choices.[96]

In 2019, two Filipinas bound for China were intercepted because they were suspected to have been hired by human traffickers as surrogate mothers. The two admitted that they agreed to be surrogates in China because they needed money; they were offered Php 300,000 to carry an embryo into full-term. They were hired through a website that invites women who want to bear a child for others for a fee. The interception was under the fight against human trafficking in the Philippines.[97]

On September 23, 2024, authorities in Cambodia raided a villa and found 20 women and four Vietnamese. Out of the 20 Filipinos, 13 were pregnant. Based on the investigation, these women were recruited by an agency in Thailand to carry babies for commissioning parties. Cambodia's law on Suppression of Human Trafficking and Sexual Exploitation considers pregnant women as criminals for being part of the prohibited act of surrogacy.[98]

On the other hand, some Filipinos who are experiencing fertility and pregnancy problems availed of surrogacy services. Vicky Belo and Hayden Kho had their daughter through IVF by an American-Mexican surrogate mother. Korina Sanchez and Mar Roxas had twin babies in 2019 through a surrogate mother in Pittsburgh, Pennsylvania. Beth Tayamo and Alix Dixson, despite their advanced age, had their babies through surrogacy. Alice has expressed her gratitude to modern science which allowed her to fulfill her dream as a mother. Rona Tai and Eric Tai, despite having miscarriages and inability to carry a baby

[96] Murdoch, Lindsay. "Philippine Police Arrest Surrogate Mothers-to-Be in Human Trafficking Crackdown." Sydney Morning Herald.
https://www.smh.com.au/world/philippine-police-arrest-surrogate-mothers-to-be-in-human-trafficking-crackdown-20170104-gtli45.html.
[97] Asia Times, Staff. "Filipinas Were Going to Be Surrogate Mothers." Asia Times, April 15, 2019.
https://asiatimes.com/2019/04/filipinas-were-going-to-be-surrogate-mothers/.
[98] "Pregnant Philippine Women Arrested in Cambodia for Surrogacy Could Be Prosecuted After Giving Birth." CNN, October 13, 2024.
https://edition.cnn.com/2024/10/13/asia/philippine-women-arrested-cambodia-surrogacy-intl-hnk/index.html.

into full-term, became parents through surrogacy.[99]

B. Philippine laws in relation to surrogacy

There is no law acknowledging and regulating surrogacy in the Philippines, regardless of the kind of surrogacy. The filiation, status, and citizenship of the child will be determined through the Constitution, the Civil Code of the Philippines, and the Family Code of the Philippines. Consequently, the determination of these aspects surrounding the child borne out of surrogacy is complicated in the Philippines.[100]

The 1987 Philippine Constitution provides under Article IV, Section 1 (2) that if the mother or father of a child is a Filipino citizen at the time of birth, the citizenship of the child is Filipino. The Family Code provides under Article 163 that the filiation of children may be by nature or by adoption. Natural filiation may be legitimate or illegitimate.

Under Article 164 of the Family Code, as long as a child is born during the marriage of parents, the child is considered the legitimate child of the couple. This includes a child conceived through artificial insemination, regardless of whether the sperm used was that of the husband or a donor.

A complicated legal problem arises if the surrogate mother is a Filipino and the commissioning parents and/or genetic parents are of different citizenship. A dilemma will arise since the Philippines considers the surrogate mother as the biological mother of the child, and the determination of who the father is will be complicated if the surrogate mother is married.[101] If the intended parents register

[99] Tuazon, Nikko. "6 Celebrities Who Used IVF to Have a Baby." PEP.ph, May 12, 2023. https://www.pep.ph/lifestyle/parenting/173147/celebrities-ivf-baby-a721-20230512-lfrm?s=6mkois7sr20o658bmoqnmebjev.
[100] Salvador, Tranquil G. "Looking for a Surrogate Mom?" Manila Standard. https://manilastandard.net/opinion/columns/footnotes-by-tranquil-g-salvador-iii/337472/looking-for-a-surrogate-mom.html.
[101] Ibid.

the birth of the child and indicate their names as parents, they may be held liable for the simulation of birth, a crime punishable under Article 347 of the Revised Penal Code.

Philippine law has no specific definition of commercial surrogacy.[102] Therefore, if a Filipina surrogate mother gives birth, she is the mother of the child. Philippine laws do not recognize the genetic link between the child and the intended parents. Since the documents of the child do not show parentage with the intended parents, the latter will not be able to acquire travel documents for the child on their own, and they must get the consent of the surrogate mother. But still, the intended parents would not be able to acquire parental rights in the Philippines over the child unless they undergo the adoption process.[103]

Due to the absence of clear laws in relation to surrogacy, medical clinics and doctors in the Philippines do not usually perform surrogacy. They only perform artificial insemination, provided the parties are married. So, the surrogacies conducted in the Philippines are done underground. Other Filipinos will need to go to countries for the implantation and then return to the Philippines.[104]

The academic discourses on surrogacy in the Philippines are limited. There has been one study that looks at different perspectives on surrogacy among Filipinos involved in the process, leaving out potential parents. It revealed surrogacy as a largely unexplored practice in the Philippines, attributed to the risks involved, such as emotional attachment among the mothers, financial scamming on the part of the agent, perception of risk in the child's future among the general population, and the strict rules set in place by the agencies to mitigate these problems. There is also a lack of legal parameters when dealing with surrogacy, which serves as both a reason why many avail of it in the Philippines compared to other countries and a deterrent due to the unclear consequences of doing so. All of

[102] Supra note 102.
[103] Page, Stephen. "Surrogacy in the Philippines." Page Provan, February 16, 2022. https://pageprovan.com.au/surrogacy-in-the-philippines/.
[104] Ibid.

this gives surrogacy its secretive nature in the Philippines, further enforced by conservative culture, which may hinder key players from discussing the issue in public spaces.[105]

In a study conducted on ten couples who have infertility problems, the researchers examined the varied discourses on surrogacy to shed light on the gap between the limited discussion on surrogacy among infertile couples and the prevalence of the method in the Philippines. The findings reflect the discourses resulting from the relatively narrow discursive resources of potential parents, which suggest potential parents do not construct this option as a viable alternative. These discourses involve the negotiation of key concerns, such as emotional and ethical matters, which present a need to address these issues to enable informed decision-making. Surrogacy agencies, medical practitioners, and government agencies can take these discourses into consideration through the ways they frame surrogacy and create appropriate policies about it. All of this can help contextualize surrogacy in the Philippines as it continues to be practiced as a critical player in providing and availing of the service, both within the country and in the world at large.[106]

Surrogacy boils down to two legal issues, regardless of where it was done: (1) when the donor-mother (surrogate mother) re-asserts her right to the child, and (2) when intended parents attempt to make the donor responsible for the child. In the Philippines, poverty plays a major role in the decisions of surrogate mothers. Even if the surrogate knew and was aware of a contract she signed, there is no real consent if the society created circumstances that coerced poor women to give away or sell their children. Surrogacy is dehumanizing. It fosters the attitude that the womb of the woman acts as a surrogate and the child, which she gestates and gives birth to, is mere commodity. It reduces the inherent personhood of a human to a market commodity. Completely banning surrogacy in the Philippines will just

[105] "Surrogacy Among Filipinos Who Have Struggled with Infertility: A Discourse Analysis." SAGE Journals. https://journals.sagepub.com/doi/full/10.1177/1834490921997933.
[106] Id.

trigger black markets.[107]

In a study[108] conducted by the University of the Philippines Diliman, it was concluded that surrogacy is a dirty little secret in the Philippines; all participants and the PinoyExchange forum stated that surrogacy is not openly talked about in the Philippines. Much of the secrecy behind surrogacy may stem from its less-than-favorable legal status. While there is no explicit law banning the procedure of surrogacy in the Philippines, it does fall under numerous other violations. Surrogacy is often likened to renting out one's healthy womb to bear a child for another woman or couple. However, there are no laws that directly prohibit nor regulate medical practice.

In 2006, during the thirteenth Congress of the Philippines, Senator Manny Villar proposed a bill for surrogacy to completely ban this practice, but it was not acted out favorably.[109] In 2023, Zamboanga City representative Olaso filed a bill to regulate ART and surrogacy in the Philippines. The bill noted that the Philippine Society of Reproductive Medicine showed approximately 9,000 ART procedures and approximately 50 surrogacy arrangements in 2019.[110] As a response to the arrest of Filipina women in Cambodia who were acting as surrogates in September 2024, the Philippine Congress started a legislative inquiry on the transactions involving Filipinos related to surrogacy.

CONCLUSION AND RECOMMENDATIONS

Surrogacy is a medical intervention that addresses the increasing number of infertilities in the world. Women who, due to medical and social reasons, cannot carry a baby in their womb are given the chance to have babies that have a genetic link with them and their husbands, if any. Like any other medical procedure, it has

[107] Id.
[108] Different Perspectives on Surrogacy in the Philippines. https://osf.io/vk9tq/download.
[109] Villar, Manny. "Senate Bill No. 2344." 2006. https://legacy.senate.gov.ph/lisdata/54884531!.pdf.
[110] De Layola, Zaldy. "Solon Files Surrogacy Regulation Bill." PNA, May 23, 2023. https://www.pna.gov.ph/articles/1202096.

benefits and adverse effects on the body of the surrogate mother and the child. But unlike other medical procedures, surrogacy has caused social and legal problems. Some people have taken advantage of surrogacy to traffic women and children.

There is no common international policy that binds all jurisdictions in addressing nationality and filiation issues of children born out of surrogacy. Most commissioning parties or intended parents come from first-world countries. The legal trend in these countries is a liberal approach towards surrogacy. On the other hand, surrogate mothers are usually sourced from developing countries in Asia. The legal trend in Asia is the imposition of stricter policies against surrogacy and assessing acts related thereto under the lens of anti-trafficking laws. This is because of the legal problems that arose involving the lack of informed consent on the part of the surrogate mothers due to lack of education and poverty, commodification, and trafficking of women and children through surrogacy arrangements. Notwithstanding diversity in the legal frameworks on surrogacy, all recognize the importance of protecting the interest of the child who is at risk of being a stateless and abandoned person.

The Philippines has no express law that recognizes surrogacy and its impact on society. The Constitution, the Civil Law, the Revised Penal Code, and the administrative laws do not recognize the fact that the DNA print of a child born out of surrogacy is that of the genetic or intended parents. As such, filiation between the surrogate mother and the Filipina is the only relationship where the rights and obligations of the surrogate mother over the child are established. This results in further complicated legal problems, especially if the surrogate is legally married. A complete prohibition on this procedure will not be fair for those who need it, and it will trigger black market surrogacy that exposes Filipinas further to concealed and iniquitous arrangements.

Recommendations

There is a need for a law that will address the regulatory gaps to protect its

citizens. This study recommends the appropriate legislative measures to regulate surrogacy:

1. The 1987 Philippine Constitution, Article IV, Section 1 (2) should be amended to include the fact that citizenship may be based on the genetic parents if the child is born through a Filipina surrogate mother;

2. The Article 163 of the Family Code of the Philippines, should be amended to include another basis of filiation, which is surrogacy. Article 164 should likewise be amended to include the conception and birth of a child through surrogacy as an exception, such that the surrogate mother will not be recognized as the parents but rather the genetic parents; and,

3. The Philippines should continuously align its policies with the international policies on surrogacy and anti-trafficking laws to ensure the protection of children in all circumstances where there is a conflict of law among the jurisdictions involved.

The Philippines should enact a law that recognizes the nature and concept of surrogacy as well as the significance of the source of the DNA print of a child. This law should include the following:

1. The commissioning parties or intended parents should meet certain qualifications such as medical necessity or need for surrogacy and absence of criminal conviction that renders them morality unfit to have the child to ensure the necessity of surrogacy and the capacity of the commissioning parent to exercise parental rights and obligations;

2. The surrogate mother should undergo counseling, proper education about the risks of the procedures to be undertaken, undergo medical clearance, secure consent of husband if married, and should not be older than 35 years of age to ensure that the surrogate mother understands the consequences of

the arrangement, the husband will not demand rights of the child and that she is in proper mental, emotional and physical condition;

3. The surrogate born-child should be registered with the civil registry as the child of the commissioning and intended parents without the need for additional procedure or adoption. This is to ensure that the child's right to have a name and nationality will be observed, and no stateless child will be abandoned.

   The medical professional who will perform the surrogacy procedure should be specially trained not only in their medical skills but also in determining signs of trafficking;

4. The Government should establish a committee attached to the DSWD through which all surrogacy arrangements should be approved. Medical professionals should not perform surrogacy unless with the approval of the committee. The committee will likewise monitor the welfare of the child upon the assumption of parental roles by the genetic parents;

5. The law should include a penal provision that criminalizes violation of the provision of the surrogacy act, abandonment by the commissioning parties of the child, or commission of abuses against either the surrogate mother or the surrogate-born child;

6. Intermediaries involved in surrogacy arrangements should secure a permit from the government committee that controls surrogacy arrangements in the Philippines and mandate disclosure of all contracts or agreements negotiated for and between the parties. This committee shall mandate a default contract that ensures the protection of the rights of all parties; and

7. Protect the rights of all surrogate-born children regardless, and proper documentation should be maintained for continuous monitoring to ensure

that these children will not be abused or trafficked wherever they are raised.

THE LEGAL AND ETHICAL IMPLICATIONS OF USING REVERSE ENGINEERING TO GAIN INFORMATION RELATIVE TO PATENTS

Monica Reymundo Alvarado, Marc Crisante Cruz Bueno, Astrid Dulnuan Guay, and Marvel Esther Balsina Toctocan

ABSTRACT

Today's technology brings convenience to copy a product protected by a copyright and patent. The inner workings of a product or process can be made and copied by using 3-dimensional scanning using lasers, 3-dimensional printing, CT scanning, light digitizers, chemical analysis, and other similar procedures. Industries spend hefty money researching and developing a product from a concept until its final iteration, where it is available for sale. The information derived from the research and development of these products plays a vital role in the profitability and longevity of a business. Currently, reverse engineering is legal in our country since it is a way to diffuse knowledge to the public, which in turn will be used for the nation's development and to promote progress. Specifically, the reverse engineering of a product is allowed for educational or research purposes. This study uses a qualitative approach by analyzing data from local and international research papers and news articles, as well as court decisions primarily available online, to determine if there is a need to protect enterprises from the perverse effects of reverse engineering by learning how reverse engineering works and if reverse engineering is valid within the confines of law if used as a means to create another product.

Keywords: *reverse engineering, patent, copyright, intellectual property, infringement, protected information*

INTRODUCTION

Reverse engineering is a practice that has been embedded in human ingenuity since time immemorial. It is historically inaccurate to believe that reverse engineering only emerged during the Industrial Revolution in the 18th Century. Reverse engineering has existed ever since earlier humans began to craft and discover inventions such as wheels, carriages, and architectural designs. To improve a certain tool or thing, reverse engineering was used. An object was disassembled, either in whole or in part, observed, and subsequently rebuilt. A notable invention created through reverse engineering was the 300 ships by the Romans in 264 BC. Historically, the fleet of 300 ships was created by reverse engineering the Carthaginian quinquereme. Furthermore, reverse engineering was also utilized by the military to create new and improved weapons. However, over the years, reverse engineering has found its application in many different fields.

For many inventors, a Coordinate Measuring Machine (CMMs), probe systems and robot-mounted articulating arms have been widely used for reverse engineering and eliminating the issues associated with manual methods.

Despite the lack of novelty in discourse, reverse engineering continues to be a polarizing topic, especially among inventors and legislators considering its economic and legal impact. After all, the impact of reverse engineering is already proven. According to a study conducted by the Boston University School of Law, about 40% of all patent litigation in the United States (U.S.) is related to reverse engineering. In 2018, the U.S. International Trade Commission received about 2,962 complaints about patent infringement due to reverse engineering. In the Philippines, the Intellectual Property Code (IPC) is silent about the rights of patent owners regarding reverse engineering. Further, as it stands today, there is no existing jurisprudence discussing the impact of reverse engineering on the rights of patent owners.

Thus, the crux of this paper stemmed from the confusion brought by the

opinions of different experts if reverse engineering should be allowed or deterred while patent subsists. It is also derived from the researchers' curiosity to understand reverse engineering as a tool to create new inventions. As future lawyers, we also wish to understand the legal implications of using reverse engineering and the extent of protection, if there is, of inventions made from using reverse engineering.

I. REVIEW OF RELATED LITERATURE

A. Reverse Engineering as a Double-Edged Sword

Understanding the concept of reverse engineering as a tool for innovation holds significant importance in the field of technology. In the engineering industry, creativity and innovation are crucial to developing novel products that offer a better benefit than those existing products. The pursuit and the desire to create something beneficial and impactful but at the same time novel push engineers to break their boundaries and come up with an inventive solution. However, when you think about innovation, one question comes to mind, how do engineers keep inventing innovative products in a very competitive business environment? The answer lies in reverse engineering. To understand the concept, this paper discusses reverse engineering as a process and the diverse application of reverse engineering across several industries.

Engineering is the creative application of scientific principles to design or develop structures, machines, devices, or manufacturing processes or works. Thus, it involves a process of designing, manufacturing, assembling, and maintaining products and systems.[1]

There are 2 types of engineering: forward engineering and reverse engineering. Forward engineering is the traditional process of moving from high-level abstractions and logical designs to the physical implementation of the system. It is basically a process that starts from principles and ends with the final

product. Reverse engineering is the opposite. Reverse engineering starts with the known product and works backward to determine the technical principle behind its construction. It is defined as the process of duplicating an existing part or product without drawings, documentation, or a computer model. Reverse engineering is the process of capturing the physical entities of a component.[1] In traditional manufacturing products, this analysis can be performed by taking apart a machine and analyzing its components. On the other hand, modern methods include chemical analysis of the components or electronic scanning of the shape of the product or its parts.[2] There are three general steps common to all reverse engineering that is: information extraction, modeling, and review.

In *information extraction*, the information about the design is extracted. The information extracted will not be used to determine how the pieces fit together to create the product. However, software reverse-engineering might include gathering the source code and related design documents necessary for the study. It may also involve using tools to disassemble or break apart the program into constituent parts. In *modeling*, the collected information is abstracted into a conceptual model, with each piece of the model explaining its function in the overall structure. The purpose of this step is to take information specific to the original and abstract it into a general model that can be used to guide the design of the product. Lastly, in *review*, it involves reviewing the model and testing it in various scenarios to ensure it is a realistic abstraction of the original product. Once it is tested, the model can now be used to reengineer the original product. [3]

A survey conducted by the National Academy of Engineers in the U.S. found that 90% of the respondent-engineers use reverse engineering in their profession. This is because the application of reverse engineering extends far beyond product innovation. Reverse engineering also finds application in various fields such as

[1] Outsource2india Blog. "6 Benefits of Reverse Engineering." Outsource2india, 2020.
[2] Raja, V., and K. J. Fernandes, eds. Reverse Engineering: An Industrial Perspective. New York: Springer Science & Business Media, 2007.
[3] Lutkevich, B. "Reverse-Engineering." TechTarget, 2021.
https://www.techtarget.com/searchsoftwarequality/definition/reverse-engineering

automotive, mechanical designs, software and hardware engineering, entertainment, chemicals, and electronic products.[4] For example, when a new machine comes out in the markets, competing manufacturers buy one machine and disassemble it to learn how it was built and how it works. In civil engineering, reverse engineering is also used to create better bridges and building designs from the successes or failures of past designs.

In software engineering, a programmer could use reverse engineering to learn code or programs in the hopes of creating a new and improved program. The programmer would extract the data and the different parts of the software to understand their function and design. From unraveling complicated computer code to enhancing everyday technology, reverse engineering serves as a catalyst for innovation. Indeed, reverse engineering can be applied in multiple fields and industries becoming a tool too powerful to be wielded as a weapon. On one hand, it fosters innovation, enhances compatibility, and generates competition. On the other hand, it raises ethical concerns, threatens intellectual property rights, and poses security risks. For developers and innovators, reverse engineering offers a chance to pick up knowledge from already-developed technologies to improve current goods. It makes it easier to find functional restrictions or inefficiencies which helps in product improvements. Aspiring engineers can also expand their knowledge by analyzing existing products to learn more about design concepts, implementation strategies, and industry standards.[5] Furthermore, it is also a useful tool that, when applied ethically, can dissect complex systems to reveal operational insights, recover invaluable lost code, and strengthen software against cyber threats.

However, while it can be a useful tool for developers, in the hands of malicious inventors, reverse engineering is used to uncover and exploit application

[4] Kolar, V. D. Application of Reverse Engineering and Rapid Prototyping to Casting. Thesis, 2008.
[5] Gyanchandani, V., and Gyanchandani, V. "Reverse Engineering and IP Rights: Striking a Balance | TTC." TT Consultants, 2023. https://ttconsultants.com/reverse-engineering-and-intellectual-property-rights-balancing-innovation-and-legal-considerations/.

vulnerabilities, often leading to security incidents and data breaches. The potential for reverse engineering to be leveraged by hackers and attackers is a real and present danger.[6]

The following information describes the various security risks that arise when reverse engineering is misapplied and gives developers plenty of reasons to safeguard their applications diligently.

One of the primary risks associated with reverse engineering is the potential exposure of trade secrets or sensitive code, as competitors or hackers can dissect the product to learn about how the product works. This information may be replicated or exploited to compromise the original product's integrity. This revelation provides a blueprint for unauthorized parties to duplicate and capitalize on a company's hard-earned innovations.

An illustrative instance of this occurred when Apple suspected Samsung of patent infringement. Through reverse engineering, Apple substantiated in court that Samsung had replicated its patents, resulting in legal action and a fine. Illicit developers can leverage reverse engineering to create unauthorized derivative works, ranging from imitation products to modified software versions that circumvent revenue models, such as subscription services. This can lead to financial losses and damage the brand reputation of the affected company.

Furthermore, one of the most concerning risks is using reverse engineering to discover and exploit security vulnerabilities. This could result in unauthorized access to private data, disruption of services, and other malicious activities that erode user trust and satisfaction. Skilled attackers can employ reverse engineering to craft Advanced Persistent Threats (APTs), which are prolonged and targeted cyberattacks capable of going undetected for extended periods.

[6] PreEmptive. "What Is Reverse Engineering?" PreEmptive, 2023. https://www.preemptive.com/what-is-reverse-engineering/.

B. Why should Reverse Engineering be Protected?

Reverse engineering is usually frowned upon due to its association with potential patent infringement concerns. However, reverse engineering is far beyond disassembling, extracting information, and copying. The end product of reverse engineering is not an imitation of the originally manufactured product. The purpose of reverse engineering is to enhance the previously manufactured product to provide the public with cheap and best technology.[7]

In the U.S., reverse engineering is generally legal. In U.S. Patent Law, the patent owner has exclusive rights to use, own, or develop the patent, thus, reverse engineering is not a defense.[8] Theoretically, there should be no need to reverse engineer a patented invention because the patent specification should inform the relevant technical community about how to make the invention. Insofar as a patent does not teach everything to a technologist, one thing is clear and that is that some reverse engineering activities do not amount to patent infringement. A patent infringement does not automatically arise just because the product is created through reverse engineering. When the modification or improvement is significant such that it satisfies the triple Test of Patentability requirement, the product is considered legal.[9]

In the case of *Kewanee Oil Co. V. Bicron Corp*,[10] the U.S. Court of Appeals ruled that reverse engineering is considered an allowed method to discover trade secrets. While patent laws give inventors protection for their invention for 20 years and exclusive rights to make, use, and market the patented product, the right is given only in exchange for public disclosure of significant technical details about their inventions. For as long as the inventor is asked to disclose sufficient information about the invention and about how it is made, reverse engineering is not necessary

[7] Nair, S. S. (2016). Reverse engineering: An emerging and contentious technique in I.P.R. International Journal of Advance Research in Innovative Ideas and Innovations, 1(4), 161–166.

[8] Legal Information Institute. (n.d.). Reverse engineering. Cornell Law School. https://www.law.cornell.edu/wex/reverse_engineering

[9] Id. at 8.;. The law and economics of reverse engineering. Yale Law Journal, 111, 1575–1608

[10] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

and does not affect patent law. Moreover, in the case of *Bonito Boats Inc. v. Thunder Craft Boats Inc.*[11] where the the court resolved the issue on the act of the respondent in using the direct molding process to duplicate the Bonito 5VBR fiberglass hull and knowingly selling such duplicates in violation of the Florida Statute, the U.S. Supreme Court ruled that there must be a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the progress of science and useful arts. The Congress may not create patent monopolies of unlimited duration, nor may it "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." Consequently, the use of reverse engineering is allowed.

In the words of the U.S. Supreme Court (SCOPUS), reverse engineering is characterized as “an essential part of innovation which likely yields variations on the product that could lead to significant advancement in technology.” The court cites that “the competitive reality of reverse engineering may act as a spur to the inventor to develop patentable ideas.” Even when reverse engineering does not lead to additional innovation, the *Bonito Boats* decision suggests that it may still promote consumer welfare by providing consumers with a competing product at a lower price.

In the European Union (E.U.), the Directive on Legal Protection of Computer Programs adopted by the E.U. permits reverse engineering. In the Directive, it states that, “in the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right to knowhow or information protected as trade secrets. Thus, the independent discovery of the same know-how or information should remain possible. Reverse engineering of a lawfully-acquired product should be considered as a lawful means of acquiring information, except when otherwise contractually agreed. The freedom to enter into such contractual arrangements can, however, be limited by law’”. It could be inferred that reverse

[11] Bonito Boats, Inc v. Thunder Craft Boats, Inc. 489 U.S 141 (1989).

engineering is legal under certain conditions. [12]

Why should Reverse Engineering not be Protected? As understood, reverse engineering is the process of extracting secret information by analyzing an existing product to understand its inner workings. While it can serve as a tool for innovation, several concerns have been growing among patent owners about the inherent dangers it poses to patent rights. U.S. generally allows reverse engineering especially in products concerning copyright laws. However, for products covered by patents, the U.S. Patent Law is silent. There are some instances when reverse engineering is considered a violation of patent laws and trade secret laws. For example, it is not legal to reverse engineer a product if the purpose is to create a competing product circumventing patent rights. For this purpose, the U.S. enacted the Defend Trade Secrets Act in 2016 to give plaintiffs a parallel right to file for trade secret misappropriation lawsuits if the trade secret is related to a product or service used in interstate or foreign commerce. Trade secrets may include but are not limited to, the types of inventive discoveries that are eligible for U.S. patent protection. [13]

The IPC also enunciates a provision for the protection of undisclosed information but does not necessarily provide concrete provisions for its protection. On one hand, Philippine laws want to protect, promote, and secure the rights of inventors, and diffuse information and knowledge for national development. The pertinent provisions of law relative to the disclosure of patents state that a patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, making information readily available.

Patent infringement is when there is making, using, offering for sale, selling or importing of a product subject to patent, or using the process, and from

[12] Id. at 4.
[13] Congressional Research Service. (2023). *An introduction to trade secrets law in the United States*. Congressional Research Service. https://sgp.fas.org/crs/secrecy/IF12315.pdf .

manufacturing, dealing in, using, selling or offering for sale, or importing any product obtained directly or indirectly from such process without prior consent.[14]

There are limitations to patents, specifically in Sections 72 and 73 of the Intellectual Property Code:[15]

> Using a patented product which has been put on the market in the Philippines by the owner of the product, or with his express consent, insofar as such use is performed after that product has been so put in the said market;
>
> Where the act is done privately and on a non-commercial scale or for a non-commercial purpose: Provided, That it does not significantly prejudice the economic interests of the owner of the patent;
>
> Where the act consists of making or using exclusively for experimental use of the invention for scientific purposes or educational purposes and such other activities directly related to such scientific or educational experimental use;
>
> Where the invention is used in any ship, vessel, aircraft, or land vehicle of any other country entering the territory of the Philippines temporarily or accidentally;
>
> Any prior user, who, in good faith was using the invention or has undertaken serious preparations to use the invention in his enterprise or business, before the filing date or priority date of the application on which a patent is granted, shall have the right to continue the use

[14] Section 71, Intellectual Property Code of the Philippines.
[15] Sections 72-73, Intellectual Property Code of the Philippines.

thereof.

Reverse engineering and code modification present significant security and business risks. These allow malicious hackers or competitors to easily gain access to your proprietary source code, including your algorithms, ideas, data formats, licensing, security mechanisms, and potentially even your customer data.[16] Reverse engineering can be used to gain unauthorized access to a software program, steal proprietary code, or create competing products. It can also be used to modify a software program for malicious purposes, such as introducing malware or viruses. Software reverse engineering protection is essential for protecting the intellectual property of software developers and ensuring the integrity of their products.[17]

In the current landscape, numerous applications lack source code protections, leaving the application's source code exposed to anyone with access to installers or installed files. This accessibility poses various risks, including the potential for cloning the product, injecting malicious code for redistribution, crafting programs to expertly attack the product, and identifying previously unknown vulnerabilities in the code. Beyond the information security concerns, there are significant business risks as well. The intellectual property contained in the application becomes easily accessible through techniques that individuals with average skills can perform swiftly using popular open-source tools. Moreover, the discovery of vulnerabilities or customer data within the application can lead to potential damage. Fortunately, there are strategies to address these vulnerabilities, such as employing obfuscation and encryption measures to enhance protection against unauthorized access and potential exploitation.

While reverse engineering primarily revolves around trade secrets, its impact extends to other intellectual property rights, including patents and

[16] Fagan, I. (2015, August 10). How to protect your business from reverse engineering & code modification. *Telos*. https://www.telos.com/blog/2015/08/10/protect-your-business-from-reverse-engineering-and-code-modification/

[17] SofPro. (2023). Software reverse engineering protection. SofPro. https://www.sofpro.com/blog/software-reverse-engineering-protection#:~:text=Why%20protect%20against%20reverse%20engineering,as%20introducing%20malware%20or%20viruses.

copyrights. Patents provide inventors with a 20-year protection period and exclusive rights to produce, use, and market the patented product.[18] This exclusivity, however, is granted in exchange for the public disclosure of significant technical details related to the inventions. It appears that if the inventor discloses adequate information about the invention and its manufacturing process, reverse engineering may not be necessary, and patent law may remain unaffected. Nevertheless, the potential for infringement arises when a 3D scanner is employed to scan an object, which is subsequently replicated using a 3D printer. This process results in a duplicate of the original product, potentially infringing on the patent protection originally granted.[19]

FINDINGS AND DISCUSSION

In the Philippines, Section 13 of Article XIV of the 1987 Constitution states that "the State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."

The above provision acknowledges the duty of the State to establish and uphold a legal framework that protects the exclusive rights of individuals in their intellectual property rights including the right of patent owners with regard to their patentable inventions. It reflects the idea that inventors' "great labor and much expense" should be rewarded. Included in the reward is the right to prevent, restrain, prohibit, and prevent any unauthorized person or entity from making, using, offering for sale, selling, or importing the product.

Consistent with the duty of the State to establish and uphold a legal framework that protects the exclusive rights of individuals in their intellectual

[18] Republic Act No. 8293, Section 54 (Philippines)
[19] Weinberg, M. (2016). "*When 3D Printing and the Law Get Together, Will Crazy Things Happen?".* 15 in Van den Berg, B, Van der Hof, S., Kosta, E. (Editors), 3D Printing Legal, Philosophical and Economic Dimensions

property rights is Section 71 of the Intellectual Property Code which provides that:

> A patent shall confer on its owner the following exclusive rights:
>
> a. Where the subject matter of a patent is a product, to restrain, prohibit and prevent any unauthorized person or entity from making, using, offering for sale, selling or importing that product;
>
> b. Where the subject matter of a patent is a process, to restrain, prevent or prohibit any unauthorized person or entity from using the process, and from manufacturing, dealing in, using, selling or offering for sale, or importing any product obtained directly or indirectly from such process.

Clearly, the provision prohibits third parties from making, using, offering for sale, selling or importing the product if it causes significant prejudice to the economic interest of the owner of the patent.

The right of reverse engineering is also absent under the Intellectual Property Code. However, Section 2 of the same Code provides that "the use of intellectual property bears a social function. To this end, the State shall promote the diffusion of knowledge and information for the promotion of national development and progress and the common good."

The law must balance its duty of protecting the rights of patent owners and at the same time, its duty to diffuse knowledge for the common good. With reverse engineering, information is more available to inventors and researchers to develop better products than those existing without fearing legal prosecution. After all, the development of better technology is for the benefit of the common good and the

promotion of national development and progress.

In support of the previously stated provision, Section 72.2 of the same Code provides that the owner of a patent has no right to prevent third parties from performing, without his authorization, act/s such as making, using, selling, offering for sale, or importing the patented article or product which are done privately and on a non-commercial scale or for a non-commercial purpose, provided that such act does not significantly prejudice the economic interests of the owner of the patent.

An act is said to be done in private and on a non-commercial scale when it does not significantly prejudice the economic interests of the patent owner.[20] The determination of this is on a case-to-case basis. The debate on limiting the rights of patent owners for non-commercial uses involves weighing the interests of innovators, the public, and society at large. Striking the right balance is essential to ensure that intellectual property rights continue to promote innovation while also addressing the broader needs of the public.

CONCLUSION AND RECOMMENDATION

The desire of mankind to make life better and easier led to countless innovations worldwide. Even with innovative products, humans can never stop developing them further, to find ways to make them better, to make them greater, and this non-stop progress is not only brought upon by the pursuit of a breakthrough in knowledge but also because of the demand from society.

As the world develops, the competition to provide newer inventions continues to become fiercer. Take for example mobile phones and smartphones that have become necessities to users. It was once a telephone, where it needed to be connected to a landline and could only transmit sounds. Then, when this was invented in the 19th century, many inventors saw the potential, and this paved the

[20] Sections 72, Intellectual Property Code of the Philippines.

way for the invention of the cell phone due to the continued research and improvements made by the inventors and developers.

Innovation is not conjured in a moment nor a day because it is a step-by-step process. Thus, reverse engineering should not be seen as a negative undertaking in the field of innovation because this process has paved the way too many inventions and discoveries that helped make the lives of mankind easier. Medical supplies, like machines, are one of the great innovations humans make. These inventions were not invented by one person, as it is a result of reverse engineering researched by many developers and inventors who have worked to improve it to make it more accessible to every sick person. Ships or vessels that make transportation easier in the sea, were also a result of reverse engineering. Most of the great inventions today are a result of reverse engineering.

Considering all these, the world remains dynamic. Presently, everything is easily accessed by everyone, hence the sense of protection to their own creation is badly needed because although acceptance of reverse engineering in the field of innovation is a sign of progress, this can also be abused by other users for their own gain, thereby creating unfair competitions between developers and inventors, including businessmen who support and finance reverse engineered inventions.

Thus, it is crucial to strike a balance between harnessing the positive aspects and mitigating the negative implications of reverse engineering. Responsible and ethical use of reverse engineering, committed to protecting intellectual property and ensuring cybersecurity, can transform it into a force for positive change rather than a weapon with destructive potential.

As we navigate the evolving landscape of technology, a nuanced approach to reverse engineering is essential for a sustainable and innovative future. Because if “reverse engineering and intellectual property rights are viewed from a balanced angle, they can coexist peacefully. Reverse engineering techniques that are ethical and responsible can promote healthy competition, spur creativity, and advance

technology. Protecting intellectual property rights also makes sure that artists are encouraged to keep coming up with innovative ideas. We can achieve the ideal balance that supports both innovation and intellectual property rights by navigating the legal system, upholding ethical standards, and encouraging collaboration."[21]

Therefore, although reverse engineering can be a way for inventors and developers to create or make improvements it should be "legitimate to learn how something works; modify or repair a product; create a competitive product; enable interoperability with a product."[22]

Further, to protect the trade secret of a patented invention, consent from the inventor or developer should first be asked before delving into the researched documents, and other information relating to a certain product. Protection should also be given to the inventors or developers, and/or the patent owners to maintain their rights against infringement.

> Because protecting the valuable information to a business by designating it as a trade secret is a necessity in today's ultra-competitive global market. Businesses need a protected, confidential environment with a view to developing new products and generating business strategies. By means of trade secrets, the developer of a product has the ability to insulate all information from disclosure, irrespective of the product stage (from the research and development phases until the application

[21] TTConsultants. (2023). Reverse engineering and intellectual property rights: Balancing innovation and legal considerations. *TTConsultants*. https://ttconsultants.com/reverse-engineering-and-intellectual-property-rights-balancing-innovation-and-legal-considerations/.; Trade Commissioner: Government of Canada (2022): Reverse Engineering Considerations When Protecting Inventions https://www.tradecommissioner.gc.ca/united-states-of-america-etats-unis-amerique/retro-ingenierie-reverse-engineering.aspx?lang=eng

[22] Trade Commissioner: Government of Canada (2022): Reverse Engineering Considerations When Protecting Inventions https://www.tradecommissioner.gc.ca/united-states-of-america-etats-unis-amerique/retro-ingenierie-

> for a patent protection, if wanted so); or the developer could keep protecting the information as trade secrets, if the threat of reverse engineering is mild.[23]

In addition, there is also a need to provide protection for digital innovation because everything is already digitally accessible nowadays, particularly through social media or the use of technology, hence, patent data can be easily stolen. Thus, there is a need to protect software intellectual property as "a patent or copyright proves authorship of an innovation, which allows the owner company to assert its rights and prevent others from using it for a set period. However, the law does not protect the code itself, but only the way specific processes are carried out in the software."[24]

Therefore, to protect software innovation or patent information, there is a need to develop a legal framework for cybersecurity. Thus, protecting reverse engineering is essential for maintaining a balance between innovation and safeguarding intellectual property. It also contributes to the overall security and ethical practices within the technology industry. Striking this balance ensures that the benefits of reverse engineering can be harnessed responsibly for advancing technology and society.

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[23] SHS Web of Conferences. (2023). The legality of reverse engineering or how to legally decipher trade secrets. *SHS Web of Conferences, 177*, 02001. https://www.shs-conferences.org/articles/shsconf/pdf/2023/26/shsconf_copeji2023_02001.pdf.
SHS Web of Conference. "The Legality of Reverse Engineering or How to Legally Decipher Trade Secrets." SHS Web of Conferences 177, 02001 (2023). https://www.shs-conferences.org/articles/shsconf/pdf/2023/26/shsconf_copeji2023_02001.pdf

[24] Quarkslab. (n.d.). Reverse engineering: A threat to intellectual property of innovations. *Quarkslab*. https://www.quarkslab.com/article-reverse-engineering-threat-to-intellectual-property-innovations/.