Enforcing Liberty and Prosperity through the Courts of Law: A Shift in Legal Thought from Juridification to Judicialization

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Abstract

Human Rights may be divided into two broad categories: liberty, which embraces civil and political freedoms, and prosperity, which embodies social and economic rights. Both liberty and prosperity have long been adopted in the Philippines; entrenched in legal doctrine, yet compromised in practice. While the Philippines may have juridified both liberty and prosperity through the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights, the latter is demoted as mere aspiration in municipal law absent enabling legislation. But the safeguard and nurture of liberty and prosperity require more than legislative action, they necessitate a shift in judicial thought. It is the purpose of this paper to redefine the judiciary’s role in enforcing civil, political, social, and economic rights; elevating the proverbial second generational rights as justiciable rights within the Philippine legal system. To this end, this paper will seek to expand fundamental guarantees against non-state actors by abandoning the state action threshold. Though Philippine constitutional tradition presumes that the state is the only threat to liberty and prosperity, today even non-state actors wield the power to deprive without due process of law. This paper will thus look at social paradigms in which liberty and prosperity are applied vis-à-vis the tripartite duties of the state as enshrined in the Maastricht Guidelines—i.e. the duties to respect, protect, and fulfill. By ascertaining legal concepts that erode the state action requirement, this paper seeks to identify various approaches in protecting liberty and prosperity within the private sphere.
Outline

In the safeguard of civil and political rights, judicial remedies are just as essential as legislation. Unfortunately, the contrary assumption is made in relation to social and economic norms. This paper seeks to re-structure the enforcement of liberty and prosperity in the courts of law. We will look at the following:

Chapter I will address the misconceptions of social and economic rights. This chapter will establish two points: first, the relevance of prosperity vis-à-vis traditional liberties; and second, the justiciability of civil, political, social, and economic rights in the courtroom.

Philippine constitutional tradition places liberty and prosperity beyond the expediency of the passing hour. But the question remains: from whom are these rights protected? Chapters II and III seek to address this query by looking at the doctrinal and structural challenges in reserving fundamental protections against public actors alone. Chapter II will establish the inadequacies of the state action threshold in protecting fundamental rights amidst the rise of economic forces. We will also look at how traditional assumptions of law hinder the state’s compliance with its tripartite duties to respect, protect, and fulfill human rights, whether recognized as first or second generational rights. Chapter III will continue by bridging traditional doctrine with contemporary realities. Here we will identify jurisprudential approaches in enforcing fundamental rights against both public evils and private wrongs. Before concluding, Chapter IV will seek to define the role of the judiciary in protecting liberty and prosperity vis-à-vis judicial restraint. This discussion will be dedicated to reconciling the demands of judicial activism with the counter-majoritarian difficulty.
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Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances. It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events.

– Panganiban, C.J

INTRODUCTION

Liberty and prosperity embody the twin beacons of justice—through liberty we uphold civil and political freedoms, while prosperity enshrines economic, social, and cultural rights. They dispense with the antiquated notion of state obligation as a negative responsibility alone; and canonize positive duties to guard against the invisible hand of the market forces, to combat social prisons, and to give more in law to those who have less in life.

Principles of liberty and prosperity have long been recognized in the Philippine jurisdiction; entrenched in legal doctrine, yet compromised in practice. The Philippines ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—together, the International Bill of Rights—but fail to afford them consistency. While “civil and political rights have attracted much

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3 See DeShaney, 489 U.S. 189.
attention in theory and practice… economic, social and cultural rights have often been neglected.\(^8\)

Dissimilar to fundamental liberties, prosperity is recognized as aspiration rather than right. Indeed, in *Simon v. Commission on Human Rights (CHR)*,\(^9\) the Philippine Supreme Court pronounced that the jurisdiction of the CHR excludes social and economic rights. Though the International Covenants and the Universal Declaration of Human Rights (UDHR) “suggest that the scope of human rights can be understood to include those that relate to an individual's social, economic, cultural, political and civil relation[.]”\(^10\)

Section 18, Article XIII, of the 1987 Constitution was interpreted to empower the Commission to investigate “human rights violations involving civil and political rights” alone.\(^11\) As confirmed in the *Concluding Observations* of the *United Nations Committee on Economic, Social and Cultural Rights* (UNCESCR), the CHR “is not explicitly mandated to deal with economic, social and cultural rights.”\(^12\)

A further dilemma is the non-enforceability of liberty and prosperity against private parties. Traditional views of political law divide the world into two spheres: the public sphere, which deals with government action, and the private sphere, which regulates private relations. The United States Supreme Court has generally reserved the application of the Bill of Rights to the public sphere.\(^13\) Philippine constitutional law having its roots in American constitutional tradition abides by that same system.\(^14\) This principle is called the *state action doctrine*, and the structure is known as the *public/private distinction*.\(^15\)

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\(^11\) Ibid.

\(^12\) Committee on Economic, Social and Cultural Rights, *Concluding Observations* on the Combined Fifth and Sixth Periodic Reports of the Philippines, E/C.12/PHL/CO/5-6, 26 October 2016, 9. (hereinafter, *Concluding Observations*)

\(^13\) *Civil Rights Cases*, 109 U.S. 3 (1883).


The dichotomy was drawn on the assumption that only the state is in the position to violate fundamental rights. But this premise is now radically transformed. With the shifting of political and economic powers from the sovereign to the oligarch, and the blurring of the public and private spheres through privatization and government deregulation, we have come to realize that “We the People” too are threats to the rights of our fellow men. Today, in the “advent of liberalization, deregulation and privatization…. even individuals [are] sources of abuses and threats to human rights and liberties.”

Reserving fundamental protections to public actors is as antiquated as it is inadequate. As seen through the Limburg Principles, and the Maastricht Guidelines, states have a tripartite duty to respect fundamental rights—i.e. the duty to respect, as well as to protect and fulfill these rights from private intrusions—i.e. the duties to protect and fulfill. By limiting the ambit of fundamental protections to the positive acts of the state alone, the state action doctrine fails to keep apace the complexities of reality.

The orthodox approach to the inadequacies of law is the juridification of hitherto social and economic claims—the positivist approach of expanding fundamental guarantees by writing them down as law. Yet that remedy is for the political branches of the government. I ask: What are the lawyers and judges to do?

Preserving liberty and prosperity does not rest solely on the legislation of new economic programs or novel social policies—it requires a shift in judicial perspective. It is the purpose of this paper to restructure access to power through the courts; repositioning the role of the judicial branch in placing the coercive power of the state at the disposal of individuals and social movements. We will look at the following:

Chapter I will establish how human rights embraces both liberty and prosperity. Necessitous men are never truly free men. “We the People” thus

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18 Serrano, 323 SCRA 445 (Panganiban, J., separate opinion)
19 Ibid.
22 Vernon v. Bethell (1762), 28 ER 838, 2 Eden 110.
need not only justice, but jobs; not just freedom, but food; not only ethics, but economics. This chapter seeks to determine the justiciability of social and economic rights *qua* human rights within the Philippine legal system.

Chapter II looks at the doctrinal and structural challenges in reserving the enforcement of fundamental protections against public actors. This discussion will contrast old and new paradigms. In the *Old Paradigm*, as exemplified in the cases of *People v. Marti* and *Duncan v. Glaxo*, the Supreme Court reserved the application of fundamental rights against the state alone. Galvanized by Chief Justice Panganiban’s separate opinion in *Serrano v. National Labor Relations Commission*, this chapter will delve into the *New Paradigm*, acknowledging how public rights are often the subject of private intrusions.

Chapter III seeks to bridge the gap between traditional legal doctrine and contemporary complexities. Political power now lies in the hands of private parties, be they economic elites, warlords, or dynasties. By exploring jurisprudence where fundamental liberties were successfully invoked against ostensibly non-state actors, this chapter seeks to recast legal characterizations of the “public” and “private” in order to safeguard liberty and prosperity against both public evils and private wrongs.

Before concluding, Chapter IV will look at the role of the judiciary in the enforcement of human rights policies vis-à-vis the principle of separation of powers. Here we seek to reconcile judicial activism with counter-majoritarian critique by re-defining the judiciary’s role in conserving liberty and prosperity within the Philippine constitutional framework.

While the “less favored in life will be the more favored in law,” it is substantive, rather than mere formal, equality that will protect liberty and prosperity. But by empowering the everyman to harness the law to advance

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26 *Serrano*, 323 SCRA 445.
27 *Serrano*, 323 SCRA 445 (Panganiban, J., separate opinion).
equal access to social goods through the courts, the author hopes to give they who have less in life more in life; and not simply in law.

I. SOCIAL AND ECONOMIC RIGHTS IN THE PHILIPPINE LEGAL SYSTEM

On 11 October 2016, President Rodrigo Roa Duterte signed Executive Order No. 05, approving and adopting the Ambisyon Natin 2040 program. In a 25 year-long plan, Duterte seeks to secure a matatag, maginhawa at panatag na buhay—a strongly-rooted, comfortable, and secure life. While there is no contesting that poverty and gross inequality are problems besetting the nation, surely the solution does not lie so far into the distance.

There exist three concepts of rights under the Philippine constitutional framework: civil liberties, political freedoms, and economic freedoms. These rights were delineated by a thin but dividing line by the Constitutional Commission of 1986:

To civil liberties belong freedom from arbitrary confinement, inviolability of the domicile, freedom from arbitrary searches and seizures, privacy of correspondence, freedom of movement, free exercise of religion and free choices involving family relations. Political freedoms include the freedoms involving participation in the political process, freedom of assembly and association, the right to vote, the right of equal access to office, the freedom to participate in the formation of public opinion, and also non-establishment of religion or what is popularly called separation of church and state. Economic freedom covers everything that comes under the heading of “economic self-determination,” free pursuit of economic activity; in general, free choice of profession, free competition and free disposal of property. It should be emphasized, however, that in the hierarchy of freedom under existing jurisprudence, economic freedom ranks the lowest and it is the freedom whose reasonable invasion by the state is easily allowed.

The intent of the drafters of the 1987 Constitution is clear: social and economic rights—as embodied in the Declaration of Principles and State Policies, as well as the Social Justice provisions of the basic law—are not one of the traditional rights like those enshrined in the Bill of Rights, and are mere

29 NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, PHILIPPINE DEVELOPMENT PLAN 2017-2022 (2017), xii.
31 Bernas, Sponsorship Remarks, supra note 9.
commands to the state. But note the irony: while, domestically, social and economic rights have been demoted as second-generation rights, they are embraced as human rights in the realm of international law.

Though antithetical to the thesis of the constitutional framers, both liberty and prosperity are embedded in the Philippine legal system. The Philippines has ratified twenty (20) international human rights instruments, including all seven (7) core human rights treaties: the ICCPR, the ICESCR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. By virtue of the incorporation doctrine enshrined in Section 2, Article II of the 1987 Constitution, generally accepted principles of international law, treaty or otherwise, form part of the law of the land.

The dual character of social and economic rights is encapsulated in the clash of Philippine municipal law with Philippine international obligation. Effectively, the Philippines wears two hats: it exalts social and economic rights in the realm of international law, yet relegates them in the municipal legal system. The following segment seeks to disentangle the web of municipal and international doctrines by elevating the status of social and economic rights as human rights—rights for which the state is responsible as they are for civil and political liberties.

32 AGABIN, MESTIZO supra note 4, 240.
34 Response of the Philippine Government to the concerns raised by the Committee on Economic, Social and Cultural Rights during its 59th session in Geneva, Switzerland on September 28-29, 2016, 48 (hereinafter, Response of the Philippine Government).
35 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
A. Second-Generation Rights in International Law

International Human Rights Law may be divided into two broad categories: (i) civil and political rights, and (ii) economic and social rights. The latter is “surrounded by controversies both of an ideological and technical nature.” As earlier established, the Constitutional Commission of 1986 was of the opinion that second-generation rights are not true rights at all, but duties imposed upon the state. Another criticism of economic and social rights goes further; contesting their obligatory nature, and demoting them as mere aspiration.

Underlying these criticisms are several assumptions, not all of them well-founded. Common misconceptions of social and economic rights may be abridged through three issues: Nature, State Action Liability, and Resource Dependency.

These criticisms will be addressed in seriatim.

1. Nature of Social and Economic Rights

The dichotomy drawn between first and second-generation rights stems from the understanding that “[h]uman rights are rights possessed by all human beings simply in virtue of their humanity.” Civil and political rights have openly been characterized as natural rights, yet social and economic rights have been shunned as a mere political conception of rights. Liberty is accepted as absolute, enforceable, and thus, justiciable, while prosperity is merely programmatic, requiring realization by the state through affirmative action. Second-generation rights are therefore not “human rights” at all, but human constructs—a product of political will, rather than of our humanity.

41 EIDE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, 5.
42 Bernas, Sponsorship Remarks, supra note 9.
43 Ibid. cf. CONST., art. II. “The Declaration of Principles and State Policies.” See also e.g. Espina v. Executive Secretary, G.R. No. 143855, 21 Sept. 2010.
44 UN HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTION, 41.
45 EIDE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, 10.
48 JAMES GRIFFIN, ON HUMAN RIGHTS (Oxford University Press, 2008), 1–2.
The Philippines adopted this philosophy in the proceedings of the Constitutional Commission of 1986. Commissioner Regalado E. Maambong contemplated a constitutional right which protected the citizen against every kind of enemy, whether it be human or inhuman, such as unemployment, starvation, pestilence, ignorance, poverty, or disease. In response, Commissioner Joaquin Bernas argued that social and economic rights, though enshrined in the constitution, required further action by the legislature:

[T]here have arisen in recent years, particularly under the influence of socialist teachings and also of the teachings of the Pope, certain economic and social rights which strictly are not on the same level as the traditional political and civil liberties we have in the Bill of Rights because they are not self-executory. They are more in the nature of claims or demands which the citizen may make of the state, or claims or demands made by the people in general. The provision on social justice, for instance, says that the state shall insure good working conditions for laborers. Strictly speaking, that is not one of the traditional rights under the Bill of Rights. It is more of a command to the state—“Look, you better take care of that.”

The distinction drawn between civil and political rights and social and economic rights is more apparent than real. First, there are a number of human rights which do not strictly conform with either of the purported clear-cut categories. The right to life vis-à-vis the right to health, equality of the law vis-à-vis non-discrimination in the work force, the right to education vis-à-vis property rights protected by due process guarantees, and the right to association vis-à-vis trade union rights—all these illustrate that the alleged “subordinate” social and economic rights are often intertwined with professed “first-line” civil and political rights.

There are certain aspects of human rights which may be considered both civil and political as well as economic and social in nature. Indeed, despite arguing against the incorporation of social and economic rights in the Bill of Rights, Commissioner Bernas recognized “some of the provisions of the Bill

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50 Bernas, Sponsorship Remarks, supra note 9.
53 Art. 26, ICCPR cf. arts 3, 7, IESCR.
of Rights as economic rights, [such as] the due process protection for property.”

Second, the professed first and second generational rights are often entwined in terms of consequence. In the drafting of the 1987 Constitution, Commissioner Minda Luz M. Quesada recognized:

The limitation of the present conceptualization of the Bill of Rights has contributed to the lack of respect for human life. There is no such strong guarantee in our Constitution that enables us to give due respect not just to a fertilized ovum but to a fully developed being who loses his life, for instance, in a hospital. We health workers feel so helpless and powerless to do something about this because there is no such provision in our law that makes it the state’s responsibility to insure that nobody is denied this right to health and, in effect, right to life.\(^56\)

That relationship may even be further described as causational, rather than mere co-relation. In his seminal piece, Dean Melencio Sta. Maria examines how that relationship may be described as a double-edged sword. Indeed, “economic globalization enhances human rights because the latter ‘leads to economic benefits resulting from trade and financial liberalization, and to benefits in the fields of human rights and political freedom by creating the economic conditions that allow these freedoms to flourish.’”\(^57\) Yet in that seam breadth, the interplay of traditional civil and political rights with social and economic rights likewise bears its hazards. Utilizing the Generalized System of Preferential Plus (GSPP)—“a unilateral arrangement where a first world country provides a non-reciprocal trade benefit in favor of a developing country”\(^58\)— Dean Sta. Maria illustrates how the violation of the former may result in the detriment of socio-economic interests—particularly, the withdrawal by the European Parliament of GSPP benefits amidst growing reports of gross human rights atrocities.\(^59\) With about $901 million worth of

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\(^58\) Id. at 5.

\(^59\) Id., at 6.
total exports, about 48.3 percent of the Philippines’ total exports, that “removal of the EU GSPP will [but] impact our economy negatively.”

Clearly, the relationship of liberty and prosperity is not a one-way road. Nurturing prosperity may indeed safeguard liberties, while the violation of fundamental liberties may likewise impair prosperity. Human rights being indivisible, interdependent, interrelated, and of equal importance for human dignity, the relevance of liberty to prosperity, and vice versa, is all-too-clear. As observed in the Response of the Philippine Government to the UNCESCR, the Duterte administration itself has adopted that school of thought; oft invoking the respect for civil and political rights to establish its compliance with ICESCR treaty obligation.

2. State Action Liability

The Constitution was crafted to allow the government to control the governed, but in that same breath, oblige it to control itself. The Bill of Rights is “a list of those which the state may not do. It is not a list of those which the state must do.” Thus, traditionally, the state is bound by a single obligation: the duty to respect.

Pursuant to the state action doctrine, “the state is merely required to refrain from interfering in the sphere of individual rights and freedoms… [It] is under no legal obligation to take positive action in support of individuals regarding their social and economic situation.” Civil and political rights are thus “true rights” because they impose upon the state only negative obligations. On the other hand, social and economic rights are programmatic, requiring positive action from the state. It is thus argued that the latter are not, in the strict sense, rights.

The objection is flawed. Both civil and political rights as well as social and economic rights “require a combination of negative and positive conduct from states.” For example, in Thurman v. City of Torrington, the Torrington

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60 Id. at 7.
61 Maastricht Guidelines, ¶4.
62 Response of the Philippine Government supra note 34, 29.
64 Bernas, Sponsorship Remarks, supra note 9.
65 DeShaney, 489 U.S. 189.
66 NOLAN, HUMAN RIGHTS LAW IN PERSPECTIVE, 25.
67 Id. at 25-26
Police Department’s failure to respond to Tracey Thurman’s reports of domestic violence gave rise to state liability. The U.S. Court ruled that such “inaction on the part of the officer is a denial of the equal protection of the laws”—a civil and political right. Likewise, the Inter-American Commission on Human Rights in *Lenahan v. United States*¹⁰ and the European Court of Human Rights in *Opuz v. Turkey*⁷¹ recognized that the systemic failure of the state to take reasonable measures to offer coordinated and effective response constituted an act of discrimination in violation of the right to equality before the law.⁷²

Legal theory has departed from the narrow understanding that the state is only bound by negative obligations. The *Limburg Principles* and the *Maastricht Guidelines* are instructive in laying down the tripartite duty to respect, protect, and fulfil fundamental rights. Likewise, in the Philippine legal system the *Writ of Amparo*,⁷³ which safeguards the right to life, liberty, and security; the *Writ of Habeas Data*,⁷⁴ which involves the right to privacy, and the *Writ of Kalikasan*,⁷⁵ which seeks to protect the constitutional right to a balanced and healthful ecology, guard against both acts and omissions of state and non-state actors alike.

3. Resource Dependency

A blend of the *Nature* and *State Action Liability* objections, fiscal considerations are forwarded to disprove the inherent nature of social and economic rights. Because civil and political rights are intrinsic to our very humanity, they are “free” in the sense that the state is only negatively bound to respect these rights. On the other hand, social and economic rights are *programmatic*, which require expenditure.⁷⁶

The claim is a hasty generalization and is unsustainable. Fiscal considerations depend “on the obligation in question, rather than the

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⁶⁹ Id. at ¶23.
⁷¹ *Case of Opus v. Turkey*, European Court of Human Rights, Application No. 33401/02, 9 June 2009, ¶191.
⁷² Id. at ¶170.
⁷⁵ A.M. No. 09-6-8-SC, 13 Apr. 2010, “Rules of Procedure for Environmental Cases”
classification of the right imposing that obligation↩]

As may be observed from *Thurman, Lenahan, Opuz*, and the Philippine *Writs*, state duties “cover the full spectrum of obligations—from measures that are essentially cost-free to those clearly requiring significant public expenditure.”

### B. Judicializing Social and Economic Rights

The canonical approach to justice is juridification—the expansion of rights through positive acts of the political branches. Yet in our fixation with juridical act, the judicial remedy is taken for granted. The purpose of this section is to rethink the role of the judiciary to enable the safeguard and nurture of liberty and prosperity in the courts of law. Civil and political rights having been openly incorporated in the Bill of Rights, this section will focus on the justiciability of social and economic rights alone.

*Justiciability* is the quality or state of being appropriate or suitable for adjudication by a court. In Philippine legalese, it refers to an “actual case or controversy,” stemming from a *cause of action*—a demandable legal right—which may be resolved by a court of law. As opined by Chief Justice Panganiban in his Separate Opinion in *Sanlakas v. Executive Secretary*:

> [T]he existence of a live case or controversy means that an existing litigation is ripe for resolution and susceptible of judicial determination; as opposed to one that is conjectural or anticipatory, hypothetical or feigned. A justiciable controversy involves a definite and concrete dispute touching on the legal relations of parties having adverse legal interests.

Economic, social, and cultural rights are argued to be non-justiciable rights in the sense that they are not capable of being invoked before the courts absent enabling legislation. The argument works off the assumption that enforcement of these rights rests solely with the political branches of the

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77 Nolan, Human Rights Law in Perspective, 28
78 UN Handbook for National Human Rights Institutions, 24
79 Committee on Economic, Social and Cultural Rights, General Comment No. 9: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, para 10. (hereinafter, General Comment No. 9)
82 Rules of Court, Rule 2, §2
85 Nolan, Human Rights Law in Perspective, 29.
state. On the contrary, the Committee on Economic, Social and Cultural Rights recognized through General Comment No. 9 that the judiciary too is essential in the promotion of second-generation rights.\(^{87}\)

The following section will establish the justiciability of social and economic rights in the Philippine legal framework. Two approaches will be forwarded: Direct Application, which domestically enforces the provisions of the ICESCR through incorporation and transformation; and Indirect Application, an interpretative approach where traditional rights are read to integrate socio-economic interests.\(^{88}\)

1. Direct Application of Economic and Social Rights the International Covenant on Economic, Social and Cultural Rights as Law of the Land

Ideally, “international human rights standards should operate directly and immediately… thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.”\(^{89}\) The justiciability of treaty provisions, in this case, that of the ICESCR, greatly hinges on the constitutional framework of the state in which its provisions are sought to be effected.

In a dualist system, ratified treaties have no direct validity in domestic law until they are incorporated or transformed into the domestic legal system. In the case of incorporation, the treaty as a whole becomes part of domestic law through a specific statute. A treaty is transformed into domestic law by amending or supplementing legislation without any specific reference to the treaty provisions.\(^{90}\)

By virtue of Section 2, Article II of the 1987 Constitution, the Philippines “adopts the generally-accepted principles of international law as part of the law of the land.” Through the incorporation clause, the Constitution changes the status of “generally accepted principles of international law” into Philippine law.\(^{91}\) As penned by Chief Justice Panganiban in Tañada v. Angara, by virtue of the doctrine of incorporation, the Philippines “is bound by

\(^{87}\) General Comment No. 9, ¶9.

\(^{88}\) Id. at ¶13.

\(^{89}\) Id. at ¶4.

\(^{90}\) EIDE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, 84

\(^{91}\) MERLIN MAGALLONA, THE PHILIPPINE CONSTITUTION AND INTERNATIONAL LAW (U. Phil, 2013), 64
generally accepted principles of international law, which are considered to be automatically part of our own laws.\textsuperscript{92}

Whether the Philippines subscribes to a monist or dualist system is the eternal debate—a query the author will not attempt to settle. However, what is for certain is that the Duterte Administration appears to lean towards the former. In its response to concerns raised by the UNCESCR during its 59th session, the Philippines “assured the Committee that [the Philippines] domestic legal order provides for the direct application and appropriate measures (sic) that protect economic, social and cultural rights[.]”\textsuperscript{93} It thus appears that, in constitutional provision and political preference, the Philippines favors the direct incorporation, and effectively the justiciability, of the ICESCR in its domestic system.

\textit{a. Economic, Social and Cultural Rights in the Municipal Legal Framework}

1. The 1987 Constitution

Even in the absence of the \textit{incorporation clause}, social and economic rights are not without basis. In both its constitutional and statutory framework, the Philippines enforces the rights enshrined in the ICESCR. The \textit{Declaration of Principles and State Policies} commits the State to value the dignity of every human person and guarantee full respect for human rights,\textsuperscript{94} to protect and promote the right to health\textsuperscript{95} and the right to a balanced and healthful ecology.\textsuperscript{96} Furthermore, Article XIII of the Constitution, on Social Justice and Human Rights, seeks to protect and enhance the right of all the people to human dignity, and reduce social, economic, and political inequalities.\textsuperscript{97}

The Constitution’s drafters envisioned social justice as the centerpiece of modern constitutional tradition.\textsuperscript{98} The purpose of social justice is to provide an “economic and social equilibrium” for the “realization of basic human rights, the enhancement of human dignity and effective participation in democratic processes.” Principles of prosperity were precisely enshrined in the

\textsuperscript{92} Tanada \textit{v. Angara}, G.R. No. 118295, 2 May 1997.
\textsuperscript{93} Response of the Philippine Government \textit{ supra note} 34, 1.
\textsuperscript{94} 1987 \textit{CONST.}, art. II, §11.
\textsuperscript{95} \textit{Id. at art. II, §12.}
\textsuperscript{96} \textit{Id. at art II, §16.}
\textsuperscript{97} \textit{Id. at art. XIII, §1.}
Constitution in recognition of the fact that “human rights... remain illusory without social justice.”

2. Statutory Framework

The justiciability of the ICESCR finds further basis in its provisions’ transformation into domestic law. In addition to the incorporation clause of the constitution, the Philippines has transmuted social and economic rights through legislation, albeit without necessarily invoking the language of the covenant. This is aptly observed through laws such as the Responsible Parenthood and Reproductive Health Act of 2012, the Health Research Act, the Magna Carta of Health Workers, and R.A. 8344, which penalizes the refusal of hospitals and medical clinics to administer appropriate initial medical treatment and support due to non-payment of deposit. These laws juridify, and thus make justiciable, the social and economic right to health.

3. Jurisprudence

Jurisprudence has historically recognized the justiciability of social and economic rights. As early as 1953, the Philippine Supreme Court pronounced in Philippine Movie Pictures Workers’ Association v. Premiere Productions, Inc. that the right to labor “is deemed to be property within the meaning of the constitutional guarantees.” The Duterte administration itself invoked a laundry list of cases where the Supreme Court “applied the provisions of the [ICESCR],” such as International School Alliance of Educators v. Quisumbing, which involved the right to just and favorable conditions of work, Central Bank Employees Association v. Bangko Central ng Pilipinas, which “[upheld] Article 2 of the Covenant,” Imbong v. Ochoa, Jr., where the Supreme Court unanimously upheld and recognized the right to health, and Leus v. Sto. Scholastica’s College, which safeguarded the right to labor and security of tenure.

99 Ibid.
100 General Comment No. 9, ¶6.
104 Art. 12, ICESCR.
106 G.R. No. 128845, 1 June 2000.
107 Response of the Philippine Government supra note 34, 3.
109 Response of the Philippine Government supra note 34, 3.
110 G.R. No. 204819, 8 Apr. 2014.
It is well to take note that the Constitutional Commission of 1986 enshrined social and economic rights in Article II and XIII of the 1987 Constitution. Though these were intended by the Constitution’s drafters to be non-justiciable, many of these rights have been treated by the Supreme Court as self-executing.\(^{112}\)

Justiciability and self-executing norms are separate and distinct concepts, yet are tightly intertwined. Justiciability refers to an actual case or controversy that is the proper subject of the court, while self-executing is the legal quality of being capable of application by courts without further elaboration.\(^{113}\) The pattern in Philippine jurisprudence shows that justiciability and self-execution go hand-in-hand.\(^{114}\)

In \textit{Oposa v. Factoran inter alia}, the Court ruled that though the right to a balanced and healthful ecology is “found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter.”\(^{115}\) A “denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action.” Likewise, in \textit{Manila Prince Hotel v. Government Service Insurance System}, the Court ruled that Section 10, Art. XII of the 1987 Constitution—on Social Justice and Human Rights—“does not require any legislation to put it in operation. It is \textit{per se} judicially enforceable.”\(^{116}\)

The author agrees with this approach. As provided in General Comment No. 9, courts should dispense with an \textit{a priori} assumption that social and economic rights are non-self-executing.\(^{117}\) Indeed, it has been jurisprudentially proclaimed that “unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the


\(^{113}\) General Comment No. 9, ¶10.


\(^{117}\) General Comment No. 9, ¶11.
presumption now is that all provisions of the constitution are self-executing.”

2. Indirect Protection of Second-Generation Rights through Civil and Political Rights

The justiciability of social and economic rights has also been effected through their re-characterization as derivatives of civil and political rights. By an expansive reading of the Bill of Rights, the proverbial first-generation right may be read to encompass second-generation rights. Such an approach was adopted by the Philippine Supreme Court in *Wallem Maritime Services, Inc. v. NLRC*. The court recognized labor as a property right protected by due process guarantees.

The line distinguishing civil and political rights from social and economic rights is blurred. A number of guarantees categorized as traditional rights have socio and economic implications, and vice versa. The right to health may be argued as a derivative of the right to life, the right to non-discrimination in the work force as a derivative of equality of the law, and the right to trade unionism as a derivative of the civil and political right to association and free expression. Indeed, the dual nature of rights was recognized by the Constitutional Commission with regard to due process guarantees on property rights—a right both civil and political, as well as social and economic in nature.

Conclusion

Human Rights embraces both liberty and prosperity. While the drafters of the 1987 Constitution intended to exclude social and economic rights from the courts absent legislation, legal developments in the form of treaties, constitutional provisions, and jurisprudence has elevated social and economic rights as justiciable rights. Clearly, fundamental guarantees place both liberty and prosperity beyond the vicissitudes of political controversies and the

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120 EIIDE, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK*, 73
121 G.R. No. 108433, 263 SCRA 174, Oct. 15, 1996
122 *NOLAN, HUMAN RIGHTS LAW IN PERSPECTIVE*, 36
123 Quesada, Record of the Constitutional Commission of 1986, supra note 56.
124 *Victoria v. Edgardo Rape Worker’s Union*, G.R. No. L-25246, Sept. 12, 1974
125 Art. 26, ICCPR *cf.* arts 3, 7, IESCR.
126 Bernas, Sponsorship Remarks, supra note 9.
expediency of the passing hour. Yet the question remains: From whom are these rights protected?

II. OLD DOCTRINES, NEW PARADIGMS

A. The Old Paradigm: State Action Only Liability

During the deliberations of the 1987 Philippine Constitution, the drafters contemplated a Bill of Rights that would “govern the relationship between the individual and the State and not the relationship between private individuals.” The reason was “simple: Only the State had authority to take the life, liberty, or property of the individual.” Solely the Government was powerful, which if unlimited, was tyrannical.

Note the irony. While “the great ordinances of the Constitution do not establish and divide fields of black and white,” the state action threshold effects the converse; reducing penumbral questions of fundamental rights to monochromatic concerns. Essentially, liberty and prosperity is not an issue of substance, i.e. whether there was a violation of fundamental right; but one of form, i.e. whether the violation was the result of government action.

There is an incongruity in addressing substantive rights with formal remedies. Structurally, the state action threshold is destined to fall short in grasping the expanse of constitutional guarantees. Such is aptly illustrated in Duncan v. Glaxo, where petitioner Pedro Tecson was mandated by company policy to “voluntarily” resign from his employment for having entered into a marriage with an employee of a competing company. Tecson argued that this violated his right to equal protection. The Court categorically rejected this contention explaining that “the equal protection clause erects no shield against

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128 Bernas, Sponsorship Remarks, supra note 9.
129 Serrano, 323 SCRA 445 (Panganiban, J., separate opinion).
132 Duncan, 438 SCRA 343.
133 Oscar Franklin B. Tan, Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio, 82 PHIL. L.J., 78, 102 (2008). “The contract provision on marrying a competitor’s employee provided: ‘You agree to disclose to management any existing or future relationship you may have, either by consanguinity or affinity with co-employees or employees of competing drug companies. Should it pose a possible conflict of interest in management discretion, you agree to resign voluntarily from the Company as a matter of Company policy.’”
merely private conduct.”\textsuperscript{134} The employer-employee relationship being between private persons, the Bill of Rights could not be applied.

\textit{Duncan} illustrates the state action paradox. In protecting individual rights from government action alone, the doctrine shields non-state actors from liability for private evils which are just as coercive as public wrongs. In this case, Tecson’s right of autonomy and freedom to enter into marriage—an institution specially protected under the 1987 Constitution\textsuperscript{135}—was subdued by management prerogative. This is especially perplexing considering that labor contracts are impressed with \textit{public interest} and are easily the subject of government regulation.\textsuperscript{136}

\section*{B. Paradigm Shift}

\subsection*{1. The New Paradigm: Private Evils, the New Face of Abuse}

A paradigm shift is described as a fundamental change in underlying assumptions. The Philippines continuously undergoes this phenomenon, witnessing the clash of old doctrines with new paradigms. While the old paradigm was premised on state-monopolized power, modern case law paints a different picture for the Philippine minutiae; illustrating violations of civil, political, social and economic rights by private individuals. \textit{Duncan} deals with the conflict of a private employer’s management prerogative versus an employee’s right to autonomy and equality in employment.\textsuperscript{137} \textit{Victoriano v. Elizalde Rope Worker’s Union} is about a labor union’s threats against its members’ religious liberty, touching on free trade unionism enshrined in the ICESCR.\textsuperscript{138} \textit{Zulueta v. CA} concerns a spouse’s conduct of a warrantless search and seizure under the veneer of marital privacy.\textsuperscript{139} \textit{Alcuaz v. Philippine School of Business Administration},\textsuperscript{140} among others, involves a private school’s violation of their employees’ and students’ rights to due process and free expression vis-à-vis the social and economic right to work and education.\textsuperscript{141} Each of these cases involved private intrusions into fundamental rights—the new paradigm.

\textsuperscript{134} Duncan, 438 SCRA 343.

\textsuperscript{135} CONST., art. XV, §2.


\textsuperscript{137} Duncan, 438 SCRA 343.

\textsuperscript{138} Victoriano v. Elizalde Rope Worker’s Union, G.R. No. L-25246, 59 SCRA 54, Sept. 12, 1974 cf. ICESCR, art. 8.

\textsuperscript{139} Zulueta v. Ct. of Appeals, G.R. No. 107383, 253 SCRA 699, Feb. 20, 1996 (hereinafter, Zulueta).

\textsuperscript{140} G.R. No. 76353, 161 SCRA 7, May 2, 1988 (hereinafter, Alcuaz).

\textsuperscript{141} ICESCR, arts. 6, 7, 8, 13.
Private threats to public rights are all-the-more pervasive in the advent of government deregulation and privatization. Where the state has ceded its powers to the market forces, it opens the floodgates to new sources of abuse and threats to liberty and prosperity.\footnote{142} Corporate powers have been used to subvert principles of individual autonomy and impair relationships of transcendental importance.\footnote{143} What is more, the inherent economic inequality between labor and management has been given statutory and jurisprudential recognition.\footnote{144} Today, the evil sought to be avoided—government abuse—has well passed on to the invisible yet coercive hand of the market forces.\footnote{145}

Clearly, the private sphere is no longer the benign domain it was purported to be. The new paradigm has brought with it substantial changes in the Philippine socio-political landscape that necessitates a concomitant modification in legal approach. Contrary to the presumptions of the past, the economic powers of private individuals may now prevail over the sovereignty of State—what more the autonomy of the lone individual.

\section*{2. Blurring of the Public/Private Spheres}

\textit{a. The Living Constitution}

The traditional division between the public and private spheres is no longer a reliable threshold. The comingling of the two spheres has engendered the rise of the quasi-public and quasi-private domains where it is well-nigh impossible to determine where the realm of private ends and public begins.

The quasi-public refers to that situation where public functions are assumed by private actors and spaces.\footnote{147} In \textit{Marsh v. Alabama},\footnote{148} private spaces and relations were made the subject of constitutional limitations when opened to the general public, or upon the assumption of public responsibilities. Similarly, the Philippine Supreme Court has ruled that when private property is used for a public purpose, it ceases to be \textit{juris privati} only and becomes subject to public regulation.\footnote{149}
On the other hand, quasi-private property refers to property that “is publicly owned but is not open for public use.”\(^{150}\) Take government owned airports, such as the Ninoy Aquino International Airport, for example. Though it is “devoted to public use and thus are properties of public dominion,”\(^{151}\) it is considered quasi-private as it is not open to public access.\(^{152}\) There being only a selective access rather than a general access to the MIAA properties, the same is considered as a non-public forum and thereby, a quasi-private entity.\(^{153}\)

The quasi-public and quasi-private spheres have blurred the once crisp boundaries of the distinction. The state has delegated traditional government functions to private actors through public-private partnerships and outright privatization.\(^{154}\) Private actors are emancipated from state control and are engaged in traditionally public functions.\(^{155}\) In that same breath, government entities too have delved into proprietary functions.\(^{156}\)

Legal experts have gone as far as to say that even the form of law has changed, springing from private arrangements rather than government legislation.\(^{157}\) “Today, the source of law has shifted “from political to economic power—from the people as sovereign to private individuals as economic units.”\(^{158}\)

The revitalized private sphere has evolved to become a real threat to constitutional rights just as much as any government act could. Clearly, the entanglement of the spheres is a formula for inevitable conflict which the traditional distinction is neither intended nor poised to address. Even the Constitution itself must adapt to the context in which it finds its application,


\(^{154}\) Republic of the Philippines Public-Private Partnership Center (2013), *What is PPP?*, available at: https://ppp.gov.ph/?page_id=27574.


\(^{158}\) Id. at 282.
lest we settle with a stalemate due to the impossibility of foreseeing novel issues that will inevitably arise.  As opined by Chief Justice Panganiban:

Constitutions are designed to meet not only the vagaries of contemporary events. They should be interpreted to cover even future and unknown circumstances. It is to the credit of its drafters that a Constitution can withstand the assaults of bigots and infidels but at the same time bend with the refreshing winds of change necessitated by unfolding events... The Constitution must be quintessential rather than superficial, the root and not the blossom, the base and framework only of the edifice that is yet to rise. It is but the core of the dream that must take shape, not in a twinkling by mandate of our delegates, but slowly in the crucible of Filipino minds and hearts, where it will in time develop its sinews and gradually gather its strength and finally achieve its substance. In fine, the Constitution cannot, like the goddess Athena, rise full-grown from the brow of the Constitutional Convention, nor can it conjure by mere fiat an instant Utopia. It must grow with the society it seeks to re-structure and march apace with the progress of the race, drawing from the vicissitudes of history the dynamism and vitality that will keep it, far from becoming a petrified rule, a pulsing, living law attuned to the heartbeat of the nation.

It is said that the Constitution is but a work in progress, and will inevitably yield to change, for while the meaning of constitutional guaranties never varies, the scope of its application must expand and contract with the refreshing winds of change.

In an ever-changing world, it is impossible that it should be otherwise.

b. Public Duties of Non-State Actors

The public and private spheres have blurred most visibly in the realm of international law. That phenomenon is best illustrated by the emergence of the fields of International Criminal Law (ICL) and Business and Human Rights (BHR), both of which seek to bind non-state actors—entities that are, quite

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simply, not a state. For the purposes of space, these two fields of law will be utilized in unison.

It was famously declared by the *Nuremberg International Military Tribunal* that:

> Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced... Individuals have international duties which transcend the national obligations of obedience imposed by the individual state."**

Public International Law was once state-centric, yet has now penetrated into the realm of individual liability. Seventy years after *Nuremberg*, and twenty years following the adoption of the Rome Statute establishing the International Criminal Court (ICC), it is settled doctrine that state actors and non-state actors alike bare the risk of incurring individual criminal responsibility. Indeed, in all four situations brought within the jurisdiction of the ICC by self-referral—that is, the Situations in Uganda, the Central African Republic, the Democratic Republic of the Congo, and Mali—the governments concerned seek to have non-state actors tried before the international criminal tribunal.

Yet this is not to say that the role of non-state actors is isolated to perpetration. On the contrary, it is in fact the paradox how non-state actors embody both the capacity to violate human rights and the potential for their protection. With both roles in mind, in 2011 the United Nations Human Rights Council unanimously endorsed the *United Nations Guiding Principles on Business and Human Rights*, thus providing the first global standard for preventing and addressing adverse human rights linked to business activity. 

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165 *Judgment of the Nuremberg International Military Tribunal*, 1946 (1947) 41 AJIL 172.
166 Clapham, * supra* note 164, 532
168 *Id.* at art. 25, cf. Article 7(2)(a).
169 *Id.* at art. 13(a).
171 Clapham, * supra* note 164, 532
These principles recognize not only the states’ “obligations to respect, protect and fulfill human rights and fundamental freedoms[.]” but the “role of business enterprises… to comply with all applicable laws and to respect human rights[.]”\(^{173}\)

Both ICL and BHR recognize that even private actors bare public duties.\(^{174}\) Interestingly, both issues are put front and center in the campaign for *international corporate criminal liability*, which recognizes how “criminal law provides a powerful and appropriate tool to deter and punish companies… [for] gross human rights abuses amounting to crimes under international law.”\(^{175}\) The Office of the Prosecutor of the ICC has itself announced how both fields of law find themselves tightly entwined:

> [T]he prosecutor believes that investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for prosecution of crimes already committed. If the alleged business practice continues to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted.\(^{176}\)

In the past, there was “that belief that economics or business and human rights cannot work together”\(^{177}\) — as realms that were completely distinct, never to meet.\(^{178}\) Both ICL and BHR do away with that antiquated notion. In the age of globalization and privatization, non-state actors “play an increasingly important role in all levels of public life”\(^{179}\) — for better or for worse.

### 3. Tripartite Duties in Philippine Municipal Law

In the realm of international obligation, the preservation of liberty and prosperity imposes three duties— i.e. the duties to respect, protect, and fulfill.\(^{180}\) The *Maastricht Guidelines* provide guidance:

\(^{173}\) *Id.* at “Guiding Principles.”
\(^{177}\) Sta. Maria, *supra* note 57, 1.
\(^{178}\) Elizabeth Aguiling-Pangalangan, ‘Foreword’ in *VENERACION & TRIPODI, PEOPLE AND PROFITS: A GUIDE ON BUSINESS AND HUMAN RIGHTS FOR NGOs* (2017), i.
\(^{179}\) *Ibid.*
\(^{180}\) Maastricht Guidelines, ¶6.
The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights... The obligation to protect requires States to prevent violations of such rights by third parties. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.\textsuperscript{181}

The duty to respect embodies the traditional \textit{state action doctrine}, as opposed to \textit{state inaction liability}. It is a negative duty, and requires that the state does not \textit{impair} fundamental rights without due process of law.\textsuperscript{182} That conservative view is broadened through the obligations to protect and fulfill; departing from the orthodox thought that public rights are affected by public actors alone.\textsuperscript{183} In the face of new paradigms, the duty to protect requires the state to prevent not only public wrongs, but private evils. Lastly, the obligation to fulfill is the duty to \textit{facilitate} and \textit{provide} basic needs.\textsuperscript{184}

Unfortunately, Philippine constitutional tradition has taken a narrow view on state obligation: government abstinence.\textsuperscript{185} The state merely has a negative duty to refrain from interfering in liberty and prosperity.\textsuperscript{186} By adopting \textit{state action} as the ultimate threshold in enforcing fundamental rights, the Philippine legal system was neither contemplated nor poised for the duties to protect and fulfill.

\textbf{Conclusion}

The orthodox \textit{state action doctrine} is incompatible with the \textit{Maastricht Guidelines} on two points: first, the former contemplates violations by non-state actors alone, and second, it envisages only action, as opposed to omission. As established earlier, the advent of ICL and BHR precisely came to be in recognition of private perils to public rights.

The Philippines continues to apply old doctrines in new paradigms. The foregoing discussion has provided two justifications for the abandonment of the \textit{state action} threshold to give way to the \textit{Maastricht Guidelines}' tripartite duties: \textit{first}, because reserving fundamental guarantees fails to guard against the private evils rampant in new paradigms; and \textit{second}, because the \textit{public/private}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{181} \textit{Ibid.}
\item \textsuperscript{182} \textit{See} DeShaney \textit{v. Winnebago}, 489 U.S. 189, 196-7 (1989). (hereinafter, \textit{Deshaney})
\item \textsuperscript{183} \textit{EIDE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK}, 22
\item \textsuperscript{184} \textit{Id.} at 24.
\item \textsuperscript{185} \textit{Id.} at 63.
\item \textsuperscript{186} \textit{NOLAN, HUMAN RIGHTS LAW IN PERSPECTIVE}, 25
\end{itemize}
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distinction is no longer a reliable standard to delineate state from non-state actors. Abandoning the state action requirement is key in safeguarding liberty and prosperity. In doing so, the Philippine legal framework would look beyond the duty to respect, and facilitate the incorporation of positive state duties to protect and fulfill.

III. Liberty and Prosperity in the Private Sphere: Various Approaches

There is no hard and fast rule when it comes to slippery constitutional questions.\textsuperscript{187} The state action doctrine is of no exception. In the face of new paradigms, the Philippine Supreme Court has grappled with unshackling the remnants of constitutional tradition. However, rather than abandoning traditional doctrine per se, the Court has circumvented the state action doctrine by establishing exceptions to the general rule.

The following discussion will explore jurisprudential bases to safeguard public rights from private intrusions.

\textit{A. Traditional Exceptions to State Action}

U.S. case law has recognized a number of exceptions to the state action doctrine. These include the tests of Public Function, State Compulsion, Nexus, State Agency, Entwinement, Symbiotic Relationship, and Joint Participation.\textsuperscript{188} While there is no single test in imputing public character to ostensible private matters, each of these exceptions involve some form of government entanglement\textsuperscript{189}—the main consideration in Philippine jurisdiction.\textsuperscript{190}

In \textit{Duncan}, the Philippine Supreme Court expressly limited the exceptions to traditional doctrine to cases of government entwinement or involvement. \textit{Duncan} notwithstanding, the listed tests recognized in foreign jurisprudence may be utilized in the Philippine legal system, but only to evidence an “entwinement” or “involvement” of the State.\textsuperscript{191}

\textsuperscript{188} Julie K. Brown, \textit{Less is More: Decluttering the State Action}, 73 Mo. L. Rev. 561, 565 (2008).
\textsuperscript{189} Id. at 566.
\textsuperscript{190} \textit{Duncan}, 438 SCRA 343.
\textsuperscript{191} Id.
B. Circumventing the State Action Threshold

1. Changing the Subject: Public Interest as State Action

Though the principle of state action is entrenched in legal doctrine, it is compromised in practice. The Court has many-a-time applied constitutional standards to private actors by modifying either the nature of the right invoked or the character of the parties involved. In *Marsh*, the U.S. Supreme Court modified the status of a company-owned town of Chicksaw in rural Alabama from private to public. The Court ruled that when private actors or spaces assume a public function, then the same would be bound by constitutional limitations.\(^ {192}\) Philippine jurisprudence has adopted a similar doctrine, but of a lower threshold; requiring only a public interest to apply Bill of Rights guarantees to private relations.\(^ {193}\)

In a series of cases involving private schools, the Supreme Court invoked public interest to justify the application of the Bill of Rights despite the absence of state action. In *Alcuaz*, students of the PSBA were barred from re-enrolling for the subsequent semester because of their participation in student protests. The Court decided for the respondent-school under the termination of contract theory, i.e. that a student is admitted on a semester basis alone. Hence, after the close of the contracted semester, the PSBA no longer had any existing obligations to their students.\(^ {194}\) The Court concluded that “the charge of denial of due process [was] untenable. It is a time-honored principle that contracts are respected as the law between the contracting parties.”\(^ {195}\)

Justice Abraham F. Sarmiento dissented to *Alcuaz*. He opined that education is “more than a contract” and is “impressed with a public interest.”\(^ {196}\) Hence, it is a matter of state policy, a policy enshrined in the Constitution, to “protect and promote the right of all citizens to qualify education at all levels and shall take appropriate steps to make such education accessible to all.”\(^ {197}\)

Justice Sarmiento’s dissent would later become the majority opinion of the court, controlling till this day. In *Non v. Danes II*, petitioners-students of Mabini College were prohibited by their school from re-enrolling due to their

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\(^ {194}\) *Alcuaz*, 161 SCRA 7.
\(^ {195}\) Id.
\(^ {196}\) Id. (dissenting J., Sarmiento).
\(^ {197}\) Id.
participation in student-mass actions against the academic institution. Contrary to Alcuaz, the Supreme Court found that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The contract between school and student being one imbued with public interest “the authority of educational institutions over the conduct of students […] cannot go so far as to be violative of constitutional safeguards.”

The application of constitutional limitations to private academic institutions is no novel issue in the Philippines. As embodied in case law, the Technological Institute of the Philippines, Gregorio Araneta University Foundation, National University, Ateneo de Manila University, and De La Salle University have been the subject of the Bill of Rights. This string of case law shows how the Philippine jurisprudence has circumvented state action as a sine qua non to Constitutional protections by re-characterizing ostensibly private relations as public matters under the auspices of public interest.

2. Modifying the Right: Extra-Constitutional Guarantees

The state action requisite may be circumvented by modifying the nature of the right invoked. In Serrano, the Court ruled that the failure to observe the “notice requirement” enshrined in the Labor Code was not a violation of constitutional due process because Constitutional rights do not apply to the exercise of private power of the employer.

In his separate opinion, Chief Justice Panganiban maintained that employees are entitled to due process from their employer by virtue of the Constitution per se, and not on the strength of the Labor Code alone. Indeed, the “Constitution does not say that the right cannot be claimed against private individuals and entities.” Hence, “[a]n objective reading of the Bill of Rights clearly shows that the due process protection is not limited to government action alone. The Chief Justice continued:

[T]raditional doctrine holds that constitutional rights may be invoked only against the State. This is because in the past, only the State was in a position to violate these rights, Including the due process clause. However, with the advent of liberalization, deregulation and privatization, the State tended to

cede some of its powers to the “market forces.” Hence, corporate behemoths and even individuals may now be sources of abuses and threats to human rights and liberties. I believe, therefore, that such traditional doctrine should be modified to enable the judiciary to cope with these new paradigms and to continue protecting the people from new forms of abuses. Indeed, the employee is entitled to due process not because of the Labor Code, but because of the Constitution. Elementary is the doctrine that constitutional provisions are deemed written into every statute, contract or undertaking.\textsuperscript{204}

Likewise, Chief Justice Puno forwarded the theory of \textit{private due process} in opining how “constitutional rights of labor should be safeguarded against assaults from both government and private parties.”

Serrano was later modified in \textit{Agabon v. National Labor Relations Commission}\textsuperscript{205} and \textit{Abbott Laboratories v. Alcaraz}\textsuperscript{206} which created the novel standards of \textit{statutory} due process, i.e. due process founded on the Labor Code, and \textit{contractual} due process, i.e. due process founded on the terms of a labor contract. According to these latter cases, violation of the notice requirement by a private employer may violate the right to due process, albeit one sourced extra-constitutionally.

The author submits that the distinctions among and between constitutional, statutory, and contractual due process are more apparent than real. What is alluded to by “statutory” or “contractual” due process is merely “what” process is due, rather than “from whom” it is due. Hence, notwithstanding its provenance, due process holdings in labor law are in fact no different from constitutional law. Ultimately, it is still the constitutional requirement that “no person… be deprived of life, liberty or property without due process of law” that is invoked, the Labor Code and labor contract merely defining what that process is, i.e. notice and hearing, inter alia.\textsuperscript{207}

\textit{Agabon} and \textit{Abbott} play both sides of the argument. While recognizing the need for due process within the private sphere, the Court re-characterized the same as mere statutory or contractual right; separate and distinct from fundamental constitutional rights. In making this delineation, the Court kept intact the traditional doctrine which requires prior government action, but in that same breath extended fundamental protections against private actors.

\textsuperscript{204} Serrano, 323 SCRA 445 (Panganiban, J., separate opinion).
\textsuperscript{206} Abbott Laboratories v. Alcaraz, G.R. No. 192571 Jul. 23, 2013, 701 SCRA 682.
While worth celebrating, Agabon and Abbott come with their own caveat. As opined by Chief Justice Panganiban in his opinion in Serrano, the Court ignores precedence recognizing one’s employment as a right protected by constitutional due process protections per se. Indeed, in Philippine Movie Pictures Workers’ Association, recognized that “the right of a person to his labor is deemed to be property within the meaning of the constitutional guarantees[.]” Here, the constitutional guarantee was directly applied to private economic power.

3. Constitutional Construction: Black Letter Law

There are two ways to interpret the Constitution: the originalist approach, where the Constitution is read “according to the original intent of the framers, regardless of the dire consequences on current and future events[.]” and the liberal or progressive approach, which construes the charter as a “living Constitution; one that grows with time, solves the vagaries of the present and anticipates the needs of the future.” The author takes the view that lawyers and jurists alike are more than mere social technicians, but “social engineers who courageously fix their gaze on the underlying principles and overarching aspirations of the Constitution[.]” With this in mind, the progressive approach is adopted.

The law must be understood not only by “the letter that killeth but by the spirit that giveth life.” To that end Philippine jurisprudence adopts both the verba legis and ratio legis rules of interpretation, the latter used in the face of textual ambiguities. It is the author’s submission that either approach supports the conclusion that constitutional protections may be applied within the private sphere.

The obsolescence of the state action threshold finds basis within the four corners of the Constitution itself. A verba legis reading of the Bill of

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210 See Panganiban, supra note 159. See also Bret Boyce, Originalism and the Fourteenth Amendment, 33 Wake Forest L. Rev. 909 (1988).
211 Ibid.
212 Ibid.
213 Civil Service Commission v. Cortes, G.R. No. 200103, Apr. 23, 2014
215 See Serrano, 323 SCRA 445 (Panganiban, J., separate opinion).
Rights shows that government action is not a *sine qua non* to its application. The Due Process clause, for example, merely provides that no person shall be deprived without due process of law, yet fails to distinguish between public or private impairments.

But how reliable is a plain meaning interpretation of the Constitution? Philippine constitutional law having its roots in American constitutional tradition; the case of *Barron v. Baltimore* provides guidance.

*Barron* is the first in U.S. case law which dealt with the breadth and scope of the Bill of Rights. Here the U.S. Supreme Court distinguished between Federal Government and State Government liability under the Takings clause of the Fifth Amendment. The Court unanimously decided that when the Constitution “intended to act on State power, words [were] employed which directly express[ed] that intent”. Unless expressly provided, the Bill of Rights would not apply to the State government.

The U.S. Supreme Court adopted a plain meaning interpretation of the Constitution, similar to the *verba legis* rule of interpretation utilized in the Philippine legal system. Simply put, “if the words are clear, the words should be followed.” Absent a “No State shall” clause, *Barron* ruled that only the U.S. Federal Government was bound. As ruled in *Chicago Co. v. Chicago*, it was not until the ratification of the Fourteenth Amendment in 1868, through the U.S. incorporation clause, that the Bill of Rights was wholly applied to state governments.

U.S. jurisprudence sheds light on Philippine notions of state action. In both *Barron* and *Chicago*, the Court took a literal interpretation of the constitution. Similarly, the Philippine Due Process clause, not having distinguished between government acts and private acts, should apply without distinction.

Admittedly, abandoning the state action doctrine through a literal application of the Constitution would be repugnant to the intent of its drafter’s. Yet the Philippine Supreme Court has ruled that the proceedings of the constitutional convention are not controlling. They merely reflect the

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216 Ibid.
217 *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833)
219 *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 227 (1897)
views of the individual members of the Commission, which may be resorted to amidst ambiguity. Hence it is “safer to construe the constitution from what appears upon its face” and “how it was understood by the people adopting it [rather] than in the framer’s understanding.”

4. Constitutional Construction: The Spirit that Giveth Life

The state action doctrine was expressly adopted by the U.S. Supreme Court in 1883 through the Civil Rights Cases. About a century later, the Philippine Supreme Court echoed that doctrine in Marti where the constitutional right against unlawful search and seizure vis-à-vis the exclusionary rule were the subject of judicial scrutiny.

While conducting a routine procedure, Mr. Job Reyes, the proprietor of a private packaging company, noticed an odor emitting from one of the boxes consigned to him. Suspecting its contents to be cannabis, he sought the aid of the police and, in their presence, opened the boxes which revealed dried marijuana leaves. The accused, Andre Marti, contended that the contraband found was inadmissible as evidence having been obtained without a warrant. The Court categorically rejected this claim by citing the state action doctrine. The search having been made by a private actor and for a private purpose, constitutional guarantees could not apply.

The same issue was brought before the court in Zulueta, but resulted in an opposing conclusion. The clandestine love letters between Alfredo Martin and his paramours were obtained by his wife, Cecilia Zulueta, who had ransacked her husband’s office. Similar to Marti, Alfredo claimed that these correspondence were inadmissible as evidence. Under Marti, the case would have been dealt with as a matter squarely within the private sphere, hence excluding the application of the Bill of Rights. However, Zulueta held that “any violation of [the Constitutional right to privacy] renders the evidence obtained inadmissible for any purpose in any proceeding.” The court reasoned that the:

intimacies between husband and wife do not justify any one of them in breaking the drawers and cabinets of the other and in ransacking them for any telltale evidence of marital infidelity. A person, by contracting marriage, does

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220 Civil Liberties Union v. Executive Secretary, G.R. No. 83896, 194 SCRA 317, 1991.
not shed his/her integrity or his right to privacy as an individual and the constitutional protection is ever available to him or to her. 221

The state action threshold was set aside in Zulueta. Instead, the court took into consideration Cecilia’s underlying justification, or lack thereof. 222 Dissimilar to Marri, the Court ruled on the substance of the right, i.e. whether the ransacking was justified; rather than form, i.e. whether the occurrence was the product of government action.

Conclusion

The state action doctrine is the threshold only in principle. In practice, jurisprudence shows that the courts have bent over backwards to accommodate new paradigms under the time-honored doctrine’s inflexible standards. In some cases, Bill of Rights protections were enforced against ostensibly non-state actors “impressed with public interest,” while other cases expanded due process guarantees under the veneer of statutory or contractual stipulation.

Historically, only Zulueta has extended Bill of Rights guarantees to non-state actors without qualifying the private nature of the conflict. Though aberrant in Philippine jurisprudence, Zulueta is undoubtedly a step in the right direction. The preservation of the ideals of liberty, equality and security against the assaults of opportunism, 223 requires an analysis beyond the public/private distinction. Where private evils are as coercive as public wrongs, the state action doctrine fails to justify its relevance.

Justice Oliver Wendell Holmes Jr. maintained that the “Blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” 224 In the Philippine legal system, we need not choose between one and the other. Both the letter that kills and the spirit that gives life support the conclusion that liberty and prosperity should not be reserved for public actors alone. As forwarded by Chief Justice Panganiban, an “objective reading of the Bill of Rights clearly shows that the due process protection is not limited to government action alone. The Constitution does not say that the right cannot be claimed against private individuals and entities.” 225 Likewise, the courts would be working toward the

221 Zulueta, 253 SCRA 699.
222 Ibid.
224 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
225 Serrano, 323 SCRA 445 (Panganiban, J., separate opinion)
spirit of the law in piercing the veil of state action and applying constitutional protections in private relations. Absent any express constitutional prohibition on applying fundamental rights to private wrongs, there exists sufficient basis to abandon the state action threshold. The Constitution’s silence is its imprimatur to a more equitable interpretation of fundamental guarantees.

IV. JUDICIAL ACTIVISM AND THE COUNTER-MAJORITARIAN DIFFICULTY

Under the 1987 Constitution, the judiciary stands as the bulwark of fundamental rights.\textsuperscript{226} The UNCESCR emphasized in \textit{General Comment No. 3} that the adoption of legislative measures “is by no means exhaustive of the obligations of States parties.”\textsuperscript{227} Indeed, the safeguard of liberty and nurture prosperity requires more than juridification, it necessitates a shift in judicial thought.\textsuperscript{228}

But that approach is not without contention. The foregoing discussion, dedicated to redefining the role of the judicial branch in protecting fundamental rights, is met by counter-majoritarian objection, argues that the “creation” of justiciable rights and the expansion of fundamental protections against non-state actors is a legislative, political, function, and not one for the apolitical courts. By expanding the law beyond its intended confines, the will of the people, acting through elected representatives, is thereby substituted with the will of the judiciary—appointed officials.

This chapter seeks to identify a place for the activist court in a system of separation of powers, though not without reservation. Hand-in-hand, this chapter will likewise temper judicial activism with judicial restraint.

\textit{A. Judicial Activism vis-à-vis the Separation of Powers}

The principle of separation of powers ordains that the three great branches of government—the executive, legislative, and judicial branches—have “exclusive cognizance of and is supreme in matters falling within its own ‘constitutionally allocated sphere.’”\textsuperscript{229} As penned by Chief Justice Panganiban

\begin{itemize}
\item \textsuperscript{227} General Comment No. 3: The Nature of States Parties, UNCESCR, E/1991/23, 4 Dec. 1990, ¶4
\item \textsuperscript{228} Id. at ¶8
\item \textsuperscript{229} Santiago v. Guingona, G.R. No. 134577, 18 Nov. 1998.
\end{itemize}
in *Santiago v. Guingona*, the Constitution categorizes the functions of the state according to their nature:

1) The making of laws, which are allocated to the legislative department;
2) The enforcement of such laws and of judicial decisions applying and/or interpreting the same, which belong to the executive department; and
3) The settlement of disputes, controversies or conflicts involving rights, duties or prerogatives that are legally demandable and enforceable, which are apportioned to courts of justice.\(^{230}\)

In the Philippine tripartite framework, the creation of demandable rights is not for the courts, but for the legislature. Counter-majoritarian critique advances the view that a judicial determination of justiciability and the enforcement of liberty and prosperity against non-state actors would expand the law beyond its intended limits. Judicial review, all-the-more judicial activism, is thus denounced as undemocratic in substituting the will of “the people” with that of the unelected judge.\(^{231}\)

The counter-majoritarian difficulty collides with the courts’ duty to protect and enforce constitutional rights.\(^{232}\) As pronounced in *Tañada v. Angara*, judicial review is not judicial superiority, but constitutional supremacy.\(^{233}\) As penned in Chief Justice Panganiban’s seminal opinion, the Philippine judiciary is not merely permitted, but mandated to be activist courts:

> The Constitution imposes this intervention as a duty, not just as a power or as an authority. A power can be relinquished but a duty cannot, under any circumstance, be evaded. The judiciary, especially the Supreme Court, must uphold the Constitution at all times. It cannot shirk, waver, or equivocate. Otherwise, it will be censured with dereliction and abandonment of its solemn duty.\(^{234}\)

Under the Philippine Constitutional framework, the counter-majoritarian argument does not pose an insurmountable obstacle. The judicial enforcement of civil, political, economic, and social rights is justified by the constitutionally imposed duty to protect fundamental rights.\(^{235}\) Indeed, in both


\(^{232}\) 1987 CONST., §5(5), art. VIII.


\(^{235}\) CONST. art. VIII, §5(5).
municipal and international law, the judiciary is not just permitted, but mandated to remedy violations of human rights.

Another way to rebut the counter-majoritarian argument is by zeroing on the justiciability of the ICCPR and ICESCR. The separation of powers ingrains in the legislative branch the power to make laws, and to the judicial branch, the power to interpret them. While the legislature has no authority to execute or construe, neither is the judiciary empowered to create or execute. Yet as earlier established, the justiciability of both liberty and prosperity is recognized in the Philippine legal system through international obligation, constitutional provisions, and legislative fiat. If the interests of liberty and prosperity are a political question, it is submitted that these sources provide the political answer.

B. Judicial Restraint vis-à-vis Judicial Activism

One of the benefits in reserving the application of liberty and prosperity to the public sphere is to afford the private sphere the freedom to structure itself as it sees fit, subject only to the constraints of legislation. A wholesale application of the Bill of Rights to private acts would result in a paradox where the very freedoms afforded to the people are the very limits to their exercise.

It is not the purpose of this essay to say that constitutional protections should apply in each and every case. Rather, it is proposed that the law ought to be attuned to the circumstances of the situation. If the interplay of facts and evidence merit the application of the Bill of Rights, then the judiciary should not fret from applying its protections. However, absent such exigencies, statutory rights should suffice.

As illustrated by the Marti-Zulueta contrast, the Court has applied the full force of the law, whether statutory or constitutional, when private actors overstep the boundaries of liberty through fraud or abuse. While Job Reyes discovered the evidence during “standard operating procedure,” Cecilia Zulueta obtained the inadmissible evidence by “forcibly [opening] the drawers

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236 CONST. art. VI, §1
237 CONST. art. VIII, §1.
238 Belgica v. Ochoa, G.R. No. 208566, 19 Nov. 2013
241 Tan, supra note 133, at 102.
242 Marti, 193 SCRA 57.
and cabinet in her husband’s clinic through abuse.”

Similarly, the Court should do-away with the *public/private distinction*, and with it the *state action doctrine*, when non-state actors employ intentional and forcible acts.

We must not lose sight of the Constitution’s objective to level the playing field. The Court should thus temper itself by applying the Bill of Rights within the private sphere only to situations involving relations of unequal footing. The Constitution’s function as a code of fair play should not be thwarted by the mere lack of state action.

**Conclusion**

The judicial function being “undemocratic” in nature, the counter-majoritarian objection is its own rebuttal. The court’s undemocratic role is but necessary to compensate for the flaws of democracy. The issue at hand therefore is no longer the justiciability of civil, political, economic, and social, rights; but the “willingness of adjudicating bod[ies] to entertain, examine and pronounce on claims affecting these rights.”

Judicial activism is a tool to overcome state inadequacies; judicial deference is the renunciation of constitutional duty. To argue for judicial passivity would rob liberty and prosperity of any meaningful power. The courts would but pay lip service to fundamental rights; leaving no remedy for the failures of the state to deliver on its tripartite duties.

**RECOMMENDATIONS**

The common approach to the inadequacies of law is the creation of more law. While there is no denying the vital role of the political branches in the safeguard of fundamental rights, the judicial recourse should not be dispensed with.

Adjudication excludes juridification. Indeed, the judiciary has no power to make the law just as the legislature has no authority to construe it. This paper avoids the dilemma entirely by offering structural and procedural reforms to enforce fundamental rights. Chapter I establishes the justiciability

244 Tan, supra note 133, at 102.
245 *Philippine Blooming Mills*, G.R. No. L-31195.
of liberty and prosperity in the realms of international and municipal law. The Philippines ratified core human rights instruments recognizing civil, political, economic, and social rights, and has transmuted them into municipal law by incorporation or transformation. Chapter II shows how the presumptions of old paradigms have been overtaken by history. The orthodox state action threshold was the product of an antiquated assumption that only the government is in a position to violate fundamental rights. But old doctrine has failed to keep apace the complexities of new paradigms, and have hindered the state’s compliance with its tripartite duties. By abandoning the state action standard, the courts would loosen the state’s fixation with the duty to respect and streamline compliance with the duties to protect and fulfill. Restructuring our access to power through the courtroom will transform fundamental rights into a private cause of action against non-state actors.

The protection of human rights is not solely hinged on state programs or social policies, but on the willingness of the judiciary to position itself in a way that would most empower individuals to harness the law. In Chapter III we observe how the court has historically enforced public rights against private parties to preserve liberty and prosperity—a power endowed by the social justice provisions of the Philippine Constitution. Lastly, as seen in Chapter IV, the counter-majoritarian nature of activist courts is constitutionally mandated precisely to safeguard liberty and prosperity from the inadequacies of democracy.

Liberty and prosperity forwards common sense in pursuit of uncommon justice. It recognizes how civil and political rights are tightly intertwined with social and economic relations—how freedom from fear necessitates freedom from want.

While unshackling the chains of old paradigms may be fueled by noble convictions, the same must be tempered to avoid the paradox where our freedoms are their own limits. Traditional notions of state action having been premised on the supremacy of the state over the plebeian individual, it is recommended that the laws on liberty and prosperity be similarly extended within the private sphere only to level the playing field, tilting the scales of justice in favor of the penury.

The safeguard and nurture of liberty and prosperity requires the rule of law to realize lessons of the past, but more importantly, to live within the
realities of the present.\textsuperscript{248} Traditional doctrine must give way to allow the judiciary to continue with its plight against new forms of abuse whether within the public or private spheres. The \textit{state action doctrine} should thus be abandoned to facilitate a change in legal theory: negative duties alone do not suffice, the state must also protect and fulfill liberty and prosperity through positive action.

The Philippine legal system has reached a crossroads and must now choose which path to take: that with antiquated, yet tried-and-tested views of state action, or the path less traveled, unchartered, but full of auspicious promise.

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BIBLIOGRAPHY

Primary Sources

Case Law

Abbott Laboratories v. Alcaraz
G.R. No. 192571 Jul. 23, 2013, 701 SCRA 682

G.R. No. 158693, 442 SCRA 573, Nov. 17, 2004

Alcuaz v. PSBA
G.R. No. 76353, 161 SCRA 7, May 2, 1988

Arreza v. Gregorio Araneta Univ. Foundation
G.R. No. L-62297, 137 SCRA 94, June 19, 1985

Ateneo de Manila Univ. v. Ct. of Appeals
G.R. No. L-56180, 145 SCRA 100, Oct. 16, 1986

Basco v. Phil. Amusements and Gaming Corp.
G.R. No. 91649, 14 May 1991

Bayan Telecommunications Inc. v. Republic
G.R. No. 161140, 31 Jan. 2007

Belgica v. Ochoa
G.R. No. 208566, 19 Nov. 2013

Biraogo v. Philippine Truth Commission 2010
G.R. Nos. 192935 & 193036, 7 Dec. 2010

Central Bank Employees Association v. Bangko Central ng Pilipinas
G.R. No. 148208, 15 Dec. 2004

Chavez v. Gonzales
G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008

Civil Liberties Union v. Executive Secretary
G.R. No. 83896, 194 SCRA 317, 1991

Civil Service Commission v. Cortes
G.R. No. 200103, Apr. 23, 2014

*De La Salle Univ., Inc. v. Ct. of Appeals*

*Del Rosario v. De Los Santos*
G.R. Nos. L-20589-90, 21 Mar. 1968

*Duncan Ass’n of Detailman-PTGWO v. Glaxo Wellcome Philippines, Inc.*
G.R. No. 162994, 438 SCRA 343, Sept. 17, 2004

*Espina v. Executive Secretary*
G.R. No. 143855, 21 Sept. 2010

G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003

*Government of the Philippines Islands v. Springer,*
277 U.S. 189 (1928)

*Guzman v. National Univ.*
G.R. No. L-68288, 142 SCRA 699, July 11, 1986

*Imbong v. Ochoa*
G.R. No. 204819, 8 Apr. 2014

*International School Alliance of Educators v. Quisumbing*
G.R. No. 128845, 1 June 2000

*Laguna Lake Development Authority v. Court of Appeals*
G.R. No. 110120, 16 Mar. 1994

*Antamok Goldfields Mining Company v. Court of Industrial Relations*
G.R. No. L-46892, 28 June 1940


*Legaspi v. Civil Service Commission*
G.R. No. L-72119

*Leus v. St. Scholastica’s College*
G.R. No. 187226, 28 Jan. 2015

Liban v. Gordon
G.R. No. 175352, 593 SCRA 68, July 15, 2009

G.R. No. 78763, 175 SCRA 277, July 12, 1989

Manila Int'l Airport Authority v. Ct. of Appeals
G.R. No. 155650, 495 SCRA 591, July 20, 2006

Manila Prince Hotel v. GSIS
G.R. No. 122156, 3 Feb. 1997

Nitto Enterprises v. Nat'l Lab. Rel. Comm'n
G.R. No. L-114337, 248 SCRA 654, Sept. 29, 1995

Non v. Danes II
G.R. No. 89317, 185 SCRA 523, May 20, 1990

Oposa v. Factoran
G.R. No. 101083, 30 July 1993

People v. Marti
G.R. No. 81561, 193 SCRA 57, Jan. 18, 1991

G.R. No. L-31195, 51 SCRA 189, 5 June 1973

Philippine Movie Pictures Workers' Association v. Premiere Productions, Inc.
G.R. No. L-56121, 25 Mar. 1953

Republic v. Manila Electric Co.
G.R. No. 141314, 391 SCRA 700, Nov. 15, 2002

Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes
G.R. No. 180771, 181527, 21 Apr. 2015

Sanlakas v. Executive Secretary
G.R. No. 159085, 3 Feb. 2004

Santiago v. Guingona
G.R. No. 134577, 18 Nov. 1998


*Simon v. Commission on Human Rights*
G.R. No. 100150, 5 Jan. 1994

*Springer v. Government of the Philippine Islands*
277 U.S. 189, 209 (1928)

*Tañada v. Angara*
G.R. No. 118295, 272 SCRA 18, May 2, 1997

*Valmonte v. Belmonte*
G.R. No. 74930, 13 Feb. 1989

*Victoriano v. Elizalde Rope Worker’s Union*
G.R. No. L-25246, 59 SCRA 54, Sept. 12, 1974

*Villar v. Technological Institute of the Philippines*
G.R. No. L-69198, 135 SCRA 706, Apr. 17, 1985

*Zulueta v. Ct. of Appeals*
G.R. No. 107383, 253 SCRA 699, Feb. 20, 1996

**Laws**

*1987 Constitution of the Republic of the Philippines*

A.M. No. 07-9-12-SC, 25 Sept. 2007

A.M. No. 08-1-16-SC, 22 Jan. 2008

“Data”

A.M. No. 09-6-8-SC, 13 Apr. 2010


(2012)


UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465


Secondary Sources

Case Law

Arkansas Educational Television Commission v. Forbes

Barron v. Mayor & City Council of Baltimore
32 U.S. 243 (1833)

*Case of Opus v. Turkey*
European Court of Human Rights, Application No. 33401/02, 9 June 2009

*Chicago, Burlington & Quincy Railroad Co. v. Chicago*
166 U.S. 226 (1897)

*Civil Rights Cases*
109 U.S. 3 (1883)

*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*
73 U.S. 788 (1985)

*DeShaney v. Winnebago*
489 U.S. 189, 196-7 (1989)

*Edmonson v. Leesville Concrete Co.*
500 U.S. 614 (1991)

Judgment of the Nuremberg International Military Tribunal
1946 (1947) 41 AJIL 172

*Lenahan v. United States of America*

*Lloyd Corp. v. Tanner*
407 U.S. 551, 561-2 (1972)

*Marsh v. Alabama*
326 U.S. 501-2 (1946)

*Prosecutor v. Ntaganda*
No. ICC-01/04-02/06-309, Decision on the Charges, Pre-Trial Chamber, 9 June 2014

*Prosecutor v. Ruto et al.*
No. ICC-01/09- 01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012

*Situation in the Republic of Kenya*
No. ICC-01/09-19, Decision on the Authorisation of Investigation, Pre-Trial Chamber, 31 March 2010

Vernon v. Bethell
28 ER 838, 2 Eden 110(1762)

Publications


T. Baviera, “Teaching Civil Law in the Grand Manner”, IN THE GRAND MANNER: LOOKING BACK, THINKING FORWARD (Danilo L. Concepcion et al. eds., 2012)

AOIFE NOLAN, HUMAN RIGHTS LAW IN PERSPECTIVE: CHILDREN’S SOCIO-ECONOMIC RIGHTS, DEMOCRACY AND THE COURTS (HART PUBLISHING, 2011)

ASBJORN EIIDE, ET AL. ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, (MARTINUS 2ND ED., 2001)


Hall & Ambos, ‘Article 7 Crimes Against Humanity’ in O. TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Beck, 2008)

JAMES GRIFFIN, ON HUMAN RIGHTS (OXFORD UNIVERSITY PRESS, 2008)


John Simmons, ‘Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke’ in JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS (CAMBRIDGE UNIVERSITY PRESS, 2001)

MERLIN MAGALLONA, THE PHILIPPINE CONSTITUTION AND INTERNATIONAL LAW (U. PHIL, 2013)


UNITED NATIONS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS (UN PUBLICATIONS, 2005)

Journal Articles


Artemio V. Panganiban, Old Doctrines and New Paradigms, 75 Phil. L.J. 513, 2001

Bret Boyce, Originalism and the Fourteenth Amendment, 33 Wake Forest L. Rev. 909 (1988)
Corporate Complicity & Legal Accountability, Criminal Law and
Commission of Jurists Expert Legal Panel on Corporate
Complicity in International Crimes (2008)

H. Shamir, *Public/Private Distinction Now: The Challenges of Privatization and of
the Regulatory State*, 5 Theoretical Inq. L. 1, 2014

Joaquin G. Bernas S.J., *Justiciability of Socio-Economic and Cultural Rights*,

Julie K. Brown, *Less is More: Decluttering the State Action*, 73 Mo. L. Rev. 561
(2008)

Culture* (1986)

Melencio Sta. Maria, *Human Rights, Politics, International Law and Trade
Arrangement and Economic Prosperity: A Reading of the Philippine
Situation*, A Paper for the Foundation for Liberty and Prosperity
(2017)

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469
(1897)

Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in
Constitutional and Civil Law: A Tribute to Chief Justice Fernando and
Justice Carpio*, 82 Phil. L.J. 78 (2008)

P. M. Schoenhard, *A Three-Dimensional Approach to the Public and Private


Lectures

Artemio V. Panganiban, *Safeguard Liberty, Conquer Poverty, Share Prosperity
(Part Three — for the Business Community)*, 4th Integrity Summit
with the Makati Business Club and the European Chamber of
Commerce and Industry, at Dusit Thani Hotel, Makati City,
available at https://cjpanganiban.com/2014/09/19/safeguard-
liberty-conquer-poverty-share-prosperity-part-three-for-the-business-community/


**Miscellaneous**

**BLACK’S LAW DICTIONARY** (WEST 9TH ED., 2009)

FoodFirst Information & Action Network (FIAN), *Parallel Report: On the Occasion of the Review of the Philippines Combined 5th and 6th Periodic Reports to the UN CESCR at the 59th Session*.


NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, PHILIPPINE DEVELOPMENT PLAN 2017-2022 (2017)

Republic of the Philippines Public-Private Partnership Center (2013), What is PPP?, available at: https://ppp.gov.ph/?page_id=27574

Response of the Philippine Government to the concerns raised by the Committee on Economic, Social and Cultural Rights during its 59th session in Geneva, Switzerland on September 28-29, 2016.


Committee on Economic, Social and Cultural Rights, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Philippines, E/C.12/PFL/CO/5-6, 26 October 2016.

Committee on Economic, Social and Cultural Rights, General Comment No. 9: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights