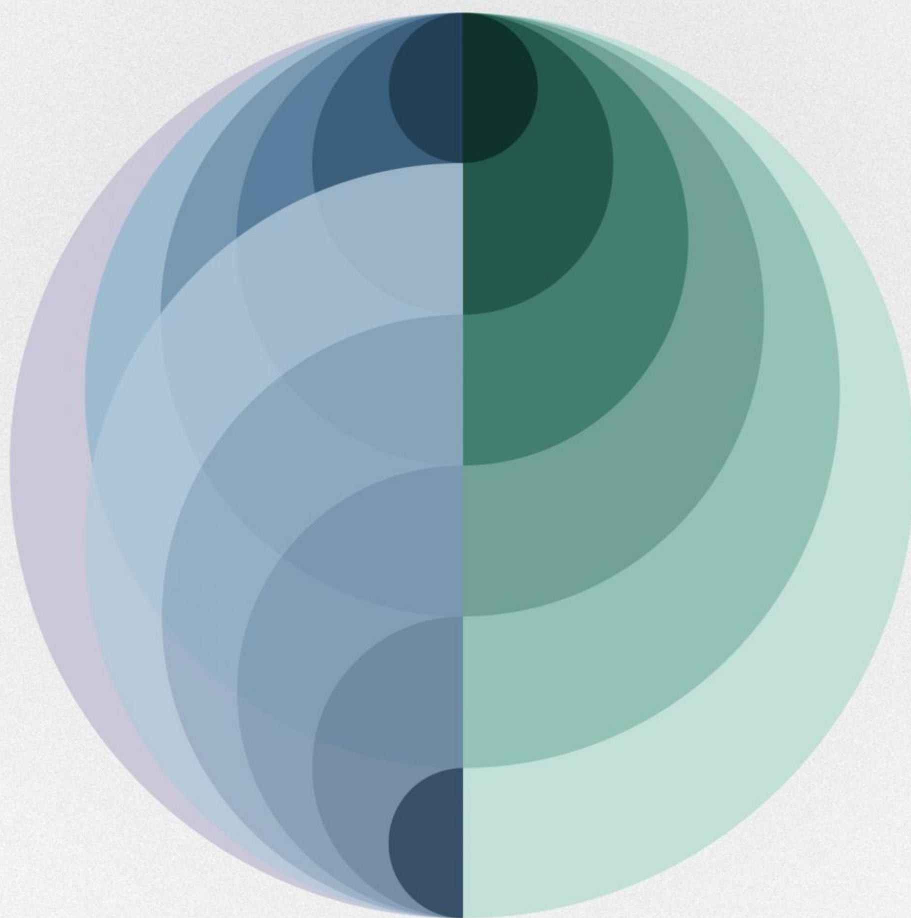
Asian Comparative Law



Volume I

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ASIAN COMPARATIVE LAW
VOLUME I

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EDITOR'S NOTE

With the current movement of people, businesses, and affairs among ASEAN countries, there is an increasing need to further analyze the different legal systems that support these transactions. Asian legal systems have their own peculiarities and complexities, largely shaped by their own culture and values. However, globalization demands that these legal systems interact with one another as a necessary consequence of the countries' interdependence with aspects of their economy, politics, sovereignty, and culture. Businesses tend to cross borders, tourism among Asian countries are encouraged, and more talks regarding regional agreements among governments have begun—thus, studies on the interaction of these systems are in high demand.

The *Asian Comparative Law Project* was initiated with that objective in mind—to provide a comparison of laws highlighting the similarities and differences in the laws and legal concepts among our Asian neighbors. The publication is divided into different areas of law—marital property law, copyright law, law in the digital age, and corporation law. Experts from Indonesia, Vietnam, Malaysia, and Myanmar contributed articles that became the basis for their Filipino counterparts to write on the same branch of law. The result is an interesting comparison of each area of law.

In Elizabeth Aguiling-Pangalangan's article, *Fundamental Conflict of Laws Concepts as Applied to the Philippine Law on Personal and Property Relations of Couples Within and Without Marriage,* she writes about the conflict-of-laws issues amongst people of different nationalities or domiciles and how these interconnections have given rise to "interstate families." According to her, courts must consider applying foreign law in cases with foreign elements in order to safeguard the collective interests of states to protect families.

In Abdul Salam's article, *Some Principles of Indonesia Marital Property Law: Study of Mixed Marriage Couples,* he discusses some of the principles of property in a marriage, particularly regarding land ownership by a foreign spouse in mixed marriages in Indonesia. The author analyzes the legal consequences of certain property laws on marital property.

In Emerson S. Bañez article, *Philippine Copyright Law,* he aims to provide a summary and background of Philippine copyright law that treats the law as a given artifact. He uses a descriptive model that examines the law along several

dimensions and provides a historical view for its current features. With this article, he hopes to predict future developments in Philippine copyright law.

In Nguyen Thi Hong Nhung's article, *Copyright Law in Viet Nam,* he introduces the generality of Vietnamese copyright to gain more understanding of the Vietnamese attitude towards copyright law. Methods of analysis, thesis, and comparison are used to highlight the point of view of Vietnamese legislation.

In Jose Jesus M. Disini's article, *Philippine Electronic Contracting,* he writes about the evolution of cyberspace into what is now a widely accepted virtual marketplace where transactions can be completed by the click of a mouse. Thus, there is a need to translate the Civil Code governing contracts in the context of these online transactions, since the current Code is unable to fully address all the issues raised by them. He also examines United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and the United Nations (UN) Convention on the Use of Electronic Communication in International Contracts.

In Dennis W.K. Khong's article, *Copyright Exceptions for the Digital Age: A Comparative Study in Malaysia and the Philippines,* he compares copyright exceptions in Malaysia and the Philippines, with particular emphasis to those relevant to the digital age. He looks at how the fair use doctrine is implemented in both jurisdictions. He also compares recent developments with respect to technological measures, digital rights management, and Internet service provider liabilities.

In Nicholas Felix L. Ty's article, *Overview of Philippine Corporation Law*, he assesses the Revised Corporation Code as applied to both domestic and foreign corporations.

In Rémi Nguyen's article, *The Evolution of Companies Legislation and Corporate Legal Landscape in Myanmar,* he writes about the Burma Companies law that has evolved from the Indian Companies law. This evolution, which led to the country opening up to investment and foreign capital, came about due to certain historical, ideological, and economic influences.

ROMMEL J. CASIS
ANA REGINA A. BUBAN
Editors

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MARITAL PROPERTY LAW

FUNDAMENTAL CONFLICT OF LAWS CONCEPTS AS APPLIED TO THE PHILIPPINE LAW ON PERSONAL AND PROPERTY RELATIONS OF COUPLES WITHIN AND WITHOUT MARRIAGE

ELIZABETH AGUILING-PANGALANGAN

I. INTRODUCTION

Conflict-of-laws issues in family relations are a by-product of mobility and interaction amongst people of different nationalities or domiciles, or by the occurrence in other states of events central to the formation of the family. These interconnections have given rise to the phenomenon of interstate families. With the presence of foreign elements, legal issues arising from cross-border family relations are therefore not automatically governed by the laws of a single state.

Family law is an area of substantive law which inexorably reflects state policies often moored to fundamental personal beliefs and societal values. Thus, when courts must choose between applying domestic law or foreign law, they seldom consider the latter. Yet, with the collective interest of states to protect families, there is a need to ensure the certainty and security of the legal status of families and children. It is necessary, then, to encourage courts to consider applying foreign law in cases with foreign elements. This tension makes Conflicts Family law problems one of the most complex and sensitive areas to be examined from a Private International law perspective.

II. MARRIAGE

A. Definitions and Requisites

Article XV, Section 2 of the Philippine Constitution characterizes marriage as an "inviolable social institution" that serves as the foundation of the family, and as such, is entitled to the protection of the State. The character of marriage as an institution is accentuated in the Family Code definition of marriage:

> Article 1. Marriage is a special contract of permanent union between man and woman entered into in accordance with law for the establishment of

> conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within limits provided by this Code.

Therefore, despite the broad Constitutional mandate found in Article II for the State "to protect and strengthen the family as a basic autonomous social institution", Article XV of the Constitution dispels any doubt that Philippine laws privilege families built on marriage.[1]

Philippine case law has consistently recognized the legal institution of marriage as a relationship of transcendental importance.[2] As stated in *Avenido v. Avenido*,[3] "[t]he basis of human society throughout the civilized world is that of marriage. Marriage in this jurisdiction is not only a civil contract, but it is a new relation, an institution in the maintenance of which the public is deeply interested. Consequently, every intendment of the law leans toward legalizing matrimony." The legal maxim of *semper praesumitur pro matrimonio*—a presumption always arises in favor of marriage[4]—is codified in law through Article 220 of the Civil Code.[5]

Despite this presumption, cases involving marriages and remarriages of Filipinos and foreigners are not necessarily deemed valid if proven to have contravened Philippine law. These have significant impact on the property relations of the parties cohabiting.

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[1] ELIZABETH AGUILING-PANGALANGAN, MARRIAGE AND UNMARRIED COHABITATION: THE RIGHTS OF HUSBANDS, WIVES, AND LOVERS, (UP College of Law, Philippines 2015), 1-2.

[2] *See e.g.* Santos v. Angeles, G.R. No. 105619, Dec. 12, 1995.

[3] Avenido v. Avenido, G.R. No. 173540, Jan. 22, 2014.

[4] *Ibid.*

[5] CIVIL CODE, art. 220. "In case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of law or facts leans toward the validity of marriage, the indissolubility of the marriage bonds, the legitimacy of children, the community of property during marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression."

B. Validity of Marriage

1. Extrinsic Validity

The *lex loci celebrationis* principle is expressed in the first paragraph of Article 26 of the Family Code: "All marriages solemnized outside the Philippines in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country."

Though stated as the controlling law in all questions of validity of marriage, *lex loci celebrationis* applies only to the extrinsic requirements of marriage. Article 3 of the Family Code sets forth the formal requisites of marriage:

a. Authority of the solemnizing officer;
b. A valid marriage license except in the cases provided in Chapter 2 of this Title; and
c. A marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife in the presence of not less than two witnesses of legal age.

Notice that the extrinsic validity of marriage relates to the conduct of third persons such as public officers in solemnizing the marriage, the issuance of the marriage license or performance of the marriage ceremony; it does not relate to acts attributed to the parties getting married.[6] As long as there is compliance with the requirements imposed in the country where the marriage was celebrated, the marriage is considered valid there and everywhere. As an example, consider the marriage of two Filipinos solemnized by a notary public in Las Vegas. Since Chapter 240 of the Nevada Revised Statues authorizes a notary public in good standing with the Nevada Secretary of State to officiate marriages, the marriage of the Filipino couple is valid in Nevada, US. The validity of this Las Vegas marriage is not undermined by the exclusion of notaries public from the list of authorized solemnizing officers under Article 7 of the Family Code of the Philippines.[7] However, if the validity

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[6] *Contra e.g.* FAMILY CODE, art. 35(2). "The following marriages shall be void from the beginning: (2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing office had the legal authority to do so[.]"

[7] FAMILY CODE, art. 7. "Marriage may be solemnized by: (1) Any incumbent member of the judiciary within the court's jurisdiction; (2) Any priest, rabbi, imam, or minister of any church or religious sect duly authorized by his church or religious sect and registered with the civil registrar general, acting within the limits of the written authority granted by his church or religious sect and provided that at least one of the contracting parties belongs to the solemnizing officer's church or religious sect; (3) Any ship

of the marriage is put into question, the Nevada statute, which is the foreign law authorizing a notary public to solemnize marriage, must be properly pleaded and proven.

In *Wong Woo Yu v. Vivo*,[8] the petitioner declared that she came to the Philippines in 1961 to join her Filipino husband, Perfecto Blas, whom she married in a ceremony celebrated by a village leader in China. Petitioner was admitted to the Philippines as a non-quota immigrant, but when the composition of the Board of Special Inquiry was changed, this ruling was reversed. In deciding whether or not this marriage was valid, the Court held that:

> [A] marriage contracted outside of the Philippines which is valid under the law of the country in which it was celebrated is also valid in the Philippines. But no validity can be given to this contention because no proof was presented relative to the law of marriage in China. Such being the case, we should apply the general rule that in the absence of proof of the law of a foreign country it should be presumed that it is the same as our own.
>
> x x x
>
> Since our law only recognizes a marriage celebrated before any of the officers mentioned therein, and a village leader is not one of them, it is clear that petitioner's marriage, even if true, cannot be recognized in this jurisdiction.

In *Adong v. Seng Gee*,[9] the Court held that to establish the validity of a foreign marriage it is necessary to prove the foreign law as a question of fact, and the alleged foreign marriage by convincing evidence.

The Court held that the marriage of the decedent in China was not sufficiently proven by the presentation of a matrimonial letter. Thus, although Seng Gee alleged that he was a legitimate child of the deceased Cheng Boo and Tan Dit, who were married in China prior to the marriage of Boo with Adong in the Philippines, the Court held that "there is no competent testimony what the laws of China in the

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captain or airplane chief only in the case mentioned in Article 31; (4) Any military commander of a unit to which a chaplain is assigned, in the absence of the latter, during a military operation, likewise only in the cases mentioned in Article 32; (5) Any consul-general, consul or vice-consul in the case provided in Article 10."

[8] G.R. No. L-21076, Mar. 31, 1965.

[9] G.R. No. L-18081, Mar. 3, 1922.

Province of Amoy concerning marriage were in 1895." In the absence of such evidence, the alleged prior Chinese marriage was not considered valid in the Philippines.

Although in the *Wong Woo Yu* and *Adong* cases the marriages solemnized abroad would have been valid if they conformed to the *lex loci celebrationis*, proof of the foreign law enumerating requirements for a valid marriage is indispensable. Without properly pleading and proving foreign law, Philippine courts will apply the doctrine of processual presumption. The Philippines borrowed this legal concept, also called the presumed-identity approach, from common law. It provides that "unless there is a specific, applicable statute in another state, a court will presume that the common law has developed elsewhere identically with how it has developed in the court's own state, so that the court may apply its own state's law."[10] In sum, "where a foreign law is not pleaded or, even if pleaded, is not proved, the presumption is that foreign law is the same as ours."[11]

2. Intrinsic validity

a. Lex Nationalii

The new Civil Code of the Philippines provides for the application of the nationality principle on significant issues in family law: "Article 15. Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."

The municipal laws of each State specify the rules governing marriage and its termination, and the rights and duties of members of the family. For the Philippines, the substantive requirements for a valid marriage are found in Article 2 of the Family Code. These essential elements of marriage are: (1) legal capacity of the contracting parties who must be a male and a female; and (2) consent freely given in the presence of the solemnizing officer. Legal capacity to marry means that the parties entering into the marriage must be at least 18 years of age, that one party is a female and the other a male, and that neither is barred by any impediment to marry the other. The second substantive requisite is consent freely given by the parties in the presence of an authorized solemnizing officer.

Take for example, a marriage between two 17-year old Filipinos that is celebrated in Canada where the minimum age of marriage is 16. Although such

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[10] BLACK'S LAW DICTIONARY, 1306. *See also* PHILIPPINE LEGAL LEXICON, 2015 ed., 787; *and* F. MORENO, PHILIPPINE LAW DICTIONARY, 3rd ed. 748.

[11] Phil. Nat'l Construction Corp. v. Asiavest Merchant Bankers (M) Berhad, G.R. No. 172301, Aug. 19, 2015.

marriage is in accordance with Article 139 of the new Civil Code of 2014 of Canada, the *lex loci celebrationis*, it will not be recognized as valid in the Philippines, which follows the *lex nationalii*. Given that Article 15 of the Philippine Civil Code states that Filipino citizens are bound by laws on "status, condition and legal capacity", it is Philippine law that sets 18 as the minimum age of marriage,[12] not Canadian law, that determines who are legally capacitated to marry.

The exceptions to the *lex loci celebrationis* rule, found in Article 71 of the Civil Code of the Philippines, are marriages that are bigamous, polygamous or incestuous. However, Article 26 of the Family Code, the law in force to this day, expanded these exceptions.[13] Thus, a marriage, although valid in the foreign country where it was celebrated, will be void in the Philippines if: (a) either or both parties are below 18 years of age;[14] (b) it is bigamous or polygamous;[15] (c) a subsequent marriage is performed without recording in the Civil Registry and Registry of Properties the Judgment of annulment or declaration of nullity of the first marriage, the partition and distribution of the properties of the spouses and the delivery of the children's presumptive legitimes;[16] (d) there was mistake as to the identity of the contracting party;[17] (e) one of the parties was psychologically incapacitated to comply with the essential marital obligations;[18] (f) the marriage is incestuous;[19] or (g) the marriage is void by reason of public policy.[20]

One should observe that these exceptions to the *lex loci celebrationis* put in issue the intrinsic validity of the marriage given that they inquire into the capacity of the contracting parties to enter into marriage.

As discussed earlier, the national law of the parties to the marriage governs questions of capacity or "the general ability of a person to marry, for instances defined by requirements of age and parental consent."[21]

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[12] FAMILY CODE, art. 5. "Any male or female of the ae of eighteen years or upwards not under any of the impediments mentioned in Articles 37 and 38, may contract marriage."

[13] Art. 26, ¶ 1. "All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they were solemnized, and valid there as such, shall also be valid in this country, except those prohibited under Articles 35 (1), (4), (5) and (6), 3637 and 38."

[14] Art. 35(1).

[15] Art. 35(4).

[16] Art. 35(6) *vis-à-vis* arts. 52-53.

[17] Art. 35(5).

[18] Art. 36.

[19] Art. 37.

[20] Art. 38.

[21] *Rabel, supra,* at 263.

Another issue that goes into the capacity to marry and is therefore not governed by the *lex loci celebrationis* is the determination of the prohibited degree of kinship. Though valid in a foreign country where the marriage was celebrated, a marriage will be void in the Philippines if it was incestuous or against public policy. An incestuous marriage is defined as one "(1) [b]etween ascendants and descendants of any degree; and (2) [b]etween brothers and sisters, whether of the full or half blood."[22]

The marriage of first cousins was part of the enumeration of incestuous marriages under Article 81 of the Civil Code. In the Family Code, it is no longer deemed incestuous but remains void on the ground of public policy under Article 38.[23] Where the intrinsic validity of the foreign marriage between a Filipino citizen and a foreigner is challenged on Article 38 grounds, Philippine courts will most likely consider it void even if the marriage was valid in the place it was contracted. At the outset, Philippine law characterizes these marriages as "void from the beginning for reasons of public policy" so it will not be unreasonable for courts to refuse to recognize these marriages.

In particular, what is the status of the marriage between two persons within the prohibited degree but who wed in a country where such marriages are legal? An English court decided a case[24] that involved a marriage celebrated in London of first cousins who were nationals and domiciliaries of Portugal, a state which bars first-cousin marriages. The Court held that:

> If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid... The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been

[22] FAMILY CODE, art. 37. "Marriages between the following are incestuous and void from the beginning, whether the relationship between the parties be legitimate or illegitimate[.]"

[23] FAMILY CODE art. 38. The following marriages shall be void from the beginning for reasons of public policy:

1. Between collateral blood relatives, whether legitimate or illegitimate up to the fourth civil degree;
2. Between step-parents and stepchildren;
3. Between parents-in-law and children-in-law;
4. Between the adopting parent and the adopted child;
5. Between the surviving spouse of the adopting parent and the adopted child;
6. Between the surviving spouse of the adopted child and the adopter;
7. Between an adopted child and the legitimate child of the adopter;
8. Between adopted children of the same adopter; and,
9. Between parties where one, with the intention to marry the other, killed that other person's spouse or his or her own spouse.

[24] Sottomayor v. De Barros, 47 L.J.P. 23; L.R. 3 P.D. (1877).

> constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile, and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this in our opinion imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where the law prevails, and renders invalid a marriage between persons, both at the time of their marriage subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country which imposes the restriction wherever such marriage may have been solemnized.

Substitute Portugal with the Philippines in a hypothetical scenario where Filipino first cousins are married in the UK. If the validity of their marriage is brought before a Philippine court, it will most likely apply the personal law of the parties, as decided in *Sottomayor*. In the Philippines, nationality is the personal law and, hence, controls capacity.

Consider another situation where first cousins who are British citizens but domiciled in California, validly marry in accordance with Section 2200 of the California Family Code. Will the validity of their marriage be recognized in the Philippines should they decide to make their permanent home here? Given that the nationality principle established in Article 15 of the Civil Code clearly states that Philippine laws "are binding upon citizens of the Philippines, even though living abroad[,]" the prohibition found in Article 31 of the Family Code should be limited to Filipino nationals. Non-Filipinos are not bound by Philippine laws on capacity to enter marriage. Furthermore, as earlier mentioned, in case of doubt as to the validity or invalidity of a marriage, there is a presumption in favor of its validity.[25]

Whether or not the marriage is valid has implications on civil rights. *In the Matter of Bautista*,[26] the petitioner, a Filipino citizen, was admitted to the United States as a lawful permanent resident. He filed a visa petition seeking to accord his wife second preference status for the issuance of an immigrant visa. Following the general rule governing recognition of marriages for immigration purposes, the US Immigration Office applied *lex loci celebrationis*, which is the law of the Philippines. It denied his visa petition on the ground that their marriage was void, his wife being

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[25] CIVIL CODE, art. 220.

[26] 16 IN Dec. 602 (B.I.A. 1978) *available at* Interim%20Decision.%20not%20incest%20marr.2671.pdf.

the daughter of Petitioner's cousin. On appeal, a more accurate computation of the degree of consanguinity was made:

> Since the beneficiary in this case, the child of the petitioner's cousin, is related to the petitioner in the *fifth* degree, her marriage to the petitioner is not proscribed by Article 81 of the Philippine Code, and will be deemed valid for immigration purposes... We will, therefore, sustain the appeal filed in this case, and approve the visa petition filed on the beneficiary's behalf.[27]

Notice that the US Immigration Office applied *lex loci celebrationis*. The requisite in question in this visa proceeding case was the capacity of the parties to marry, an issue governed by the *lex nationalii*. But because the Philippines was both the state of nationality and place of celebration of the marriage, the applicable law was the Philippines. It is important though to apply Philippine law as *lex nationalii* because it will not change no matter where the marriage was celebrated. Moreover, the *lex nationalii* governs whether the case is litigated in the parties' state of citizenship, the place of celebration of the marriage or in any third state.

b. Public Policy Considerations

As discussed above, the issue of capacity to enter marriage is governed by the person's personal law, whether it be the law of his nationality or domicile. However, if the personal law is a foreign law, the court may decide not to apply it by reason of the public policy exception—"the court declines to give due course to a claim existing under a foreign law because it considers the nature of the claim unconscionable"[28]—or that the application of the foreign law will violate a fundamental public policy of the forum.

It is worth examining if marriages which are incompatible with the *ordre public* of the state should nonetheless be recognized when raised as a preliminary question in a case, the main issue of which does not profane the mores of the forum state. An example is a case[29] decided in the US where an Indian man died intestate in California. Two women, both living in India, joined in a petition to determine their successional rights, alleging in their petition that at the time of the man's death, they were his legally wedded wives according to the laws of the Jat community in India. The trial

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[27] *Id.*

[28] Jorge R. Coquia AND ELIZABETH AGUILING-PANGALANGAN, CONFLICT OF LAWS: CASES, MATERIALS, AND COMMENTS 212 (Central Professional Books 2000) 146.

[29] In re. Dalip Singh Bir Estate, 188 P. 2nd 499 (Cal. App. 1948), *available at* http://law.justia.com/cases/california/court-of-appeal/2d/83/256.html.

court found that though the decedent was legally married to the petitioners under the laws of India, under the laws of California, only the first wife of the decedent was recognized as his legal widow. Petitioners argued that Singh's polygamous marriages should be held valid since they were valid in the state where they were contracted. Ruling in favor of the petitioners, the Court held that:

> The decision of the trial court was influenced by the rule of 'public policy'; but that rule, it would seem, would apply only if the decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, 'public policy' is not affected...'Public policy' would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties.

The California Court held that the public policy exception was not appropriate here since both women would not be living with their husband in California, which would have been offensive to the community. Hence, the court interpreted public policy very narrowly and "confer[red] on the wives the status of 'wife' [...] for the purposes of succession, and upon the children the status of legitimacy."

If a similar case is heard before a Philippine court, it is submitted that the approach of the California court should be adopted. Community standards of morality will not be transgressed if the parties do not seek to immerse themselves in the life of the community. At a multistate level, this will also avoid "limping marriages" which, in Private International law, refers to marriages that are valid in some states and invalid in others. There is good reason to uphold the validity of marriages when possible, in order to protect the rights and interests of children and parties who in good faith believed that they were legally married.

III. TERMINATION OF MARRIAGES

A. Void and Voidable Marriages

Article 4 of the Family Code states: "The absence of any of the essential or formal requisites of marriage results in a marriage that is void from the very beginning, and the parties may file for declaration of nullity of their marriage."[30]

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[30] FAMILY CODE, art. 35. The following marriages shall be void from the beginning:

(1) Those contracted by any party below eighteen years of age even with the consent of parents or guardians;

In contrast, where all the essential requisites are present but there is a defect in either the consent or capacity, this is a ground for annulment of the marriage.[31] In contrast, an irregularity in any of the formal requisites does not affect the validity of the marriage, but renders the person responsible for the irregularity as civilly, criminally or administratively liable.[32]

The case of *Fujiki v. Marinay* was about Minoru Fujiki, a Japanese national who married Maria Paz Marinay in the Philippines in 2004. The marriage crumbled when Fujiki was unable to bring his wife to Japan where he was a resident. Eventually, they lost contact with each other. In 2008, Marinay met another Japanese, Shinichi Maekara. Without her marriage to Fujiki being dissolved, Marinay and Maekara were married in the Philippines. Maekara brought Marinay to Japan, but their marriage was unhappy due to the alleged physical abuse Marinay experienced in the hands of Maekara. She left Maekara and reestablished connections with Fujiki.

In 2010, Fujiki helped Marinay obtain a judgment from a family court in Japan which declared her marriage to Maekara bigamous and thus, void. Subsequently,

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(2) Those solemnized by any person not legally authorized to perform marriages unless such marriages were contracted with either or both parties believing in good faith that the solemnizing officer had the legal authority to do so;

(3) Those solemnized without license, except those covered the preceding Chapter;

(4) Those bigamous or polygamous marriages not falling under Article 41;

(5) Those contracted through mistake of one contracting party as to the identity of the other; and

(6) Those subsequent marriages that are void under Article 53.

[31] FAMILY CODE, art. 45. "A marriage may be annulled for any of the following causes, existing at the time of the marriage:

(1) That the party in whose behalf it is sought to have the marriage annulled was eighteen years of age or over but below twenty-one, and the marriage was solemnized without the consent of the parents, guardian or person having substitute parental authority over the party, in that order, unless after attaining the age of twenty-one, such party freely cohabited with the other and both lived together as husband and wife;

(2) That either party was of unsound mind, unless such party after coming to reason, freely cohabited with the other as husband and wife;

(3) That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife;

(4) That the consent of either party was obtained by force, intimidation or undue influence, unless the same having disappeared or ceased, such party thereafter freely cohabited with the other as husband and wife;

(5) That either party was physically incapable of consummating the marriage with the other, and such incapacity continues and appears to be incurable; or

(6) That either party was afflicted with a sexually transmissible disease found to be serious and appears to be incurable.

[32] FAMILY CODE, art. 4.

Fujiki filed a petition in the Philippine Regional Trial Court seeking the judicial recognition of the foreign Decree of Absolute Nullity of Marriage. The RTC dismissed the petition. The Supreme Court, however, reversed the RTC and granted the petition to have the Japanese Court's decision recognized in the Philippines. The Court held:

> A petition to recognize a foreign judgment declaring a marriage void does not require re-litigation under a Philippine court of the case as if it were a new petition for declaration of nullity of marriage. Philippine courts cannot presume to know the foreign laws under which the foreign judgment was rendered. They cannot substitute their judgment on the status, condition and legal capacity of the foreign citizen who is under the jurisdiction of another state. Thus, Philippine courts can only recognize the foreign judgment as a fact according to the rules of evidence.
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> The Court further clarified the limits on its power:
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> In the recognition of foreign judgments, Philippine courts are incompetent to substitute their judgment on how a case was decided under foreign law. They cannot decide on the "family rights and duties, or on the status, condition and legal capacity" of the foreign citizen who is a party to the foreign judgment. Thus, Philippine courts are limited to the question of whether to extend the effect of a foreign judgment in the Philippines. In a foreign judgment relating to the status of a marriage involving a citizen of a foreign country, Philippine courts only decide whether to extend its effect to the Filipino party, under the rule of *lex nationalii* expressed in Article 15 of the Civil Code.
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> For this purpose, Philippine courts will only determine (1) whether the foreign judgment is inconsistent with an overriding public policy in the Philippines; and (2) whether any alleging party is able to prove an extrinsic ground to repel the foreign judgment, i.e. want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact. If there is neither inconsistency with public policy nor adequate proof to repel the judgment, Philippine courts should, by default, recognize the foreign judgment as part of the comity of nations.

The Court explained that after the foreign judgment is recognized in the Philippines, it must be registered in the Philippine Civil Registry so that the change in marital status and rights flowing therefrom are officially recorded and reflected in the official registry. The court warned that without this, "there will be an inconsistency between the recognition of the effectivity of the foreign judgment and the public records in the Philippines." In addition, the Court stressed that the recognition of a

foreign judgment nullifying a marriage on the ground of bigamy does not extinguish criminal liability under Articles 89 and 94 of the Revised Penal Code.

B. Absolute Divorce

Another way by which a marriage is terminated is through absolute divorce. Transformations in society and the economy—such as the higher level of education and increased labor participation of women and changing attitudes to marriage and being unmarried—affect marriage and divorce trends. For instance, a study[33] in Malaysia shows that the divorce rate increased steadily from 2000 to 2005 among Muslims and non-Muslims. A United Nations demographic survey shows that Singapore has had a slight increase in the annual number of divorces from 7,133 in 2013 to 7,207 in 2017, while Brunei reported 522 divorces in 2013 and 566 in 2017.[34] Among Southeast Asian countries, only the Philippines has no law allowing divorce.

If a man and a woman who are nationals of the same country marry, domicile, and divorce there, the legal consequences of their marriage and divorce will most likely be controlled by only one law. Notwithstanding, in a conflict of laws case, a divorce decree rendered in one state may be sought recognition in other states. The Hague Convention on the Recognition of Divorces and Legal Separations[35] addresses this very problem and seeks to "facilitate the recognition of divorces and legal separations"[36] not because divorce is favored, but because it is "necessary to limit the social consequences of this unfortunate phenomenon."[37] The Report explains further that:

> Respect for the rights acquired in foreign countries is the very foundation of international law, and the requirements of security and stability in family matters demand the highest degree of cooperation between States

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[33] PATCHARAWALAO WONGBOONSIN AND JO-PEI TAN, CARE RELATIONS IN SOUTHEAST ASIA: THE FAMILY AND BEYOND, BRILL (2019) 441.

[34] United Nations, *United Nations Demographic Yearbook 2017, available at* https://unstats.un.org/unsd/demographic-social/products/dyb/dybsets/2017.pdf.

[35] 978 UNTS 393; 8 ILM 31 (1969). Hereinafter "Convention on the Recognition of Divorces and Legal Separations."

[36] *Id.*

[37] P. Bellet and B. Goldman, *Explanatory Report on the 1970 Convention on the Recognition of Divorces and Legal Separations, no 2.* (1970) *available at* https://www.hcch.net/en/publications-and-studies/details4/?pid=2966. Under Art. 2 of the Convention, the State that issued the judgment, also called the State of Origin, validly acquires jurisdiction of the original case if it is the state of domicile, habitual residence or nationality of one or both of the parties.

> for the sake of the private interest involved, even if this means some sacrifice of their freedom of action.
>
> It must, moreover, not be forgotten that divorce is often followed by remarriage and that it is consequently as much a matter of facilitating the recognition of the validity of the second marriage as of recognizing the validity of the divorce. This is, of course, of particular importance for the children of this second union, to whom no blame attaches for the quarrels that broke up the first marriage and whose rights are morally as great as those of the children of that marriage.

Countries in Southeast Asia, including the Philippines, are not signatories to the Convention. There is likewise no domestic law that requires Philippine courts to recognize any foreign divorce decree. Nonetheless, courts recognize these judgments under the principle of international comity. Recognition is premised on the proper exercise of jurisdiction by the court that issued the decree, the validity of the judgment according to the parties' personal law, and compliance with the procedural requirements for proving foreign judgments.

However, where one of the spouses is a Philippine citizen, this becomes unduly complicated given that, aside from the Holy See, the Philippines is the only country in the world where there is no absolute divorce.[38] Instead, Philippine law provides only for legal separation[39]—a disunion *a mensa et thoro*[40]—where the marital bond

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[38] ELIZABETH AGUILING-PANGALANGAN, MARRIAGE AND UNMARRIED COHABITATION: THE RIGHTS OF HUSBANDS, WIVES, AND LOVERS (UP College of Law, Philippines 2015) 248.

[39] FAMILY CODE, art 55. "A petition for legal separation may be filed on any of the following grounds:

(1) Repeated physical violence or grossly abusive conduct directed against the petitioner, a common child, or a child of the petitioner;
(2) Physical violence or moral pressure to compel the petitioner to change religious or political affiliation;
(3) Attempt of respondent to corrupt or induce the petitioner, a common child, or a child of the petitioner, to engage in prostitution, or connivance in such corruption or inducement;
(4) Final judgment sentencing the respondent to imprisonment of more than six years, even if pardoned;
(5) Drug addiction or habitual alcoholism of the respondent;
(6) Lesbianism or homosexuality of the respondent;
(7) Contracting by the respondent of a subsequent bigamous marriage, whether in the Philippines or abroad;
(8) Sexual infidelity or perversion;
(9) Attempt by the respondent against the life of the petitioner; or
(10) Abandonment of petitioner by respondent without justifiable cause for more than one year. For purposes of this Article, the term "child" shall include a child by nature or by adoption."

[40] Black's Law Dictionary 96 (9th ed. West 2009). "*A mensa et thoro*—from board and hearth[.] Effecting a separation of the parties rather than a dissolution of the marriage."

subsists notwithstanding the suspension of common marital life.[41] This is merely a separation of bed and board—that is why legally separated spouses who engage in sexual relations with others will have committed adultery or concubinage; or if they enter into another marriage, they will be guilty of bigamy.

The general rule is that although the divorce decree was valid in the place where it was obtained, and despite years of residence by the parties in the foreign country, a decree of absolute divorce obtained by Filipinos are not recognized in Philippine jurisdiction. Again, we see the application of Article 15 of the Philippine Civil Code earlier discussed.

The case of *Tenchavez v. Escano*[42] decided in 1965 encapsulates the law on the effect of a foreign divorce on Filipinos still prevailing to this day:

(1) That a foreign divorce between a Filipino is not entitled to recognition as valid in this jurisdiction; and neither is the marriage contracted with another party by the divorced consort, subsequently to the foreign d decree of divorce, entitled to validity in the country;
(2) That the remarriage of the divorced wife and her cohabitation with a person other than the lawful husband entitle the latter to a decree of legal separation conformably to Philippine law;
(3) That the desertion and securing of an invalid divorce decree by one consort entitles the other to recover damages.

To this rule, there are only two exceptions. First is where the marriage is between a foreigner and a Filipino and the divorce is "validly obtained abroad by the alien spouse" under Article 26 of the Family Code.[43] The second exception is found in the Code of Muslim Personal Laws ("CMPL"),[44] which recognizes divorces obtained from Shari'a courts by Muslims who were married under Muslim rites. It bears underscoring that for the exception to arise, the Muslim Filipinos must have been married and divorced under the CMPL. If they were instead married by a judge of a trial court, Court of Appeals or Supreme Court, it is the Family Code and not the CMPL

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41 Garcia v. Recio, G.R. No. 138322, Oct. 2, 2001. "[D]ivorces are of different types. The two basic ones are (1) absolute divorce or a vinculo matrimonii and (2) limited divorce or a *mensa et thoro*. The first kind terminates the marriage, while the second suspends it and leaves the bond in full force."

42 G.R. No. L-1967, Nov. 29, 1965.

43 FAMILY CODE, art. 26, ¶ 2. "Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall have capacity to remarry under Philippine law.

44 Pres. Dec. No. 1083 (1977). Code of Muslim Personal Laws.

which will apply. Hence, they will not be able to secure a divorce since no provision on divorce is contained in the Family Code.

At present, there is a significant number of cases decided by the Philippine Supreme Court on the issue of validity of a foreign divorce decree where at least one of the parties is a Filipino. The legal recognition given by that decree and its consequences have become one of the most challenging problems in Philippine Conflict of Laws.

Van Dorn v. Romillo[45] was a case which involved Alice Reyes Van Dorn, a Filipino citizen, and Richard Upton, an American citizen. They were married in Hong Kong in 1972 and established their residence in the Philippines where they raised their children. In 1982, they were divorced in the United States and thereafter, petitioner remarried in Nevada to Theodore Van Dorn. On 8 June 1983, Upton filed a suit against petitioner in the Pasay City court, alleging that Van Dorn's business in Manila was part of their conjugal property for which the latter should render an accounting and which the former had a right to manage.

In *Van Dorn v. Romillo*,[42] the Respondent moved for dismissal on the ground that the cause of action is barred by a previous judgment in the divorce proceedings before the Nevada Court wherein respondent had acknowledged that he and petitioner had no "community property". The Pasay Court denied the motion to dismiss. Because the property involved was located in the Philippines, the Court ruled that the foreign divorce decree had no bearing in the case. The pivotal issue in this case is whether the divorce is recognized as valid in the Philippines. The Philippine Supreme Court held: "[T]here can be no question as to the validity of that Nevada divorce in any of the States of the United States. The decree is binding on private respondent as an American citizen." It further explained that owing to the nationality principle embodied in Article 15 of the Civil Code, only Philippine nationals are covered by the policy against absolute divorces which are considered contrary to our concept of public policy and morality. It clarified:

> [A]liens may obtain divorces abroad, which may be recognized in the Philippines, provided they are valid according to their national law. In this case, the divorce in Nevada released private respondent from the marriage from the standards of American law, under which *divorce dissolves the marriage*.

[45] G.R. No. L-68470, Oct. 8, 1985.

The Court held that pursuant to his own national law, Upton was no longer the husband of Van Dorn and had no standing to sue to exercise control over conjugal assets:

> To maintain, as private respondent does, that, under our laws, petitioner has to be considered still married to private respondent and still subject to a wife's obligations under Article 109*, et seq*. of the Civil Code cannot be just. Petitioner should not be obliged to live together with, observe respect and fidelity, and render support to private respondent. The latter should not continue to be one of her heirs with possible rights to conjugal property. She should not be discriminated against in her own country if the ends of justice are to be served.

Similarly, the Court held in *Pilapil v. Ibay-Somera*[46] that where a foreign court has granted a divorce between Geiling, the German husband, and Pilapil, the Filipino wife, Geiling was no longer Pilapil's husband. That being the case, Geiling had no legal standing to commence an adultery case as an offended spouse.

The application of the second paragraph of Article 26 has likewise been tested in several cases involving the marriage of two Filipino citizens where one of them subsequently changes his/her citizenship. In the case of *Quita v. Court of Appeals,*[47] Fe Quita and Arturo Padlan, both Filipinos, were married in the Philippines in 1941. In 1954, Fe obtained a final judgment of divorce. After three weeks, she entered into another marriage which proved to be short-lived. Still in the US, she married for the third time. In the meantime, Arturo re-married in 1947 and had children by Blandina. When Arturo died, Blandina alleged that she was the surviving spouse of Arturo and, together with her children, claimed to be the heirs of Arturo in the intestate proceedings. In support of their contention, they submitted certified photocopies of the final judgment of divorce between Petitioner and Arturo.

During the trial, when asked whether she was an American citizen, Fe answered that she was an American citizen since 1954, the same year the decree of divorce was obtained. As a result, the trial court disregarded the divorce between Fe and Arturo which they obtained in 1954 and resolved that the marriage of Blandina and Arturo in 1947 was a bigamous marriage considered *void ab initio*. Consequently, Blandina was not a surviving spouse who can inherit from Arturo. On appeal, the Supreme Court held that the trial court must have overlooked the materiality of Fe's citizenship at the time of her divorce. Once proved that she was no longer a Filipino citizen at the time

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[46] G.R. No. 80116, June 30, 1989.

[47] G.R. No. 124862, Dec. 22, 1998.

of their divorce, she could very well lose her right to inherit from Arturo. But if Fe was still a Filipino citizen at the time of the divorce—the petition which she herself filed—the divorce decree validly terminated their marriage. The Court held that the question of Fe's citizenship had to be established in the trial court to determine her right to inherit from Arturo as his surviving spouse. As to Blandina, the Court held that having married Arturo while the prior marriage of Fe and Arturo was subsisting, her marriage to Arturo was bigamous and *void ab initio*. Consequently, she is not a surviving spouse that can inherit from him as this status presupposes a legitimate relationship.

The case of *Republic v. Orbecido*[48] is similar in that the spouses were both Filipino citizens at the time of their marriage but subsequently, the wife became a naturalized American citizen and divorced her Filipino husband. In determining the issue of whether the Filipino spouse can remarry, the Court concluded that "[p]aragraph 2 of Article 26 should be interpreted to include cases involving parties who, at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree." Otherwise, the Court said the result would be absurd and unjust. The Court likewise clarified that "the reckoning point is not the citizenship of the parties at the time of the celebration of the marriage, but their citizenship *at the time a valid divorce is obtained abroad* by the alien spouse capacitating the latter to remarry." Since Orbecido's wife was a naturalized American citizen at the time she obtained a valid divorce that capacitated her to remarry, Orbecido, the Filipino, was allowed to remarry.

Bayot v. Court of Appeals[49] is illustrative of the legal premises under which a foreign divorce is recognized in Philippine jurisdiction:

> First, a divorce obtained abroad by an alien married to a Philippine national may be recognized in the Philippines, provided the decree of divorce is valid according to the national law of the foreigner.
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> Second, the reckoning point is not the citizenship of the divorcing parties at birth or at the time of marriage, but their citizenship at the time a valid divorce is obtained abroad.

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[48] G.R. No. 154380, Oct. 5, 2005.

[49] G.R. No. 155635, Nov. 7, 2008.

> And third, an absolute divorce secured by a Filipino married to another Filipino is contrary to our concept of public policy and morality and shall not be recognized in this jurisdiction.[50]

This requires that the foreign judgment and its authenticity must be proven as facts in accordance with Section 24, Rule 132 of the Philippine Rules of Court. Aside from this, proof must be presented on the alien's applicable national law to show the effects of the judgment on the alien himself or herself.[51] This is the practical consequence of the legal maxim that courts do not take judicial notice of foreign judgments since "no sovereign is bound to give effect within its dominion to a judgment rendered by a tribunal of another country."[52]

In the recent case of *Republic v. Manalo*[53], the Court held that the purpose of the second paragraph of Article 26 referring to "a divorce thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry" is "to avoid the absurd situation where the Filipino spouse remains married to the alien spouse" who is no longer considered the spouse of the Filipino after the divorce. The Court held that:

> Based on a clear and plain reading of the provision, it only requires that there be a divorce validly obtained aboard. The letter of the law does not demand that the alien spouse should be the one who initiated the proceeding wherein the divorce decree was granted.

The recognition or non-recognition of foreign divorces, similar to the cases on validity or non-validity of marriages where at least one of the parties is a Filipino, defines the personal and property rights of the parties.

IV. EFFECTS OF MARRIAGE

A. Personal Relations Between the Spouses

Personal relations between the spouses include mutual fidelity, respect, cohabitation, support, and the name that the wife may use. These are governed by the personal law of the parties. If the spouses are of different nationalities, the personal law of the husband will generally prevail as long as such is not contrary to law, customs, and good morals of the forum. Our courts may also use the Most

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[50] *Id.*

[51] Corpuz v. Sto. Tomas, G.R. No. 186571, Aug. 11, 2010.

[52] *Id.*

[53] G.R. No. 221029, April 24, 2018.

Significant Relationship approach to decide the choice of law question, instead of using the traditional preference for the husband's personal law.

Article 69 of the Family Code gives both husband and wife the right to fix the family domicile. The court may find valid and compelling reasons to exempt one spouse from living with the other where, for instance, there is a legal impediment to the continued residence of the foreigner spouse in the Philippines. A case in point is *Djumantan v. Domingo*[54] where the Court decided the issue of whether an alien woman who married a Filipino in Indonesia has a right to stay in the Philippines permanently. The Court held that "there is no law guaranteeing aliens married to Filipino citizens the right to be admitted, much less to be given permanent residency, in the Philippines." It underscored that "the fact of marriage by an alien to a citizen does not withdraw her from the operation of the immigration laws governing the admission and exclusion of aliens." Hence, she is not excused from her failure to depart from the country upon the expiration of her extended stay in the Philippines.

It should be noted that *Djumantan* is a conflict of laws case since it has a foreign element—the nationality of the spouse—but that the Philippines is the only state interested in applying its law. Thus, the Philippine Court characterized the case as one of immigration rather than that of family law.

B. Property Relations Between Spouses

Article 74 of the Family Code lays down the governing law on property relations between the spouses, as follows:

> The property relationship between husband and wife shall be governed in the following order:
>
> (1) By marriage settlements executed before the marriage;
> (2) By the provisions of this Code; and
> (3) By the local custom.

A marriage settlement is a "written agreement regarding matters of support, custody, property division and visitation" upon separation of the couple.[55] The couple who is about to be married may enter into a pre-nuptial agreement that determines which properties, if any, will be owned jointly by the spouses, and which remain exclusive. They may also determine the share of each spouse upon division of the

[54] G.R. No. 99358, Jan. 30, 1995.
[55] Merriam Webster's Dictionary of Law (1996), 307.

properties jointly owned. For majority of Filipinos, however, preparing a marriage settlement is not a primary concern or common practice. In this situation, the presumed property regime is the system of absolute community of property ("ACP").[56] In this regime, all the properties owned by the spouses at the time of the celebration of the marriage, which necessarily means those properties each of them purchased when they were still single, as well as properties either one or both of them acquired during the marriage, belong to the community.[57] It is interesting to note that once a piece of property is proven to have been acquired during the marriage, there is a presumption in law that that property belongs to the community though the title to the property is in the name of only one of the spouses.[58] The spouse who asserts that such property is excluded from the community property has the burden to prove such claim.[59]

Under the Civil Code that was in effect from August 30, 1950 until August 2, 1988, the presumed property regime was the Conjugal Partnership of Gains ("CPG"). In this regime, the spouses retained ownership of their separate property[60] but they also place in a common fund the proceeds, products, fruits, and income of their separate property, and those acquired by either or both spouses through their efforts (e.g. work) or by chance (e.g. share in hidden treasure).[61] Although the same presumption applies that all properties acquired during the marriage belong to the

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[56] FAMILY CODE, art. 88.

[57] FAMILY CODE, art. 91.

[58] FAMILY CODE, art. 93.

[59] FAMILY CODE, art. 92. The following shall be excluded from the community property:

(1) Property acquired during the marriage by gratuitous title by either spouse, and the fruits as well as the income thereof, if any, unless it is expressly provided by the donor, testator or grantor that they shall form part of the community property;

(2) Property for personal and exclusive use of either spouse. However, jewelry shall form part of the community property;

(3) Property acquired before the marriage by either spouse who has legitimate descendants by a former marriage, and the fruits as well as the income, if any, of such property.

[60] FAMILY CODE, art. 110. "The spouses retain the ownership, possession, administration and enjoyment of their exclusive properties.

Either spouse may, during the marriage, transfer the administration of his or her exclusive property to the other by means of a public instrument, which shall be recorded in the registry of property of the place the property is located."

[61] FAMILY CODE, art. 106. "Under the regime of conjugal partnership of gains, the husband and wife place in a common fund the proceeds, products, fruits and income from their separate properties and those acquired by either or both spouses through their efforts or by chance, and, upon dissolution of the marriage or of the partnership, the net gains or benefits obtained by either or both spouses shall be divided equally between them, unless otherwise agreed in the marriage settlements."

CPG,[62] there are three distinct patrimonies formed in this system: the husband's capital property or properties he owned prior to the marriage; the wife's paraphernal property or properties she acquired before the marriage; and the conjugal property to which belong all properties acquired by either or both of the spouses from the precise moment of their marriage.[63] If funds belonging to one patrimony is used by the other, for instance, where the husband uses funds from the CPG to pay for his gambling debts he incurred before the marriage,[64] he must reimburse that amount to the CPG.

In the case of *Bayot v. Court of Appeals*,[65] Rebecca, an American citizen of Filipino descent married Vicente, a Filipino, in the Philippines in 1979. Their marital property regime was CPG, which was the presumed property regime in the Philippines in the absence of a prenuptial agreement. Years later, Rebecca filed a petition for divorce in the Dominican Republic. The Court issued a divorce decree which likewise settled their property relations in accordance with the ex-spouses' Agreement they contracted in Manila that the only property in their conjugal partnership was their home in the Philippines. She later filed before a Philippine court a petition for declaration of nullity of her marriage. Vicente invoked the foreign divorce decree and asked for the dismissal of the case. Rebecca insisted that she was a Filipino citizen and, therefore, the divorce decree she herself obtained was not valid unto her. This case reached all the way to the Supreme Court. The Court held that when the divorce decree was granted, Rebecca was not yet recognized as a Filipino citizen and that she had identified herself in all public documents as an American citizen. As such, she was bound by the laws of the US, which allows divorce. The Court also held that since the divorce decree was valid, the adjudication on the property relations of Rebecca and

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[62] FAMILY CODE, art. 116.

[63] FAMILY CODE, art. 109. "The following shall be the exclusive property of each spouse:

(1) That which is brought to the marriage as his or her own;
(2) That which each acquires during the marriage by gratuitous title;
(3) That which is acquired by right of redemption, by barter or by exchange with property belonging to only one of the spouses; and
(4) That which is purchased with exclusive money of the wife or of the husband."

[64] FAMILY CODE, art. 122. "The payment of personal debts contracted by the husband or the wife before or during the marriage shall not be charged to the conjugal partnership except insofar as they redounded to the benefit of the family.

Neither shall the fines and pecuniary indemnities imposed upon them be charged to the partnership.

However, the payment of personal debts contracted by either spouse before the marriage, that of fines and indemnities imposed upon them, as well as the support of illegitimate children of either spouse, may be enforced against the partnership assets after the responsibilities enumerated in the preceding Article have been covered, if the spouse who is bound should have no exclusive property or if it should be insufficient; but at the time of the liquidation of the partnership, such spouse shall be charged for what has been paid for the purpose above-mentioned."

[65] G.R. No. 155635, Nov. 7, 2008.

Vicente was binding, and that Rebecca could no longer claim that there were other properties belonging to the conjugal partnership.

Though no longer the presumed marital property regime, the CPG may be the governing property regime if indicated in the pre-nuptial agreement.

Another regime that may be chosen by the spouses-to-be is the regime of separation of property.[66] In this property regime, each spouse has complete control and ownership of his or her own properties including his or her salary, other earnings from practice of one's profession, and "all fruits natural, industrial or civil due or received during the marriage from his or her separate property."[67] This regime espouses the motto, "to each his own" (*Suum cuiqui*) and consequently, each spouse is empowered to "mortgage, encumber, alienate or otherwise dispose of his or her exclusive property" without having to secure the consent of the other spouse.[68] However, expenses of the family including expenses for food, utilities, and education of children are borne by the spouses "in proportion to their income, or, in case of insufficiency or default thereof, to the current market value of their separate properties."[69]

The Philippine conflict of law rule on property relations between spouses is found in Article 80 of the Family Code:

> Art. 80. In the absence of a contrary stipulation in a marriage settlement, the property relations of the spouses shall be governed by Philippine laws, regardless of the place of the celebration of the marriage and their residence. This rule shall not apply:
>
> (1) Where both spouses are aliens;
> (2) With respect to the extrinsic validity of contracts affecting property not situated in the Philippines and executed in the country where the property is located; and
> (3) With respect to the extrinsic validity of contracts entered into in the Philippines but affecting property situated in a foreign country whose laws require different formalities for its extrinsic validity.

Applying Article 81, the property relations of the spouses, one of whom is a Filipino citizen and the other a foreigner, are governed by Philippine law whether the

[66] FAMILY CODE, art. 143.
[67] FAMILY CODE, art. 145.
[68] Rep. Act No. 10572, § 2, amending art. 111 of the Family Code.
[69] FAMILY CODE, art. 146.

Filipino is the husband or the wife. In accordance with the principle of immutability, their property regime will remain unaltered by any change in their nationality subsequent to the marriage.[70]

A conundrum will arise if the personal law of the alien spouse has a provision identical to the Philippines in that it mandates the application of their law on marital property regimes unless both spouses are aliens. To illustrate, take a situation where one of the spouses is a citizen of the Philippines, which is State A with an absolute community of property regime, and is married to an alien from State B that follows the complete separation of property regime. Presume that both States A and B provide that their domestic law applies unless both are aliens. This gives rise to a real conflict of laws since according to the law of State A, all properties acquired by the spouses prior to and during the marriage are equally owned by the spouses irrespective of who purchased these properties. However, according to the laws of State B, the spouse who acquired the property owns it exclusively. Following the traditional approach, it is likely that the issue of ownership of property will depend on whether the court before which the case is brought will apply its own law. However, the use of a policy-centered approach could provide a less uncertain result. For instance, the most significant relationship approach, which will look at factors that will establish the center of the relationship such as where the marital or family abode is, will point to the application of that state law.

Likewise, the intersection of conflict of law rules in family law and property law will present interesting legal problems. In this situation, two provisions of the Philippine Civil Code are relevant. First is Article 15 that applies the *lex nationalii*, in relation to Article 81 of the Family Code which fixes the law on marital property relations. Second is Article 16 of the Civil Code which states that immovable and movable properties are governed by the *lex rei sitae*.

Let us consider now a situation where two Filipinos get married in Texas, which is a community property state. During their marriage, the husband purchases a property in Michigan, a non-community property state. Will that property be owned by the husband alone or will it be part of his absolute community of property that is the marital property regime in both the Philippines and Texas?

As of yet, there is no Philippine authority found on this legal point. However, there are two possible solutions. One is that the rights to immovables are determined by the law of the place where the property is situated or *lex rei sitae*. The laws governing their property relations, which in this case presumes that all properties

[70] Rabel, *supra* at 384-386.

acquired during the marriage belong to the spouses jointly, do not apply. The application of *lex rei sitae* may be justified, whether the court uses a traditional or modern approach to choice-of-law. The conventional wisdom for the *lex rei sitae* is that the "immovable property as an isolated object of rights"—thus, the State where it is situated exercise power over it, including the decision of the validity and effects of the transfer of property.[71] On the other hand, the policy-centered rationale for applying the *lex rei sitae* is that the property being physically a part of the State makes that State most closely and significantly related to the property. Thus, it should be subject to the laws thereof.[72]

An alternative answer is that since the state of nationality and the state of matrimonial domicile are community property states, then any subsequently acquired property is community property in accordance with the *lex nationalii* and/or *lex domicilii*. Since absolute community property laws provide that all properties including the salaries and compensation of the spouses go to the community, then funds that the husband used to purchase the land in Michigan are likewise community funds. This second option is the more logical and sound solution.

V. PROPERTY RELATIONS OF UNMARRIED COHABITANTS

The Family Code likewise provides for rules that govern property regimes of unions without marriage. The Code distinguishes between the property relations of unmarried cohabitants who have no legal impediments to marry but choose not to marry, on one hand, and those who are barred from marrying because of an existing impediment. The first situation is governed by Article 147[73] and the second by Article

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[71] Coquia AND AGUILING-PANGALANGAN, *supra* note 28 at 301.

[72] *Id.,* at 302.

[73] FAMILY CODE, art. 147. "When a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.

In the absence of proof to the contrary, properties acquired while they lived together shall be presumed to have been obtained by their joint efforts, work or industry, and shall be owned by them in equal shares. For purposes of this Article, a party who did not participate in the acquisition by the other party of any property shall be deemed to have contributed jointly in the acquisition thereof if the former's efforts consisted in the care and maintenance of the family and of the household.

Neither party can encumber or dispose by acts *inter vivos* of his or her share in the property acquired during cohabitation and owned in common, without the consent of the other, until after the termination of their cohabitation.

When only one of the parties to a void marriage is in good faith, the share of the party in bad faith in the co-ownership shall be forfeited in favor of their common children. In case of default of or waiver by any or all of the common children or their descendants, each vacant share shall belong to the respective

148.[74] The differences between these provisions are examined in *Nicdao Cariño v. Yee Cariño*.[75] In that case the Court held that since the marriage of Carino to Susan Nicdao was void for lack of a marriage license, Article 147 of the Family Code governs. The Court held:

> This article applies to unions of parties who are legally capacitated and not barred by any impediment to contract marriage, but whose marriage is nonetheless void for other reasons, like the absence of a marriage license.
>
> In contrast to Article 148, under the foregoing article, wages and salaries earned by either party during the cohabitation shall be owned by the parties in equal shares and will be divided equally between them, even if only one party earned the wages and the other did not contribute thereto. Conformably, even if the disputed "death benefits" were earned by the deceased alone as a government employee, Article 147 creates a co-ownership in respect thereto, entitling the petitioner to share one-half thereof[.]

As to the second marriage that was bigamous for having been entered during the subsistence of the marriage of Nicdao and Cariño, the Court applied Article 148:

> Under Article 148 of the Family Code, which refers to the property regime of bigamous marriages, adulterous relationships, relationships in a state of concubine, relationships where both man and woman are married to other persons, multiple alliances of the same married man, [...] the properties acquired by the parties through their actual joint contribution shall belong to the co-ownership. Wages and salaries earned by each party belong to him or her exclusively. Then too, contributions in the form of

surviving descendants. In the absence of descendants, such share shall belong to the innocent party. In all cases, the forfeiture shall take place upon termination of the cohabitation."

[74] FAMILY CODE, art. 148. "In cases of cohabitation not falling under the preceding Article, only the properties acquired by both of the parties through their actual joint contribution of money, property, or industry shall be owned by them in common in proportion to their respective contributions. In the absence of proof to the contrary, their contributions and corresponding shares are presumed to be equal. The same rule and presumption shall apply to joint deposits of money and evidences of credit. If one of the parties is validly married to another, his or her share in the co-ownership shall accrue to the absolute community or conjugal partnership existing in such valid marriage. If the party who acted in bad faith is not validly married to another, his or her shall be forfeited in the manner provided in the last paragraph of the preceding Article.

The foregoing rules on forfeiture shall likewise apply even if both parties are in bad faith."

[75] G.R. No. 132529, Feb. 2, 2001.

care of the home, children, and household, or spiritual or moral inspiration, are excluded in this regime.

The case of *San Luis v. San Luis*[76] involved the settlement of the estate of Felicisimo San Luis who married three times. When his first wife Virginia died, he married an American, Merry Lee. When the second marriage ended in divorce, he married Felicidad, the Respondent in this case. Upon the death of Felicisimo, Felicidad sought the dissolution of their conjugal partnership assets. The children of the first marriage contested this on the ground that the marriage of Felicidad and Felicisimo was void, since the divorce between him and his American wife was not valid in the Philippines. The Court held that "if respondent fails to prove the validity of both the divorce and the marriage, the applicable provision would be Article 148 of the Family Code." It expounded on the property regime that governs unmarried cohabitation:

> The regime of limited co-ownership of property governing the union of parties who are not legally capacitated to marry each other, but who nonetheless live together as husband and wife, applies to properties acquired during said cohabitation in proportion to their respective contributions. Co-ownership will only be up to the extent of the proven actual contribution of money, property or industry. Absent proof of the extent thereof, their contributions and corresponding shares shall be presumed to be equal.

Philippine law is consistent in disallowing donation[77] and sale of properties between spouses and "persons living together as husband and wife without a valid marriage."[78] The rationale for this prohibition is that "the vulnerability of an individual, married or in unmarried cohabitation, to the undue influence or coercion of or a genuine desire to please his or her loved one might be exploited by the latter. Even to his or her own disadvantage the more trusting or submissive partner may end up donating all of his or her properties to the other."[79] In *Matabuena v. Cervantes*,[80]

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[76] G.R. No. 133743, Feb. 6, 2007.

[77] FAMILY CODE, art. 87. "Every donation or grant of gratuitous advantage, direct or indirect, between the spouses during the marriage shall be void, except moderate gifts which the spouses may give each other on the occasion of any family rejoicing. The prohibition shall also apply to persons living together as husband and wife without a valid marriage."

[78] CIVIL CODE, art. 1490.

[79] COQUIA AND AGUILING-PANGALANGAN, *supra* note 28 at 337.

[80] G.R. No. L-28771, Mar. 31, 1971.

the Court explained that "the dictates of morality require that the same prohibition should apply to a common law relationship."

The notion that this rule is simple to apply because it is consistent is debatable. If cohabitation is between an alien and a Filipino citizen, the validity of the donation will not necessarily be governed by Philippine law. Recall that Article 80 of the Family Code that dictates the application of Philippine laws pertains only to property relations of married couples. Philippine laws do not mandatorily govern the property relations of unmarried cohabitants. And although there is a specific rule that prohibits donation and sale between persons cohabiting without a valid marriage, the Philippine Family Code and Civil Code are not necessarily the controlling law. Hence, where the donor is an alien whose national or domicile law does not proscribe donating to one's partner, and if by the law of the place of donation this is valid, there is no legal obstacle for the Filipino donee to accept such donation. If, however, the donation is made in the Philippines, this could be repelled by a claim that the acceptance of the donation by the Filipino would offend the public policy of the Philippines.

SOME PRINCIPLES OF INDONESIA MARITAL PROPERTY LAW: STUDY OF MIXED MARRIAGE COUPLES

ABDUL SALAM*

I. INTRODUCTION

Marriage in Indonesia is closely related not only to religion but also to law. The legal consequences of marriage can be seen in the legal rights and obligations of husbands, wives, and offspring born in the marriage, as well as in marital property relations. Marital property, which is governed by Law No. 1/1974 on Marriage ("Marriage Law"), is divided into two types, namely: personal property and common property.

As time passed and the need for developing marriage laws in Indonesia arose, the Constitutional Court issued Decision No. 69/PUU-XIII/2015. This ruling has had a major impact on the Marriage Law. It permitted the making of a marriage agreement even after the marriage has been solemnized. On the contrary, Article 29 of the Marriage Law only recognized marriage agreements made before or at the time of solemnizing the marriage.

According to the decision, a marriage agreement made after the marriage ceremony is valid if the agreement is authorized by the marriage registrar or notary, after which its contents also apply to third parties, as long as such parties are involved.

The contents of the marriage agreement may concern the marriage property or any other agreement. In principle, it cannot be changed or revoked unless both parties agree to amend or withdraw the same. However, any amendment to or withdrawal from the marriage agreement should not injure third parties.

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1. Marriage Law in Indonesia A. Marriage Law in Indonesia

1.1. Marriage Law in General

1.1.1. Elements of Marriage Institutions in Indonesia a. Elements of Marriage Institutions in Indonesia

Article 1 of the Marriage Law defines marriage as "a relationship of body and soul between a man and a woman as husband and wife with the purpose of establishing a happy and lasting family (household) founded on belief in God Almighty."[1] Further explanation of the article clarifies that as a State based on *Pancasila*, where the first *Sila* is belief in the One Supreme, marriage has a very close relationship with religion/spirituality, so that marriage has not only the birth/physical element, but also the mind/spiritual element. The rights and obligations of parents include establishing a happy family, producing offspring which is the purpose of marriage, and maintaining and educating them.

Based on the formulation of Article 1 of the Marriage Law it can be understood that the elements of marriage institutions are: (a) inner bonds; (b) between a man and a woman; (c) as husband and wife; (d) forming a happy and lasting family (household); and (f) based on the One Supreme Godhead.

The first element of marriage is an inner bond. This means that the marital bond does not involve either bonds of birth or inner bonds alone. Rather, both must be closely integrated. Birth bond is a visible bond and reveals a legal relationship between a man and a woman who live together as husband and wife. The birth bond is referred to as a formal bond. Formal relations are real and bind husband and wife, as well as third parties. On the other hand, inner bonds are unseen, unreal ties which can only be felt by the party concerned.[2]

The second element of marriage requires that it only occur between husband and wife. This suggests that marriage can only be between a man and a woman. Marriages other than that are marriages between individuals of the same sex which are not possible or permitted in Indonesia. In addition, this second element indicates a related monogamous principle.[3]

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[1] Indonesia, *Undang-Undang Tentang Perkawinan,* UU No. 1 Tahun 1974, TTLN No. 3400, art. 1.

[2] R. Soetojo Prawirohamidjojo, *Pluralisme dalam Perundang-undangan Perkawinan di Indonesia*, Airlangga University Press, 1988, p. 38.

[3] *Id.*

The third element of the institution of marriage is the bond between a man and a woman seen as a marriage bond in a legitimate marriage. A marriage is legal when it meets the conditions prescribed by law. Under Indonesian law, the legal requirement of a marriage is divided into internal and external terms. Internal requirements relate to the parties who make a marriage, namely their agreement, skills, and the consent of the other party to marry. In contrast, external conditions are associated with the formalities that must be fulfilled in marriage.

The fourth element of the institution of marriage is forming a family, or a happy and eternal household. This element is the purpose of marriage itself. The families referred to in this case consist of fathers, mothers, and children who are the basic units of Indonesian society.

Lastly, the fifth element of marriage is a close relation to religion or spirituality. Marriage not only has a birth/physical element, but also a mind/spiritual element.[4]

In addition to the elements of marriage under the Marriage Law in Indonesia, there are also rules concerning the validity of a marriage. Marriage is a legal act that causes legal effects as well. The consequences of this law are very closely related to the validity of the act of law itself. For example, an unauthorized marriage will result in the birth of an illegitimate child.

According to Article 2, paragraph (1) of the Marriage Law, a marriage is valid if it is done according to the law of a person's religion and belief. This includes the provisions of legislation applicable to each religious class and belief, as long as it does not contradict the Marriage Law. In this regard, Hazairin states that it is not possible for a person to marry by breaking his or her own religious law.[5]

1.1.2. The Formal Validity of Marriage

Article 2, paragraph (2) of the Marriage Law stipulates that each marriage shall be recorded according to prevailing laws and regulations. The purpose of the recording is not explained. In the General Explanation, it is only said that recording each marriage is the same as recording important events in a person's life, such as birth and death. It can be said that the marriage recording aims to make the marriage event clear. The act of recording does not define the validity of a marriage, but states that the marriage event did exist and take place. Thus, it is purely administrative.[6] Supreme Court Jurisprudence No. 1776 K/Pdt/2007 reinforces this, where it was held that the

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[4] *Id.* at 43.

[5] Sudarsono, *Hukum Perkawinan Nasional*, Penerbit Rineka Cipta, 2005, p. 10.

[6] *Id.* at 17.

marriage between Tjia Mie Joeng and Lion Tjoeng Tjen, which was done customarily but not recorded on civil registration, was legally valid.

The terms of marriage are set forth in Articles 6 through 12 of the Marriage Law. Article 6, paragraph (1) provides that marriage shall be based on the consent of the two prospective spouses. The existence of the agreement means that a solid foundation has been set up to foster a family and a household. This article disallows the practice of forced marriages.[7]

Article 6, paragraphs (2), (3), (4), (5), and (6) require the consent of both parents/guardians for the prospective spouse who is not yet 21 years of age. This is because marriage does not merely unite the two spouses as husband and wife, but also unites the family of the bridegroom and the family of the bride. Additionally, a child who is not yet 21 years old is still inexperienced with life. Thus, such a covenant is necessary for the purpose of marriage to be realized.[8]

Regarding age limit, Article 7, paragraph (1) of the Marriage Law stipulates that a man must have reached the age of 19 years and a woman must have reached the age of 16 years in order to be allowed to marry. If a prospective spouse has not yet reached the requisite age to marry, a dispensation from a court or other official is required.[9]

Articles 8, 9, and 10 determine marriages that are prohibited. These can be classified into seven kinds, namely:

(a) the existence of blood relations;
(b) a relationship of *semenda*;
(c) the existence of a relationship;
(d) the existence of a relationship in a polygamous marriage;
(e) those restricted by religion;
(f) those where a prospective spouse is still bound in marriage; and
(g) those where a prospective spouse has been divorced both times.

Chapter 11 also sets the waiting time for a woman who broke up her marriage. As such, a woman who broke up her marriage may not immediately marry again, but must defer until the requisite waiting time is up.[10]

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[7] *Id.* at 25.

[8] Akhmad Munawar, Al' Adl Volume VII Nomor 13, Januari-Juni 2015: Sahnya Perkawinan menurut Hukum Positif yang Berlaku di Indonesia.

[9] K. Wantjik Saleh, *Hukum Perkawinan Indonesia*, p. 26.

[10] *Id.* at 27.

1.2. Mixed Marriage Couples in Indonesia

Mixed marriage occurs because of the plurality of marriage laws and the meeting of two or more marriage legal systems. Article 57 of the Marriage Law defines a mixed marriage as one between two persons in Indonesia subject to different laws because of their difference in citizenship. Given that the restrictions apply only to couples with differences in citizenship, marriages between couples of different classes or religions, but who are both Indonesian citizens, are not considered as mixed marriages.

Under Article 59, paragraph (2) of the Marriage Law, a mixed marriage in Indonesia shall take place under the applicable law of marriage in Indonesia. Similarly, all the requirements of their marital matters must also be based on the Marriage Law in Indonesia. Article 2, paragraph (1), which is based on religious law, as well as Articles 6 to 12 likewise apply.[11]

For the material requirement, additional conditions must be complied with by foreign nationals. Foreign citizens who wish to enter into a mixed marriage must fulfill all the requirements stipulated by the law of their respective countries.[12] This must be evidenced by obtaining information from the embassy in the form of a certificate of non-impediment to marriage or a certificate of ability to marry. This document verifies that the person concerned has no obstacle to marry under its domestic law. In addition, foreign nationals must also present:

(a) A certificate of admission to Islam for new converts to Islam;
(b) A Letter of Self-Check (STMD) from the residence service for those who have the status of a tourist, or a Permit Stay (KITTAP / KITAS) for those who have the status of a resident;
(c) A photocopy of tax for foreign nationals;
(d) A divorce/death certificate from the relevant civil registry office which must be translated into Indonesian, for widows/widowers;
(e) A permit from the police; and
(f) Six (6) sheets of 3x4 cm-sized photographs.

Article 61 of the Marriage Law prescribes that the mixed marriage certificate shall be signed by the competent recording officer. In this case, it is the Office of Religious Affairs for Muslim couples or Civil Registry Offices for Non-Muslim religious partners. Article 56, paragraph (2) provides that for marriages held abroad, the husband and wife must register their marriage certificate at the Marriage

[11] *Laporan Akhir Pengkajian Hukum Tentang Perkawinan Campuran (Dalam Hukum Perdata Internasional)*, Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1994, p. 28.

[12] J. Prins, *Tentang Hukum Perkawinan di Indonesia*, cet. I, (Jakarta: Ghalia Indonesia, 1982), p. 80-81.

Registering Office with jurisdiction over their domicile, within one year of returning to Indonesia.

The Marriage Law does not mention the legal consequences of mixed marriage matters to the parties that have married or to the future combatants. Articles 58 and 59 only determine the effect on citizenship.[13]

Mixed marriages may cause a change in citizenship. Law No. 12/2006 on Citizenship of the Republic of Indonesia ("Citizenship Law") regulates the effect of mixed marriages entered into by Indonesian women with male foreign citizens. Article 26, paragraph (1) of the Citizenship Law states that an Indonesian woman who marries a male foreign national may lose the Indonesian citizenship if, according to the law of the country of origin of her husband, the citizenship of the wife follows that of the husband as a consequence of the marriage. Similarly, paragraph (2) thereof states that an Indonesian man who marries a female foreign national may lose Indonesian citizenship if, under the laws of his wife's country of origin, the nationality of the husband follows that of the wife after their marriage.

Should the Indonesian spouse wish to retain his or her Indonesian citizenship, the aforementioned spouse may submit a declaration of his or her wish to the Official or Representative of the Republic of Indonesia which has jurisdiction over the domicile of the concerned spouse, unless the filing results in the dual citizenship of the applicant.

Mixed marriages only affect immovable objects, as land cannot be owned by a husband or wife who is a foreign citizen. This is in accordance with Article 21, paragraph (1) of Law No. 5/1960 on Basic Regulations of Agrarian Principles or the Basic Agrarian Law ("BAL").

2. Marital Property Law and Marriage Settlements in Indonesia

2.1. Indonesian Marital Property Law

2.1.1. Indonesian Property Law in General

The notion of property itself can be found in Article 499 of the Civil Code which states that "the so-called property is, every goods and every right, which can be controlled by property rights." On the other hand, the law of property is a collection of all kinds of rules of law about objects. Property law under the Civil Code embraces a

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[13] *Id.* at 30.

closed regulatory system, which means that a person cannot establish new property rights other than those set forth in Book II of the Civil Code.

The Civil Code distinguishes objects into several types, as follows:

(a) Object-bodied/tangible;
(b) Consumable and non-consumable;
(c) Objects that already exist and objects that do not, such as tone;
(d) Items within and outside of trade;
(e) Replaceable and non-replaceable;
(f) Registered and unregistered; and
(g) Movables and immovables.

Property rights are absolute rights. As such, property rights attach to an object, giving direct power over the object which can be defended against the world. The right to own property according to the Civil Code is the right of control (*bezit*) and property rights (*eigendom*).

According to Article 529 of the Civil Code, the right to master or *bezit* includes the right to control a material, either by oneself or through the intercession of others, and the right to retain or enjoy it as its possessor. On the other hand, the right of *eigendom* or proprietary rights under Article 570 of the Civil Code is the right to enjoy and dispose of a material freely, provided it is not contrary to law, general rules stipulated by the competent authority, or with the rights other people. Notwithstanding, such rights may be revoked in the public interest based on the provisions of law and with payment of indemnity.

The dualism of Indonesian Land Law ended with the revocation of Article II of the Civil Code regarding the earth, water, and natural resources contained therein, as well as the stipulation that *Adat* Law becomes the basis of the new Land Law as stated in Article 5 of the Basic Agrarian Law. Thus, Land Law was unified, which according to the UUPA is "in accordance with the ideals of national unity." With the enactment of the Basic Agrarian Law, the rights regulated in the Civil Code in relation to the land are no longer valid, including all the property rights and other material rights to land and land-related objects.

Agrarian law in the broad sense is a set of laws governing the right of control over natural resources including the earth, water, and space as well as the natural wealth contained in it. Agrarian law in the strict sense (Land Law) is a set of laws governing the control of the land surface. Land tenure is a legal relationship authorizing the legal subject (person/legal entity) to act with regard to the legal object (land) under his control.

Tenure of land based on its authority can be divided into:

(a) The right to control land which has special authority, namely public and civil authority; and
(b) The tenure of land which gives authority of a general nature and authority in the civil nature in the control and use of land in accordance with the types of land rights granted (Individual Rights over Land).

Individual rights to land consist of:

(a) Land rights; and

    (1) Primary land rights: Property rights, *Hak Guna Bangunan*, *Hak Guna Usaha*, and *Hak Pakai*
    (2) Secondary Land Rights: Right to Build, Right to Use, Lease Rights, Right of Profit-Sharing, Pawn Rights, and Right to Ride.

(b) Warranty Rights to Land: Right of ownership of land which does not authorize its holder to use the land it owns but gives authority to sell the land through auction if the land owner defaults.

The Basic Agrarian Law prohibits foreign citizens from owning land rights as provided for in Article 21. Under Article 42 of the Basic Agrarian Law, the right to land, which may be controlled by legal subjects of foreign nationals domiciled in Indonesia, is the right to use.

2.1.2. Marital Property Law in Indonesia

Marriage is a legal relationship that affects both parties, the husband and the wife, with regard to property acquired during marriage, as well as the status and position of their offspring. In marriage, there is marital property. Such property is derived from property acquired prior to and throughout the marriage. Marital property becomes the material basis for family life.

Article 66 of the Marriage Law provides that after its effectivity, other laws regulating marriage to the extent provided for in the former shall be declared null and void. Consequently, matters relating to marital property are regulated by the Marriage Law which is supplemented by the provisions under the Indonesian Compilation of Islamic Laws for Muslims ("ICIL").

2.2. Marriage Settlements in Indonesia

2.2.1. Marriage Settlement in Indonesia before the Constitutional Court Decree No. 69/PUU-XIII-2015

2.2.1.1. Definition of Marriage Settlement

Marriage agreements are also known in the community as pre-marriage agreements. Neither the Book of Civil Law nor the Marriage Law defines what a marriage agreement is. Marriage agreements are often confused with the mating pledge, or the promise to marry or promise to propose. Therefore, the definition of the marriage agreement must be discussed first.

Wahyono Darmabrata defines the marriage agreement as an agreement made by future husbands and future wives to regulate their rights and obligations over individual property brought into the marriage to deviate from the principle of mixing around.[14] Wirjono Prodjodikoro is of the opinion that the marriage agreement is defined as a legal relation of wealth property between two parties, in which either party promises or is considered to promise to do something, while the other party has the right to demand the execution of the agreement.[15] R. Subekti argues that a marriage agreement is a treaty on the property of a married couple during their marriage that deviates from the principle or pattern established by law.

The marriage agreement can also be interpreted as an agreement[16] made by a married couple before or at the time of marriage which regulates the effects of marriage on their property.

Although the Marriage Law determines that a marriage agreement can only be made before or at the time of marriage, there is a Decision of the East Jakarta District Court 2173/Pdt.P/2012/PNJkt.Tim which allows marital agreements to be made even after the marriage takes place. The decision contemplates a situation where the reason for filing it is the ignorance of the married couple concerning the making of marriage agreements before marriage, and the married couple are at risk of burdening their personal property. In this decision, the Judge filled the legal void on marital agreements entered into within the life of the marriage, with the purpose of protecting the property of the spouses.

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[14] Wahyono Darmabarata, *Perjanjian perkawinan dan Pola Pengaturannya dalam Undang-Undang Perkawinan,* Hukum dan Pembangunan, 1996, No. 1 Year XXVI, p. 21.

[15] Wirjono Prodjodikoro,Hukum Perkawinan di Indonesia, (Jakarta: Sumur Bandung, 1981), p. 8.

[16] R. Subekti, Pokok-Pokok Hukum Perdata, (Jakarta: Intermasa, 1995), p. 9.

2.2.1.2. Purposes of a Marriage Settlement

Establishing a marriage agreement is a preventive measure to anticipate conflict before marriage. The purpose of making a marriage contract is to regulate the effects of marriage on property relations.[17] In general, a marriage agreement is made:[18]

(a) Where there is a greater amount of wealth on one side of the other; or
(b) Where both parties each bring considerable input.

The purposes of making a marriage contract are, among others, to:[19]

(a) Restrict or completely exclude property togetherness by law;
(b) Organize gift-giving from husband to wife or vice versa and reward gift between husband and wife (in relation to Article 168 of the Indonesian Civil Code);
(c) Limit the right of the husband on the common property as determined by Article 124, paragraph (2) of the Indonesian Civil Code, so that without the help of his wife, the husband cannot act. This also applies to movable or immovable bodies carried by a wife or are immobile throughout the marriage in the name of a wife;
(d) Arrange testimony from husband to wife or vice versa, or as mutual grant (as governed by Article 169 of the Civil Code);
(e) Arrange gift-giving by a third party to the husband or the wife (as stipulated in Article 176 of the Civil Code); and
(f) Arrange testimony from a third party to the husband or the wife (as regulated in Article 178 of the Civil Code).

In addition, there are also considerations in entering into a marriage agreement, namely:[20]

(a) In marriages with common property: in order for the wife to be protected from possible misconduct of the husband concerning the immovable and movable property that the wife brought into marriage; and

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[17] Soetojo Prawirohamidjojo, *Hukum Orang dan Keluarga*, (Surabaya: Airlangga University Press), p. 87 melalui Haedah Faradz, *Tujuan dan Manfaat Perjanjian Perkawinan* dalam Jurnal Dinamika Hukum Vol. 8 No. 3, 2008, Fakultas Hukum Universitas Jenderal Soedirman.
[18] Haedah Faradz, *Tujuan dan Manfaat*, p. 250-251.
[19] Soetojo Prawirohamidjojo dan Martalena Pohan, *Hukum Orang dan Keluarga,* (Surabaya: Airlangga University Press, 2000), p. 74-75.
[20] J. Satrio, *Hukum Harta Perkawinan,* p. 148-149.

(b) In marriages with separate property: for certain goods or all goods brought by husbands or wives into the marriage not to enter into the union of marital property and thus remain private property.

In cases of personal property, the wife can act thereon regardless of the management of the husband. This shall be expressly stipulated in the marriage agreement.

2.2.1.3. Requirements of a Marriage Settlement

The conditions for the validity and the applicability of marriage agreements can be divided into three categories:

(a) Requirements about person

As a contract, marriage agreements must also fulfill the requirements for valid contracts under Articles 1320 to 1337 of the Indonesian Civil Code. The spouses must have the legal capacity to enter into a contract. The spouses must be adults who are not under guardianships. In order to determine maturity, reference may be made to some rules given differences depending on what legal deeds are done.

Article 1330 of the Indonesian Civil Code provides that an adult is 21 years old. Article 7 of the Marriage Law provides that the age of marriage for men is 19 years and for women is 16 years, while Article 47, paragraph (1) of the law stipulates that children who have reached the age of 18 years are no longer under the authority of a parent or guardian. Thus, when referring to Article 7, those who are competent to marry should also be able to make a covenant. On the other hand, when referring to Article 47, a child who has attained the age of 18 is considered capable of legal action.

Article 39, paragraph (1) of Law No. 30/2004 regarding Position of Notary requires that those who appear must be:[21]

(1) At least 18 years of age or married; and
(2) Capable of legal action.

[21] Indonesia, *Undang-undang Jabatan Notaris,* UU No. 30 year 2004, LN No. 117 year 2004, TLN No. 4432.

Given the differences above, the solution offered is that a marriage contract may be made by parties who are minors, provided that:[22]

(1) The person concerned is eligible for marriage;
(2) The party is assisted by persons whose permission is required for marriage (The assistance herein is not representative of persons granting permission to marry in the form of signing a marriage agreement or written permission which states the consent of the marriage agreement. This is a logical consequence of the provisions of Article 6, paragraph (2) of Law No. 1/1974 stating that a person under the age of 21 if wishing to marry must first obtain permission from a parent); and
(3) If the marriage takes place with the permission of the judge, then the plan of the marriage agreement must be approved by the court.

(b) Requirement of marriage agreement and its validity

Articles 1330 to 1337 of the Indonesian Civil Code does not specify whether agreements should be written or not. However, marriage agreements in particular must be written as stipulated in the Indonesian Civil Code and Law No. 1/1974.

Article 147 of the Indonesian Civil Code provides that marriage agreements must be set forth in the form of notarial deeds. If this is not met, then there is a threat of irritation. On the other hand, the Marriage Law does not require notarization. Article 29 thereof does not limit the form of the marriage agreement to be authentic or under the hand. However, it must be authorized by the Employee of Marriage. The decision of Constitutional Court No. 69/PUU-XII/2015 affirms that a candidate for marriage has the option of passing a marriage agreement to a marriage or notarial employee.

The marriage agreement may also relate to a third party other than the married couple. Article 152 of the Indonesian Civil Code provides for the registration of a marriage agreement to the Court Clerk in order to allow third parties the opportunity to know and ascertain their interests. If a marriage agreement has not been registered, a third party may consider that he or she is not aware of the marriage agreement.[23]

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[22] J. Satrio, *Hukum Harta Benda Perkawinan,* (Bandung: Citra Aditya Bakti, 1991), p. 151.

[23] R. Soebekti, *Kaitan Undang-undang Perkawinan dengan Penyusunan Hukum Waris*, Kertas Kerja Simposium Hukum Waris Nasional di Jakarta, 1983, p. 38.

(c) The term of marriage agreement

The Indonesian Civil Code provides that the focus of marriage contracts is to give freedom to married couples to make aberrations of the basic form of marital property, which is a unified union with several restrictions of the law.[24] Marriage agreements, like other agreements, may not contain forbidden causes because they are prohibited by law, or are contrary to morality and public order.[25]

2.2.1.4. Variety of Marriage Agreements under Indonesian Law

(a) Profit and Loss Joint Marital Property

Article 155 of the Indonesian Civil Code states that if a prospective couple agrees that between them there will be a unity of profit and loss, then such provision is assumed to mean that between the parties there shall be no unity of property unanimously, while the profits earned and the losses suffered throughout the marriage shall be divided between husband and wife.[26] The existence of a profit and loss association can occur because the parties expressly commit it in their marriage agreement, or the parties only agree that between them there is no unity of property.[27] With such agreements the following property groups are formed:[28]

(1) Limited marital property, in the form of profit and loss union;
(2) Husband's personal property; and
(3) Wife’s personal property.

(b) Joint Marriage Property Regarding Income

The provision regulating this form of marriage agreement is in Article 164 of the Indonesian Civil Code. In this form, husbands and wives are given the right to make calculations with the unity of results and income, but with the limitation that the amount should not exceed the existing assets in unity. The unity of yield and income is almost equal to the unity of profit and loss, only with

[24] Oetari Darmabrata, *Hukum Perdata I,* p. 219.
[25] J. Satrio, *Hukum Harta Benda Perkawinan*, p. 157.
[26] J. Satrio, *Hukum Harta Perkawinan*, p. 174.
[27] *Ibid*, p. 176.
[28] *Ibid*, p. 175.

the restriction that the debts that exceed the assets of the unity of yield and income are borne by the debtor.[29]

(c) Split Marital Property

If the couple wishes to have their property during the marriage separated altogether, then the parties in the marriage agreement must state that between them there will be no mixing of property and, in addition, expressly provide that they also do not want any unity of profit and loss.

With such a marriage agreement, each husband and wife remain the owners of the goods they bring into the marriage. Likewise, because of every form of union they have excluded, whatever they each earn during the marriage, whether in the form of profits of business or outcome of their personal property, remains the private property of each husband and wife concerned. Thus, there will only be two groups of property, that is, the husband's personal property and the wife's personal property.[30]

2.2.1.5. Marriage Agreement According to the ICIL[31]

The ICIL regulates the marriage agreement in Chapter VII. Article 47 thereof provides that at the time of or before the marriage, the spouses-to-be may conclude a written agreement authorized by the Registrar of Marriage Registry concerning property relations in marriage. Such agreements may include the mixing of personal property and the separation of their respective livelihoods as long as it is not contrary to Islamic Law. In addition to the above provisions, it may also specify the authority of each to enter into a mortgage bond on personal property and common property, or property of the company.

Article 48 of the ICIL provides that if a marriage agreement is made concerning the separation of joint property or property of the company, the agreement shall not eliminate the obligation of the husband to fulfill the household's needs. If a marriage agreement does not meet the provision, it is deemed to be the case of separation of joint property or *shari'a* property with the obligation of the husband to bear the cost of household needs.

Article 49 of the ICIL states that a treaty for the mixing of private property may include all property, whether brought into the marriage or obtained by each spouse

[29] *Ibid*, p. 182-183.
[30] J. Satrio, *Hukum Harta Perkawinan*, p. 164-165.
[31] In bahasa, Kompilasi Hukum Perkawinan Indonesia (KHI).

during the marriage. Without undermining such provision, it may also be agreed that the mixing of personal property shall be limited only to personal property brought at the time of marriage, so the mixing does not cover personal property acquired during marriage or otherwise.

Article 50 of the ICIL stipulates that the marriage agreement concerning property shall be binding on the parties and the third party from the date of the marriage, in the presence of the Registrar. The marriage agreement concerning such property may be withdrawn upon the consent of the spouse and shall register it to the Registrar's Office of Marriage where the marriage takes place. After the registration, the retraction will bind the husband and wife. However, it will only bind third parties after the announcement of the date of registration by the husband and wife in a local letter of *kabah*. If within six months, the announcement is not made by the person concerned, then the registration of the revocation shall automatically be void and not binding to a third party. Revocation of a marriage agreement concerning property shall not prejudice any agreements previously made with a third party.

Article 51 of the ICIL provides that breach of a marriage agreement grants the wife the right to request for the cancellation of the marriage or to file it as the reason for the divorce in the Court of Religion. Article 52 determines when marriages with second, third, or fourth wives may be promised on residence, turn time, and household expenses for the wife to be married.

It can be seen that the arrangement on the ICIL concerning the marriage agreement is more detailed than the existing arrangement in the Marriage Law where it is only governed by Article 29.

2.2.2. Marriage Settlement after the Constitutional Court Decree No. 69/PUU-XIII-2015

After the Decision of the Constitutional Court No. 69/PUU-XIII/2015, Article 29 of the Marriage Law is read as follows:

(1) At the time of, prior to, or during the marriage, the two parties by mutual consent may lodge a written agreement authorized by the marriage or notarial registry officer, after which the content also applies to third parties as long as the third party is involved.
(2) The agreement cannot be ratified when it violates legal, religious, and moral boundaries.
(3) The Agreement shall enter into force upon the date of marriage, unless otherwise specified in the Marriage Agreement.

(4) During marriage, marriage agreements relating to marital property or other agreements are irrevocable, unless on both sides there is agreement to amend or withdraw, and such amendment or revocation shall not harm a third party.

The consideration of the Court is that the phrase "at the time or before the marriage takes place" in Article 29, paragraph (1), the phrase "... since marriage takes place" in Article 29, paragraph (3), and the phrase "during marriage takes place" in Article 29 paragraph, (4) of the Marriage Law limits the freedom of two individuals to decide when to enter into an agreement, and as such are contrary to Article 28 E, paragraph (2) of the 1945 Constitution which provides that "[e]veryone has the right to freedom of belief, expression of thought and attitude, his conscience."[32]

Changes in Article 29 of the Marriage Law had an impact on the terms of making a marriage agreement. Article 29 of the Marriage Law prior to the issuance of Constitutional Court Decision No. 60/PUU-XIII/2015 did not limit the form of a marriage agreement to be authentic or under the hand, but only required it to be authorized by the employee of the Marriage Register. The verdict only reinforced the choice to make an agreement in notarial deed as an option, and not a requirement.[33]

Regarding the time of validity, it is clearly different as the making of marriage agreements were only allowed at or before marriage, prior to Constitutional Court Ruling No. 60/PUU-XIII/2015. However, after such decision, the making of a marriage agreement during the marriage was allowed. Such agreements made during the marriage are not deemed to have been valid from the moment of marriages. Rather, their validity is determined by the parties themselves. Furthermore, marriage agreements made during marriage are not required to have a court appointment to be ratified because there has been an option to certify them through a marriage registrar or with the help of a notary.[34]

3.2.2.1. Registration of Marriage Settlements

Article 29, paragraph (1) now reads as follows: "At the time of, prior to, or during the marriage, the two parties by mutual consent may submit a written agreement authorized by the marriage or notary[.]" The word "authorized" in that sentence does not mean that if the marriage agreement is not endorsed by the Registrar, then the

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[32] Mahkamah Konstitusi, Putusan Nomor 69/PUU-XIII/2015, p. 154.

[33] *Ibid.*, p. 156-157.

[34] Alwesius, *Pembuatan Perjanjian Perkawinan Pasca Putusan Mahkamah Konstitusi,* 2016.

marriage agreement becomes invalid. Such endorsement is merely the accounting or recording of the marriage agreement in the list book which is provided for the listing.

The recording of a marriage agreement is made at the Office of the Employee of Marriage Record, which is in the Civil Registry Office for married couples abroad and non-Muslim couples or the Office of Religious Affairs for Muslim couples. This also applies to marriage agreements made during marriage. The amendment to Article 29, paragraph (1) also causes this ratification to be made on a notary.

3.2.2.2. Applicability of Marriage Agreements

Article 29, paragraph (3) after the promulgation by the Constitutional Court of Decision No. 60/PUU-XIII/2015 now reads as "[t]he treaty becomes effective from the moment the marriage takes place, unless otherwise specified in the Marriage Agreement." This can be said to be the effect of the permissibility of making a marriage contract during marriage. If the marriage agreement is valid only after the marriage takes place, then the agreement will affect the condition of the marriage property prior to the making of the marriage agreement. For example, it can eliminate the unity of joint property from the beginning of marriage to the time the marriage agreement is made.

There is also a Circular Letter of Directorate General of Islamic Community Guidance B.2674/DJ.III/KW.00/9/2017 concerning Records of Marriage dated September 28, 2017. It is stipulated therein that the registration of a marriage agreement made before marriage, at the time of marriage, or during marriage authorized by the notary may be registered by the Registrar. This is so that marriage agreements authorized by a notary can be accessed and known by the general public.

3.2.2.3. Third Party Protection from Separation of Marital Property Taken After Marriage

Separation of property with marriage agreements made after or during marriage in Indonesia may be authorized by the Office of Marriage or Notary. After that, the new marriage agreement can be said to bind a third party. Marriage agreements certified by a notary can be registered by the Registrar of Marriage Officer based on the Circular Letter of Directorate General of Islamic Community Guidance No. B.2674/DJ.III/ KW.00/9/2017 concerning the recording of a marriage agreement However, this is not enough to provide legal certainty to third parties.

Applications for separation of property with Judicial Separation of Property in the Philippines are brought to justice. The application must be accompanied by a list creditors of married couples. Then the creditors are notified to allow them to attend

the session and defend their interests.[35] The application may also be supplemented by a plan for the separation of property which the couple wishes, and may be granted for as long as it does not conflict with legislation or general principles.[36]

Mechanisms provided in Indonesia can be said to be good enough. A marriage certificate endorsement through a notary can now be registered to a Marriage Officer. However, the rights and obligations of third parties in making this marriage agreement are not yet clear. It would be better for third parties should they be more involved. However, disallowing third parties from intervening in the making of the agreement further facilitates the stage of separation of property after marriage.

3. Joint Martial Property (*Harta Bersama*) in Indonesia

3.1. *Adatrecht*

According to customary law, the property of the marriage consists of luggage (Lampung: *sesan*, Javanese: *gawan*: Batak: *yeast*), treasure (Minangkabau: property of *suarang*, Java: *gana-gini*, Lampung: *masses besesak*), and treasure (inheritance) may also be added to the gift treasure. The marital property relations depend on the form of marriage, local customary law, and the circumstances of the indigenous peoples concerned, whether the community is still strongly maintaining patrilineal, matrilineal, or parental/bilateral patrimony lines, or adhering to religious law, or having advanced and following the times.[37]

In this patrilineal society, there is essentially no separation of common property and congenital property. All the treasures that enter into marriage bonds become common property or property of unity which is controlled by the husband as the head of the family. All legal acts pertaining to marital property must be known and approved by the husband, and the wife shall not act alone on his/her possessions without the consent of the husband.[38]

In the matrilineal society, common property can be separated from the innate possessions of the wife and those of the husband, including the treasures of gift and/or inheritance which are brought by each into the marriage. Thus, the common property is jointly owned, while other property such as possessions, including those of gift or

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[35] Desiderio P. Jurado, *Civil Law Reviewer*, Quezon City: Rex Printing Company Inc., 2009, p. 203 & 205.

[36] Melencio Santos Santa Maria, *Persons and Family Relations Law*, Manila: Rex Printing Company Inc., 2010, p. 564.

[37] *Ibid.*

[38] *Ibid.*

inheritance, are not a matter of dispute, unless the property involved is mixed into the common property.[39]

In a parental society, which is only tied to household-to-house relationships under the leadership of the father and mother and is not bound by extensive kinship relations, the marriage is commonly in the form of free marriage or independent marriage. In such cases, the marital status after marriage is equally balanced, and each is free to determine his or her own residence. Their marriage property is close to what is stipulated in the Marriage Law, that is, the existence of joint property controlled by husband and wife together, and the existence of luggage that remains controlled and each owned by the husband and wife, unless otherwise determined.[40] The separation of joint property and possessions during the marriage bond is intended to facilitate settlement should there later be a dispute or divorce.[41]

Marital property includes:[42]

(a) The husband's or wife's property acquired before marriage or as inheritance (original or alien);
(b) The husband and wife's property earned on the proceeds of the business before or during the marriage (the treasure or celebrating property);
(c) Treasures acquired by the husband and wife together during marriage (*gono-gini*); and
(d) Treasures given to the bride when married.

The first marriage property is usually called the property of origin, while the second, third, and fourth marriage properties (limited) are called joint possessions. The joint treasure is the property the husband and wife obtain on their own or together during the marriage, unless the property is given or inherited. The existence of joint property depends on the following conditions:[43]

(a) Husband and wife live together;
(b) The position of husband and wife are equal; and
(c) Not affected by Islamic Law.

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[39] *Ibid*, p. 125.
[40] *Ibid*, p. 125-126.
[41] *Ibid*, p. 126.
[42] Soerjono Soekanto, *Intisari Hukum Keluarga,* p. 61-62.
[43] *Ibid.*

For Batak people (indigenous peoples on the island of North Sumatra, Indonesia) joint treasures are distinguished in staples and fruits from staples. The consequence is that wives are not free to commit possessions of basic property. Because of this, in urgent circumstances when the husband is unable to give permission, such permission is required from the husband's family.

Customary Law in Indonesia concerning property follows a different principle, so that for the separation of the property that the husband or wife brings to the common property, there is no need to go through the marriage agreement. Concerning the marriage agreement, Hadikusuma argues that agreements made before or at the time of marriage apply not only between the two prospective spouses, but also between their relatives in customary law. The marriage agreement in customary law is largely not made in writing but is announced in the presence of relatives or neighbors present at the marriage ceremony. Traditional *adat* marriage agreements do not require the approval of the marriage registry officer, but it is necessary that it is known by the Head of Traditional or Relative Heads of both parties.[44]

3.2. Islamic Law

Article 1(f) of the ICIL states that what is meant by wealth in marriage or *shirkah* is the treasure obtained either individually or by a husband and wife during the marriage. This is hereinafter called joint treasure, without questioning if it is registered on behalf of anyone. According to Sayuti Thalib, *syirkah* is about arranging the association or cooperation in trade or service which is then also applied on the matter of joint property of husband and wife when talking about marriage laws.[45]

There are various kinds of *syirkah*, but they can be divided into two groups, namely:[46]

(a) *Shirkah* that is allowed, including, among others, *shirkah al-'Inan* (*shirkah* treasure), *shirkah al-Abdan* (*syirkah* work), *syirkah mudharabah*, *syirkah* property, and *shirkah 'Uquud*; and
(b) *Shirkah* that is not allowed, including *syirkah Mufaawadhah* and *syirkah Wujuh*.

[44] H. Hilman Hadikusuma, *Hukum Perkawinan Indonesia*, p. 58-59.
[45] Sayuti Thalib, *Hukum Kekeluargaan Indonesia*, (Jakarta: UI – Press, 2015), p. 79.
[46] Neng Djubaedah, Sulaikin Lubis, dan Farida Prihatini, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: PT. Hecca Mitra Utama, 2005), p 122.

Shirkah may be implemented by the husband and wife, as follows:[47]

(a) *Shirkah* may be held by entering into an agreement clearly written or spoken before or after the marriage ceremony, whether for individual property, or property acquired during marriage but not on their own, or from their livelihood;
(b) It may also be stipulated by law that property acquired on the business of husband or wife or both during the marriage shall be the common property or the property of husband and wife; or
(c) In addition to the abovementioned ways, *shirkah* wealth of husband and wife can also occur with the reality of the couple's life. This is especially the way for joint possessions gained during marriage. In a quiet way, *syirkah* happens if in fact they are united in seeking livelihood and finances. Finding livelihood here should not mean that those who earn a living should do so alone, but must also be seen from the division of labor in the household. *Shirkah* like this can be called *shirkah abdaan*.

Sayuti Thalib argues that the various treasures of the husband and wife can be seen from three points of view, that is:[48]

(a) Viewed from the point of origin of husband and wife, property can be classified into three groups:

    (1) The property that each husband and wife had before they marry, whether acquired inheritance, gifts, or other efforts, is referred to as a congenital treasure;
    (2) The property of each husband and wife acquired during marriage, but acquired not on their joint or individual endeavors, but acquired by inheritance, testament, or grant for each; and
    (3) The property acquired after they are in a married relationship for the business of both of them or one of the parties is called a livelihood.

(b) Viewed from the point of use, this treasure is used to finance:

    (1) The household, family, and education of children; and
    (2) Other assets.

[47] *Ibid.*, p. 84-85.
[48] *Ibid.*, p. 83.

(c) Viewed from the point of relationship of property with individuals in society, the treasure is:

(1) The joint property of husband and wife;
(2) One's possessions, but bound to the family; and
(3) One's possessions expressly stated by the person concerned.

Basically, according to Islamic Law, the properties of the husband and the wife are separate, so each spouse has the right to spend or use his or her property wholly without being disturbed by any other party. The property which is entirely owned by each party shall be the property of each before the marriage, or the property acquired by each of them on their own. This also includes the property received by a husband or wife because of grants, inheritance, or gifts after they get married. The Qur'an is not set about the joint property of husband and wife in marriage.[49]

Provisions on joint property in the Marriage Law in Articles 35 and 36 are also found in the ICIL Articles 85 and 86, paragraph (1). The arrangements in these articles are essentially the same, but with different formulas. The important thing is to not contradict the Koran and Sunnah of the Prophet. Article 86, paragraph (1) of the ICIL stipulates that "basically there is no mixing between husband's property and wife's property by marriage." However, the ICIL acknowledges the common property of married couples in marriage as found in Article 85, which states that "the existence of joint property in the marriage does not exclude the existence of the property of each husband or wife."[50]

The above must have an impact on the mastery and use of property in marriage. Article 86, paragraph (2) of the ICIL states that "[t]he estate of the wife shall remain the wife's right and is fully controlled by her, so the husband's property shall remain the husband's right and be fully controlled by him." Article 87, paragraph (1) of the ICIL also provides that "the property of each husband and wife and the property acquired respectively as a gift or inheritance shall be under their respective control, as long as the parties do not specify otherwise in the marriage agreement." Therefore, both husband and wife are entitled to control their property as long as they do not stipulate otherwise in the marriage agreement.

Although husbands are entitled to control over their property, they retain a responsibility to safeguard other assets, as set forth in Articles 89 and 90 of the ICIL. Article 89 provides that "the husband is responsible for the maintenance of the common property, the property of his wife, and his own property." Article 90 states

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[49] Neng Djubaedah *et. al.*, *Hukum Perkawinan Islam*, p. 122.
[50] *Ibid*, p. 125-126.

that "the wife shall be responsible for the maintenance of the common property and the property of her husband." Therefore, husbands and wives have an obligation to keep their personal property, the property of their spouses, and the joint property of the husband and wife.[51]

Basically, according to Islamic law, the husband's estate and the wife's estate are separated, then the marriage agreement can be done. The ICIL regulates marriage agreements in Chapter VII of Articles 45 to 52.

Article 45 provides that the prospective bridegroom may enter into a marriage agreement in the form of:

a. *Taklik talak*; and
b. Other agreements that are not contrary to Islamic Law.

3.3. Indonesian National Marriage Law: Law No. 1/1974

The Marriage Law does not govern the property of married persons after their marriage dissolves. There are only provisions concerning property in marriage (Articles 35-37). From the provision of Article 35, paragraph (1) that property acquired during marriage becomes a common property, R. Soetojo Prawirohamidjojo argues that since the position of husband and wife is equal, there is no such joint property to be halved. The treasures and possessions gained by both as gifts and inheritance will return to their rightful owner.[52]

Article 35 of the Marriage Law determines that property acquired during marriage becomes a common property. If each spouse brings property into his or her marriage, or if during the marriage, each gets a treasure for a gift or an inheritance, then the property is still respectively controlled by each, unless determined to be a joint treasure. Both husband and wife can use the joint property with the consent of their husbands or wives. However, with regard to inheritance, each spouse has the full right over their respective properties. If the marriage breaks up, then the joint property is regulated by their respective laws. The meaning of "law" here is religious law, customary law, and other laws.[53]

According to the article, that which becomes joint property is the property obtained during the marriage. On the contrary, innate property is the property acquired by each spouse as a gift or inheritance. Thus, the possessions that have been

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[51] *Ibid.*
[52] R. Soetojo Prawirohamidjojo, *Pluralisme dalam Perundang-undangan,* p. 147.
[53] *Ibid,* p. 35.

acquired at the time of (or brought into) the marriage lie outside the joint treasure. The abovementioned provisions do not specify where or whom the property is from, so we may conclude that included in the joint property are:[54]

(a) Results and income of the husband;
(b) Results and income of the wife; and
(c) The proceeds and income from the personal property of husband and wife—even if the estate is not included in the joint property, provided all of it is obtained during the marriage.

Harahap states that basically, all of the wealth gained during marriage form part of the common property. Based on these developments, the marriage property that forms part of the joint property is as follows:[55]

(a) The property purchased during the marriage. Who buys, on whose behalf it is registered, and where it is situated is immaterial;
(b) Treasures purchased and built post-divorce financed from joint property;
(c) Proven assets obtained during marriage bonds; and
(d) Earnings of common property and possessions.

In Article 35, paragraph (2) of the Marriage Law, it is stated that "property acquired by each as a gift or inheritance is under their control as long as the parties do not specify another." The article provides an opportunity to deviate from the arrangements concerning property contained in the law. If one wishes to deviate from that general rule, he must indicate his intent in a marriage covenant.[56]

Article 36 of the Marriage Law regulates the mastery or the management of joint property and property of married couples. Paragraph (1) provides that in respect of joint property, the husband or wife may act upon the agreement of both parties. In principle, the common property is managed together and all acts must be mutually agreed upon. Whereas, in paragraph (2), it is determined that in respect of their respective possessions, the husband and wife have the full right to engage in legal acts concerning their possessions. Over such items, they have full *beheer* or *beschikking* authority unless one of the spouses were not of age before the marriage.

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[54] J. Satrio, *Hukum Harta Perkawinan*, (Bandung: PT. Citra Aditya Bakti, 1993), p. 189.

[55] M. Yahya Harahap dalam Badul Manaf, *Aplikasi Asas Equalitas Hak dan Kedudukan Suami Istri dalam Penjaminan Harta Bersama pada Putusan Mahkamah Agung,* (Bandung: CV. Mandar Maju, 2006), p. 59-60.

[56] Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: PT Intermasa, 2010), p. 31.

Regarding authority over common property, there is jurisprudence by the Supreme Court (2691PK/Pdt/1996) which says that any action on joint property by the husband or wife should have the approval of the other spouse. If an action is taken without the requisite consent, the said act is unlawful.

Article 37 of the Marriage Law determines that in the event of divorce, the joint property shall be regulated according to their respective laws. The "law" contemplated herein refers to religious law, customary law, and other laws. Supreme Court Decision No. 1002K/Sip/1976 states that in the case of a divorced husband and wife where property has been divided into two, property does not necessarily become personal property after reconciling the same, but still remains a joint treasure of both. Supreme Court Decision No. 1476K/Sip/1982 also states that according to customary law even if a wife is *nusyuz* (ego or run), she does not lose her right to get her share of the joint property acquired during marriage.

4. Land Ownership by Mixed Marriage Couples

The most fundamental change which occurred in land law is the enactment of the BAL or *Undang-Undang Pokok Agraria*. Before the BAL, land law had a dualistic system (*adat* law and Western law). The BAL explicitly revoked the *Agrarische wet* of 1870, *domainverklaring* (domain declaration), and most of Book II of the Indonesian Civil Code. Article 5 of the BAL states that:

> The agrarian law applicable to the earth, water, and airspace is *adat* law provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislation, all with due regard to elements which are based on religious law.[57]

Article 5 of the BAL provides that customary law is the basis of land law in Indonesia, but the *adat* law was modified by principles introduced in the BAL.[58] It is interesting to note that BAL follows the principle of Single Indonesian Nationality. This is reflected firstly in Article 9, paragraph (1), which states that "[o]nly Indonesian citizens can have the most complete relationship with the earth, water, and airspace." Secondly, in Article 21, which provides that principally, land ownership rights as the most powerful rights are only owned by Indonesian citizens. Thirdly, Article 36 reads as follows: "Those eligible for building rights (*hak guna bagunan*) are as follows: Indonesian citizens, and corporate bodies incorporated under Indonesian law and domiciled in Indonesia." Foreigners, according to BAL, only have the right of use (*hak*

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[57] Article 5, Law No. 5 Year 1960 concerning The Basic Provisions Concerning The Fundamentals of Agrarian Affairs.

[58] Sudargo Gautama, Indonesian Business Law, (Bandung: PT. Citra Aditya Bakti, 1995), P. 149.

pakai) and the right to rent land (*hak sewa*) owned by other parties.[59] This rule also applies to Indonesian nationals who have dual nationalities.[60]

In the case of *Eugene Tilaar v. Jurgen Kunzel*,[61] Mrs. Eugene Tilaar (an Indonesian citizen) bought two pieces of land (the first land with land ownerships rights or *hak milik*, and the second land with building rights or *hak guna bagunan*). Mrs. Eugene Tilaar had a child who was an artist, Nola Tilaar, who lived together with her manager, Jurgen Kunzel. Mrs. Eugene Tilaar made a written statement that the purchase of the two parcels of land along with the house on top was obtained from a potential ex-spouse, Jurgen Kunzel, who was a German citizen. Because of that, Mrs. Eugene Tilaar made a Notarial Deed No. 135 concerning an Irrevocable Statement and Power of Attorney to hand over the house and land to Jurgen Kunzel. In 1982, the relationship between Nola Tilaar and Jurgen Kunzel ended. Mrs. Eugene Tilaar refused to hand over the two plots of land which prompted Jurgen Kunzel to file a lawsuit in court. Jurgen Kunzel asked the court to require Eugene Tilaar to convey the land to him.

The East Jakarta District Court decided in favor of Mrs. Eugene Tilar who refused to convey the subject lots of contrary to Notarial Deed No. 135 concerning an Irrevocable Statement and Power of Attorney. The court reasoned that because Jurgen Kunzel is a foreign citizen, then he cannot own land in Indonesia based on the BAL.

The decision of the Jakarta High Court states that the absolute power of attorney is not valid because it is contrary to the provisions of Article 1335 of the Indonesian Civil Code, as well as Articles 21 and 26 of the BAL. Because it is contrary to the Act, the agreement does not meet the objective requirements for the validity of the agreement[62] that its purpose be lawful. As a result, it is null and void. Because Jurgen Kunzel is a German citizen, the condition for the power of attorney is a false or forbidden cause. Since it aims to circumvent the provisions of Articles 21 and 26 of the BAL and Article 1335 of the Indonesian Civil Code, the power of attorney is not binding and is null and void.

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[59] BAL art. 21 (3) and 42.

[60] BAL art. 21 (4).

[61] Decision of East Jakarta District Court No.97 / JT / 1983 / G November 19, 1983. Decision of Jakarta High Court No.63 / PDT / PT DKI dated April 30, 1984.

[62] Article 1320 Indonesia Civil Code. "To establish a valid contract, four elements are required under article 1320 the Civil Code. They are mutual consent of the parties; legal capacity to contract; a certain subject matter and legal cause. Mutual consent and legal capacity are called subjective requirement that those are related to contracting parties. A certain subject matter and legal cause are classified as objective requirements that they related to contains of contract."

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COPYRIGHT LAW

PHILIPPINE COPYRIGHT LAW

EMERSON S. BAÑEZ

I. DESCRIPTIVE MODEL

For brevity, the paper will examine Philippine copyright law only along several dimensions—what Professor Lawrence Lessig describes as the scope, reach, and term of copyright.[1] First, the scope refers to the types of works protected. Second, the reach of copyright takes into consideration the rights provided to persons—the modalities of use and exclusion that the law enables. Third, and finally, the term of protection refers to the length of time the work is subject to protection.[2]

The paper will not only describe the current substance of the law but provide an account of its historical development. What is hoped to be advanced is the assertion that Philippine copyright law is largely a product of the transplantation of US law, with succeeding modifications adopted to reflect not only the development of new media and new technologies, but also the country's status as a net importer of intellectual goods. This historical view provides not only an explanatory model for the current features of Philippine copyright law, but also provides a vantage point from which to predict future developments of the law.

A. Constitutional Basis

Both the US and Philippine copyright law can be traced to constitutional texts. The US constitution provides that: "The Congress shall have Power [...] To promote the Progress of Science and useful Arts, by securing for limited Tımes to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[3] The grant of exclusive rights was derived from the Statute of Anne. At the same time, the term limitations can be attributed to the English tradition of distrust against monopolies.[4]

The Philippine Constitution also has a provision mandating copyright legislation. Under the 1987 Constitution, the State "shall protect and secure the

[1] Lessig, L., *Does Copyright Have Limits: Eldred v. Ashcroft and Its Aftermath*, QUEENSLAND UNIVERSITY LAW AND TECHNOLOGY JOURNAL, 5, 219–230, at 222.

[2] *Id.*

[3] U.S. CONST. art. I, § 8.

[4] *Supra* note 1.

exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."[5] A similar provision in the 1973 Constitution states that "[t]he exclusive right to inventions, writings and artistic creations shall be secured to inventors authors, and artists for a limited period."[6]

II. SUBJECT MATTER OF COPYRIGHT

A. Works Protected

Scope refers to the set of works that are subject to copyright protection. The subject matter protected by Philippine copyright has developed along the same path as the US model—defined by gradual expansion to protect more works as media and technology evolved. The first intellectual property law to be enacted, in what was then a territory of the US, was Act No. 3134 or the Copyright Law of the Philippine Islands. The law extended protection to the following works:

> SECTION 2.
>
> Copyright may be secured by any citizen of the Philippine Islands or of the United States for any work falling within the following classes of work:
>
> (a) Books, including composite and cyclopedic works, manuscripts, directories, gazetteers, and other compilations;
> (b) Periodicals, including pamphlets;
> (c) Lectures, sermons, addresses, dissertations prepared for oral delivery;
> (d) Dramatic or dramatico-musical compositions;
> (e) Musical compositions with or without words;
> (f) Maps, plans, sketches, charts, drawings, designs;
> (g) Works of art; models or designs for works of art;
> (h) Reproductions of a work of art;
> (i) Drawings or plastic works of a scientific or technical character;
> (j) Photographs, engravings, lithographs, lantern slides, cinematographic pictures;
> (k) Prints and pictorial illustrations;
> (l) Dramatizations, translations, adaptations, collections, compilations, abridgements, arrangements, commentaries, critical studies, abstracts, versifications; and

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5 PHIL. CONST. art. XIV, § 13.

6 PHIL. CONST. (1973), art. XV, § 9(3).

(m) Other articles and writings[.][7]

This is identical to the scope of the US Copyright Act of 1909, differing only with the addition of dramatizations and "other articles and writings" in the enumeration of materials under the scope of protection of Act No. 3134.[8]

The country's accession to the Berne Convention of 1948 in 1951 meant an expansion of the scope of protection in order to meet the international baseline. Works such as cinematographic works, as well as collections of literary or artistic works (by reason of selection and arrangement) were also under the scope of Philippine copyright.[9]

The next revision of the scope of protection was made through Presidential Decree No. 49 ("P.D. No. 49") enacted by President Marcos in his exercise of legislative powers, after placing the Philippines under martial law. The law extended the scope of protection to works which has since been covered by amendments to the US Copyright Act, such as motion pictures.[10]

P.D. No. 49 provided new exclusive rights to performers and producers of sound recordings, as well as broadcasting organizations, making the Philippines substantially compliant with the Rome Convention of 1961, even prior to its formal accession in 1984. The law also extended protection to the following new categories:

(O) Prints, pictorial, illustration, advertising copies, labels, tags, and box wraps; and
(P) Dramatization, translations, adaptations, abridgements, arrangements and other alterations of literary, musical or artistic works or of works of the Philippine Government as herein defined, which shall be protected as provided in Section 8 of this Decree.[11]

Under Section 8 of the law, protection was contingent on the "the consent of the creator or proprietor of the original works on which they are based." Furthermore, the protection extended to these works will be independent from the original works.[12]

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[7] Rep. Act No. 3134 (1924), § 2.
[8] § 2.
[9] The Berne Convention for the Protection of Literary and Artistic Works (1948), art. 2.
[10] Pres. Dec. No. 49 (1972), § 2(m).
[11] § 8.
[12] § 8.

Presidential Decree No. 285 (amended by P.D. No. 400 and P.D. No. 1203), also enacted by President Marcos, effected a partial withdrawal of the protective scope of copyright, at least insofar as textbooks are concerned. Under the said law, "educational, scientific, or cultural book[s], pamphlet[s], and other materials" could be subjected to a compulsory license upon a finding that its price "has become so exorbitant as to be detrimental to the national interest."[13]

Finally, the latest iteration of Philippine copyright law came from Intellectual Property Code of 1998 ("IP Code"). In addition to those protected under previous copyright laws, the scope was extended to the following works:

(a) Books, pamphlets, articles and other writings;
(b) Periodicals and newspapers;
(c) Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;
(d) Letters;
(e) Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;
(f) Musical compositions, with or without words;
(g) Works of drawing, painting, architecture, sculpture, engraving, lithography or other works of art; models or designs for works of art;
(h) Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;
(i) Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;
(j) Drawings or plastic works of a scientific or technical character;
(k) Photographic works including works produced by a process analogous to photography; lantern slides;
(l) Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;
(m) Pictorial illustrations and advertisements;
(n) Computer programs; and
(o) Other literary, scholarly, scientific, and artistic works.[14]

At the same time, it closely tracked the categorization and wording of the 1976 Copyright Act from the US,[15] extending protection to architectural designs. Section 175 of the IP Code also provides that no protection shall be extended to "any idea,

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[13] Pres. Dec. No. 285 (1973), § 1.
[14] Rep. Act No. 8293 (1997), § 172.1.
[15] Pub.L. 94–553.

procedure, [or] system."[16] This language is identical to Section 102(b) of the 1976 Copyright Act, which in turn codifies the US Supreme Court's ruling in *Baker v. Selden*.[17]

B. Registration Requirement

The applicability of copyright protection used to be contingent on registration of the work. Following the Philippines' accession to the Berne Convention, such formality is no longer required. Under Sec. 172.1 of the Philippines' IP Code, copyright inheres in the work from the moment of creation.

In both early versions of the Philippine law as well as the US law, registration of the work was required for copyright to apply. Under both the 1790 and the 1831 copyright laws of the United States, protection was contingent on notice of copyright and deposit of the work prior to its publication with the district court.[18] The 1909 amendments to US copyright centralized the depositary function to a national copyright office under the Library of Congress.[19] Act No. 3134 adopted a similar system, requiring registration and deposit of the work with the Philippine Library and Museum, along with publication of the copyright claim.[20] P.D. No. 49 likewise formalized the country's obligations under the Berne Convention to ensure that the protection of works and the enjoyment of rights are no longer contingent on a formality. This was maintained in the latest copyright provisions of the IP Code.

III. THE REACH OF COPYRIGHT

A. Modalities Available to Rightsholders

The Statute of Anne,[21] the world's first copyright law, was concerned only with the right of publishers to reprint books.[22] Given the state of technology and the market at the time that it was enacted, the law was simply concerned with the printing, reprinting, publication of books, as well as exposing these for sale.[23] It did not cover any modalities of use, such as translations, adaptations, or other modes of distribution. The US copyright laws of 1790 and 1831 covered the same ground,

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[16] § 175.
[17] 101 U.S. 99 (1879).
[18] U.S. Copyright Act of 1790, § 3; U.S. Copyright Act of 1831 (1831), § 4.
[19] U.S. Copyright Law of 1909, § 54.
[20] Rep. Act No. 3134 (1924), § 11.
[21] 8 Ann. c. 19
[22] *Supra* note 1.
[23] The Statute of Anne, *available at* http://avalon.law.yale.edu/18th_century/anne_1710.asp.

protecting the rights to "printing, reprinting, publishing and vending."[24] The 1909 US copyright law added to this the right to make translations and dramatizations, public delivery (in the case of a speech or a sermon), as well as performances (for dramas and musical compositions).[25]

These formed the basis of the grant of rights in the Philippines' Act No. 3134, the Philippines' first copyright law after it gained independence, which gave creators the following exclusive rights:

(a) To print, reprint, publish, copy, distribute, multiply, sell, and make photographs, photo-engravings, and pictorial illustrations of the copyrighted work;
(b) To make any translation or other version or extracts or arrangements or adaptations thereof; to dramatize it if it be a non-dramatic work; to convert it into a non-dramatic work if it be a drama; to complete or execute it if it be a model or design;
(c) To exhibit, perform, represent, produce, or reproduce the copyrighted work in any manner or by any method whatever for profit or otherwise; if not reproduced in copies for sale, to sell any manuscripts or any record whatsoever thereof; and
(d) To make any other use or disposition of the copyrighted work consistent with the laws of the land.[26]

This reflects the innovation of the US Copyright Act of 1909, which protects performance rights and derivative works in US copyright law for the first time.[27]

The same set of rights was re-enacted in P.D. No 49, which reproduced the above provision in its entirety.[28]

The 1976 Copyright Act of the US featured a broader grant of rights, integrating new modalities of use and distribution made possible by new forms of media:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

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[24] U.S. Copyright Act of 1790, § 1; U.S. Copyright Act of 1831.
[25] U.S. Copyright Law of 1909, § 1.
[26] Rep. Act No. 3134 (1924), § 3.
[27] *Supra* note 25.
[28] Pres. Decree No. 49 (1972), § 5.

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.[29]

In a bilateral treaty it entered into with the US through an exchange of notes in April 6, 1993, the Philippines committed to enacting legislation that will bring the scope and reach of Philippine copyright law at parity with the US—providing new exclusive rights to the producers of sound recordings and computer programs—both growing sources of revenue for US companies at that time.[30] As a result of this commitment, the Philippines passed the IP Code.[31] Chapter V, covering copyright, added new exclusive economic rights that prohibited the rental of the copyrighted works to the public and gave exclusive rights to the producers of sound recordings and authors of computer programs:

177.1. Reproduction of the work or substantial portion of the work;
177.2 Dramatization, translation, adaptation, abridgment, arrangement or other transformation of the work;
177.3. The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;
177.4. Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental; (n)
177.5. Public display of the original or a copy of the work;
177.6. Public performance of the work; and
177.7. Other communication to the public of the work.

The US also insisted on better enforcement mechanisms in the Philippines' IP law.[32] In response to the bilateral treaty's requirements, the IP Code allows for infringement claims to be pursued through administrative action (instead of judicial

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[29] 17 U.S.C. 106.
[30] *See, generally,* Wrase, A.M., *US Bilateral Agreements and the Protection of Intellectual Property Rights: Effective for U.S. Intellectual Property Interests or a Way Out of the Issue?* DICKINSON JOURNAL OF INTERNATIONAL LAW 19, 245–267.
[31] Rep. Act No. 8293 (1998).
[32] Wrase, *supra* note 30.

remedies, such as a criminal action for copyright infringement).[33] The IP Code also provides for border enforcement (through customs authorities) of intellectual property rights.[34]

B. Anti-circumvention of Technological Measures

The last round of major amendments to the Philippine Copyright law was carried out through Republic Act No. 10372. The amendment had the effect of expanding the reach of copyright by changing what it meant for a work to be communicated to the public to include rebroadcasting or retransmission by cable or satellite:

> 171.3. 'Communication to the public' or 'communicate to the public' means any communication to the public, including broadcasting, rebroadcasting, retransmitting by cable, broadcasting and retransmitting by satellite, and includes the making of a work available to the public by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them[.][35]

Furthermore, the law gave additional teeth to rights enforcement by penalizing not only the copying of the work, but also the circumvention of technological measures and rights management mechanisms designed to protect the work from unauthorized copying:

> 216.1. Remedies for Infringement.—Any person infringing a right protected under this law shall be liable:
>
> x x x
>
> (b) To pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty: Provided, That

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[33] Under Philippine law, a criminal action can have a "civil aspect" which relates to the private harm resulting in damages.

[34] *Id.*

[35] Rep. Act No. 10372 (2013), § 4.

the amount of damages to be awarded shall be doubled against any person who:

(i) Circumvents effective technological measures; or
(ii) Having reasonable grounds to know that it will induce, enable, facilitate or conceal the infringement, remove or alter any electronic rights management information from a copy of a work, sound recording, or fixation of a performance, or distribute, import for distribution, broadcast, or communicate to the public works or copies of works without authority, knowing that electronic rights management information has been removed or altered without authority.[36]

The new law defines technological measures and rights management information as such:

171.12. 'Technological measure' means any technology, device or component that, in the normal course of its operation, restricts acts in respect of a work, performance or sound recording, which are not authorized by the authors, performers or producers of sound recordings concerned or permitted by law; and
171.13. 'Rights management information' means information which identifies the work, sound recording or performance; the author of the work, producer of the sound recording or performer of the performance; the owner of any right in the work, sound recording or performance; or information about the terms and conditions of the use of the work, sound recording or performance; and any number or code that represent such information, when any of these items is attached to a copy of the work, sound recording or fixation of performance or appears in conjunction with the communication to the public of a work, sound recording or performance.[37]

In both intent and text, the amendment mirrors the US Digital Millennium Copyright Act,[38] which provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."[39]

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[36] § 22.
[37] § 6.
[38] DMCA, Pub. L. No. 105-304, 112 Stat. 2860.
[39] 17 U.S.C. 1201.

C. Fair Use

Related to the economic rights extended to creators (or their assignees) is the affordances provided by fair use, which allows use of the works without giving rise to infringement of copyright. Under US copyright law, "fair use" was a common law doctrine before it was codified into the Copyright Act of 1976.

To a certain extent, P.D. No. 49 codified the general contours of common law fair use by excluding some excerpts as well as matters of public interest from the scope of copyright protection:

> Section 11. To an extend compatible with fair practice and justified by the scientific, critical, informatory or educational purpose, it shall be permissible to make quotations or excerpts from a work already lawfully made accessible to the public. Such quotations may be utilized in their original form or in translation.
>
> News items, editorials, and articles on current political, social, economic, scientific or religious topic may be reproduced by the press or broadcast, unless they contain or are accompanied by a notice that their reproduction or publication is reserved. In case of musical works, parts of little extent may also be reproduced.
>
> Quotations and excerpts as well as reproductions shall always be accompanied by an acknowledgment of the source and name of the author, if his name appears thereon.

The IP Code replaced this with a more general four-factor test, lifted directly from Section 107 of the 1976 Copyright Act:

> Sec. 185. Fair Use of a Copyrighted Work.—185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:
>
> (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;
> (b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(d) The effect of the use upon the potential market for or value of the copyrighted work.

IV. THE TERM OF COPYRIGHT

The evolution of the US copyright law is marked by the growth in the length of term for protection. As discussed above, copyright law emerged as a compromise between the need to incentivize the creation of cultural works on one hand, and the need to suppress monopolies on the other. Limited terms represent the fulcrum of that balance. Longer terms provided by each new re-enactment of the copyright law indicate that the balance may have shifted in favor of rights holders (many of which are not necessarily individual creators but their assignees—large multinational corporations).

The first US Copyright law in 1790 provided for a 14-year term, which can be renewed once at the end of the first term.[40] Under the 1909 act, the first term was 28 years from the date the copyright was secured, extensible once to another term at the end of the 28th year—a maximum of 56 years.[41] Both required registration for the works to receive copyright protection. Under the 1976 Copyright Act, the term was the life of the author plus 50 years after the author's death, in compliance with the Berne Convention standard.[42] Under the Copyright Term Extension Act of 1998, this was extended to 70 years after the author's death.[43]

The Philippine Copyright Law has followed the general direction of this trend. Act No. 3135, passed in 1924, did not deviate far from the 1909 US law, with an initial term of 30 years, renewable once for a similar length of time.[44] Presidential Decree No. 49 was ahead in complying with Berne standards, providing for a term that lasted for the life of the author plus 50 years.[45] This term was preserved in the 1998 IP Code.[46]

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[40] U.S. Copyright Act of 1790, § 1.
[41] U.S. Copyright Law of 1909, § 23.
[42] Copyright Act of 1976, § 302(a).
[43] 112 Stat. 2827, § 102.
[44] Rep. Act No. 3134 (1924), § 18.
[45] Pres. Dec. No. 49 (1972), § 21.
[46] Rep. Act No. 8293 (1997), § 213.1.

V. CONCLUSION

This short survey of the legislative histories of both the Philippine and US Copyright laws shows a correlation of text, concepts, and policy direction.

In both streams of legislation, we see a movement towards the expansion of the entitlements of rights holders. This can be seen in the number and types of works protected. The trend can also be seen in the growing extent of the rights that may be exercised over the protected works. Finally, successive amendments of each country's copyright laws have seen the repeated extension of the term of protection.

Although the correlation is apparent, the causal mechanisms are far less obvious. The internationalization of intellectual property may account for developments, such as the removal of formalities as well as the establishment of a common baseline of rights. However, the expansion of the works covered, and the term of protection have marked US copyright legislation even before its accession to the Berne Convention. Records of the US Congress as well as scholarship on the matter reflect that this expansion can be attributed to aggressive lobbying from rightsholders, who often had direct participation in drafting the language of subsequent amendments to the US copyright laws.[47]

On the other hand, the record is incomplete when it comes to Philippine copyright law. No records are available locally concerning any legislative debates that led to Act No. 3134. P.D. No. 49, on the other hand, was enacted based on authoritarian fiat instead of legislative debate. There are no records of the policy justifications behind its provisions. The IP Code was largely brought about by the country's commitments to the US and with the WIPO. Representatives of key US-based IP producers, such as Microsoft, were very active at the committee level hearings. The same justifications—treaty compliance and keeping up with international standards—were deployed for the passage of R.A. No. 10372.[48]

Each strata in the evolution of copyright law in both countries indicate a greater concentration of power for rightsholders, with minimal elaboration in the legislation for the other aspect of the limited monopoly—reasonable affordances for the spread of information and culture.

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[47] *See, generally,* Goldman, A. A. *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, The House Report 1 on the Copyright Act of 1909 (1909). *See also* Litman, J. D., *Copyright Compromise and Legislative History*, CORNELL LAW REVIEW, 72, 857–904 (1987).

[48] *Villar: Protect Filipino artists, amend IP law*, PHILIPPINE SENATE WEBSITE, *available at* http://www.senate.gov.ph/press_release/2011/1207_villar3.asp.

COPYRIGHT LAW IN VIET NAM

NGUYEN THI HONG NHUNG*

I. CONCEPT OF COPYRIGHT

Under Vietnamese law, intellectual rights to literary and artistic works are an important part of the intellectual property law, in addition to industrial property rights and the rights to plant varieties. Intellectual rights to literary and artistic works include personal and property rights which allow the right holder to exclusively exploit or authorize the exploitation of his or her rights.

Copyright is known as the basis of intellectual rights to literary and artistic works, aside from other related rights. The protected subject matter of copyright includes literary, artistic, and scientific works. On the other hand, the subject matter covered by other related rights are the performances, phonograms, video recordings, broadcast programs, and encrypted satellite signals carrying programs.[1] Thus, it can be concluded that copyright law is built to protect the original intellectual creations which is the basis for the formation of related rights. According to Vietnamese law, copyright is recognized and protected from the creation of the work (Article 6.1 - Law on Intellectual Property).

For the concept of copyright, Article 4.2 of the Law on Intellectual Property provides one disposition, as follows: "Copyright is the right of organizations and individuals for works created or possessed." However, this concept needs to be reviewed soon because it is obvious that when one possesses an artistic work, it does not mean that one gets the copyright on this work—one only gets the materials. At the very least, the transfer of copyright can make a non-author a copyright-holder, thereby allowing him to exercise the right of an author.

In addition, Article 18 of the Law on Intellectual Property offers a list of constituents of copyright which includes personal and property rights. Because of its significance, copyright has gradually been recognized as one of the most important

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[1] LAW ON INTELLECTUAL PROPERTY, art. 3.1.

and fundamental rights in the economic, cultural, social and legal life of Vietnam today.

II. HISTORY OF VIETNAM'S COPYRIGHT LAW

Unlike many Western countries, regulations on copyright in Vietnam have only appeared recently. This is because for quite a long time, Vietnam has had to face many wars which instead led to the division of Vietnam's efforts to attain freedom and the reconstruction of the country post-war. After the successful August Revolution of 1945, the basis for copyright appeared for the first time in the Vietnam Constitution of 1946. Article 10 of this Constitution recognizes the right to free speech and right to free publishing for Vietnamese citizens, though the term "copyright" was not yet used at that time. During this time, the war was still going on in the South of Vietnam.

With the reunification of the South and North of Vietnam, the economy and society of Vietnam have started to recover and develop gradually. It began in the 1980s, or more precisely, during the Sixth Congress of the Communist Party, when Vietnam initiated its economic and social "Doi moi" policy.[2] For the first time in 1986, the term "copyright" was mentioned in Decree 142/HDBT of the Council of Ministers ("Decree 142/HDBT"). This was a very simple legal document that regulated the protection of copyright in Vietnam, which included only eight articles that dealt with the fundamental concepts of copyright such as the concept of the author and his basic rights, as well as protected works.

As a result, Decree 142/HDBT exposed the limitations of copyright both in form and content. Particularly, in terms of content, the Decree lacked important provisions on the protection of computer programs and related rights. Moreover, there were some provisions in the Decree that did not conform to international conventions on copyright, such as the term of copyright protection which lasts only 30 years after the author's death, while under the Berne Convention, it is 50 years after the author's death. Formally, this Decree was only a sub-law[3] document, and the scope of the document did not meet the requirements of Vietnam during its economic, social, and legal reform. From an international perspective, this Decree had not been properly

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[2] "Doi moi" was the new policy of the Vietnamese Communist Party during the 1980s. With this policy, Vietnam began to renovate the economy by transitioning from a subsidized economy to a market economy. Copyright legislation was therefore necessary in order to help develop Vietnam's culture and economy.

[3] In Vietnam, "laws" in their restricted meaning are only regulations elaborated by the National Assembly. Therefore, other acts made by other authorities—for example the Government and the Ministry—are not "laws", but subordinate to "laws".

assessed in order to allow Vietnam to participate in international relations with other countries in the field of copyright protection.

Faced with the abovementioned shortcomings and the recognition of the importance of imposing policies on intellectual property as a tool to attract foreign investment into Vietnam, Vietnam has issued many legal documents regulating copyright. Beginning in the early 1990s, copyright was mentioned in the highest legal document of Vietnam, the Constitution of 1992. This was an important legal document that defined the most basic rights of citizens, wherein Article 60 provided that "[c]itizens have the right to conduct scientific and technological research, inventions, innovations, technical innovations, production rationalization, literary and artistic production and criticism, and participation in other literary activities. State provides the protection of copyright, industrial property rights." With this recognition of copyright in the Constitution, it could be said that copyright in Vietnam has grown to new heights.

Next, with the help of experts from the World Intellectual Property Organization (WIPO) and references to the provisions of foreign laws, the Ordinance on the Protection of Copyright ("Ordinance") was adopted by the Standing Committee of the National Assembly on December 12, 1994. This Ordinance, which was more complete than Decree 142/HDBT, consisted of 47 articles which were divided into seven chapters, stipulating the fundamental issues of copyright, such as authors, co-authors, protected works, works by foreign authors, computer program protection, copyright limitations, copyright exploitation contracts, copyright protection duration (until 50 years after the author's death), and related rights.

However, this Ordinance also quickly expired due to the birth of the Civil Code of 1995 ("Code"). The Civil Code of 1995 provided some of the provisions on intellectual property rights, which included copyright in Part VI. Along with inheriting the provisions of the Ordinance of 1994, the Code also added new regulations on owners of works, rights and obligations of performers, producers of phonograms and recordings, and broadcasting organizations. But it must be noted that the Civil Code of 1995 only mentioned copyright from the perspective of civil law. Other issues related to state management, as well as the resolution of copyright disputes, were still stipulated in other legal documents promulgated by the Government, specifically, the Ministry of Culture and Information.

Along with the rapid development of Vietnam's economy and society and with the goal of joining the World Trade Organization ("WTO"), many legal documents such as the Civil Code and Intellectual Property Law have since been amended, supplemented, or newly promulgated with provisions consistent with Vietnam's

commitments upon accession to international conventions. Again, copyright was mentioned as a civil right that had to be respected and protected in the Civil Code of 2005. Furthermore, in order to put in one book all laws relating to intellectual property which were found scattered in different legal documents and caused difficulties in application and implementation, the National Assembly of Vietnam issued the Law on Intellectual Property of 2005, which entered into force on July 1, 2006. This law contained 222 articles in which copyright and related rights were mentioned.

Some years later, according to the Report[4] of the Ministry of Culture, Sports, and Tourism on the enforcement of the Law on Intellectual Property of 2005, the Law had caused certain limitations that were inconsistent with Vietnam's commitments in bilateral and multilateral international treaties, such as the "3-step Test" principle defined in the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and the principle of "Most Favored Nation Treatment" within the WTO. To face these issues, on February 4, 2009, the Vietnamese Government submitted a Standing Committee Report on the Draft Law to the National Assembly, amending and supplementing the Law on Intellectual Property of 2005. This amendment was then submitted to the National Assembly for approval. The Report mentioned objective and subjective causes leading to limitations in the present Law and provided explanations for the amendment. After many discussions, on June 19, 2009, the National Assembly of Vietnam issued the Law amending and supplementing a number of articles of the Intellectual Property Law, including 30 terms which came into effect on January 1, 2010. Ten years later, in 2019, the Law on Intellectual Property was revised to adapt with the demands of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which Vietnam has joined officially in January 14, 2019. This Law is in effect until now.

Moreover, internationally, in order to have a stable legal system that satisfies the requirements of copyright protection, Vietnam has also participated in many bilateral and multilateral international copyright conventions, such as the Vietnam-United States Agreement on the Establishment of Copyright Relations, the Vietnam-Switzerland Agreement on the Protection of Intellectual Property Rights, trade agreements between Vietnam and the United States, the Berne Convention of 1886, the Geneva Convention for the Protection of Producers of Phonograms, the Brussels Convention on the Distribution of Programs by Satellite, the Rome Convention of 26 October 1961 on International Protection of Performers, and the TRIPS Agreement of April 15, 1994 within the framework of the WTO.

[4] Report No. 202/BC-BVHTTDL, Dec. 10, 2008.

Thanks to the many legal reforms mentioned above, copyright in Vietnam has, little by little, developed. In addition, it can be seen that copyright plays a very important and indispensable role in Vietnam's international economic and social integration.

III. LITERARY AND ARTISTIC WORKS PROTECTED

Article 2.1 of the Berne Conventions provides an unlimited list of works that are protected by copyright. In accordance with this Convention, Article 14.1 of the Law on Intellectual Property of Vietnam also provides a list of works protected by copyright. Accordingly, there will be cases that are not protected by copyright. Thus, in order to be eligible for copyright protection, works must satisfy two basic conditions: first, being creative; and second, existing in a certain form.

A. Original Creation

How can there be original creation? It can be understood that original creation is the mark of the author.[5] In other words, the work is the author's own intellectual creation.[6] However, this concept is still difficult to define. There are works that are not original in themselves but are still considered to be creations of the author's own mind, and thus still have the nature of an original creation. The typical examples of this are collections, such as encyclopedias or data banks, which are subject to copyright protection even though these only serve to collect the work of others. The reason for the recognition of copyright for these works is that there is actually a rearrangement of works expressed in a certain order that brings about the author's own stamp on those collections. For the same reason, translations and adaptations are also protected by copyright as an original work because they reflect the creativity of the author. Article 14 of the Law on Intellectual Property of Vietnam also states that the protected work "must be created directly by the author by his intellectual work without copying from the work of others."

Should an original creation be a new thing? It can be confirmed that a work is an original creation even if it is not new. French theorists also claim that creative origin is the basis of copyright, which is different from the novelty of industrial property.[7] They also say that "original creation is subjective: it is the author's personal stamp that

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5 Nguyen Thi Hong Nhung, *Copyright in cyberspace*, Publishing House of National University of Ho Chi Minh City, 2015, p. 10.

6 Berne Convention, arts. 2.2 & 2.3.

7 Desbois H., *Le droit d'auteur en France*, Paris, Dalloz, 3rd edition, 1978, p. 5.

results from the creative endeavor of the author, while novelty is judged objectively because it is determined by comparison with previous analogues[.]"[8]

Similar to novelty, the quality of a work is not considered to be a factor in deciding whether or not a work is protected. As Stephen M. Stewart wrote in his book,[9] "the quality of a work is just a matter of taste and emotion, and therefore it is not a factor to judge whether it is a work that can be protected."

Similar to these opinions, Article 6.1 of the Law on Intellectual Property of Vietnam declares that copyright is born from the time of creation of the work, whether or not it is new or published.

B. Certain Form

Simple ideas will not be protected. This means that if the idea only exists in the mind of each person and is not expressed in some certain form, then it is not subject to the protection of copyright. And so, the author needs to mark the creations of his thinking in a certain form, possibly "some form or manifestation" as referred to in Article 2.1 of the Berne Convention. Accordingly, the thinking, methodology, or even the mode of operation is not protected by copyright.

Ideas in a certain form, in order to be protected by copyright, need not be a complete form that can be publicly disclosed. Certain forms may be a manuscript, or a summary expressing the creative intent of the author. However, it can be said that the boundaries between the idea (the unprotected) and the format in a certain form (the protected) are often lacking in clarity. So, to be protected, the idea should be edited or developed with a certain structure.

Should the form be material or non-material? The question is whether the "certain form" mentioned above is required to be in material form. From the point of view of French scholars and countries with the same legal system of copyright, formatting in certain forms does not require expression in a material form.[10] That is why speeches or works of a similar nature are subject to copyright protection (in accordance with Article 2.1 of the Berne Convention). However, Article 2.2 of the Berne Convention provides an alternative interpretation and application: States

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[8] Colombet C., *Grands principes du droit d'auteur et des droits voisins dans le monde*, Paris, Litec, 1990, p. 2.

[9] Stewart S.M., *International copyright and neighbouring rights*, London, Butterworths, 1989, 2nd edition, p. 50.

[10] Lucas A. and Lucas H.J., *Traité de la propriété littéraire et artistiques*, Paris, Litec, 3rd edition, 2006, p. 62.

Parties are entitled to recognize protection for works only in the material form. And in accordance with Article 2.2 of the Berne Convention, the Law on Intellectual Property of Vietnam provides in Article 6.1 that "[c]opyright came into being from the time the work was created and expressed in a form of a certain substance."

Thus, it can be summarized that under Vietnamese law—in addition to the original creative element—in order for a work to be protected, the work must also be expressed in a material form. Other factors such as novelty, length, and quality of the work are not used to evaluate the protection of works.

C. Author's Rights

It is possible to view the author's exclusive rights to the work as privileges granted by law to persons engaged in creative work. Vietnamese law recognizes the authors of two fundamental rights groups—moral rights and property rights. This recognition meets two basic objectives: if moral rights allow the author to mark his or her personal stamp on the work, the property rights allow the author to obtain the profit derived from the exploitation of products.

1. Moral Rights

Moral rights belong to a family of non-property rights that allow the author to protect his personal identity as embodied in the work the author created. Thus, this right arises from the link between the work and the human being of the author, the expression of the author's personality in the work. Logically, moral rights prevail over property rights because at the time of publication, the author has made one of the first manifestations of moral rights: publication rights. In the Law on Intellectual Property of Vietnam, moral rights (Article 19) are placed before property rights (Article 20).

Vietnamese law raises a list of moral rights that express the relationship between the author and his or her work.[11] Accordingly, the moral rights of authors protected by Vietnamese law include the right to name the work, the right to display the real name or pseudonym on the work, the right to use a real or pen name when the work is published or used, the right to publish the work or authorize others to publish the work, and the right to protect the integrity of the work—to prevent others from repairing, mutilating, or distorting the work in any form that is detrimental to the honor and reputation of the author.

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[11] LAW ON INTELLECTUAL PROPERTY, art. 19.

a. Right to Name the Work and Right to Display the Real Name or Pseudonym on the Work

The right to name the work and the right to display the real name or pseudonym of authors on the work are the rights to be placed before other moral rights of authors in Vietnamese law. Paragraphs 1 and 2 of Article 19 of the Law on Intellectual Property stipulate that the author has the right to "name his work" and "to have his or her real name or pseudonym on the work" when products are published or used. These rights are also mentioned in Article 6 of the Berne Convention. This also means that the respect of these rights is mandatory. The naming of the work is significant to authors, similar to how a father wants to name his son. As to the right to display his name on the work, this right is also important because it serves as evidence before the court that the person with the name displayed on the work is the author.

The right to display the real name or pseudonym of authors on the work can be understood in two ways: the right to include his or her name in the work, and the right to object. For the first right, the author has the right to authorize his or her name and address to appear on all published copies, as well as any materials relating to the work, if desired. However, naming the author is accepted as a right and not an obligation—for example, a particular author may not like fame, so they can choose anonymity by using a pseudonym. However, anonymous authors or those using pseudonyms can reveal their real names at any time. As for the right to protest, it is the right of the author of a work to protest against another person's name being displayed on his work. This is a prohibition on any third person who claims to be the author of the work of others.

b. Right to publish the work

Publishing a work is the introduction of a work to the public. The author evaluates the perfection or completeness of the work and has right to bring it to the public. This also means that he has the right not to publish or publish his work and no one can prevent this. In other words, the right to publish a work entails the obligation of others not to freely introduce the work without the author's permission. This is not strange because under Article 19.3 of the Law on Intellectual Property of Vietnam, the author has the right "to publish or allow others to publish the work." The phrase "allow others to publish their work" clearly explains why the right to publish a work can be transferred, under the provisions of Article 45.2 and Article 47.2 of the Law. However, it can be added that the right to publish a work is not universally recognized, which explains why the right to publish a work is not uniformly defined in the different countries of the world. The Berne Convention does not even recognize this right.

Furthermore, according to Vietnamese law, the right to publish a work only covers the distribution to the public of certain copies of the work.[12] This right does not cover the performance or broadcast of a work, even if it is made for the first time. According to this provision, it can be understood that when the author publishes his work by means of paper, this is protected by the right to publish the work; however, when his work soon appears in electronic form on the Internet without his prior permission, this act cannot be regarded as an infringement of the right to publish the work (but obviously, an infringement of another right).

Moreover, in Vietnam, we do not find any regulations related to the exhaustion of the right to publish the work. However, Article 22 of Decree No. 100/2006/ND-CP, details and guides the implementation of a number of articles of the Civil Code and the Intellectual Property Law regarding copyright and related rights. This Article stipulates that the right to publish a work is recognized for certain copies of a work. Therefore, it is possible to understand that another author's consent is required to publish other copies in the same mode of publication.

c. *Right to Respect the Integrity of the Work*

The right to respect the integrity of the work is provided for in Article 19.4 of the Law on Intellectual Property of Vietnam, in accordance with Article 6bis of the Berne Convention. Accordingly, this right allows the author to protect the integrity of his work against any modification or misrepresentation of the work which infringes the author's reputation. In other words, this right allows the author to request that his work must be communicated to the public exactly as the author intended. This ensures that the author's wishes, ideas, as well as his personality, are reflected well in the unchanged work. Therefore, everyone is obliged to respect the work, including the right holder of the work.

In addition, it should be noted that under the provisions of the Vietnamese law, the author can only sue for infringement of the right to respect the integrity of the work, provided that the infringement of the integrity of the work is detrimental to his honor and prestige. It can be seen that this provision is in line with the content of Article 6bis of the Berne Convention to which Vietnam is a party. Accordingly, in such an understanding, all acts of infringement of the right to respect the integrity of a work shall not be subject to automatic penalties, but only those which are harmful to the honor and prestige of the author. What are the damages to the honor and dignity of the author? There is no precise guide to this issue in the Law on Intellectual Property

[12] Decree No. 100/2206/ND-CP of Sept. 21, 2006, art. 22.2, detailing and guiding the implementation of a number of articles of the Civil Code and the Law on Intellectual Property regarding copyright and related rights.

or the Berne Convention. However, the right to protect the honor and prestige of an individual can be found in Article 34 of the Vietnamese Civil Code.

In summary, the above provision of the law aims to prevent the abuse of the author's rights. However, if viewed from a different angle, this provision makes it difficult for the author to exercise his or her statutory rights since the existence of damage to his or her honor and reputation is not easy to prove, even though infringements of the right to respect the integrity of the work are clear and increasingly popular. Some examples are the insertion of commercial advertisements during a film without the consent of the author, coloring a black and white film, or modifying the lyrics of a song.

d. Term of Protection of Moral Rights

Article 6bis of the Berne Convention provides that after the author's death, the author's moral rights shall be maintained, at least until the expiration of the term of protection of property rights. Pursuant to this Convention, the laws of Vietnam recognize that the author is given a longer time to exercise his moral rights. Specifically, in accordance with the law of Vietnam, the right to name the work and the right to respect the integrity of all types of work is, in principle, protected indefinitely. This is defined in Article 27.1 of the Law on Intellectual Property. This protection is given in order to fit the personal attributes of the privileges, because it is the author's personal mark and will last forever, even if the author dies.

It should be added that, contrary to those rights just mentioned above, the right to publish a work, in accordance with the provisions of the Law on Intellectual Property, has the same term of protection as property rights (Article 27.2 – Law on Intellectual Property). This makes the right to publish a work half a moral right and a half a property right.

2. Property Rights

In material terms, the author is given the property rights associated with the exploitation of his or her work. These are economic privileges that allow the author or owner of the copyright to determine the conditions of exploitation, and to obtain material benefits from the exploitation of the work. In other words, by virtue of these rights, the author may be remunerated for the exploitation of his work. The work is a product of the author's thinking and can be exploited in various forms such as books, video discs, cable television, and satellite TV, especially now that the Internet has created a new method for exploiting their work. In fact, with digital technology, the Internet has allowed the maximum exploitation of their work, while the pay to the author is still limited. So, how can the author protect his financial interests and have

a legitimate and effective incentive to continue to innovate? In Vietnam, the legal provisions relating to the protection of rights mentioned above are recognized in Article 20 of the Law on Intellectual Property.

Article 20 of the Law on Intellectual Property provides a list of the property rights of authors. Accordingly, the property rights of the author are recognized and protected by Vietnamese law, including the right to make derivative works, the right to perform their work before the public, the right of reproduction, the right to distribute or import the original or a copy of the work, the right to communicate the work to the public by wire, wireless, electronic information network or any other technical means, and the right to rent the originals or copies of cinematographic works and computer programs.

However, in order to make it easier to compare the laws of Vietnam with other foreign laws on copyright, it is possible to summarize the property rights into four groups: the right of reproduction (including the right to make derivative works); the right to communicate the work to the public (including the right to communicate the work to the public by wire or wireless means, or any other technical means); the right of distribution; and the right to rent a work. These rights are recognized as the exclusive rights of authors for their works.[13] And in principle, any exploitation of a work requires the permission of the author or copyright owner.

a. Right of Reproduction

It is logical that the duplication of the work in a certain form which ensures long-term continuity is considered a material reproduction (copy), while the translation of the work or adaptation is considered a non-material reproduction and is therefore understood as "making a derivative work."[14]

According to Article 4 of this Law, the term "derivative works" refers to works of translation, adaptation, transformation, compilation, annotation, and selection.[15] The "copy" of a work means the making of one or more copies of a work or of a phonogram or recording of a work, by any means and in any form, including the electronic form.[16] A similar understanding can also be found in Article 9.3 of the Berne Convention, but with a broader definition—"[a]ny sound or visual recording shall be considered as a reproduction."

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13 LAW ON INTELLECTUAL PROPERTY, art. 19.

14 LAW ON INTELLECTUAL PROPERTY, art. 20.1.

15 LAW ON INTELLECTUAL PROPERTY, art. 4.8.

16 LAW ON INTELLECTUAL PROPERTY, art. 4.10.

b. Right to Communicate the Work to the Public

The Berne Convention provides three articles regulating the right to communicate the work to the public (Articles 11, 11bis, 11ter). For the purposes of this Convention, authors of literary and artistic works enjoy the exclusive right of authorizing the presentation or transmission of works to the public by any means or process. Pursuant to the provisions of this Convention, the Vietnamese Law on Intellectual Property authorizes the author to communicate their work to the public pursuant to Article 20.

Accordingly, the communication of their work before the public is considered as a way of demonstrating and directing their work to the public by means of wire, wireless, electronic information network, or any other technical means. Nowadays, in the digital era, the digitization or storage of a work on an online web page will constitute a copy of the work and making this work available to Internet users is considered an act of conveying the work to the public because it allows for the transmission of their work which can be accessed all over the world.

c. Right of Distribution

Vietnamese law stipulates that the distribution of the original or copies of the work depends on the permission given by the copyright owner.[17] This provision aims to comply with Article 6 of the WIPO Copyright Treaty, which states: "[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sales or other transfer of ownership."

In detail, the law of Vietnam provides that the author is exclusively entitled to perform or authorize a third party to distribute his work, in any form or by any means, including the transmission of copies through the Internet. One question is whether Vietnamese law recognizes the theory of the depletion of copyright. Although the answer is "yes" for the material world, it seems that in the Internet world, the right to distribute the work online does not appear to be exhausted after the first distribution (the first transmission) because it cannot be found in any legal text. It means that in principle, after the authorized transmission of work, the work received by the user A cannot be redistributed online by this user to other user (user B), without the permission of the copyright owner (or without payment to the copyright owner). Moreover, there are provisions on infringements of copyright, such as the "publication, distribution of works without the author's permission"[18] or "exporting,

[17] LAW ON INTELLECTUAL PROPERTY, art. 20.
[18] LAW ON INTELLECTUAL PROPERTY, art. 28.3.

importing, distributing copies of works without the permission of the copyright owner."[19]

d. Right to Rent a Work

For cinematographic works and computer programs, the Vietnamese law prescribes that copyright owners have the exclusive right to rent or allow others to rent originals or copies of their works.[20] This provision originated from the TRIPS Agreement and the WIPO Copyright Treaty.

Nowadays, transmissions of film and computer programs on the Internet actually have the same role and lead to the same result as rental of physical materials such as CDs, VCDs, or DVDs. It can be seen that there is no real difference between renting a traditional physical CD in a store and a non-physical rental on the Web because with these two methods, users can only use works for a definite period of time. Vietnamese law stipulates that the lessee is responsible for paying the copyright owner.[21] Despite such regulations, infringement of the author's right to rental, such as the use of similar code for multiple computers or the prolongation of use of programs, is also common.

However, it should be noted that the right to rental does not apply where the computer program is necessary and mainly for the operation of machinery or other technical equipment. This provision is intended to be consistent with the international provisions of the TRIPS Agreement (Article 11) and the WIPO Copyright Treaty (Article 2 (2) (i)).

e. Term of Protection of Property Rights

In general, the term of protection of property rights for copyright holders is 50 years after the death of the author.[22]

Furthermore, Vietnamese legal provisions relating to the protection of intellectual property rights are valid in the territory of Vietnam and apply to Vietnamese organizations and individuals, as well as to foreign organizations and individuals. This is in accordance with conditions prescribed by Vietnamese law and treaties to which Vietnam is a contracting party.[23] Thus, Vietnamese law will apply if a violation to copyright is carried out within the territory of Vietnam or outside

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[19] LAW ON INTELLECTUAL PROPERTY, art. 28.16.
[20] LAW ON INTELLECTUAL PROPERTY, art. 20.
[21] LAW ON INTELLECTUAL PROPERTY, art. 20.3.
[22] LAW ON INTELLECTUAL PROPERTY, art. 27.2.b.
[23] LAW ON INTELLECTUAL PROPERTY, art. 2.

Vietnam, by a Vietnamese or by other nationalities, against a Vietnamese copyright owner under the international treaties to which Vietnam is a party.

D. Limitations of Copyright

In fact, the author's privileges for works are not absolute, because such privileges need to respect other fundamental interests. The Vietnamese law provides for some exceptions[24] to permit the harmonization of the requirements of copyright protection with other requirements for the common good. Some limitations are explained by the need to protect the basic rights and interests of individuals (press freedom and freedom of speech), such as citation, analysis, and comments. Some other restrictions are explained on the basis of public interest, such as for teaching purposes, research, or propaganda activities.

It should be added that these restrictions are strictly regulated and applied. In other words, these restrictions can only be applied when it complies with the "Three-step Test" principle. This is the standard set out in Article 9-2 of the Berne Convention, Article 13 of the TRIPS Agreement, and Article 10 of the WIPO Copyright Treaty. Clause number 2 in Articles 25 and 26 of the Vietnamese Law on Intellectual Property are prescribed in accordance with those international treaties: "[o]rganizations and individuals using works defined in Clause 1 of this Article must not affect normal exploitation of works, without prejudice to the rights of authors or copyright holders; must disclose information on the name of the author and the origin of the work." Thanks to the "Three-step Test" principle, the user may use the work for legal purposes provided by law, while the author can effectively protect his or her rights.

1. Cases of Usage Without Permission and Without Payment

There are cases where people can have the right to use a work without asking permission from copyright holders or making payment[25]—one is as a copy for personal purposes or scientific research and teaching activities; as reasonable citation for comments, newspapers, or for teaching purposes without misleading author's opinion; as copies for archival purposes in the library; as a performance of works in cultural activities without commercial purpose; as a record or photograph of live performances for news coverage or for teaching purposes; as a transfer of the work to braille or other language for the visually impaired; and as an import of copies of works for personal use.

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[24] LAW ON INTELLECTUAL PROPERTY, arts. 25 & 26.

[25] LAW ON INTELLECTUAL PROPERTY, art. 25.

Thus, according to this Article, the copy for personal use can only escape the "net of copyright" if only one copy is made and used for the purposes of scientific research and teaching. This means that the user does not need the permission of the copyright owner nor make payment to him or her. This is an absolute exception. It also means that it is not legal if the users make copies for their studies, because this activity can harm the property rights of the copyright holder. Theoretically, this provision is in line with the "Three-Step Test" principle set forth in Article 9-2 of the Berne Convention, and stated international treaties to which Vietnam is a party. In other words, if a personal copy is used for purposes other than for scientific research and teaching without the permission of the copyright owner, it is considered to be a copyright infringement.

Article 25 of the Law on Intellectual Property of Vietnam also applies to digital copies. This means that in order to be considered as an exception to copyright, it must be a digital copy of a personal nature for the purposes of scientific research and teaching. Thus, it is considered illegal for a computer user to download work from the Internet to his or her computer memory for other purposes that are not intended for research or teaching, without the permission of the copyright owner.

However, in practice, it is not possible to completely prevent the use of personal copies for purposes other than scientific research and teaching. Still, it is important for Vietnam to recognize them as an absolute exception to copyright for personal use, not limited to the purposes of teaching and scientific research. In order to balance the conflict of interest between the copyright holder and the users, as well as to be in line with the "Three-step Test" principle, Vietnam must establish a mechanism of remuneration for copyright holders for produced personal copies. It can be included in the sale price of recording and copying devices such as computer disks, writable CDs and DVDs, photocopy machines, hard drive integrated players, and CD and DVD players. The calculation of payment can be based on the working capacity of the devices.

Libraries (as well as data centers) enjoy a number of privileges including the ability to make copies. Paragraph 1.e of Article 25 of the Law on Intellectual Property of Vietnam stipulates that libraries have the right to reproduce works for archival purposes. For the number of copies, Clause 2 of Article 25 of Decree No. 100/2006/ND-CP states that libraries may "not make more than one copy" and "the library may not copy and distribute copies of works to the public, including digital copies."

Similar to the right to reproduce a work, Vietnamese law recognizes an exception to the right to perform the work for the benefit of the individual. This is the case of

performance at home. A reason for this exception is the inability to control the performance of the work within the family. It should be added that the exception to the right to perform works is not found in Article 25 or Article 26 of the Law on Intellectual Property, but in Article 20. In Article 20, when talking about the nature of the right of performance, the law uses the term “public” (“right to communicate the work to the public”). It means that if the work is performed at home, it does not need the acceptance of the copyright holder. This is recognized in Decree No. 100/2006/ND-CP: “the performance of a work before the public includes the performance of the work at any place, except at home.”

2. Cases of Using a Work Without Permission but Paying Remuneration

Another form of exception to property rights is the use of works without obtaining the permission of the copyright owner, but having to pay royalties.

As discussed, copyright owners should make the work available to the public. However, in order to facilitate the development of culture, education and communication as well as to balance conflicts of interest between authors and communities, the Vietnam Law on Intellectual Property has provided in Article 26 the use of work by paying remuneration, even without permission from the copyright holder. This exception is only for broadcasting organizations. According to this provision, when a work has been published, the broadcasting organization has the right to use it for broadcasting without the consent of the copyright owner, but must pay the remuneration.

The amount of remuneration shall be agreed upon by the broadcasting organization and the copyright owner. In the absence of such agreement, it shall be governed by the government’s regulations or the court’s decision, if it is for commercial purposes. In cases where the broadcasting organizations use the published works for broadcasting without sponsorship or advertising in any form, the remuneration shall be paid according to the government’s regulations.

In line with the principle of "Three-step Test" provided for in international treaties to which Vietnam is a contracting party, Article 26 of the Law on Intellectual Property also provides that broadcasting organizations should not affect the normal exploitation of the work, nor cause prejudice to the rights of the author or the copyright owner.

However, it is noted that this exception shall not be applied to cinematographic works. It is because this kind of work is too expensive—there has to be agreement with the right holder before using the work.[26]

E. Protection Measures to Violation of Copyright

1. Civil Measures

Article 202 of the Intellectual Property Law of Vietnam provides for five civil measures to deal with infringements of intellectual property rights in general, as well as of copyright in particular: termination of the infringement; apology and public correction; forced performance of civil obligations; damages; and forced destruction or forced distribution or use for non-commercial purposes.

Termination of infringing acts. The copyright owner has the right to request the violator to terminate the act of infringement.

Apology and public correction. Vietnam's intellectual property law recognizes civil measures whereby the offending person expresses his or her apology through public media, at the request of the copyright owner. In addition, the offender must also make a public correction of false information that affects the reputation and dignity of the author. Accordingly, the public media includes newspapers online or in paper, television, radio, and social networks. These measures specifically apply to an infringement of the author's moral rights, which is judged to be detrimental to the author's reputation.

Forcible performance of civil obligations. Where an act of using a protected work is committed without the consent of the copyright owner, the owner of copyright may request the infringer to fulfill the obligation to pay a sum of money for the use of that work from the time of use.

Damages. This measure is stipulated in Vietnamese law, in line with Article 45 of the TRIPS Agreement. Under the provisions of Vietnamese law, compensation for damage must meet the following conditions: violating act, damage, and the causal relationship between the violating act and damage.[27]Accordingly, the offender who commits intentional or unintentional acts (other than force majeure) prescribed in Article 28 of the Law on Intellectual Property—causing damage to the copyright owner—shall be obliged to pay compensation. Therefore, in order to claim damages, the party incurring damages must prove that the actual loss occurred and, afterwards,

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[26] LAW ON INTELLECTUAL PROPERTY, art. 26.3.

[27] CIVIL CODE OF 2015, art. 584.

determine the damage in accordance with the provisions of Articles 204 and 205 of the Law on Intellectual Property.

However, it can be seen that identifying physical damage is much easier than identifying mental damage. Accordingly, the benefits are lost when property rights infringed can be determined in a variety of ways; for example, based on signed contracts of transfer or use of copyright. And for damage to personal rights, similar to French law, Vietnamese judges have full competence to determine damages based on reasonable information. Furthermore, it should be added that in accordance with Article 45(2) of the TRIPS Agreement, Vietnamese law also provides that the offender is obliged to pay the copyright owner the costs for hiring lawyers in the litigation.[28]

Forced destruction or forced distribution or use for non-commercial purposes. This measure is applied to goods, raw materials, materials, and means used primarily for the production and trading of infringing goods. However, when applying this measure, we must ensure that it does not affect the ability to exploit the rights of copyright holders.

2. Administrative Measures

a. Violation Acts

As stated, the author is entitled to personal and property rights. As a consequence, infringements of copyright through the use of a work without the consent of the author or the owner of the copyright shall be prohibited by law. Article 211 of the Law on Intellectual Property of Vietnam provides a list of infringements of intellectual property rights that may be subjected to administrative penalties. These are acts that "infringe upon intellectual property rights causing damage to authors, owners, consumers or the society[.]"[29] However, it may be noted that this provision is still general, because it shall be detailed by the government's regulations. Accordingly, the government issued Decree No. 131/2013/ND-CP dated October 16, 2013 on sanctioning of administrative violations of copyright and related rights, which detailed the acts violating copyright.

b. Administrative Sanctions

For administrative sanctions of infringements of copyright, Article 214 of the Law on Intellectual Property of Vietnam provides for two main forms of sanctions—warnings and fines. However, although the Intellectual Property Law recognizes the

[28] LAW ON INTELLECTUAL PROPERTY, art. 205.3.
[29] LAW ON INTELLECTUAL PROPERTY, art. 211.1.

existence of a warning, this measure is not used in practice. In the Decree of the Vietnamese government, only the fine is mentioned. And the fines are limited to VND 500,000,000, depending on the nature and seriousness of the violation.[30]

In addition to the main sanctions, additional sanctions and remedies are also provided for in Article 214 of the Law on Intellectual Property of Vietnam.

c. *Competence Authorities*

According to current Vietnamese law, many authorities are given competence to sanction administrative violations, including specialized inspection, chairmen of people's committees at all levels, people's police, border guard maritime, customs, tax authorities, and market management agencies.[31]

In practice, as there are many authorities in one field, the overlapping responsibility can cause some difficulties in copyright protection. There is no one person or entity who is mainly responsible to detect violations and protect copyright.

3. Criminal Measures

In Vietnam, criminal measures against copyright infringements are governed by Article 225 of the Penal Code (2015), amended in 2017. The severity of penalties for copyright infringement shows the dangers of these behaviors in the current economic and cultural development of Vietnam, in accordance with international law. When copyright is not well protected, intellectual creativity will be less. It can affect socio-economic development and foreign investment in Vietnam.

However, there are only certain acts of violations sanctioned by criminal measures, such as copying works, phonograms and video recordings, and distributing copies of works, copies of phonograms, and copies of video recordings to the public. This means that for other kinds of acts of violations, other measures and not criminal measures will be applied.

According to this Penal Code, subjects of criminal measures are not only individuals, but also commercial moral persons. Depending on the amount of money they earn from the violation of copyright or damages made to the right holder, the violator can be subject to criminal sanctions ranging from a fine of 50 million to 3 billion Vietnamese dong, imprisonment of up to 5 years, and prohibition of business of up to 5 years.

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[30] Decree 131/2013/ND-CP.

[31] *Id.*

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THE LAW IN THE DIGITAL AGE

PHILIPPINE ELECTRONIC CONTRACTING

JOSE JESUS M. DISINI, JR.

I. INTRODUCTION

Cyberspace has evolved to such an extent that it is now widely accepted as a virtual marketplace. Online transactions have changed the way private individuals and businesses enter into contracts. Offers and advertisements, acceptance, and payment can be completed via keystroke or a click of the mouse.

Although the Philippines has passed the Electronic Commerce Act of 2000 ("E-Commerce Act"), the primary governing law in the Philippines for contracts is still the Civil Code of the Philippines ("Civil Code"), whose drafters never contemplated online transactions.[1] Without more specific and current legislation, there is a need to "translate" the Civil Code in the context of online transactions. Further, the E-Commerce Act by itself remains unable to fully address all the issues raised by the practice of electronic contracts or commercial communications. This latter point is better illustrated by examining international instruments such as the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and the United Nations (UN) Convention on the Use of Electronic Communication in International Contracts.

II. E-COMMERCE ACT

A. Philippine Contract Law

It has been said that the objective of the E-Commerce Act is to legalize electronic contracts and transactions. However, as explained below, electronic contracts were never invalid under Philippine law in the first place; these already would have been accommodated under the Civil Code.

The Civil Code adheres to the spiritual system where contracts are valid if made in any way that indicates the party wished to be bound. Article 1356 of the Civil Code states that a "[c]ontract shall be obligatory, in whatever form they may have been

[1] The Civil Code of the Philippines (also known as Republic Act No. 386) was enacted in 1949.

entered into, provided all the essential requisites for their validity are present." On the basis of the foregoing, the Supreme Court of the Philippines ("Supreme Court") has repeatedly upheld the validity of contracts proven solely by testimonial evidence.[2] Hence, as a general rule, a contract under Philippine law will be valid in whatever form it may be found, whether it be oral, paper-based or for that matter, electronic.

B. Recognition of Electronic Contracts

There is also some basis to say that Philippine law also recognized electronic contracts that were validly executed overseas even before the passage of the E-Commerce Act. Article 17 of the Civil Code provides that the forms and solemnities of contracts shall be governed by the laws of the country where the contract was executed. By this express codal provision, the Philippines follows the *lex loci contractus* rule insofar as the formal validity of contracts is concerned. In this regard, the Supreme Court has had occasion to rule that a power of attorney executed in Germany must be tested as to its formal validity by the laws of Germany, and not the Civil Code.[3]

Such a case is an example of a situation when extrinsic validity and intrinsic validity may be governed by different legal regimes. Extrinsic validity of a contract refers to formalities and solemnities which must be followed under the law, while intrinsic validity refers to the legality of the contract. Thus, pursuant to Article 17 of the Civil Code, if the law where the electronic contract was entered into recognizes such form of agreements, those electronic agreements are extrinsically valid in the Philippines. Assuming further that such agreements are also intrinsically valid under Philippine law, then those electronic contracts would be valid in all respects under Philippine law.

In light of this conclusion, as well as the argument that electronic contracts executed in the Philippines were not prohibited under prior law, some were of the view that Philippine law did not need any new legislation to accommodate electronic commerce. Any issue respecting the applicability of existing law to electronic documents and signatures could be properly resolved by the courts, as cases on electronic commerce come before them. However, the limitations of the judicial system, if taken into account, would not have been able to create a stable legal environment necessary for the growth of electronic commerce. In fact, inconsistent or irrational rulings may even have a destabilizing effect and inadvertently lead to a

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[2] J.M. DISINI, JR., THE ELECTRONIC COMMERCE ACT/THE RULES ON ELECTRONIC EVIDENCE: COMMENTS AND ANNOTATIONS (2nd ed., 2001) 78; *citing* Thunga Chui v. Que Bentec, 2 Phil. 561; Alcantara v. Alineo, 8 Phil. 111; Peterson v. Azada, 8 Phil. 432.

[3] *Id.* at 78; *citing* German & Co. v. Donaldson, Sim & Co., 1 Phil. 63 (1901).

decline in electronic commerce. These issues have, of course, become moot and academic with the passage of the Act.

C. Validity of Electronic Contracts

The statutory recognition and definition of "electronic contracts" under the E-Commerce Act are established by Section 16(1), which states:

> Except as otherwise agreed by the parties, an offer, the acceptance of an offer and such other elements required under existing laws for the formation of contracts may be expressed in, demonstrated and proved by means of electronic data messages or electronic documents and no contract shall be denied validity or enforceability on the sole ground that it is in the form of an electronic data message or electronic document, or that any or all of the elements required under existing laws for the formation of contracts is expressed, demonstrated and proved by means of electronic data messages or electronic documents.

Section 16(1) explicitly validates electronic contracts under Philippine law without supplanting substantive rules on contracting. The E-Commerce Act does not amend the law on contracts but merely allows the requisite elements of offer and acceptance, or its external manifestations, to be expressed in electronic form. It should be emphasized that the E-Commerce Act covers not merely the cases in which both the offer and acceptance are communicated orally, but also cases in which only the offer or only the acceptance is electronically communicated.[4] For example, based on this provision, e-mail acceptance to a handwritten offer can be used as basis to prove the existence of a contract.

D. Freedom to Opt Out

The opening phrase used in Section 16(1)—"[e]xcept otherwise agreed by the parties"—is intended to reinforce party autonomy and to make it clear that the law is not intended to impose electronic contracting upon those who insist upon paper-based communications if they so stipulate. This idea is also expressed in Section 9 of the Implementing Rules to the E-Commerce Act ("IRR").[5]

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[4] DISINI, *supra* note 3, at 79, citing ¶ 78, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. As such, common forms of e-commerce contracting mechanisms such as clickwrap agreements would be covered under Section 16(1).

[5] § 9 of the Implementing Rules to the E-Commerce Act states: "Section 9. Use Not Mandatory. - Without prejudice to the application of Section 27 of the Act and Section 37 of these Rules, nothing in the Act or these Rules requires a person to use or accept information contained in electronic data messages,

E. Contract Law – Intrinsic Validity

As earlier explained, nothing in the provisions of the E-Commerce Act or its IRR should be deemed to have amended the law on contracts insofar as intrinsic validity is concerned. Contracts are either valid or invalid based on the existing Civil Code provisions on Obligations and Contracts, as well as other related statutes. In addition, illegal stipulations such as *pactum commissorium,*[6] and other covenants contrary to law, morals, public order or public policy will receive equal treatment even though appearing in an electronic document. Again, the E-Commerce Act intends only to amend the law with respect to the form of documents and transactions, not their intrinsic validity.

III. INTERNATIONAL MODELS AND INSTRUMENTS

The UNCITRAL has drafted two model laws on e-commerce. This section will explain whether the E-Commerce Act is consistent with these model laws, how they differ from each other, and how this may affect electronic contracts in the Philippines.

Model laws provide a uniform set of rules in order to facilitate efficiency in transactions among the members of United Nations. Model laws constitute a new step in a series of international instruments adopted by UNCITRAL, which are either specifically focused on the needs of electronic commerce or were prepared bearing in mind the needs of modern means of communication. However, although model laws are entered into to bind signatory member countries, their persuasiveness and binding authority are also limited, as they might conflict with local laws.

A. UNCITRAL Model Law on Electronic Commerce 1996

Date of adoption: June 12, 1996
Date of amendment: June 1998

The Model Law on Electronic Commerce ("MLEC") was enacted in order to enable and facilitate commerce with the use of electronic means by providing legislators with a set of internationally acceptable rules that remove legal obstacles and provide legal stability.[7]

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electronic documents, or electronic signatures, but a person's consent to do so may be inferred from the person's conduct."

[6] The automatic appropriation by the creditor of a thing, mortgaged upon the failure of the debtor to pay the principal obligation. See Art. 2088, Civil Code of the Philippines.

[7] *See* UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998*, available at* http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf (last accessed Oct. 1, 2018).

The MLEC embodies three fundamental principles of modern electronic commerce law.[8] First, the principle of non-discrimination, which provides that an electronic document will not be denied legal effect, validity, and enforcement based solely on the fact that it was executed through electronic means. This principle is seen in Articles 5, 9(1)(a), 11(1), and 12.

Second, the principle of technological neutrality requires that States should adopt provisions that are neutral to the technology used in order to maintain the statutes' relevance despite the rapid change in technology.

Third, the principle of functional equivalence provides for the standards that would allow electronic communications to be considered equivalent to paper-based communications. Article 8(1) of MLEC requires that an electronic message be presented as the original form if there is a reliable assurance as to the integrity of the information stored in said message, and that a person to whom it is to be presented would be able to identify the information. For the assurance of the integrity of the information, Article 8(3)(a) requires that the information must remain complete and unaltered. Meanwhile, for the standard of reliability, Article 8(3)(b) provides that the purpose for which the information was generated and all relevant circumstances be taken into consideration.

Aside from the embodied principles discussed above, MLEC also provides rules for the formation, validity, enforcement, and interpretation of electronic contracts, and for admissibility and evidentiary weight. These rules help facilitate international commerce by providing a common ground among the states.

B. UNCITRAL Model Law on Electronic Signatures 2001

Date of adoption: July 5, 2001

The Model Law on Electronic Signatures ("MLES") was enacted to address the increased use of electronic authentication techniques used in place of handwritten signatures and other traditional authentication methods. The former can lead to uncertainty as to the legal effect that may result from it, thus a specific legal framework was needed. MLES aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and handwritten signatures, specifically those used in commercial transactions. This may

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[8] "The MLEC was the first legislative text to adopt the fundamental principles of non-discrimination, technological neutrality and functional equivalence that are widely regarded as the founding elements of modern electronic commerce law." UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998, *available at* https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (last accessed Nov. 11, 2019).

assist states in addressing the issue as to the legal treatment and status of electronic signatures. MLES also establishes basic rules of conduct which may serve as a guide in assessing duties and liabilities for the signatory, the relying party, and third parties involved in the signature process.[9] It also favors the recognition of foreign certificates and electronic signatures based on the principle of substantive equivalence, regardless of the place of origin of the foreign signature.[10]

IV. COMPARISON WITH THE E-COMMERCE ACT

The very purpose of the MLEC and MLES is to promote commerce through electronic means and to facilitate the use of electronic signatures. This is why they put in place a set of standards and criteria which may universally govern electronic commercial transactions. However, the E-Commerce Act expands their scope of application and imposes additional requirements and standards which may impede e-commerce rather than uphold the purpose of the Model Laws. A comparison of pertinent provisions in the Model Laws and the E-Commerce Act is provided below.

A. Scope of Application

Many believe that the E-Commerce Act is intended to apply only to commercial transactions between private persons. However, unlike the MLEC and MLES, the E-Commerce Act also applies to electronic data messages or electronic documents used in non-commercial activities.[11]

B. Definition of Electronic Signatures

In order not to suggest any technical limitation regarding the method that could be used by a signatory to perform the functional equivalent of a handwritten signature, flexible wording under the MLES was used, thus:

> "Electronic Signature" means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message.[12]

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[9] UNCITRAL Model Law on Electronic Signatures, arts. 8 and 9.

[10] UNCITRAL Model Law on Electronic Signatures, art. 12.

[11] Rep. Act No. 8792 (2000), § 4.

[12] UNCITRAL Model Law on Electronic Signatures, art. 2(a).

The definition under the E-Commerce Act, however, is less clear:

> Any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or any methodology or procedures employed by a person and executed or adopted by such person with the intention of authenticating or approving an electronic document.[13]

From the text of the provision alone, the "methodology" or the "procedure" is not qualified by the phrase "in electronic form," giving the impression that other kinds of signatures need not be in electronic form. The definition under the E-Commerce Act should then be simplified, preferably aligned with (if not incorporating in whole) the definition adopted under the subsequently enacted MLES, as to align the E-Commerce Act with the more widely-adopted classification.

C. Recognition of Electronic Signature

One of the requirements of recognizing electronic signatures is that a method is used to identify the signing party and to indicate his approval to the information contained in the electronic message. Both the MLES and the E-Commerce Act state that such method must be reliable and appropriate for the purpose for which the electronic data message or document was executed.[14] But the E-Commerce Act adds the following in its provisions:

> (c) It is necessary for the party sought to be bound, in or order to proceed further with the transaction, to have executed or provided the electronic signature; and
> (d) The other party is authorized and enabled to verify the electronic signature and to make the decision to proceed with the transaction authenticated by the same.[15]

D. Formation and Validity of Contracts

The following is embodied in Article 11 of the MLEC regarding the communication of data messages in relation to the formation and validity of contracts:

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[13] Rep. Act No. 8792 (2000), § 5(d).

[14] UNCITRAL Model Law on Electronic Commerce, art. 6; *See also* Rep. Act No. 8792 (2000), § 8.

[15] Rep. Act No. 8792 (2000), § 8.

> In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

A similar provision is found in the E-Commerce Act. However, the coverage is expanded under the E-Commerce Act. Section 16 of the E-Commerce Act:

> Except as otherwise agreed by the parties, an offer, the acceptance of an offer and such other elements required under existing laws for the formation of contracts may be expressed in, demonstrated and proved by means of electronic data messages or electronic documents and no contract shall be denied validity or enforceability on the sole ground that it is in the form of an electronic data message or electronic document, or that any or all of the elements required under existing laws for the formation of contracts is expressed, demonstrated and proved by means of electronic data messages or electronic documents.[16]

E. Acknowledgement and Time of Receipt

As regards the acknowledgment of receipt of the electronic documents, Section 20 of the E-Commerce Act essentially reproduced Article 14, paragraphs (1) to (4) of the MLEC, but omitted paragraphs (5) to (7).

On the time of receipt of electronic documents, Article 15(2)(a)(i) of the MLEC provides that:

> Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
>
> (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
>
> (i) at the time when the data message enters the designated information system.

On the other hand, Sec. 22(a) of the E-Commerce Act qualifies such provision, stating that:

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[16] Rep. Act No. 8792 (2000), § 16.

Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic data message or electronic document is as follows:

a.) If the addressee has designated an information system for the purpose of receiving electronic data message or electronic document, receipt occurs at the time when the electronic data message or electronic document enters the designated information system: Provided, however, that if the originator and the addressee are both participants in the designated information system, receipt occurs at the time when the electronic data message or electronic document is retrieved by the addressee[.]

Due to this provision, the time of receipt of the document shall be placed when the electronic document is retrieved by the addressee, but only when both parties use the designated information system.

V. UNCITRAL CONVENTION ON ELECTRONIC CONTRACTING

As discussed in Philippine jurisprudence, international agreements[17] may take different forms including treaty, act, protocol, agreement, convention, covenant, declaration, exchange of notes, and memorandum of agreement, to name a few.[18] Regardless of form, however, all international agreements, once properly ratified, either through congressional or presidential action,[19] becomes valid and binding in the Philippines following the principle of *pacta sunt servanda*. Unlike the Model Laws which could, at most, only have persuasive effect, international agreements bind the contracting parties ensuring the implementation of the provisions under these agreements.

A. United Nations Convention on the Use of Electronic Communication in International Contracts

Date of adoption: November 23, 2005
Entry into force: March 1, 2013

The United Nations Convention on the Use of Electronic Communication on International Contracts is one of the more important international agreements related

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[17] Please note that the term "international agreements" are being used loosely to include all kinds of agreements between countries. This should not be confused with "international agreements" as used in Section 21, Article VII of the 1987 Philippine Constitution. It should be noted that the said term as used in Section 21, based on the discussion found in the case of Rene A.V. Saguisag, et al. vs. Executive Secretary Paquito N. Ochoa, Jr., et al. (G.R. No. 212426, January 12, 2016), does not include executive agreements.

[18] Saguisag v. Executive Secretary, G.R. No. 212426, January 12, 2016.

[19] See Executive Order No. 459, November 25, 1997.

to electronic contracting which the Philippines has signed. However, although the Philippines signed the Convention on September 25, 2007, it has not yet expressed its ratification, accession, approval, acceptance, or succession of such; thus, it is not a party to the convention. Currently, there are 15 Contracting Parties, namely, Azerbaijan, Bahrain, Benin, Cameroon, Congo, Dominican Republic, Fiji, Honduras, Kiribati, Mongolia, Montenegro, Paraguay, Russian Federation, Singapore, and Sri Lanka.[21]

At this point, it is useful to inquire whether the Convention contains provisions that may ultimately enhance the implementation of the E-Commerce Act, especially in areas where the E-Commerce Act is seemingly inconsistent with the UNCITRAL Model Laws.

B. Scope of Application

The Convention does not explicitly state that it only applies to commercial transactions in contrast with the Model Laws. Instead, it states that it is applicable to the use of electronic communications, in connection with the formation or performance of contracts between parties whose places of business are in different States.[23] In a similar vein, the E-Commerce Act applies to "any kind of data message and electronic document used in the context of commercial and non-commercial activities[,]"[24] instead of being confined only to commercial transactions. It should be noted, however, that unlike in the E-Commerce Act, the Convention also excludes from its scope contracts concluded for personal purposes and transactions on a regulated exchange.[25] Simply put, despite the fact that the scope of application of the Convention is greater than the Models Laws, the E-Commerce Act still has a wider scope compared to the Convention.

C. Electronic Signatures

The Convention does not have any provision regarding electronic signatures, and the authentication or recognition thereof. Despite this, it provides similar provisions on the method of recognition of electronic signatures contained in the

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[21] See Status: United Nations Convention on the Use of Electronic Communication in International Contracts, available at https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/ status (last accessed May 4, 2021).

[23] UNCITRAL Convention on the Use of Electronic Communication in International Contracts, art. 1,

[24] Rep. Act No. 8792 (2000), § 4.

[25] UNCITRAL Convention on the Use of Electronic Communication in International Contracts, art. 2.

Model Laws, but in the context of form requirements in electronic communications or contracts. This is found in Article 9(3):

> 3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
>
> (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and
>
> (b) The method used is either:
>
> (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
> (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

Subparagraphs (a) and (b)(i) are likewise found in Section 8 of the E-Commerce Act, likely owing to their shared provenance under the Model Laws. However, the E-Commerce Act additionally requires that electronic signature be recognized that "it is necessary for the party sought to be bound [...] to have executed or provided the electronic signature," and that "the other party is authorized and enabled to verify the electronic signature and to make the decision to proceed with the transaction authenticated by the same." These additional requisites provide more opportunities to dispute an electronic signature under the E-Commerce Act than they would under the Convention.

D. Formation and Validity of Contracts

There are also no provisions similar to those provided for in the Model Laws with respect to offer and acceptance in the context of the formation of contracts; but the Convention defines "communication" as "any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract."[26]

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[26] UNCITRAL Convention on the Use of Electronic Communication in International Contracts, art. 4(a).

E. Time of Receipt of Electronic Communications

Article 10(2) of the Convention states that:

> The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

As stated, due to Section 22 of the E-Commerce Act, the time of receipt of the document shall be placed when the electronic document is retrieved by the addressee, but only when both parties use the designated information system. The said provision has an additional qualification when compared with the provision of the Convention.

VI. CONCLUSION

A review of the applicable laws governing Philippine Electronic Contracting shows that even before the enactment of the E-Commerce Act, electronic contracts can already be considered as valid and binding. However, as noted, the benefits of the E-Commerce Act is that its enactment was able to provide a foundation for the creation of a stable legal environment necessary for the growth of electronic commerce - something that would have been difficult without a law which focuses on it.

Although admittedly we are now reaping the benefits of the enactment of the E-Commerce Act, comparing the provisions of the E-Commerce Act with the international instruments, like the Model laws and the UN Convention on the Use of Electronic Communication in International Contracts, shows that the E-Commerce Act has more requirements or qualifications, if not more stringent, than the former. Although this does not mean that the E-Commerce Act provisions are completely in conflict with its international counterparts, the legal regime that the E-Commerce Act results in could be improved to be more consistent with international practice. It remains possible that the Philippines would update the E-Commerce Act itself to the extent of textually adopting specific provisions of the Convention or other international instruments as part of the updated statute. Yet, the same legislative process could also integrate additional requisites or decline to incorporate other provisions, thus possibly negating the "efficiency through uniformity" that the Convention, and other international instruments, had sought to achieve.

COPYRIGHT EXCEPTIONS FOR THE DIGITAL AGE: A COMPARATIVE STUDY IN MALAYSIA AND THE PHILIPPINES

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I. INTRODUCTION

Copyright is a major form of intellectual property rights. It is one of the seven recognized forms of intellectual property rights under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Much of copyright law today is harmonized internationally through the Berne Convention on the Protection of Literary and Artistic Works, 1886, and its subsequent revisions.

Copyright exceptions, or sometimes also known as copyright limitations, are situations where a person technically infringes a copyright owner's rights, but is otherwise excused by the law. The legal basis for copyright exceptions is said to be grounded on Article 9(2) of the Berne Convention: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The conditions laid down in Article 9(2) is known as the Three-Step Test.

Copyright exceptions are important parts of copyright law. They provide a balance between the rights of a copyright owner and the users' rights to legitimately enjoy a work. With the rise of digitization, copyright exceptions take on an ever significant role. In the digital world, everything is a copy, and is potentially subject to the control of copyright owners. Therefore, it is for copyright exceptions to restore the balance in favor of users in this digital age.

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The United Kingdom's government commissioned a review on intellectual property in 2010. The report, chaired by Professor Ian Hargreaves, provided an overview of where copyright exceptions have to be reformed to cater to the users' practices and expectations in the digital age.[1] In the Report, several areas and cases have been highlighted which needed reform in order to enable greater use of copyright works: text and data mining; search-engine indexing; digital archival and digitization of text; educational use (e.g. YouTube videos in classrooms and reuse of copyrighted material in students' assignments and presentations); video parodies and mash-ups; digitization of orphan works; format-shifting; non-commercial uses in research; and limited private copying. These identified situations can be used to assess whether Malaysian and Philippine copyright laws are forward-looking enough in addressing these issues.

II. COPYRIGHT LAW IN MALAYSIA

Copyright law in Malaysia is governed by the Copyright Act of 1987 (Act 332). As a former British colony and a common law country, Malaysia's copyright law is highly influenced by English case law and statutory interpretations. In fact, the first copyright statute in force in pre-independence Malayan territories was the English Imperial Copyright Act of 1911, which was applicable to the Straits Settlements of Malacca, Penang, and Singapore.[2] Even after the UK joined the European Union (EU), and the EU started to impose its continental civilian influence on English copyright law, Malaysian courts' deference to English jurisprudence remains unwavering.

Malaysia is a party to several international treaties governing copyright and intellectual property rights. The country acceded to the Berne Convention on the Protection of Literary and Artistic Works on 1 January 1990 and the World Intellectual Property Organization (WIPO) Copyright Treaty on 27 September 2012. Malaysia is also a member state of the World Trade Organization (WTO) from 1 January 1995, and is thus party to the TRIPS as part of the WTO Agreement. Membership in all these international treaties means that Malaysian copyright law is largely, if not wholly, in compliance with international copyright norms and obligations.

The Malaysian Copyright Act of 1987 was enacted to replace the Copyright Act of 1969, which was the first copyright legislation applicable throughout the country. One of the main objectives of the 1987 Act was to bring Malaysian copyright law in line with the provisions of the Berne Convention in anticipation of the country's joining the Convention. Several amendments to the Copyright Act of 1987 in subsequent years

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[1] IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH (2011).

[2] LAKE TEE KHAW, COPYRIGHT LAW IN MALAYSIA 4 (3d ed., LexisNexis 2008).

have added corrections to some legislative shortcomings[3] as well as provided additional protection, especially those related to technological advances.[4]

Although the Copyright Act of 1987 technically governs copyright law in Malaysia, and Section 6 declares that "[s]ubject to this Act, no copyright shall subsist otherwise than by virtue of this Act," English copyright principles remain influential in interpreting and applying the provisions of the Copyright Act. For example, subsection 7(2A) incorporating Paragraph 9.2 of the TRIPS Agreement states that "[c]opyright protection shall not extend to any idea, procedure, method of operation or mathematical concept as such." However, the distinction between what is an unprotected idea and what is a protected expression is not as developed in English copyright law as in the United States. As Lord Hailsham noted in the House of Lords' opinion in *LB (Plastics) Ltd. v. Swish Products Ltd.*, "[i]t all depends on what you mean by 'ideas'."[5] More importantly, unprotected ideas only mean "commonplace, unoriginal, or consist of general ideas,"[6] whereas detailed "ideas" are still being protected, such as the content of a literary work, from being translated into another language.

III. COPYRIGHT EXCEPTIONS IN MALAYSIA

Copyright exceptions in Malaysian copyright law are in the form of fair dealings and permitted acts. For literary, musical or artistic works, films, sound recordings, or derivative works, 21 separate paragraphs provide for different copyright exceptions. Most of these exceptions were written in an era where usage of computers was not ubiquitous. However, since they are largely technologically agnostic, the exceptions could well be applied to a digital platform.

Of the 21 paragraphs, only two paragraphs have direct relevance to the digital sphere. Paragraph (p) of subsection 13(2) concerns an exemption from "the commercial rental of computer programs, where the program is not the essential object of the rental." This is to exclude control by the copyright owner over rental of electronic equipment which include embedded computer programs. For example, modern automobiles use digital technology to control various aspects of the

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3 Lake Tee Khaw, *Recent Amendments to Malaysian Copyright Law*, 19 EUROPEAN INTELLECTUAL PROPERTY REVIEW 81–90 (1997).

4 Lake Tee Khaw, *Of Encryption and Devices: The Anti Circumvention Provision of the Malaysian Copyright Act 1987*, 27 EUROPEAN INTELLECTUAL PROPERTY REVIEW 53–64 (2005).

5 [1979] R.P.C. 551, at 629.

6 Designers Guild Ltd. v. Russell Williams (Textiles) Ltd., [2000] 1 W.L.R. 2416, at 2425; Elias Idris v. Mohd Syamsul Md Yusof & Ors.

functioning of vehicles and will have computer programs operating as part of the control system.

Paragraph (q) concerns "transient and incidental electronic copy of a work made available on a network if the making of such copy is required for the viewing, listening or utilization of the said work." The phrase "required for the viewing, listening or utilization of the said work" suggests that this exception was written with Internet browsing in mind. For example, when a page is viewed on a web browser, the digital information will have to pass through numerous network devices, where each will make a temporary copy for relaying down the next node. When the information arrives at a user's computer, a temporary copy will be stored in the browser program's cache. This piece of digital information is then processed, and the information which was appropriately formatted is presented on the user's screen which, in the eyes of copyright law, is also a copy. Although the Act is silent as to the maximum duration allowed within the meaning of "transient", it is reasonable to assume that it does not amount to permanent storage, although temporary caching by a browser program is to be expected as the norm.

It is to be noted that the exception in Paragraph (q) is only applicable to "a work made available on a network." The corresponding exception in the EU Information Society Directive covers two distinct scenarios: "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use [...] of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."[7] Paragraph 13(2)(q) roughly falls within the ambit of scenario (b).

Scenario (b) of an exception for "lawful use" covers a wider range of situations than temporary copy for network transmission purposes. It may cover temporary copies, such as those which reside on a user computer's random access memory (RAM). Regrettably, the "lawful use" exception does not cover a copy of a properly licensed computer program installed on a user's hard drive. Most likely, the legislature assumes that such a right to install a copy on a user's hard drive for "lawful use" of the program is already covered by an explicit license agreement or some form of implied license.[8]

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[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, O.J. (L 167) 10, article 5(1).

[8] *See* Robin Ray v. Classic FM Plc [1998] F.S.R. 622 (HC).

In addition to the above, Part VIB of the Malaysian Copyright Act further provides for limitation of liabilities of service provides. These limitations were enacted to bring into force the WIPO Copyright Treaty of 1996. Section 43D provides for a service provider who caches a copy of a copyrighted work on a network "in order to facilitate efficient access to the work by a user[.]" This is an exemption from liability under certain conditions. This section supersedes a similar exception introduced under the Copyright (Amendment) Act of 1997. Section 43D falls within scenario (a) of Article 2 of the EU Information Society Directive.

Section 43E covers exemptions, under certain conditions, of a service provider from liability for (a) providing an online storage facility, and (b) linking to an infringing copy of a work. It is conceivable that exemption (a) applies to cloud storage providers, hosting providers, and content management providers which allow members of the public to post or upload content to their systems. Exemption (b) explicitly exempts search engines and web pages possessing links to content which could potentially be considered as infringing another's copyright. In both circumstances above, a mechanism is provided to allow a copyright owner to notify a service provider of the infringement in order for the latter to remove access to the infringing copies.[9] Exemption (b), however, does not go so far as to sanction a search engine provider for storing a snapshot of a website in order to build an index for its search engine.

Section 36A recognizes technological protection measures, and Section 37 makes it an infringement and Section 41 an offence, for a person to circumvent or distribute a device to evade technological protection measures. Six exceptions are available to this section on technological protection measures: (a) to achieve inter-operability of a computer program, (b) vulnerability testing, (c) security testing, (d) to disable undisclosed capability collecting personal data, (e) law enforcement purposes, and (f) for making an acquisition decision by a library, archive or educational institution.

IV. TECHNOLOGICALLY NEUTRAL EXCEPTIONS

Of the 21 paragraphs of exceptions provided under subsection 13(2), majority of the exceptions are technologically neutral and their applications are not necessarily

[9] Surprisingly, a copy of the notice by a copyright owner is not needed to be furnished to the content owner before or after removal or disablement of any content. On the other hand, section 43I provides that anyone who suffers a loss or damages as a result of a false notice may claim compensation from the issuer of such false notice.

confined to the digital environment. Nevertheless, a few exceptions have significant implications to practices in the digital world.

Paragraph (e) covers "the incidental inclusion of a work in an artistic work, sound recording, film or broadcast," of which, "artistic work" would most likely be a photograph. Therefore, the incidental inclusion of a work in a photograph, sound recording, film or broadcast is not an infringement. This is particularly pertinent to digital photography, sound recording, and video recording of public events by the public. The operative word here is "incidental", which has been discussed in an English case. In *IPC Magazines Ltd. v. MGN Ltd.,*[10] Mr. Richard McCombe QC, sitting as deputy judge of the High Court, interpreted the word "incidental" to mean "casual, inessential, subordinate or merely background."

Paragraph (f) covers "the inclusion of a work in a broadcast, performance, showing, or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair practice[.]" The exception is applicable to the educational practices of playing online videos in classrooms, or linking to videos and textual content in a virtual learning environment (VLE) for an online learning setting. What amounts to "fair practice" is not defined, and so far, there has been no judicial determination on what is and is not fair practice in the context of Paragraph (f).

Paragraphs (gg) and (ggg) cover sound and video recording for "private and domestic use." The paragraphs give an exemption for "the making of a sound recording [or film] of a broadcast, or a literary, dramatic or musical work, sound recording or a film included in the broadcast insofar as it consists of sounds [or visual images] if such sound recording [or a film] of a broadcast is for the private and domestic use of the person by whom the sound recording [or film] is made." One application of paragraphs (gg) and (ggg) is for home taping of television programs.[11] The word "broadcast" is defined as "the transmitting, by wire or wireless means, of visual images, sounds or other information which—(a) is capable of being lawfully received by members of the public; or (b) is transmitted for presentation to members of the public[.]" Although this definition of "broadcast" appears to be fairly wide and may potentially include video-on-demand services through fibre optic cables or the Internet, a further reading of the phrase "broadcasting service" shows that it is confined to "any service of radio or television broadcast, operated under the general direction and control of or under licence by the Government, in any part of Malaysia." Thus, it would appear that the word "broadcast" has to be given a restrictive meaning

[10] [1998] FSR 431 (ChD).
[11] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

limited to radio and television broadcasts, which excludes video-on-demand and streaming services through the Internet.

Paragraph (gggg) is an accessibility exception: "[T]he making and issuing of copies of any work into a format to cater for the special needs of people who are visually or hearing impaired and the issuing of such copies to the public by non-profit making bodies or institutions and on such terms as the Minister may determine." It is not clear whether the 3 parts of the exception are to be read conjunctively or disjunctively. If the case is the former, then to evoke this exception, there must be "such terms as the Minister may determine." On the other hand, since the word "may" is used in relation to the terms, this exception can be read to mean that even if the relevant Minister does not make any terms, the exception can be used. This exception is best read in relation to print or physical media. "Making and issuing of copies" of the Braille version of a literary work would fit into this exception. Likewise, "making and issuing of copies" of an audiobook version of a literary work would also satisfy this exception.

With the advent of text-to-speech technology and digital Braille display, the need for pre-recorded audiobooks and Braille text is substantially diminished. The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (2017), for which Malaysia is yet to be a signatory member, provides for a list of exceptions to cater to visually impaired persons' access to published works. Arguably, Paragraph (ggg) can also substantially satisfy the requirements and ideals of the Marrakesh Treaty. It could also potentially sidestep the legality issue of enabling a text-to-speech feature for e-books, such as the one found in Amazon's Kindle e-book readers.[12]

V. FAIR USE IN MALAYSIA

Traditionally, copyright exceptions in Malaysian copyright law follow the English approach of situationally-specific fair dealings. An amendment introduced in 2012 added a new subsection to Section 13, which can potentially be read as introducing the American fair use doctrine into Malaysian copyright law.[13] Prior to the amendment, Paragraph (2)(a) reads:

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[12] *See* Jeremy B. Francis, *The Kindle Controversy: An Economic Analysis of How the Amazon Kindle's Text-to-speech Feature Violates Copyright Law,* 13 VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW 407–440 (2011).

[13] Copyright Act of 2012, § 9.

(2) Notwithstanding subsection (1), the right of control under that subsection does not include the right to control—

(a) the doing of any of the acts referred to in subsection (1) by way of fair dealing for purposes of non-profit research, private study, criticism, review or the reporting of current events, subject to the condition that if such use is public, it is accompanied by an acknowledgement of the title of the work and its authorship, except where the work is in connection with the doing of any of such acts for the purposes of non-profit research, private study and the reporting of current events by means of a sound recording, film or broadcast[.]

After the amendment in 2012, Paragraph (2)(a) now reads:

[T]he doing of any of the acts referred to in subsection (1) by way of fair dealing including for purposes of research, private study, criticism, review or the reporting of news or current events:

Provided that it is accompanied by an acknowledgement of the title of the work and its authorship, except that no acknowledgment is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast[.]

Furthermore, a new subsection (2A) is provided:

For the purposes of paragraph (2)(a), in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include—

(a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
(b) the nature of the copyright work;
(c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
(d) the effect of the dealing upon the potential market for or value of the copyright work.

It is argued that the amendment to Paragraph (2)(a) and the inclusion of subsection (2A) have the effect of changing the meaning of "fair dealing" in the Copyright Act. Prior to 2012, fair dealing under Paragraph (2)(a) is restricted to the purposes of "non-profit research, private study, criticism, review or the reporting of current events" which, according to the English principle of fair dealing, has a narrower application than the American fair use doctrine.

Nallini Pathmanathan J, in *MediaCorp News Pte Ltd. v. MediaBanc (Johor Bharu) Sdn Bhd,* held, in relation to the old Paragraph (2)(a):

> The section is drafted so as to specify with particularity the only circumstances or occasions of use which would qualify for exemption, namely non-profit research, private study, criticism, review or the reporting of current events. The section does not provide for a broad and unspecified category of acts of 'fair dealing' or use, of which the circumstances of non-profit research, private study, criticism, review or the reporting of current events provide some specific examples. This is evident from the fact that the words 'fair dealing' are immediately qualified by the words 'for the purposes of' and followed by the specific events or circumstances in which copyright control is precluded.
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> Unlike the situation in the United States of America, the Act does not allow for 'fair dealing' to be assessed by considering a broad category of circumstances and ascertaining whether those circumstances conform to a set of statutory guidelines. On the contrary, fair dealing under the Act is confined to 'fair dealing' for the prescribed purposes set out in that section and no more. The aforesaid case therefore has to be read in the context of application of the statutory test provided in that jurisdiction.[14]

The addition of the word "including" in the amended Paragraph (2)(a) of Section 13 is of utmost importance. In *Ng Beng Kok v. PP,* Zabariah Mohd Yusof JCA held:

> By introducing the word 'including' immediately after the words '[...] circumstances', the Legislature has expanded the meaning of the expressions "circumstances" for the purposes of the Act. The word 'include/including' is generally used to enlarge the meaning of the words or phrases occurring in the body of statute. When it is so used, those words or phrases must be construed as comprehending not only such things, such as they signify according to their natural impart, but also those things which the interpretation clause declares that they shall include. In other words, when the words 'include/including' is used in the definition or section, the Legislature does not intend to restrict the definition; it makes the definition enumerative but not exhaustive.[15]

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[14] [2010] 6 M.L.J. 657 (HC).

[15] [2017] 7 C.L.J. 175, at ¶ 35.

Applying the same principle to Paragraph (2)(a), the acceptable purposes of "fair dealing" in the amendment paragraph would go beyond the traditional "research, private study, criticism, review or the reporting of news or current events." With the amendment, this list of purposes are merely illustrative and not exhaustive.[16]

The addition of subsection (2A) is also important. If read literally, it sets the four factors that have to be considered when applying the extended scope of fair dealing. However, the fact that they are an almost verbatim copy of the four factors for fair use in Section 107 of the US Copyright Act gives it an additional meaning. In fact, the enactment of subsection (2A) looked as if the legislature took an inspiration from Nallini Pathmanathan J in *MediaCorp News Pte Ltd v. MediaBanc (Johor Bharu) Sdn Bhd:*

> [T]he position in the United States is somewhat different. In that jurisdiction four factors are statutorily provided, the application of which will enable a determination of whether a use is fair. These four factors are the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect of the use upon the potential market for or value of the copyrighted work. The various purposes set out there, namely criticism, comment, news reporting, teaching scholarship or research are referred to as examples of fair use but do not serve to provide the defining limits for 'fair dealing', unlike the position under the Act in Malaysia. To that extent the definition of 'fair dealing' in that jurisdiction is considerably wider than in Malaysia under the Act.[17]

It is trite law and timeless practice in Malaysian statutory interpretation that where a local statutory provision is in *pari materia* to an English common law statute, the court is bound by the interpretation given by the English courts;[18] or if such cases fall outside the prescribed common law transplant date in the Civil Law Act of 1956, they are still regarded as of highly persuasive value.[19] In the event that the transplanted law originates from a jurisdiction outside the English common law world, it is possible that Malaysian courts may still refer to those court decisions interpreting the original statutory provisions. An example of such an arrangement can

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[16] Another subtle change in Paragraph (2)(a) is the omission of the phrase "non-profit" for research purposes. Influence for this removal is most likely to have stemmed from the Singaporean case of *Creative Technology Ltd. v. Aztech Systems Ptd. Ltd.* [1997] 1 S.L.R. 621 (CA).

[17] [2010] 6 M.L.J. 657 (HC), at ¶ 211.

[18] Khalid Panjang & Ors v. Public Prosecutor (No. 2) [1964] 1 M.L.J. 108 (FC).

[19] Abdul Malek bin Hassan v. Mohammad Hihwan bin Mastuki [1987] 1 M.L.J. 489 (SC).

be found in the Malaysian Competition Act of 2010, which is largely derived from European competition law principles. Consequently, the Malaysian Competition Commission and the Malaysian Competition Appeal Tribunal routinely cite European competition decisions as authorities.

Although the US is considered as a jurisdiction with a common law system, decisions therefrom are less commonly cited in Malaysian courts, principally because Malaysian common law relies on the common law as practiced in England, and lesser elsewhere. The few American copyright cases that have been cited in Malaysian court reports are *Computer Associates International Inc. v. Altai,*[20] *Kelly v. Arriba Soft Corp.*,[21] and *Davidson & Associates Inc. v. Internet Gateway*.[22] It is argued that with the inclusion of subsection (2A), it has essentially set in motion a process of transplanting the US' fair use jurisprudence. "Fair dealing" in Malaysia is no longer the fair dealing of the yore. In fact, it is, like wolf in sheep's clothing—nothing but a disguise for the American fair use doctrine. Thus, it is hoped that similar to competition law cases from Europe, important fair use decisions from the US would be recognized and adopted in Malaysian copyright cases.

Perhaps one difference between Paragraph (2)(a) and Section 107 of the US Copyright Act is that the former requires acknowledgement of the title of the original work and its authorship, whereas such a requirement is not stated in the US law. It is not clear whether this is the intention of the drafter or just a drafting oversight. Whereas the original purposes of "research, private study, criticism, review or the reporting of news or current events" were primarily literary in nature, and thus would not be impossible to state the title of the original work and its authorship, there might be circumstances where giving such acknowledgement might not be practical. Also, fair use in the American context is used as an ex post facto defense; or, the situation concerned might not even have anything to do with copying.

In *Sony Corporation of America v. Universal City Studios, Inc.*, the US Supreme Court allowed the fair use exception for the use of video-cassette recorders for time-shifting of television programs.[23] However, an on-going dispute between Oracle America, Inc. and Google is still pending determination by the US Supreme Court on whether the fair use exception is applicable to the Java programming language's application program interface (API).[24] In both cases, no acknowledgement

[20] 982 F.2d 693 (2d Cir. 1992).

[21] 336 F.3d 811 (9th Cir. 2002).

[22] 334 F.Supp 2d 1164 (E.D. Mo. 2004).

[23] 464 U.S. 417 (1984).

[24] Google LLC v. Oracle America, Inc., available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-956.html.

was found in the infringing subject matter, although it is arguable that a recorded television programme would retain its title and credit screen indicating authorship.

Even if Malaysian courts do not proactively develop new exceptions under its recently acquired "fair dealing" doctrine, transplanting the American fair use doctrine would mean that whatever copyright exceptions have been allowed under the fair use doctrine in the US should be similarly acknowledged as allowable in Malaysia. After all, what is good for the goose is good for the gander.

Singapore likewise amended their Copyright Act of 1987 in 2004, as part of a US-Singapore Free Trade Agreement, to create a "fair dealing" exception which contains the 4 conditions in Section 107 of the US Copyright Act. According to a Singaporean copyright scholar, this has the effect of introducing the American fair use doctrine into Singaporean copyright law.[25]

VI. COPYRIGHT EXCEPTIONS IN THE PHILIPPINES

Copyright law in the Philippines is governed by Part IV of the Intellectual Property Code (Republic Act No. 8293).[26] Chapter VIII of Part IV provides for copyright limitations. Section 184 lists eleven paragraphs of situational exceptions to copyright protection. Apart from Section 184, Sections 185 to 190 also provide various types of exceptions and limitations based on very specific conditions.

On the other hand, Section 185 provides for a fair use exception. The 4 factors found in Section 107 of the US Copyright Act are adopted verbatim. However, the way Section 185 is written does not suggest that this fair use exception is as broad as in other jurisdictions, because it states that "[t]he fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research and similar purposes is not an infringement of copyright." It appears that the fair use exception provided in the Intellectual Property Code is a limited one because its application is confined to the list of purposes, i.e. criticism, comment, news reporting, etc.

An amendment by Republic Act No. 10372 of 2012 to the Intellectual Property Code further added an additional category of fair use in Section 185: "Decompilation,

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[25] Wee Loon Ng-Loy, *The Imperial Copyright Act 1911 in Singapore: Copyright Creatures Great and Small, This Act it Made Them All*, in A SHIFTING EMPIRE: 100 YEARS OF THE COPYRIGHT ACT 1911, 141–167 (Uma Suthersanen & Ysolde Gendreau eds., 2013).

[26] For a historical background, *see* Ferdinand M. Negre & Jonathan Q. Perez, *The Philippines*, in INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS 199–231 (Paul Goldstein & Joseph Straus eds., 2009).

which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use." Interestingly, this addition does not say that decompilation of a computer program for the purpose of inter-operatability *is* fair use, but *may only constitute* fair use.

In *ABS-CBN Corporation v. Gozon*,[27] the Philippines Supreme Court had the occasion to examine Section 185. It found that to evoke Section 185, it is necessary that the purpose must be within the list enumerated in subsection 185.1. It also suggested that the fair use must be "transformative" in nature, i.e., by adding a "new expression, meaning or message." Secondly, fair use favors factual work more than creative work. Thirdly, the amount taken must be "fair" and not excessive. Finally, the use must not "have a negative impact on the copyrighted work's market." In the context of a news broadcast, of which the present case was concerned with, it was stated by the Supreme Court that "the primary reason for copyrighting newscasts by broadcasters would seem to be to prevent competing stations from rebroadcasting current news from the station with the best coverage of a particular news item, thus misappropriating a portion of the market share." Therefore, in that case, the Supreme Court rejected the fair use argument raised by the respondent as it reproduced approximately 5 seconds of news reporting from the appellant.

The 2012 amendment also incorporated protection for rights management information[28] and technological measures[29] into the Intellectual Property Code. Circumventing effective technological measures and removing or altering electronic rights management information are both a copyright infringement[30] and a crime.[31] The Intellectual Property Code provides no specific exemption to the protection of rights management information and technological measures. Likewise, the Intellectual Property Code is silent on the limitation of liability for Internet service providers.

Apart from the decompilation under the fair use exception discussed above, Section 189 provides for a back-up copy or adaptation of a computer program. In addition, several generic limitations to copyright protection are available in the Intellectual Property Code.

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[27] G. R. No. 195956, Mar. 11, 2015.

[28] Intellectual Property Code (Philippines), subsection 171.13.

[29] Intellectual Property Code (Philippines), subsection 171.12.

[30] Intellectual Property Code (Philippines), subsection 216.1.

[31] Intellectual Property Code (Philippines), subsection 217.2.

VII. COMPARATIVE ANALYSIS

There are similarities between the Malaysian and Philippine approaches to copyright exceptions. Both employ a list of exceptions based on specific situations. In addition, a fair use exception is available. The same 4 factors in Section 107 of the US Copyright Act have also been adopted by both the Malaysian and Philippine laws on fair use.

In the case of Malaysia, there is no limit as to the situations that the "fair dealing" exception can be applied to. However, as a legacy of its previous form, Paragraph 13(2)(a) requires acknowledgement of authorship. On the other hand, the Philippines' fair use exception is confined to "criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes" and "decompilation" of a computer program. No acknowledgement of authorship is required. Due to this, its application may not be as wide as in the American context, such as for the purpose of time shifting in the *Sony* case.

The Malaysian "fair dealing" exception does not explicitly provide for decompilation, although the expansive language of that paragraph does not preclude it from being considered under the "fair dealing" exception. As of the time of writing, a determination from US Supreme Court is still pending in the case of *Google LLC v. Oracle America, Inc.* on whether the use of the Java programming language API can be exempted under the fair use doctrine. Many software industry players have expressed serious concerns that there would be negative repercussions to the industry if the use of API for inter-operability purposes is not exempted under the fair use doctrine.[32]

With regard to technological measures, the Malaysian Act provides for 6 specific situational exceptions which include the inter-operability exception, and vulnerability and security testings. No equivalent exception is found in the Philippine Intellectual Property Code.

Both Malaysia and the Philippines have a provision to allow for a back-up of computer programs. These provisions are the legacy of yester-years, where computer programs were sold on easily damaged floppy disks. Nowadays, installation files are downloadable for free from websites, or more commonly nowadays, using an app store platform. Restriction of access of the installed programs is done by way of a validated unique product key.

[32] Pamela Samuelson, *API Copyrights Revisited*, Communications of the ACM, July 2019, at 20–22.

VIII. CONCLUSION

The march of technology is never-ending. Likewise, copyright law will have to constantly keep up with changes in the technological environment, just as the birth and existence of copyright law is intertwined with the emergence of copying technology, starting first with the printing presses and later digital technology.

Between Malaysia and the Philippines, the former appears to have taken into account more copyright exceptions which are relevant to the digital age. The fair use exceptions in Malaysia are also wider and not confined to any specific purposes.

Notwithstanding thus, both jurisdictions still have some fair amount of work to do on the copyright exceptions front if the issues and uses raised by the UK's Hargreaves Report are to be used as a benchmark. User digitization and format-shifting rights are important to preserve knowledge and cultural artifacts for future generations. Archiving, data mining, and storage rights need to be addressed to develop technologically advanced tools based on machine learning and deep learning. Video parody and mash-up rights by users are a modern form of digital expression. Educational practices are increasingly relied on and material on the Internet is being used and re-used, and as such, copyright law should accommodate and proffer a liberal attitude towards these practices.

The task of crafting copyright exceptions is not over and should never be. So long as copyright law exists, users' rights as defended by copyright exceptions are a necessity. This delicate balance is to be shouldered by copyright exceptions.

CORPORATION LAW

OVERVIEW OF PHILIPPINE CORPORATION LAW

NICHOLAS FELIX L. TY

I. HISTORY OF PHILIPPINE CORPORATION LAW

In the Philippines, corporations are primarily governed by the Revised Corporation Code of the Philippines,[1] which was enacted on February 20, 2019. Prior to 1906, when the Philippines was still a colony of Spain, Philippine corporations were referred to as *sociedades anonimas* and had the Code of Commerce, which was based on Spanish law,[2] as their governing law.[3] These *sociedades anonimas* closely resembled present-day corporations due to similar features such as limited liability and the centralized management of its affairs.[4]

It was during the subsequent American regime when the Philippine Commission, then mandated to exercise legislative functions, passed into law the first Corporation Law in the Philippine jurisdiction, which took effect on April 1, 1906.[5] Under the Corporation Law of 1906, existing *sociedad anonimas* were given the choice to reorganize within a reasonable amount of time into corporations which possessed the American concept of a corporate entity. Those who chose to reorganize would then have to comply with the Corporation Law, while those who chose to retain their status as a *sociedad* would continue to be governed by the Code of Commerce in matters relating to its organization, method of transacting business, and the rights of its members among themselves.[6]

Within the span of 74 years, the Corporation Law of 1906 underwent several amendments due to changes in conditions and circumstances, particularly in the business and industrial world.[7] However, it was found that these "sporadic" and "piece-meal" amendments failed to meet the demands of the dynamic modern-day needs. Thus in 1970, the University of the Philippines Law Center undertook the task

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[1] Rep. Act No. 11232 (2019). The Revised Corporation Code.

[2] SPANISH CODE OF 1885.

[3] JOSE C. CAMPOS, THE CORPORATION CODE: COMMENTS, NOTES AND SELECTED CASES 3.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 4.

of preparing a draft of a proposed Corporation Code as one of its major projects. Through the participation of the private and public sector, a draft of the new Code was formulated. Such draft was further revised by the Batasang Pambansa, the legislative body under the 1973 Constitution of the Philippines, with the participation of the Securities and Exchange Commission (SEC). On May 1, 1980, the Corporation Code of the Philippines[8] was finally approved by the President.[9]

On February 20, 2019, Republic Act No. 11232, or the Revised Corporation Code of the Philippines ("Revised Corporation Code") was approved into law, which substantially amended the Corporation Code. The Revised Corporation Code currently applies to all private corporations in general. There are, however, some special laws[10] which govern special kinds of corporations. Furthermore, corporations owned or controlled by the government (government-owned or controlled corporations or GOCCs) are regulated by their own charters, or by the law creating them.[11]

II. CORPORATIONS IN THE PHILIPPINE SETTING

The Revised Corporation Code defines a corporation as "an artificial being created by operation of law, having the right of succession and the powers, attributes and properties expressly authorized by law or incident to its existence."[12]

From this definition, four attributes of corporations may be derived. First is that corporations are *artificial beings*; this means that corporations are juridical persons with a personality separate from its individual stockholders or members and is capable of acquiring rights and obligations.[13]

Secondly, corporations are *created by operation of law*. Consent of the parties wishing to form corporations is not sufficient as the State must give its consent by way of either a special law or a general enabling act. Corporations created by special law, which are usually those owned or controlled by the government, are primarily governed by such special law, otherwise known as a charter, supplemented by the Revised Corporation Code as far as they are applicable.[14] Meanwhile, private

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[8] Batas Pambansa Blg. 68. The Old Corporation Code.
[9] CAMPOS, *supra* note 3, at 5.
[10] Such as the Insurance Code, General Banking Act, and the Investment Company Act.
[11] CAMPOS, *supra* note 3.
[12] Rep. Act No. 11232 (2019), § 2.
[13] CAMPOS, *supra* note 3, at 2.
[14] Rep. Act No. 11232 (2019), § 3.

corporations are generally formed or organized under the provisions of the Revised Corporation Code, which is the general enabling act referred to.[15]

The third attribute is that a corporation has the *right of succession*. The corporation's continued existence is not affected by the change in members or stockholders. Lastly, a corporation has the *powers, attributes, and properties expressly authorized by law or incidental to its existence*.[16] Thus, a corporation may be vested by law with such powers not only expressly provided therefor, but also those powers which are impliedly granted to it.

Other than distinguishing corporations created or organized under the Corporation Code from those created by special law or charter, corporations organized under the Corporation Code can be further classified into stock or non-stock corporations.[17] The Revised Corporation Code classifies corporations as stock corporations when two elements concur in a corporation: (1) it must have capital stock divided into shares; and (2) it must be authorized to distribute to its shareholders dividends out of its surplus profits. Without the concurrence of these elements, the corporation will be deemed a non-stock corporation.

A non-stock corporation is also defined by the Revised Corporation Code as "one where no part of its income is distributable as dividends,"[18] which may be "formed or organized for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civic service, or similar purposes, like trade, industry, agricultural and like chambers, or any combination thereof."[19] On the other hand, stock corporations are primarily formed for the main purpose of making profits for its stockholders.[20] Another distinction is that persons who compose a stock corporation are referred to as *stockholders,* while those who compose a non-stock corporation are *members*.[21] This classification is important since some rules found in the Revised Corporation Code apply exclusively to the kind of corporation in question.

A vital aspect of corporations in the Philippine legal framework in general is nationality. The importance of corporations' nationality cannot be overstated due to the various foreign equity restrictions in place, which must be complied with before a corporation may undertake an enterprise in particular industries or undertake specific

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[15] CAMPOS*, supra* note 3.

[16] CAMPOS*, supra* note 3.

[17] Rep. Act No. 11232 (2019), § 3.

[18] § 86.

[19] § 87.

[20] CAMPOS*, supra* note 3, at 44.

[21] *Id.*

endeavors in the Philippines. These restrictions are imposed by none other than the Constitution of the Philippines, as well as by other special legislation. Under the Constitution, only corporations at least 60 per centum of whose capital is owned by Filipino citizens may undertake in the exploration, development, and utilization of natural resources under the full control and supervision of the State[22] and operate public utilities.[23]

On the other hand, the Foreign Investments Act of 1991 ("FIA")[24]—while encouraging "productive investments from foreign [entities]"[25]—limits corporations' foreign equity in enterprises included in the negative list. The negative list is a list of areas of economic activity where foreign ownership in a corporation is limited to a specified maximum percentage.[26] Moreover, under the FIA, for a corporation to be considered a *Philippine national*, it must be organized under the laws of the Philippines of which at least sixty per cent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines.[27] A corporation organized abroad may also be considered a *Philippine national* if it is registered as doing business in the Philippines under the Corporation Code and that one hundred per cent (100%) of its capital stock outstanding and entitled to vote is wholly owned by Filipinos.[28] The definition of a *Philippine national* under the same section of the FIA further provides that "where a corporation and its non-Filipino stockholders own stocks in a SEC registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national."[29]

Interpretation of the constitutional restriction on foreign equity—particularly the phrase "*at least sixty per centum of whose capital is owned by Filipino citizens*"—however, proved to be a contentious issue due to the ambiguity of the word "capital." Such issue was resolved by the Philippine Supreme Court in at least three decisions. In the case *Gamboa v. Teves*,[30] initially decided on June 28, 2011, the Court held that

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[22] CONST. art. XII, § 2.
[23] § 11.
[24] Rep. Act No. 7042, as amended by Rep. Act No. 8179.
[25] § 2.
[26] *See* Executive Order No. 184 (2015). Promulgating the Tenth Regular Foreign Investment Negative List.
[27] Rep. Act No. 7042 as amended by Rep. Act No. 8179, § 3(a).
[28] § 3(a).
[29] § 3(a).
[30] Gamboa v. Teves, G.R. No. 176579, Oct. 9, 2012.

the term capital in Section 11, Article XII of the 1987 Constitution refers only to shares of stock *entitled to vote in the election of directors*. However, in a subsequent resolution of the same case promulgated on October 9, 2012, the Court modified its prior ruling and held that the term capital refers to shares *with voting rights, as well as with full beneficial ownership*. Subsequent to and in accordance with the 2012 resolution, the SEC issued SEC-MC No. 8 which provided that the required percentage of Filipino ownership shall be applied to *both*: (a) the total number of outstanding shares of stock entitled to vote in the election of directors; and (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors. In *Roy v. Herbosa*,[31] wherein the validity of SEC-MC No. 8 was assailed for not conforming to the letter and spirit of the *Gamboa* decision and resolution, the Court conclusively ruled that the SEC acted pursuant to the Court's pronouncement in both the *Gamboa* decision and resolution. Thus, the standing rule on the interpretation of the word "capital" in Article XII of the 1987 Constitution is that which is embodied in SEC-MC No. 8, which is based on the Court's holding in the *Gamboa* case.

As to the manner of actually calculating the Filipino interest in a corporation, the ruling of the Court in *Narra Nickel Mining and Development Corp., et al v. Redmont Consolidated Mines Corp.* ("*Narra Nickel* case")[32] is illustrative. It is particularly useful since shares in a corporation ("Investee Corporation") may be owned both by individual stockholders and by corporations and partnerships ("Investing Corporation"). According to *Narra Nickel*, under pertinent SEC Rules, there are two tests in determining the nationality of the Investee Corporation.

The first is the *liberal rule*, which was later coined by the SEC as the "Control Test," wherein shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as a Philippine national. Under the liberal Control Test, there is no need to further trace the ownership of the 60% Filipino stockholdings of the Investing Corporation since a corporation which is at least 60% Filipino-owned is considered as Filipino.[33] The second test is the *strict rule* or the "Grandfather Rule Proper," which states that if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. The combined totals in the Investing Corporation and the

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[31] Roy v. Herbosa, G.R. No. 207246, Nov. 22, 2016.

[32] G.R. No. 195580, April 21, 2014.

[33] *Id.*

Investee Corporation must be traced (or "grandfathered") to determine the total percentage of Filipino ownership.[34]

The *Narra Nickel* case explains that the Grandfather Rule applies only when the 60-40 Filipino-foreign equity ownership is in doubt; otherwise, it is the Control Test that should be used.[35]

III. FORMATION AND ORGANIZATION OF CORPORATIONS

Under the Revised Corporation Code, any person, partnership, association, or corporation, singly or jointly with others, may form a private corporation for any lawful purpose or purposes. These persons, also known as *incorporators*, must not exceed fifteen (15) in number, and for incorporators who are natural persons, they must be of legal age.[36] Notably, the Revised Corporation Code now allows One Person Corporations composed of a single stockholder.[37] The old Corporation Code required at least five (5) incorporators, all of whom should be natural persons.

The general steps in the formation of corporations are as follows: (1) promotional stage; (2) drafting of the articles of incorporation; (3) filing of articles and payment of fees; (4) examination of articles and approval or rejection by the SEC; and (5) issuance of certificate of incorporation.[38]

During the *promotional stage*, a person known as a "promoter" brings together persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.[39]

The second stage is the *drafting of the articles of incorporation*. The articles are important insofar as they are regarded as the contract between the corporation itself and its stockholders, as well as the agreement among the stockholders themselves.[40] The Revised Corporation Code provides for the required contents[41] of the articles, and the form[42] which they should follow. These required contents are: (1) name; (2) specific purpose or purposes for which it is being incorporated; (3) place where the principal office is to be located, which must be within the Philippines; (4) the term;

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[34] *Id.*

[35] *Id.*

[36] Rep. Act No. 11232 (2019), § 10.

[37] § 116.

[38] CAMPOS, *supra* note 3.

[39] *Id.* at 54.

[40] *Id.* at 56.

[41] Rep. Act No. 11232 (2019), § 13.

[42] § 14.

(5) names, nationalities and residences of the incorporators; (6) the number of directors or trustees, which shall not be less than 5 nor more than 15; (7) the names, nationalities and residences of the persons who shall act as directors or trustees until the first regular directors or trustees are duly elected; (8) if it be a stock corporation, the amount of its authorized capital stock, the number of shares to which it is divided, and in case the shares are par value shares, the par value of each, the names, nationalities and residences of the original subscribers, and the amount subscribed and paid by each on his subscription, and if some or all of the shares are without par value, such fact must be stated; (9) if it be a non-stock corporation, the amount of its capital, the names, nationalities and residences of the contributors and the amount contributed by each; and (10) such other matters, not inconsistent with law, which the incorporators may deem necessary and convenient.

The articles of incorporation and applications for amendments thereto are *filed with the SEC, where the corresponding fees are subsequently paid.*[43] After the filing of the articles and the payment of applicable fees, the *SEC shall examine them* in order to determine whether they are in conformity with the Code. Under the Revised Corporation Code, the SEC may disapprove articles or any amendments thereto if the same are not in compliance with the Revised Corporation Code, provided that the SEC shall give the incorporators, directors, trustees, or officers a reasonable time within which to correct or modify the objectionable portions of the articles.[44] Otherwise, the SEC shall *issue a certificate of incorporation* if it is satisfied that all the legal requirements under the Code have been complied with and that there are no grounds for rejecting or disapproving the articles or amendments thereto.[45] The date of issuance of the certificate of incorporation is material, as it is the reckoning point for the acquisition of the corporation of corporate existence and juridical personality. The corporation is deemed incorporated from such date of issuance of the certificate of incorporation.[46]

IV. THE CORPORATE ENTITY

A corporation's legal existence begins the moment its certificate of incorporation is issued.[47] It is from this moment that the corporation acquires the right to sue and be sued, to hold property in its own name, enter into contracts with third persons, and to perform all other legal acts. This legal existence or personality is separate and distinct from its stockholders or members. Thus, since a corporation owns property as

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[43] CAMPOS, *supra* note 3, at 84.

[44] Rep. Act No. 11232 (2019), § 16.

[45] CAMPOS, *supra* note 3, at 85.

[46] Rep. Act No. 11232 (2019), § 18.

[47] § 18.

a juridical person, its stockholders have no claim on the property as owners. They merely have an expectancy or inchoate right upon the corporation's dissolution, and after all obligations have been settled. Neither can stockholders use corporate property to satisfy personal claims.[48] Conversely, properties belonging to stockholders cannot be levied upon to answer for the obligation of a corporation.[49]

The constitutional guarantee against unreasonable searches and seizures extend to corporations. In the leading case of *Stonehill v. Diokno,*[50] the Supreme Court ruled that it is the corporation, and not its stockholders, who can question the admissibility of evidence obtained from an illegal search and seizure. This is because of the simple reason that the legality of a seizure can be contested only by the party whose rights have been impaired thereby, and that the objection to an unlawful search and seizure is purely personal and cannot be availed of by third parties. As corporations have their respective personalities, Stonehill, et al. had no cause of action to assail the legality of the warrants issued and the seizures made in pursuance thereof.

However, being treated as a juridical person with a separate personality is a privilege limited to legitimate uses. The Supreme Court has not hesitated to disregard the corporate entity when evidence tends to show that the corporate fiction is used for fraudulent, unfair, or illegal purposes. The corporate veil may be pierced when the corporation is used to commit a wrong, when the law provides for it, or when the corporation is a mere alter ego of its stockholders. While ownership of one corporation of all or substantially all of the stocks of another corporation does not in itself justify disregarding the subsidiary's separate existence, where one corporation is so organized and controlled and its affairs are conducted so that it is, in fact, a mere instrumentality or adjunct of the other, the fiction of the corporate entity of the "instrumentality" may be disregarded.[51] The "Instrumentality Rule" is applied when the control by one corporation over another is such that it dominates the subsidiary's finances, policies, and practices that it merely becomes a conduit of the principal. Moreover, the rule may be invoked only when such control was exercised during the period when the acts complained of occurred, and only if the control and breach of duty are the proximate causes of the injury or unjust loss.

The three-fold test in determining whether the doctrine of piercing the corporate veil applies requires: (1) CONTROL—complete domination, not only of finances, but also of policy and business practice in respect to the questioned transaction so that the

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[48] Wise and Co v. Man Su Lung, 69 Phil 309.

[49] Cruz v. Dalisay, 152 SCRA 483.

[50] Stonehill v. Diokno, 20 SCRA 383.

[51] Concept Builders v. NLRC, G.R. No. 108734.

corporate entity had, at the time, no separate mind, will, or existence of its own; (2) FRAUD—such control must have been used to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of a legal right; and (3) HARM—the aforesaid control and breach of duty must have proximately caused the injury or unjust loss complained of.[52]

When the veil of corporate entity is pierced, stockholders become "personally liable for the acts and contracts of the corporation whose existence, at least for the purpose of the particular situation involved, is ignored."[53] The corporation is regarded as either a mere group of persons, or in cases where at least two corporations are involved, as being merged into one. When a court disregards the corporate entity, it is not denying its corporate existence. It merely refuses to allow the corporation to use its corporate privileges for the fraudulent purpose involved in the case.

V. CORPORATE POWERS

A corporation can exercise those powers that are expressly conferred by law and those essential and necessary to carry out its purpose/s. Every corporation incorporated under the Corporation Code can exercise the following general powers: to sue and be sued in its corporate name; of succession by its corporate name for the period of time stated in the articles of incorporation and the certificate of incorporation; to adopt and use a corporate seal; to amend its articles of incorporation; to adopt by-laws not contrary to law, morals, or public policy, and to amend or repeal the same; to issue or sell stocks to subscribers and to sell stocks to subscribers and to sell treasury stocks in case of stock corporations; to admit members in case of a non-stock corporation; to purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage and otherwise deal with such real and personal property, including securities and bonds of other corporations, as the transaction of the lawful business of the corporation may reasonably and necessarily require, subject to the limitations prescribed by law and the Constitution; to enter into a partnership, joint venture, merger or consolidation with other corporations; to make reasonable donations, including those for the public welfare or for hospital, charitable, cultural, scientific, civic, or similar purposes: provided, that no foreign corporation, domestic or foreign, shall give donations in aid of any political party or candidate or for purposes of partisan political activity; and to establish pension, retirement, and other plans for the benefit of its directors, trustees, officers, and employees.[54] These general powers

[52] PNB v. Hydro Resources Contractor Corporation, G.R. No. 167530.
[53] CAMPOS, *supra* note 3, at 150.
[54] Rep. Act No. 11232 (2019), § 36.

are to be exercised by a corporation's Board of Directors, unless the law provides otherwise.

Corporations also possess other specific powers which can be found in other provisions of the Code. These include the power to:

1. Extend or shorten corporate term;[55]
2. Increase or decrease capital stock;[56]
3. Incur, create, or increase bonded indebtedness;[57]
4. Deny pre-emptive right;[58]
5. Sell or otherwise dispose of substantially all its assets;[59]
6. Acquire its own shares;[60]
7. Invest in another corporation or business;[61]
8. Declare dividends;[62] and
9. Enter into management contracts.[63]

These general and specific powers found in the Revised Corporation Code, along with powers granted by the Constitution and a corporation's Articles of Incorporation, comprise its express powers. The Code also defines what are ultra vires acts of a corporation. Section 44 states that no corporation "shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred." Ultra vires acts are merely voidable and may be ratified. The only exceptions to ratification are acts or contracts which are contrary to law, morals, public policy, or public order, or when there is harm or injury caused to third persons because of the ultra vires act or contract. However, it is also a settled rule that "when a contract is not on its face necessarily beyond its authority, it will, in the absence of truth to the contrary, presumed to be valid."[64] A wide range of implied powers may be inferred from Section 35 of the Revised Corporation Code, which provides that a corporation has "the power and capacity to exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in its articles of

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[55] § 36.
[56] § 37.
[57] § 37.
[58] § 38.
[59] § 39.
[60] § 40.
[61] § 41.
[62] § 42.
[63] § 43.
[64] CAMPOS, *supra* note 3, at 286.

incorporation." While as a rule, an ultra vires act is one committed outside the object for which the corporation is created as defined by the law of its organization and therefore beyond the powers conferred upon it by law, there are, however, certain corporate acts that may be performed outside of the scope of the powers expressly conferred if they are necessary to promote the interest or welfare of the corporation. Thus, the establishment of a post office at a mining camp has been held to be a reasonable and proper adjunct to the conduct of the business of a mining company as it concerns the benefit, convenience, and welfare of its employees.[65] The Supreme Court has also held that the National Power Corporation is empowered to undertake stevedoring services since the pier it owns receives various shipments of coal exclusively used to fuel its Thermal Power Plant for generating electric power.[66]

Ultra vires acts of a corporation have consequences on the corporation itself, the parties to the contract, and the rights of stockholders. A corporation may be dissolved under a quo warranto proceeding instituted by the Solicitor General, but the more common penalty is a suspension or revocation of its certificate of registration. If the contract has been fully executed, then the parties will be left as they are without the remedies of resolution or rescission. If the contract is merely executory on both sides, neither of the two parties can ask for specific performance. When one of the parties has already performed his part to the benefit of the other party, the latter is estopped from invoking the ultra vires doctrine. The remedy of an individual—filing a derivative suit—is available to stockholders if they wish to enjoin a threatened ultra vires act or contract. The same remedy is available against directors when the act has already been performed or the contract was already executed. However, the directors' liability will depend on whether they acted in good faith and with reasonable diligence.

VI. CONTROL AND MANAGEMENT OF THE CORPORATION

There are three levels of control in the corporate hierarchy: the board of directors or trustees, the corporate officers, and the stockholders or members.

Unless otherwise provided by the Corporation Code, the board of directors shall exercise corporate powers, conduct the business, and control all the property of a corporation.[67] The board of directors or board of trustees (for non-stock corporations) is the governing body of a corporation and responsible for corporate policies and the general management of the business. Directors or trustees are elected from among the corporation's stockholders or members and hold office for one year, and until their successors are elected and qualified. Once elected, stockholders will no longer have

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[65] Republic v. Acoje Mining Company, Inc., 7 SCRA 361.

[66] NAPOCOR v. Vera, G.R. No. 83558.

[67] Rep. Act No. 11232 (2019), § 22.

the right to intervene with the board's exercise of its powers and functions, unless the law provides otherwise.[68]

The acts of the board of directors are embodied in resolutions which are the result of decisions made after discussion and deliberation by the body in board meetings. A proper and lawful meeting will have the necessary quorum of majority of the number of directors or trustees as fixed in the articles of incorporation, unless such articles of incorporation or by-laws provide for a greater majority.[69] There can be no transaction of corporate business without the requisite quorum, and directors or trustees are not allowed to attend board meetings or vote on matters by proxy. However, under the Revised Corporation Code, directors or trustees who cannot physically attend or vote at board meetings can participate and vote through remote communication such as videoconferencing, teleconferencing, or other alternative modes of communication that allow them reasonable opportunities to participate.[70] Valid corporate acts are those acts decided upon by a majority of the quorum present. However, the election of corporate officers is an exception, as it requires the vote of majority of all the members of the board. These formal requirements do not preclude corporate liability in favor of third persons when they are not complied with. A corporation is still bound by an otherwise unauthorized act if majority of the members of the board have knowledge of the same and were benefitted by it.

There are two kinds of board meetings—regular and special. Regular meetings are "held monthly, unless the corporation's by-laws provide otherwise."[71] Special meetings, meanwhile, "may be held at any time upon the call of the president or as provided in the by-laws."[72] Regardless of the type of meeting, it must be properly called and convened in accordance with law, otherwise, the meeting will not be valid. Matters decided upon during an invalid meeting may be questioned by a director or stockholder without prejudice to the rights of innocent third persons who have entered into contracts with the corporation.

Notice of any meeting is mandatory in order for a board meeting to be valid. The by-laws may fix the frequency with which board meetings are held, but if the by-laws are silent regarding this matter, then the board is required to meet at least once a month to comply with Section 52 of the Revised Corporation Code. Notice must be given at least two (2) days prior to the scheduled meeting, and must include the date,

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[68] CAMPOS, *supra* note 3, at 340.

[69] Rep. Act No. 11232 (2019), § 52.

[70] § 52.

[71] § 52.

[72] § 52.

time, and place of the meeting.[73] It should also contain the purpose for which the meeting is being called and the matters to be taken up therein. Notice must be sent to every director or trustee, but this requirement is subject to express or implied waiver. Failure to notify a director or trustee will allow him or her to question the validity of the meeting and any matters taken up or decision made in said meeting. However, a director or trustee who waives notice will not have the same right.

The board may meet anywhere it pleases if the by-laws are silent on the matter. The directors or trustees may choose to meet at a different place every meeting, may choose to hold meetings at the same place every time, or they may even choose to meet outside the Philippines. By default, the corporation's President shall preside over all board meetings unless the by-laws provide otherwise.

Only matters stated in the notice of meeting can be discussed and deliberated upon in the meeting. A listing of "other matters" will only include routine and ordinary matters. The board cannot validly act upon any other matter not included in the notice, unless all members of the board are present and agree to discuss any extraordinary matter and all of them are estopped from questioning the validity of any corporate act resulting from such discussion.

As there is identity between stockholders and management in close corporations, they may do away with the formalities of a board meeting, or of even having a board of directors. The Revised Corporation Code, through Sections 96 and 100, allows close corporations to treat the stockholders as directors and relaxes the general rules in relation to meetings and the powers and functions of directors.

The second level of control is exercised by corporate officers. A corporate is officer is one who is "entrusted with the general management and control of its business, has implied authority to make any contract or do any other act which is necessary or appropriate to the conduct of the ordinary business of the corporation."[74] Their derived powers come from the board of directors which may delegate powers to individual officers, committees, or agents it appoints.

Under Section 24 of the Revised Corporation Code, immediately after their election, the directors of a corporation must elect a president, a treasurer, a secretary, and other such officers as may be provided for in the by-laws. New in the Revised Corporation Code is the requirement of electing a compliance officer for corporations vested with public interest.[75] The law allows for officers to concurrently hold two or

[73] § 52.
[74] Board of Liquidators v. Heirs of Kalaw, 20 SCRA 987.
[75] Rep. Act No. 11232 (2019), § 24.

more positions at any given time, but an officer cannot be president and secretary, or president and treasurer at the same time.[76] There is also no citizenship requirement for corporate officers save for the Secretary, which the Code requires to be a Filipino citizen.[77] Aliens also cannot become corporate officers if the business is in an industry that is partially or completely reserved for Filipino citizens[78] such as mass media, forestry, mining, and law.[79]

The President of a corporation shall also be a director of the company as provided by the Code.[80] It is the president who presides over all meetings of the board of directors or trustees, as well as stockholders or members meetings. His powers are usually enumerated in the by-laws, but he is also often impliedly vested with board powers through acquiescence, and any act of the president may be ratified later on by the board. The determination of whether an act of the president is within his powers depends mainly on the circumstances, and the burden of proving that he had acted beyond the scope of his power's rests on the corporation. The Supreme Court, speaking through Justice Brion, has ruled that "in the absence of a charter or bylaw provision to the contrary, the president is presumed to have the authority to act within the domain of the general objectives of its business and within the scope of his or her usual duties."[81]

Only the corporate secretary is required to be both a resident and citizen of the Philippines under the Code.[82] His primary duties of keeping corporate records and having custody thereof are ministerial in nature and his acts are not binding on the corporation, except if he holds the concurrent position of manager or treasurer.

The General Manager takes care of the day-to-day affairs of the corporation, and while his powers are limited mostly to policy implementation, he is given wide discretion in ensuring that the same are effectively implemented. A general manager "may, without any special authority from the Board of Directors perform all acts of an ordinary nature, which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business."[83] Thus, a corporation cannot sue its general manager for negligence and breach of duty for lost profits when its practice is to allow him to negotiate and execute contracts

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[76] § 24.

[77] § 24.

[78] CONSTI. art. XII, § 11.

[79] FIA Negative List.

[80] Rep. Act No. 11232 (2019), § 24.

[81] Advance Paper Corp v. Arma Traders Corp, G.R. No. 176897.

[82] Rep. Act No. 11232 (2019), § 24.

[83] Board of Liquidators v. Heirs of Kalaw, 20 SCRA 987.

without prior board approval.[84] Furthermore, under the doctrine of apparent authority, the rights of an innocent third party who presumes that a corporate has the authority to perform and act or enter into a contract when, in fact, he does not, cannot be prejudiced.

Stockholders exercise the least amount of control over a corporation. Their powers are merely residual in nature, meaning that there are only specific instances where stockholders' or members' consent is required before any action may be taken. These matters include:

1. The election of directors and trustees;[85]
2. The removal of directors;[86]
3. Fundamental changes affecting the contract between the stockholders and the corporation such as:

    a. Amendment of the articles of incorporation;[87]
    b. Sale or disposition of all or substantially all assets of the corporation;[88]
    c. Investment in another business or corporation;[89]
    d. Merger and consolidation;[90]
    e. Increase or decrease of capital stock; creation or increase of bonded indebtedness;[91] and
    f. Adoption, amendment, or repeal of by-laws;[92]

4. Declaration of stock dividends;[93]
5. Entering into management contracts;[94]
6. Fixing consideration for no-par-shares;[95] and
7. Fixing compensation of directors.[96]

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[84] *Id.*
[85] Rep. Act No. 11232 (2019), § 23.
[86] § 27.
[87] §15 and § 102.
[88] § 39.
[89] § 41.
[90] § 76.
[91] § 37.
[92] § 45 and § 47.
[93] § 42.
[94] § 43.
[95] § 61.
[96] § 29.

VII. DUTIES OF DIRECTORS AND CONTROLLING STOCKHOLDERS

The law makes directors fiduciaries of a corporation because they "represent the interests of all the stockholders and the corporation as a whole"[97] and are given very broad powers to formulate company policies and exercise management powers. Every director has a three-fold duty that he owes a corporation—DILIGENCE, LOYALTY, and OBEDIENCE. Section 30 of the Code states that "[d]irectors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons."[98]

Under the business judgment rule that originated from *Otis & Co. v. Pennsylvannia R. Co.*,[99] courts have properly decided to "give directors a wide latitude in the management of the affairs of a corporation, provided always that judgment, and that means an honest, unbiased judgment, is reasonably exercised by them." In *Casey v. Woodruff*,[100] it was stated that "mistakes or errors in the exercise of honest business judgment do not subject the officers and directors to liability for negligence in the discharge of their appointed duties."

The degree of diligence required is that "which men prompted by self-interest[] generally exercise in their own affairs."[101] In determining whether directors acted negligently, it has been ruled that "what constitutes negligence depends upon the circumstances of the case; that the court will not interfere with the internal management of corporations, and therefore will not substitute its judgment for that of the officers and directors; and, what is a rule of reason, that negligence must be determined as of the time of the transaction."[102]

However, the acceptance of the office by a director of a corporation implies that such director possesses competent knowledge of the duties assumed, and cannot excuse imprudence on the ground of their ignorance or inexperience.[103] Directors are presumed to keep themselves abreast of the state of the corporation and its business

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[97] CAMPOS, *supra* note 3, at 641.
[98] Rep. Act No. 11232 (2019), § 30.
[99] 61 F. Supp. 905.
[100]49 NY S.2d.
[101] CAMPOS, *supra* note 3, at 643.
[102] Otis & Co. v. Pennsylvania R. Co, 61 F. Supp. 905.
[103] CAMPOS, *supra* note 3, at 643.

transactions. Should they commit an error of judgment through mere recklessness or want of ordinary prudence or skill, they may be held liable for the consequences. In cases of gross negligence or fraud, erring directors may even be removed by the corporation's stockholders.

It is also the duty of the director to give primacy to the interests of the corporation over his own. Directors are liable for disloyal acts when corporate interests are sacrificed for personal interests. Section 31 of the Code embodies the doctrine of a self-dealing director. It states that corporate contracts with at least one of its directors, trustees, or officers are voidable at the option of the corporation. The same provision provides an exception in that such contract would be perfectly valid, provided that the following conditions are present:

1. That the presence of such director or trustee in the board meeting in which the contract was approved was not necessary to constitute a quorum of such meeting;
2. That the vote of such director or trustee was not necessary for the approval of the contract;
3. That the contract is fair and reasonable under the circumstances;
4. In case of corporations vested with public interest, material contracts are approved by at least two-thirds (2/3) of the entire membership of the board, with at least majority of the independent directors voting to approve the material contract; and
5. That in the case of an officer, the contract with the officer has been previously authorized by the board of directors.[104]

If any of the first three (3) conditions are absent and the contract was entered into with a director or trustee, the stockholders may ratify a fair and reasonable act under the circumstances by a vote of two thirds (²/₃) of the outstanding capital stock or of at least two thirds (²/₃) of the members present in a meeting called for the purpose, given that disclosure of the adverse interest of the directors or trustees involved is made at such meeting.[105] In any case, even without the exception, the disloyal act may still be ratified regardless of the damage suffered by the corporation.

A director also has a specific duty not to seize corporate opportunities for himself. Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter all such profits made by

[104] Rep. Act No. 11232 (2019), § 31.
[105] § 31.

virtue of such transaction.[106] "The doctrine of "corporate opportunity" is precisely a recognition by the courts that the fiduciary standards could not be upheld where the fiduciary was acting for two entities with competing interests. This doctrine rests fundamentally on the unfairness, in particular circumstances, of an officer or director taking advantage of an opportunity for his own personal profit when the interest of the corporation justly calls for protection."[107] The doctrine applies even if the director risked his own funds in the venture, but such act may be ratified by a vote of the stockholders owning or representing at least two thirds (2/3) of the outstanding capital stock.[108]

Furthermore, directors shall not receive compensation, except for reasonable per diems, when there is no provision providing for the same in the by-laws of a corporation.[109] Any other form of compensation may be given by a vote of the stockholders representing majority of the outstanding capital stock, or if an express contract regarding the matter was made in advance.[110] Thus, board resolutions authorizing per diems, increasing them, and appropriating discretionary funds for directors are invalid when the by-laws provide that the stockholders have the power to fix the compensation of directors.[111] Even absent this provision, such a resolution would still be invalid for violating the principle that directors of a corporation presumptively serve without compensation, and in the absence of agreement or resolution in relation thereto, no claim can be asserted therefor.

A director's compensation may include salaries, per diems, and profit sharing agreements such as bonuses, stock option plans, and pension plans. The aggregate yearly amount should not exceed ten percent of the net income, before income tax of the corporation, during the preceding year.[112] The same rules apply to trustees of non-stock corporations by virtue of Section 86 of the Revised Corporation Code. These rules do not apply to officers, who are considered employees of the corporation, and directors who render service outside of their usual duties.

Directors or trustees are prohibited from using inside information to benefit themselves or any competitor in which they have a more substantial interest. Inside information is any information that is confidential in nature and would not have been known to the director or trustee if not for his position. Contracts entered into using

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[106] § 33.
[107] Gokongwei v. SEC, G.R. No. L-45911, April 11, 1979.
[108] Rep. Act No. 11232 (2019), § 33.
[109] § 29.
[110] § 29.
[111] Central Cooperative Exchange v. Tibe, G.R. No. L-27972, Jun. 30, 1972.
[112] Rep. Act No. 11232 (2019), § 29.

inside information are void with respect to the rights of the guilty officer or director. An innocent third party can still rightfully enforce the contract, with the right to recover what he has paid or delivered if he has been prejudiced. An amendment to the by-laws disqualifying stockholders to be elected as a director, if he is also a director in a corporation whose business is in competition with that of the other corporation, is valid.[113] It has been previously held that the Philippine Constitution and its anti-trust laws prohibit combinations in restraint of trade or unfair competition, monopolies, and are aimed at raising levels of competition by improving the consumer's effectiveness as the final arbiter in free markets.[114]

It is a general principle in Philippine Corporation Law that a contract between two or more corporations having interlocking directors shall not be invalidated on that ground alone, provided that the contract is fair and reasonable and is not tainted with fraud.[115] However, if the interest of the interlocking director in one corporation is substantial and his interest in the other corporation or corporations is merely nominal, he shall be subject to the provisions of Section 31 (self-dealing director) insofar as the latter corporation or corporations are concerned. The burden of proving the validity of the contract is borne by the corporation which seeks to uphold it.

In case of insolvency, directors will be deemed trustees of the corporation's creditors and will have the fiduciary duty to manage the corporation's assets with strict regard to the creditor's interest.

A majority shareholder has the fiduciary of good faith when voting at stockholders' meetings when a matter being discussed is one in which he has a personal interest, such as ratifying an otherwise voidable action, merger, dissolution, or sale of all or substantially all of the corporation's property. While a controlling stockholder may generally dispose of his shares at any time and at any price of his choosing, he cannot violate his fiduciary duty by transferring shares to third persons who are known or should be known to have the intention to raid the corporate treasury or otherwise improperly benefit themselves.[116]

VIII. FINANCING THE CORPORATION

Corporations in the Philippines are usually financed by three sources: contributions through stockholder equity or investment equity, loans or advances, and

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[113] Gokongwei v. SEC, G.R. No. L-45911, Apr. 11, 1979.
[114] Gokongwei v. SEC, G.R. No. L-45911, Apr. 11, 1979.
[115] Rep. Act No. 11232 (2019), § 32.
[116] Insuranshares Corp. v. Northern Fiscal Corp., 42 F. Supp. 126 (1940).

profits earned by a corporation. Of the three, stockholder equity is the most common mode of financing corporations.

Capital stock is "the amount fixed, usually by the corporate charter, to be subscribed and paid in or secured to be paid in by the shareholders, either in money or property, labor or services at the organization of the corporation or afterwards."[117] Meanwhile, capital is the aggregate par or issued value of the subscribed capital stock, or what is commonly referred to as legal or stated capital. It is comprised of all the actual property of the corporation, including cash, real and personal property, and all other corporate assets.

Shares of stock are the units into which the capital stock is divided.[118] A share of stock represents the holder's interest to participate in managing the corporation, to share proportionally in the business' profits, and to obtain an aliquot part of the remaining corporate assets upon liquidation. This interest is evidenced by a certificate of stock, which is issued in the name of the holder.

The Revised Corporation Code classifies shares according to the rights granted to shareholders, privileges enjoyed, and restrictions. The Code gives corporations much leeway as to the kinds of shares it may issue, subject only to the condition that there be a class of shares with complete voting rights.[119] Section 6 outlines other guidelines for the issuance of shares which include the following: (1) any or all of the shares or series of shares may have a par value or have no par value as may be provided for in the articles of incorporation; (2) no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided; and (3) banks, trust companies, insurance companies, public utilities, and building and loan associations shall not be permitted to issue no-par value shares of stock.

The two most commonly issued classifications of shares are common stock and preferred stock. Common stock entitles the stockholder to equal pro-rata division of profits, if any. There is no common stockholder that will have advantage, priority, or preference over any other holder in the same class. When common stock is issued along with preferred stock, common stockholders are usually vested with the exclusive right to vote and have the residual right to profits and assets upon liquidation.

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[117] CAMPOS, *supra* note 3, at 5.
[118] CAMPOS, *supra* note 3, at 6.
[119] Batas Pambansa Blg. 68, § 6.

Preferred stock gives the holder some preference in the dividends or the distribution of assets upon the corporation's liquidation.[120] Unlike common stock, preferred stock can be issued only with stated par value, and the preferences that come with it must be indicated in both the articles of incorporation and the stock certificate.

Stocks with preference as to dividends may be participating or non-participating. If a preferred stock is classified as participating, it may share with the common stocks in the remaining dividends after it had already exercised its preference. Preferred stocks may also be cumulative or non-cumulative. By default, preferred stocks are deemed to be cumulative, meaning that arrears for years when no dividends were given have to first be made to preferred stocks before common stocks can be paid dividends.[121] Non-cumulative dividends may be discretionary, mandatory, or earned cumulative or dividend credit type. If a preferred, non-cumulative stock is discretionary, the right to dividends would rest upon the discretion of the board of directors. When the stock is mandatory, the directors have a positive duty to declare dividends for preferred stock on years where profit is earned. An earned cumulative or dividend credit type gives the stockholder rights to arrears in dividends for years when dividends were not declared.

Preferred stocks may also be given preference as to voting rights. As a general rule, preferred stocks are not given the right to vote by contract but when there is no express stipulation regarding the matter, a preferred stockholder would still have the right to vote. Moreover, the Code provides that even non-voting stocks have the right to vote in specified instances involving major changes.[122] As regards liquidation, the articles of incorporation must provide for the preference of preferred stocks to the corporate assets upon settlement of all corporate obligations.

Shares may also be classified as par or no-par shares. The par value of a share is the minimum issue price of such share, which must be fixed in the articles of incorporation and indicated in the stock certificate. No-par shares are those whose price is not indicated in the stock certificate even if it were fixed in the articles of incorporation, by the board, or by the shareholders themselves. Regardless of this classification, however, subscribers must pay full consideration before they can be considered issued.

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[120] CAMPOS, *supra* note 3, at 8.
[121] CAMPOS, *supra* note 3, at 10.
[122] Batas Pambansa Blg. 68, § 6.

Furthermore, no-par shares are subject to the following limitations:[123]

1. Once issued, they are deemed fully paid and therefore, non-assessable;
2. Consideration for issuance cannot be less than P5.00;
3. The entire consideration for issuance constitutes capital, hence no part of it is available for distribution as dividends;
4. They cannot be issued as preferred stocks;
5. They cannot be issued by banks, trust companies, insurance companies, public utilities, and building and loan associations; and
6. The Articles of Incorporation must state the fact that the corporation issues no-par shares as well as the number of such shares.

Treasury shares are "shares of stock which have been issued and fully paid for but subsequently reacquired by the issuing corporation by purchase, redemption, donation or through some other lawful means."[124] When treasury shares are re-issued, they may be disposed of at any reasonable price, even less than par. This is because as re-acquired shares, they had already been fully paid for, during subscription or initial purchase.

Redeemable shares come with the privilege on the part of the corporation to redeem such shares for a price higher than par or face value. These "may be issued by the corporation when expressly so provided in the articles of incorporation. They may be purchased or taken up by the corporation upon the expiration of a fixed period regardless of the existence of unrestricted retained earnings in the books of the corporation, and upon such other terms and conditions as may be stated in the articles of incorporation, which terms and conditions must also be stated in the certificate of stock representing said shares."[125]

IX. CONSIDERATION FOR ISSUANCE OF SHARES

In general, shares are not considered issued until they are paid in full. When a subscription is only partially paid at the time of issuance, the unpaid portion becomes the stockholder's debt to the corporation. Consideration for the issuance of stock may be:

1. Actual cash paid to the corporation;

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[123] CAMPOS, *supra* note 3, at 30.
[124] Rep. Act No. 11232 (2019), § 9.
[125] Batas Pambansa Blg. 68, § 8.

2. Property, tangible or intangible, actually received by the corporation and necessary or convenient for its use and lawful purposes at a fair valuation equal to the par or issued value of the stock issued;
3. Labor performed for or services actually rendered to the corporation;
4. Previously incurred indebtedness of the corporation;
5. Amounts transferred from unrestricted retained earnings to stated capital;
6. Outstanding shares exchanged for stocks in the event of reclassification or conversion;
7. Shares of stock in another corporation; and
8. Other generally accepted form of consideration. [126]

Section 61 of the Revised Corporation Code further states that:

> Where the consideration is other than actual cash or consists of intangible property such as patents of copyrights, the valuation thereof shall initially be determined by the incorporators or the board of directors, subject to approval by the Securities and Exchange Commission.
>
> Shares of stock shall not be issued in exchange for promissory notes or future service. The same considerations provided for in this section, insofar as they may be applicable, may be used for the issuance of bonds by the corporation.
>
> The issued price of no-par value shares may be fixed in the articles of incorporation or by the board of directors pursuant to authority conferred upon it by the articles of incorporation or the by-laws, or in the absence thereof, by the stockholders representing at least a majority of the outstanding capital stock at a meeting duly called for the purpose.[127]

Watered stocks are "shares issued as fully paid up but no consideration is paid or consideration is inadequate."[128] There are two theories for basis of liability on watered stock. The first is the trust fund theory which treats a corporation's capital stock as a trust for the payment of its obligations, in the absence of personal liability on the part of the stockholders. The other is the fraud or misrepresentation theory which bases liability on false representations made to creditors that the par value of the stock has been paid or agreed to be paid in full. In this theory, "the issue of watered stock is viewed as a misrepresentation of the corporation's capital, and creditors who

[126] Rep. Act No. 11232 (2019), § 61.
[127] § 61.
[128] CAMPOS, *supra* note 3, at 142.

rely on this misrepresentation are entitled to recover the "water" from the holders of watered stock."[129]

Section 64 of the Revised Corporation Code states that any director or officer of a corporation consenting to the issuance of stocks for a consideration less than its par or issued value or for a consideration in any form other than cash, valued in excess of its fair value, or who, having knowledge thereof, does not forthwith express his objection in writing and file the same with the corporate secretary, shall be solidarily liable with the stockholder concerned, to the corporation and its creditors, for the difference between the fair value received at the time of issuance of the stock and the par or issued value of the same.[130] This liability is unqualified, meaning the erring officer and stockholder will be liable to all creditors, whether the corporation incurred indebtedness prior or subsequent to the issuance of watered stock.

A. Dividends

The right to share in the corporation's assets, or what is commonly known as the dividend right, is one of the three most important rights of a stockholder (the other two being the right to vote and the right to a proportional share in the corporate assets upon liquidation). Dividends are of three kinds—cash, property, and stock. Dividends are declared by the board of directors out of a corporation's unrestricted retained earnings.[131] Unrestricted retained earnings are the undistributed earnings of the corporation which have not been allocated for any managerial, contractual, or legal purposes, and which are free for distribution to the stockholders as dividends.

The right to dividends is always proportional to the outstanding capital stock owned by the stockholder. This right is protected by the Revised Corporation Code in Section 42 which states that "stock corporations are prohibited from retaining surplus profits in excess of one hundred (100%) percent of their paid-in capital stock, except: (1) when justified by definite corporate expansion projects or programs approved by the board of directors; or (2) when the corporation is prohibited under any loan agreement with any financial institution or creditor, whether local or foreign, from declaring dividends without its/his consent, and such consent has not yet been secured; or (3) when it can be clearly shown that such retention is necessary under special circumstances obtaining in the corporation, such as when there is need for special reserve for probable contingencies."

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[129] Bing Crosby Minute Maid Corp v. Eaton, 46 Cal., 2d., 484 (1956).
[130] Rep. Act No. 11232 (2019), § 64.
[131] § 42.

Stock dividend is the distribution of the corporation's own stock to stockholders. In order to do this, earnings are transferred to capital stock, and the shares representing the increase in capitalization are distributed. While these do not represent income, they are considered civil fruits belonging to the usufructuary, which in this case is the corporation. Section 42 enumerates the guidelines in declaring stock dividends. These are: (1) that stock dividends shall be withheld from the delinquent stockholder until his unpaid subscription is fully paid; and (2) no stock dividend shall be issued without the approval of stockholders representing at least two-thirds (2/3) of the outstanding capital stock at a regular or special meeting duly called for the purpose. The Code also provides that cash dividends due on delinquent stock shall first be applied to the unpaid balance on the subscription, plus costs and expenses.[132]

B. Transfer of Shares

Shares of stock are personal property which the stockholder may freely transfer at will. This transfer may be effected by the "delivery of the certificate or certificates indorsed by the owner or his attorney-in-fact or other person legally authorized to make the transfer."[133]

The law also states that "no transfer [] shall be valid, except as between the parties, until the transfer is recorded in the books of the corporation showing the names of the parties to the transaction, the date of the transfer, the number of the certificate or certificates and the number of shares transferred."[134] Registration of the transfer in the corporation's stock and transfer book is necessary for the transfer to be valid. However, mere indorsement and delivery of the stock certificate will bind the transferor and the transferee. Thus, the following requisites must concur in order for a transfer to be binding between the parties:

1. Certificates must be signed by the President or Vice President, countersigned by Secretary or Assistant Secretary of the corporation accompanied by the corporate seal;
2. Delivery of stock certificate to the transferee;
3. The par value as to par value shares, or full subscription as to no-par shares, must be paid; and
4. Original certificate must be surrendered where the person requesting the issuance is a transferee from a stockholder.

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[132] § 42.

[133] Batas Pambansa Blg. 68, § 62.

[134] § 62.

This duty to record transfers in the corporate books falls upon the corporate secretary to whom the stock certificate and certificate authorizing registration (tax clearance) should be presented. Jurisprudence tells us that the registration allows the corporation to know who its actual stockholders are, object to or withhold its consent to the transfer, and prevent fictitious or fraudulent claims.[135] In contrast, if the transfer is not registered by the transferee, the same is not binding on the corporation and the transferee will not enjoy the full extent of the rights and privileges granted to a stockholder. Another consequence of non-registration is that a stockholder of record (the transferor), despite the transfer, can still participate in any meeting and, in the absence of fraud, any action at such meeting cannot be collaterally attacked on account of such participation. Moreover, an unregistered transfer, not being effective against persons other than the parties thereto, cannot prevail over the rights of a subsequent attaching creditor.[136] Even the transfer of unissued shares held in escrow must be recorded because the names of the parties, the date of transfer, and the number of shares transferred, which are the most important data, can still be determined.[137]

A transfer will also not bind the corporation if their stockholder's subscription has not been paid in full because there can be no stock certificate on which an indorsement may be made. In such cases, a transfer may be made by way of assignment, although the corporation may refuse to register the transfer or agree to register if the unpaid balance will be settled by the transferee.

A transferee who presents a transfer for registration that is refused may resort to mandamus to compel the corporation to register the transfer, provided that there is no other plain, speedy, and adequate remedy available; and provided further, that there are no unpaid claims against the transferred stocks. The right to have the transfer registered exists from the time of the transfer. However, the action does not accrue until there has been a demand to register and a refusal by the corporation to do so.

X. FOREIGN CORPORATIONS DOING BUSINESS IN THE PHILIPPINES

Under the Revised Corporation Code, a *foreign corporation* is defined as one formed, organized, or existing under any laws other than those of the Philippines and whose laws allow Filipino citizens and corporations to do business in its own country or state.[138] Further, the Revised Corporation Code provides that foreign corporations

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[135] Escaño v. Filipinas Mining Corp., G.R. No. L-49003, July 28, 1944.
[136] Uson v. Diomisito, G.R. No. 42135, Jun. 17, 1935.
[137] Escaño v. Filipinas Mining Corp., G.R. No. L-49003, July 28, 1944.
[138] Rep. Act No. 11232 (2019), § 140.

must obtain a license to transact business in the Philippines, and a certificate of authority from the appropriate government agency before it can *do business* in the country.

Application for a license to do business in the Philippines from the SEC is also governed by the Revised Corporation Code.[139] Such license granted to a foreign corporation enables it to transact business in the Philippines for the purpose or purposes specified in such license.[140] Thus, should the foreign corporation wish to engage in business other than that for which it was licensed, it must obtain an amended license from the SEC.[141]

Doing business in the Philippines without a license entails legal consequences. The Revised Corporation Code provides that a foreign corporation doing business in the Philippines without a license shall not be permitted to maintain or intervene in any action, suit, or proceeding in any court or administrative agency of the Philippines; however, such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine laws.[142]

From the foregoing provisions relevant to foreign corporations, it is evident that the determination of whether or not a corporation is *doing business* in the Philippines is crucial. While the Supreme Court has, in the past, repeatedly stated that no general rule can be laid down as to what constitutes doing business and that each case must be decided in light of its peculiar circumstances,[143] the FIA contains a provision defining, through enumeration and exclusion, what *doing business* means. According to the FIA, *doing business* shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling 180 days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally

[139] *See* §§ 142-143.
[140] § 143.
[141] CAMPOS, *supra* note 3, at 497.
[142] Rep. Act No. 11232 (2019), § 140.
[143] CAMPOS, *supra* note 3, at 552.

incident to, and in progressive prosecution of, commercial gain, or of the purpose and object of the business organization.[144]

The FIA also provides that *doing business* shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account.[145]

[144] Rep. Act No. 7042 (1991), § 3(d). Foreign Investments Act.
[145] § 3(d).

THE EVOLUTION OF COMPANIES LEGISLATION AND CORPORATE LEGAL LANDSCAPE IN MYANMAR

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I. INTRODUCTION

For over 100 years, the Myanmar Companies law did not change significantly even though there were important political events. For decades, Myanmar was marginalized from globalization; foreign investors were not prone to invest due to the political and economic situation in the country. Since 2012, the adoption of several important laws in the economic sphere, such as the New Investment Law of 2016 and the New Companies Law of 2017, radically modified the landscape of foreign investment in Myanmar.

The first part of this article examines how the Companies Act in Myanmar was influenced and may have been created during the British colonisation. It will then detail how the Companies Law had a different purpose after the independence of the country in 1948. Finally, it will focus on the 2017 reform of the Companies Law, which has changed the vision of the country in the international context.

II. THE CREATION OF THE COMPANIES LAW UNDER BRITISH RULE

During the feudal period,[1] there was no formal legal business framework.[2] The Ancient Burmese Law was a mosaic of different legal instruments such as

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[1] G. LUBEIGT, *La Birmanie : l'âge d'or de Pagan,* Guide Belles lettres des civilisations, 2005, p. 125: 'Avant l'occupation britannique, la Birmanie était gouvernée par des rois (*mingyi*) dans un régime de monarchie absolue (*thet oo san pine*). Les rois détenaient le pouvoir exécutif, législatif et judiciaire. Son pouvoir était suprême. Pour le pouvoir exécutif, le roi était donc la plus haute autorité. Il était assisté de ministre (*wonmin*), de maires (*myosar*), de chefs de ville (*thanbyin*), de chefs de village (*kalan, ywarsar*) ainsi que de hauts-fonctionnaires (*luhlin kyaw*). Le pouvoir législatif était détenu par le roi et il était assisté par un Parlement (*hluttaw*). Il était le législateur suprême en dehors des questions religieuses et le garant "des lois ordinaires qui reconnaissent les coutumes locales et régionales."

[2] In the *Dhammathat*, no provisions concern companies. Most of the provisions cover private law, such as criminal law, family law, property law and contract law. See D. Richardson, *The Damathat or the*

Dhammathats, Yazathats or Pyathons.[3] The Dhammathat was the most important legal source and served as a guide for the King and the judges.[4] The real contribution of the Dhammathat has been debated and scholars have disagreed on the use of the Dhammathat as a Civil Code.[5] Even though the Manugye Dhammathat is still known as the most famous Dhammathat,[6] the Court at that time, for some reason, did not accept its authority.[7] Before British colonization, Burma's economy was a village economy and did not have a developed foreign trade as it was self-sufficient as a country.[8]

Law of Menoo, University of Michigan Library Press, 1874; U. Gaung, *A Digest of the Burmese Buddhist Law Concerning Inheritance and Marriage; being a Collection of Texts from Thirty-six Dhammathats*, Office of the Superintendent Government Printing, 1905, Vol. 1-2; E. Forchhammer, *King Wagaru Manu Dhammasattham. Text, Translation, and Notes*, Rangoon: Printed by the Superintendent, Government Printing, Burma, 1892; U. Gaung, *The Attasankhepa Vannana Dhammathat: Chapters on Inheritance, Partition, Marriage, and Divorce*, Office of the Superintendent Government Printing, 1963; J. Jardine, *Notes on Buddhist Law*, Office of the Superintendent Government Printing, Vol. 1-8, 1953; H.M. Lütter, *A Manual of Buddhist Law: Being Sparks' Code of Burmese Law, with Notes of All the Rulings on Points of Buddhist Law*, The Hanthawaddy Press, 1887.

[3] See R. Okudaira, *Kingship and Law in the Early Konbaung Period of Myanmar (1752-1819)*. A Study of the Manugye Dhammathat – An Eighteenth Century Major Law Book, Mekong Publishing, 2018; Maung Maung, *Law and Custom in Burma and the Burmese Family*, The Hague Martinus Nijhoff, 1963 ; Maung Maung, *Burma in the Family of Nations*, Djambatan Ltd. International Educational Publishing House, 1956; Than Tun, *The Royal Orders of Burma, A.D. 1598-1885*, The Center for Southeast Asian Studies Kyoto University, 1983; R. Okudaira, *Cases on Theft in 18th Century Myanmar (Burma) with Special Reference to the Atula Hsayadaw Hpyathton*, art. préc., pp. 44-64.

[4] R. Okudaira, *The Burmese Dhammathat*, in Introduction: the South-East Asian Law Texts – Materials and Definitions, M.B. HOOKER, Butterworth & Co. (Asia) Pte. Ltd., 1986, Vol. 1, p. 66.

[5] Than Tun, *History of Buddhism in Burma A.D. 1000-1300*, p. 88; Htun Yee, *Collection of Hpyat-sa* (*Legal Cases and Court Decisions of Myanmar in the Kon-Baung Period)*, Myanmar Affairs Bureau: Literature Bank, Vol. 1, partie 2, 2006, p. 211; Tin Aung Aye, *Interpretation of Statute Law and Treaty*, 2ème éd., 2011, p. 42; A. Huxley, *Burma: It Works, but is it Law?*, art. préc. p. 23-37; Aung Than Tun, *Kinwun Mingyi and Dhammathats*, The Tun Foundtion Bank Literary Committee, 2006, p. 32.

[6] *See* D. Richardson, *The Damathat or the Law of Menoo*, University of Michigan Library Press, 1874; R. Okudaira, *Kingship and Law in the Early Konbaung Period of Myanmar (1752-1819),* A Study of the Manugye Dhammathat – An Eighteenth Century Major Law Nook, Mekong Publishing Co., Ltd., 2018.

[7] Dr. Tha Mya (Appellant) v. Daw Khin Pu (Respondent), B.L.R. (S.C), (1951), 108. That Buddhist Law within the meaning of s. 13 of the Burma Laws Act means the Dhammathats and collection of precedents. The Manugie Dhammathat is not the paramount authority in the body of Dhammathats as enunciated by the Privy Council in Ma Hnin Bwin v. U Shwe Gon, (1914) 8 L.B.R. 1, followed by the High Court of Judicature at Rangoon in Ma Nyun v. Maung San Thein, (1927) 5 Ran. 537.

[8] U Tun Wai, *Economic Development of Burma from 1800 to 1940*, Department of Economics, University of Rangoon, 1961, p. 95.

In the 19th century, the British invaded Burma after three successive wars.[9] Burma was part of "British India" until 1935.[10] The transplantation of the Indian Companies Act, which was derived from Indian statute law, was carried out in 1914.

The Burma Companies Act of 1914 is a vestige of the past. The Act is a reminder of the British colonial era. Indeed, it was modelled on the Indian Companies Act (1913), which was also inspired by the UK Companies Act (1907).[11] Thus, this Act is very familiar for common law countries.

This Burma Companies Act was included in Volume IX of the Burma Code, which was a codification of laws from the period 1841-1954. This Act is divided into eleven parts—Part 1: Preliminary (definitions); Part 2: Constitution and Incorporation; Part 3: Share Capital, Registration of Unlimited Company as Limited, and Unlimited Liability of Directors; Part 4: Management and Administration; Part 5: Winding Up; Part 6: Registration Office and Fees; Part 7: Application of Act to Companies Formed and Registered Under Former Companies Acts; Part 8: Companies Authorized to Register Under this Act; Part 9: Winding Up of Unregistered Companies; Part 10: Companies Established Outside the Union of Burma; Part 11: Supplemental.

In Myanmar, the main type of company that can be established is a private company limited by shares. The Burma Companies Act operated a distinction between

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[9] J.F. Cady, *A History of Modern Burma*, Cornell University Press, 1958; L.F. Burton, *The Future of Burma*, Rangoon: British Burma Press, 3ème éd., 1937; J.S. Furnivall, *Colonial Policy and Practice: a Comparative Study of Burma and Netherlands India*, New York University Press, 1956; J. Nisbet, *Burma nder British Rule – and before*, Westminster Archibald Constable & Co. Ltd., Vol. 1-2, 1901. There have been three Burmese Wars: First Anglo-Burmese War (1824-1826), Second Anglo-Burmese War (1852 to 1853) and the Third Anglo-Burmese War (1885).

[10] § 3 of the Government of Burma Act of 1935: "The Governor of Burma is appointed by His Majesty by a Commission under the Royal Sign Manual and has all such powers and duties as are conferred or imposed on him by or under this Act, and such other powers of His Majesty as His Majesty may be pleased to assign to him."

[11] Tun Zaw Mra, *The Securities Exchanges Law and Prospectus Regulations*: *Early Sketches of Equity Capital Market Law and Regulation in Myanmar*, *in* Law, Society and Transition in Myanmar (M. Crouch, T. Lindsey, eds.), Oxford: Hart Publishing, 2014; M. Tun, *A Principled Approach to Company Law Reform in Myanmar, in* Law, Society and Transition in Myanmar (M. Crouch, T. Lindsey, eds.), Oxford: Hart Publishing, 2014.

a "Burmese company"[12] and a "Foreign Company".[13] If a Myanmar citizen or a foreign investor wants to carry on business by virtue of a limited company, he could register his company under the Burma Companies Act. However, if the Myanmar company has a single foreign shareholder or director, this company is considered as a foreign company. Created in 1993, the Directorate of Investment and Company Administration ("DICA") administers the Companies Act and also functions as the registrar.[14] The Act fixes the minimum number of shareholders for a private company at two shareholders and the maximum at 50 members.[15] A private company is supposed to have at least three directors.[16] In the case of a company limited by share, the memorandum of association should indicate the name of the company with "Limited" as the last word of its name, the province in which the registered office of the company is to be situated, the objects of the company, that the liability of its members is limited; the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount. In addition, no subscriber of the memorandum of association should take less than one share. Finally, each subscriber has to write, opposite to his name, the number of shares he would take.[17] However, for a company limited by guarantee,[18] the conditions are different

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[12] § 2 (2A) of Burma Companies Act (1914). "Burmese company" means: (a) in the case of a company having a share capital, a company whose entire share capital is, at all times, owned and controlled by the citizens of the Union of Burma, or (b) in the case of a company limited by guarantee but not having a share capital, a company which is, at all times, owned and controlled by the citizens of the Union of Burma.

[13] § 2 (2B) of Burma Companies Act (1914). "Foreign Company" means: (a) any company other than a Burmese company or a special company formed under the Special Comp any Act, 1950, or (b) a company incorporated outside the Union of Burma.

[14] Section 21 (1) of Burma Companies Act (1914). The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

[15] § 2 (13) of Burma Companies Act (1914). "Private company" means a company which by its articles (a) restricts the right to transfer the shares, if any; (b) limits the number of its members to fifty not including persons who are in the employment of the company; and (c) prohib its any invitation to the public to subscribe for the shares, if any, or debentures of the company.

[16] § 83 (A) of Burma Companies Act (1914). (1) Every company shall have at least three directors. (2) This section shall not apply to a private company except a private company being a subsidiary company of a public company.

[17] § 6 of the Burma Companies Act (1914).

[18] § 7 of the Burma Companies Act (1914). In the case of company limited by guarantee: (1) the memorandum shall state (i) the name of the company, with "Limited" as the last word in its name; (ii) that the registered office of the company will be situated in the Union of Burma; (iii) the objects of the company; (iv) that the liability of the members is limited; (vi) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or

from an unlimited company.[19] The memorandum should be printed in both Burmese and English.[20] There is also a difference between a private company and a public company[21]—a public company ought to have a minimum of seven persons or more.[22]

In 1932, the Partnership Act was enforced. A "partnership" is described as the relation between persons who agree to share the profits of a business carried on by all or any of them, acting for all. Persons who have entered into partnership with one another are individually called "partners" and collectively a "firm", and the name under which their business is carried on is called the "firm name".[23] Partnerships are formed by contract, and not by statute.[24] A partnership does not have separate legal personality. A partnership cannot be enforced against third parties if the contract is not registered.[25] At the time it was passed, partnerships were not very popular in Myanmar, but this Act is still enforceable nowadays.[26]

Section 246 of the Companies Act (1914) provided that "the High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure concerning the mode of proceedings to be had for winding up (both

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within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amounts as may be required not exceeding a specified amount; (2) if the company has a share capital: (i) the memorandum shall also state the amount of share capital with the company proposes to be registered and the division thereof into shares of a fixed amount; (ii) no subscriber of the memorandum shall take less than one share; (iii) each subscriber shall write opposite to his name the number of shares he takes.

[19] § 8 of the Burma Companies Act (1914). In the case of an unlimited company, (1) the memorandum shall state: (i) the name of the company; (ii) that the registered office of the company will be situated in the Union of Burma; (iii) the objects of the company; and (2) if the company has a share capital: (i) no subscriber of the memorandum shall take less than one share; (ii) each subscriber shall write opposite to his name the number of shares he takes.

[20] § 9 (a) of the Burma Companies Act (1914).

[21] § 2 (13A) of the Burma Companies Act (1914). "Public company" means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, which is not a private company. The Indian Companies Act, 1866 was repealed by the Indian Companies Act, 1882, which in turn was repealed by the Indian Companies Act, 1913.

[22] § 5 of the Burma Companies Act (1914). Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration form and incorporated company, with or without limited liability.

[23] § 4 of the Partnership Act (1932).

[24] § 5 of the Partnership Act (1932).

[25] § 69 (1) of the Partnership Act (1932).

[26] *See* the conclusion regarding the reform of the Partnership Act.

members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-divisions of the shares of a company, and generally for all applications to be made to the Court under the provisions of this Act, and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed." These rules were published in 1940.[27]

The question which might be raised is whether this Act was really adapted for Myanmar people at that time. As such, the implementation of the Companies Act derived from British Law was not obvious, mainly due to concepts of law which were different between the British and Burmese population.[28] As a consequence, and probably because of a different organisation of the country, this Act was mainly used by the British and the Indians.[29]

The English, especially in Lower Burma, improved foreign trade after the annexation of the coastline. The settlement on the coastline, also know as the "colonization of the Delta" brought immigrants from India and Upper Burma to Lower Burma.[30] From 1886 until 1926, Burma's economy was alternatively run by the Kings, and later on, the commercial firms.[31] Foreigners were largely involved in the economic life of the country. The firms for mining, agriculture products processing, and forest removal were owned by Europeans and Indians, whereas the British mainly focused on bringing new technology to Burma.[32]

III. COMPANIES LAW AFTER INDEPENDENCE

After the independence of the country in 1948, Burma started to experience socialism[33] and adopt complementary laws in the field of business policies.

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[27] Preliminary § 1, Burma Companies Rules 1940. These Rules may be cited as "the Burma Companies Rules, 1940 ". They shall come into operation at once.

[28] Hla Aung, *Code versus Custom in the Development of Burmese Law*, JBRS, Vol. 49, 1966, p. 163; Maung Maung, *Law and Custom in Burma and the Burmese Family*, op. cit., p. 25.

[29] A. Huxley, *Is Burmese Law Burmese ? John Jardine, Em Forchhammer and Legal Orientalism*, art. préc., pp. 184-201.

[30] U Tun Wai, *Economic Development of Burma from 1800 to 1940*, Department of Economics University of Rangoon, 1961, p. 95.

[31] U Tun Wai, *Economic Development of Burma from 1800 to 1940*, Department of Economics University of Rangoon, 1961, p. 98.

[32] *Ibid.*, p. 96.

[33] Ba Maw & Maung Ba Han, *The Planned State*, Rasika Ranjani Press, 1947; Government of the Union of Burma, *Pyidawtha the New Burma*, Hazell Watson and Viney Ltd. Aylesbury and London, 1954.

In 1950, a Special Company Act was enacted.[34] This Act, which is still applicable, governs all companies in which the State has equity share capital. If the company is a State-owned company or the Government is involved in its capital, such company must be incorporated under the Special Companies Act. However, the provisions of the Myanmar Companies Act, which are not excluded by this Act, also remain applicable to such companies.

From the "coup" in 1962, nationalizations of the companies were started, and a socialist country was established with the support of the Constitution of 1974.[35] During this period, the Companies Act of 1914 started to decline.[36]

During the socialist years, the Government came up with The Burma Industries Nationalization Law of 1963. It stated that the Government had the power to nationalize any industry in Burma by merely issuing a notification.[37] Additionally, the Government could form a committee to run and manage the assets of a company.[38]

In 1988, for the first time since their independence, Myanmar encouraged new foreign investors.[39] Nevertheless, structural economic and social reforms were

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[34] Special Company Act, Act No. 54 of 1950.

[35] § 1 of the Constitution of 1974. "Burma is a sovereign independent Socialist State of the working people. The State shall be known as the Socialist Republic of the Union of Burma."

[36] A. Huxley, *The Last Fifty Years of Burmese Law: E Maung and Maung Maung*, dans Lawasia, 1998, pp. 9-20.

[37] § 3 of the Burma Industries Nationalization Law of 1963. (1) The Government shall have the authority to nationalise any industry by issuing a notification to that effect; (2) When an industry is nationalized by such issuance of notification, such an industry as stipulated in the notification will become state-owned on such a date as stipulated, in accordance with subsection (3); (3) On notification of nationalization, the following shall be specified: (a) all the assets of the said industry, and (b) any of the liabilities of the said industry that the Government should take over.

[38] § 4 of the Burma Industries Nationalization Law of 1963. (1) The Government shall form an implementation committee by notification, to take over and manage in continuity the assets of the industry, and to run it; and (2) The implementation committee shall carry out in full, instructions given by the Government.

[39] The Union of Myanmar Foreign Investment Law (The State Law and Order Restoration Council Law No. 10/88): "The Government of the Union of Myanmar has been striving hard to promote all round development of national economy to improve provisions of food, clothing and shelter for the people so as to ameliorate their living standards. In this connection steps have been taken to ensure mass participation with maximum utilization of the faculties of people and induce foreign investment on the basis of equality and mutual benefit. The Government has also envisaged such policy objectives as exploitation of abundant resources of the country with a view to catering to the needs of the nation in the first instance; exporting whatever surplus available; creation of new employment as the economic activities expand so that especially young people would have great job opportunities and privileges of learning on job training as well as technical training both inland and abroad; economic and social development of various regions of the State along with expansion and improvement of transport and

insufficient and were still a deterrent for foreign investments. A Myanmar Foreign Investment Commission ("MFIC") was created[40] to promote the interests of the State and to manage the Foreign Investment Law (1988).[41] In 1990, the rise of entrepreneurship started in Myanmar.[42]

After the adoption of the new Constitution in 2008[43] and following the enactment of a Foreign Investment Law in 2012, an important movement started with the progressive and continuous modification of the business legal framework. Many laws were enacted with respect to the economy—the Myanmar Special Economic Zone Law was enacted in January 2014, the Myanmar Competition Law in February 2015, and the new Myanmar Investment Law in October 2016.

The Myanmar Investment Commission[44] ("MIC") is the agency responsible for reviewing most types of foreign investment and coordinating with concerned

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communications. Foreign investors who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business. They would also be given proper guarantee by the Government against nationalization of their business in operation. All these rights and privileges would be granted in the interest of the Union of Myanmar and its people. At present, enquiries are being made by foreign companies and persons wishing to make investments in the State in a reasonable man ner. Similarly, enquiries and contacts are also being made by citizens. It is desirous that a Commission of a high caliber be formed so as to scrutinize the proposals and to co-ordinate all matters concerning enterprises which may be permitted. As it is necessary to make legal provisions for the above-mentioned matter, the State Law and Order Restoration Council has enacted the Foreign Investment Law."

[40] Ch. V, § 7 of the Union of Myanmar Foreign Investment Law (1993).

[41] Ch. VI, § 8 of the Union of Myanmar Foreign Investment Law (1993).

[42] *Industrial Development in Myanmar: Prospects and Challenges, Institute of Developing Economies*, Japan External Trade Organization, Toshihiro Kudo (ed.), p. 105.

[43] For instance, § 36 of the Constitution (2008). The Union shall (a) permit all economic forces such as the State, regional organizations, co-operatives, joint-ventures, private individual, so forth, to take part in economic activities for the development of National economy; (b) protect and prevent acts that i njure public interests through mnopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities; (c) strive to improve the living standards of the people and development of investments; (d) not nationalize economic enterprises; and (e) not demonetize the currency legally in circulation.

[44] Ch. VI, § 11 of the Foreign Investment Law (2012). (a) The Union Government shall : (i) in respect of investment business, form the Myanmar Investment Commission with a suitable person from the Union level as Chairman, the experts and suitable persons from the relevant Union Ministries, Government departments, Government organizations, and non-Governmental Organizations as members for enabling to carry out the functions and duties contained in this Law; (ii) in forming the Commission, stipulate and assign duty the Vice-Chairman, the Secretary and the Joint Secretary out of the members; and (b) members of Commission who are not civil service personnel shall have the right to enjoy salary, allowances and recompense allowed by the Ministry of National Planning and Economic Development.

government agencies. MIC moved from Nay Pyi Taw to Yangon on 9 July 2014 in order to improve access for the investors.

For the applicable business, the Foreign Investment Law set up new investments sectors, which were considered as restricted or prohibited for foreign investors.[45] In some certain situations, the investment needed to be explicitly approved by the Union Government.[46] The government tried to develop this law in order to modernize its economy and to converge towards international standards. The Foreign Investment Law (2012) encouraged foreign investment in Myanmar to cater to the needs of the nation,[47] through the basic principles[48] of economy. The investment may be carried

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[45] § 4 of the Foreign Investment Law (2012). The following investments shall be stipulated as restricted or prohibited business: (a) business which can affect the traditional culture and customs of the national races within the Union; (b) business which can affect the public health; (c) business which can cause damage to the natural environment and ecosystem; (d) business which can bring the hazardous or poisonous wastes into the Union; (e) the factory which produce or the business which use hazardous chemicals under international agreements; (f) manufacturing business and services which can be carried out by the citizens by issuing rules; (g) business which can bring the technologies, medicines, instruments which is testing in abroad or not obtaining the approval to use; (h) business for farming agriculture, and short term and long term agriculture which can be carried out by citizens by issuing rules; (i) business of breeding which can be carried out by citizens by issuing rules; (j) business of Myanmar Marine Fisheries which can be carried out by citizens by issuing rules; and (k) business of foreign investment to be carried out within 10 miles from borderline connecting the Union territory and other countries except the areas stipulated as economic zone with the permission of the Union Government.

[46] § 5 of the Foreign Investment Law (2012). The Commission may allow by the approval of the Union Government, the restricted or prohibited investments under section 4 for the interest of the Union and citizens especially people of national races.

[47] § 7 of the Foreign Investment Law (2012). Aimed at the people to enjoy sufficiently and to enable the surplus to export after exploiting abundant resources of the country; causing to open up of more employments for the people as the business develop and expand; causing to develop human resources; causing to develop infrastructures such as banking and financial business, high grade main roads, highways roads connected one country to another, national electric and energy production business, high technology including modern information technology; causing to develop respective area of studies in the entire country including communication networks, transport business such as rail, ship, aircraft which meet the international standard; causing the citizens to carry out together with other countries; causing to rise economic enterprises and investment business in accord with the international norms.

[48] § 8 of the Foreign Investment Law (2012). The investment shall be permitted based on the following principles: (a) supporting the main objectives of the economic development plan, business which cannot be affordable and which are financially and technologically insufficiency by the Union and its citizen; (b) development of employment opportunities; (c) production of Import substituted goods; (e) production of products which require mass investment; (f) acquisition of high technology and development of manufacturing business by high technology; (g) supporting the business of production and services involving large capital; (h) bringing out of business which would save energy consumption; (i) regional development; (j) exploration and extraction of new energy and the emergence of renewable

out in several forms i.e., the carrying out of an investment by a foreigner with full foreign capital is now permitted by the Commission; the carrying out of a joint venture between a foreigner and a Myanmar citizen or the relevant Government department and organization; or the carrying out under any system provided in the contract and which is approved by both parties.[49]

Under the Foreign Investment Law (2012), the government tended to create some incentives on certain activities such as land use. A 50-year initial lease period may be permitted and may be extended twice for another ten years. The length of the lease depends on various sectors, such as the type of business, the industry, and the amount of the investment.[50]

Under the Myanmar Special Economic Zone Law, the investors may secure land leases or may be granted permissions for use with a 50-year initial period. If the investor is desirous to continue operating after the expiry of the permitted term, he may renew it for another period of 25 years.[51] Finally, the Foreign Investment Law (2012) offers a large range of incentives[52] and guarantees[53] to foreign investors.

The Myanmar Investment Law of 2016 combined the Myanmar Citizen's Investment Law (2013) with the Foreign Investment Law (2012). Myanmar was the only ASEAN member with separate investment laws for citizens and foreigners. New approval processes with MIC[54] and tax incentives[55] are the main evolution in comparison with the former Foreign Investment Law. The Myanmar Investment Law of 2016 operates a clear distinction between the investment, which is prohibited, and the investment, which is restricted. Section 41 provides a list of 6 activities that are considered as prohibited investment,[56] whereas Section 42 establishes the list of 4

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energy sources such as bio-basic new energy; (k) development of modern industry; (l) protection and conservation of environment; (m) causing to support for enabling to exchange the information and technology; (n) not affecting the sovereign power and the public security; (o) intellectual enhancement of citizens; (p) development of bank and banking in accordance with the international standards; (q) emergence of the modern series required for the Union and citizens; and (r) causing to be sufficient the local consumption of the energy and resources of the Union in terms of short-term and long terms period.

[49] § 9 of the Foreign Investment Law (2012).

[50] § 31 and § 32 of the Foreign Investment Law (2012).

[51] § 79 of the Myanmar Special Economic Zone Law (2014).

[52] § 27 of the Foreign Investment Law (2012).

[53] §§ 28-30 of the Foreign Investment Law (2012).

[54] § 36 of the Myanmar Investment Law (2016).

[55] §§ 74-81 of the Myanmar Investment Law (2016).

[56] § 41 of the Myanmar Investment Law (2016). The following investments businesses shall be stipulated as the prohibited investment: (a) investment businesses which may bring or cause the hazardous or

activities, which may be considered as restricted.[57] Some possibilities to invest within the restricted range of investment as classified by Section 42 are even left opened by Section 43, under certain conditions. Even though the criteria selected by the government are not clear for anyone,[58] the change in mindset is obvious. The tendency is to open more sectors to investment in order to develop and enhance local economy.

A. Procedure for Establishing a Company

From 2012 and until the enactment of the new Companies Law, the process for establishing a private company with foreign ownership could take time—up to three months. At the beginning, the DICA would check the proposed company name. Next, registration forms were to be prepared and submitted to DICA—application cover letter; declaration of registration (Form 1); situation of registered office form; declaration of the official (legal) version of the document filed; certificate of translation; directors' details (Form 26); memorandum of association and articles of association with stamp duty; application form for permit to trade (Form A) which differs from an authorization to trade; and a statement of objectives and the undertaking not to conduct trading activities, that is, generally, buying and selling goods. In the meantime, a board resolution for subscription of shares, appointment of corporate representatives, and bank statements and passport copies of directors were to be submitted to the DICA.[59] After paying a registration fee, a temporary certificate of incorporation and permit would be issued by the DICA and the company could eventually start doing business. The company has around one week to inject the capital in the bank account opened with the temporary certificate of incorporation. Half of its

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poisonous wastes into the Union; (b) investment businesses which may bring technologies, medicines, flora and fauna and instruments which are still being tested abroad or which have not been obtained approvals to use, plant and cultivate, except the investments which made for the purpose of research and development; (c) investment businesses which may affect the traditional culture and customs of the ethnic groups within the Union; (d) investment businesses which may affect the public; (e) investment businesses which may cause an enormous impact to the natural environment and ecosystem; and (f) investment businesses which manufacture goods or provide services that are prohibited under the applicable laws.

[57] § 42 of the Myanmar Investment Law (2016). The following types of investment businesses shall be stipulated as restricted investment:(a) investment businesses allowed to carry out only by the Union; (b) investment businesses that are not allowed to carry out by foreign investors; (c) investment businesses allowed only in the form of joint venture with any citizen owned entity or any Myanmar citizen; and (d) investment businesses to be carry out with the approval of the relevant ministries.

[58] § 43 of the Myanmar Investment Law (2016). The Commission shall, with the approval of the Government, issue the notifications to inform the public of investment promoted sectors and restricted investment business under Section 42.

[59] According to my experience, many people with typewriters provide services to draft all the documents. They are close to the DICA.

minimum capital is to be transferred and the credit note of this operation should have been submitted to the DICA (a foreign Myanmar company must remit into Myanmar the minimum capital for each category, as follows: 150,000 USD for an industrial, hotel or construction company, and 50,000 USD for a service company. Thus, the company needs a recommendation from the relevant ward administration office to confirm the company's registered office address; this ward recommendation would also be submitted to the DICA. A copy of the lease agreement for the company's office will be submitted to obtain the recommendation letter. When all the necessary documents are provided to the DICA, the final certificates of registration and the permit to trade takes four to six weeks to be processed and the whole process could take several months (approximately three months). The company's certificate of incorporation is valid for five years and could be renewed.[60]

IV. THE NEW COMPANIES LAW OF 2017

The current Companies Law was voted by the Parliament in November 2017 and signed by the President on 6 December of the same year. The entry into force of the text was postponed to August 2018 in order to let the DICA and the MIC be fully operational at that date and have time to train all the staff concerned.[61] The role of such law consists of modernizing the legal framework, which was mainly organised by the Companies Act adopted in 1914, and which needed some adaptation to fit into an international economy.[62] This Law is divided into eight parts—Part 1: Preliminary; Part 2: Constitution, Incorporation and Powers of Companies; Part 3: Shares and Matters Relating to a Company's Capital; Part 4: Management, Administration and Governance; Part 5: Winding Up; Part 6: The Registrar, Registration Office, Registration of Documents, Powers of Inspection and Fees; Removal of Companies

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[60] S. Chapman, C. Hughes, I. Ivory, Tun Zaw Mra, *Establishing a Business in Myanmar*, *available at* https://uk.practicallaw.thomsonreuters.com/w-0144363?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1#co_anchor_a432743.

[61] Kang Wan Chern, *available at* https://www.mmtimes.com/news/delay-companies-law-negative-not-surprising.html, Dec. 12, 2017. *See also Critics on the Delay in Companies Law, available at https*://www.mmtimes.com/news/second-law-firm-exits-myanmar-calls-companies-law-delay-mistake.html.

[62] Aung Naing Oo & W. Wicklein, *Transforming Myanmar's Corporate Landscape,* DICA, Aug. 16, 2016. "Sections of the law no longer in use have not been removed, creating uncertainty for users. The law also lacks proper sanctions and enforcement mechanisms to regulate corporate conduct. The penalties and fines specified in the law were last updated in 1989 and reflect prices from 25 years ago. But change is coming. The Directorate of Investment and Company Administration (DICA), with assistance from the Asian Development Bank (ADB), has prepared a New Myanmar Companies Law. The law will govern the registration, ownership, management and internal affairs of all companies in Myanmar, and reflect tried and tested reforms from the UK, Singapore, Malaysia, New Zealand, and Hong Kong."

from the Registrar; Part 7: Proceedings, Offences, Regulations and Transitional Provisions; and Part 8: Miscellaneous.

A. New Procedure for Establishing a Company

The new text takes into account the modern technologies of communication. The law allows the possibility of using and having access to online services.[63] It is currently possible to check the name of the company via the DICA website. However, although the service is reliable and operational, there are still some issues after launch and therefore, some reviews and checking must still be done physically at the DICA. This new provision will reduce the need to go to the DICA for registration and should decrease the wait with the different services of the DICA. It is an important step toward modernization, but it will only be really effective when the DICA offices will be fully outfitted with the relevant equipment.

The Company Constitution replaces the Memorandum of Association and Articles of Association used under the Companies Act (1914). The existing Memorandum of Association and Articles of Association of a company will be replaced by the Company's Constitution following the implementation of the new law, provided that the Constitution will have no effect if it is inconsistent with the Companies Law of 2017.[64] At the election of the board of directors, the Constitution shall set out the company's corporate purpose. The corporate purpose expressed in the former Memorandum of Association of an existing company will, unless removed by the members voting to amend the constitution in accordance with the requirement of this Law, continue to apply until the end of the transition period. The corporate purpose will be deemed to have been removed after this time, unless a notice in the prescribed form confirming the passing of a special resolution to maintain them is filed with the Registar.[65] The constitution of a company must be prepared in Myanmar language, but may also be submitted in the English language (in addition to Myanmar version).[66] The DICA provides a model Company's Constitution for a private company limited by share in English[67] and in Burmese, on the website, in Burmese language.

Any company incorporated in Myanmar under the Companies Law, and, after the end of the transition period provided in the law, any company incorporated in

[63] *Abailable at* https://www.myco.dica.gov.mm/.

[64] § 12 (d) of the Companies Act (2017).

[65] § 12 (e) of the Companies Act (2017).

[66] § 16 of the Companies Act (2017).

[67] § 462 (a) (ii) of the Companies Act (2017). The Registrar may issue notifications, orders, directives, procedures, tables and forms for the proper and efficient implementation, administration and enforcement of this Law. Notification No. 60/2018 confirmed the validity of such English Template.

Myanmar, will no longer need to have a corporate purpose to describe it; but the shareholders can still elect to set it out in the constitution. A company without corporate purpose will be free to engage in any activity as long as it is in compliance with the law and as long as it has the requisite permits and licenses.[68] There is no minimum capital requirement when registering a company in Myanmar.[69]

The freedom in drafting the Company's Constitution offers more flexibility, but the control will be more complex. The main focus of the administration will be to ensure that such complex Company's Constitution will not be used for any illegal purpose. Under the Companies Act (1914), DICA was the controlling body at the moment of registration of the company. This measure was beneficial and, undoubtedly, increased the transparency of the corporate structures in Myanmar. It was also possible to inspect the Register of company—the companies had the duty to give access to shareholders and the Directors had the duty, according to the new text, to maintain and keep accurate all documentation regarding the corporate documentation.

B. Modifications in the New Companies Law (2017)

Under the new Companies Law, a foreigner who wishes to invest in Myanmar companies can invest in a company without changing the "local company regime" if he owns no more than 35% of the share capital. This measure is supposed to attract foreign investment. The same measure will also apply for companies listed on the Yangon Stock Exchange.[70] This change implies that some foreigner can become a shareholder of a Burmese company. The opening to foreign capital can be a good opportunity for foreigners to invest on low risk level into companies that are already successful in Myanmar, or for an investor who wants to set foot in a new market.

This change regarding the restriction on investment is interesting. Without changing the nationality of company, the list of activities that may be considered as restricted for investment for a foreign company will no longer apply if the investor owns no more than 35% of the shares of a company.[71] This possibility opens some way

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[68] § 12 (b) of the Companies Act (2017).

[69] § 13 (d) of the Companies Act (2017).

[70] In Oct. 2018, only five public companies have been listed at the Yangon Stock Exchange—First Myanmar Investment Co., Ltd. (FMI), Myanmar Thilawa SEZ Holdings Public Ltd. (MTSH), Myanmar Citizens Bank Ltd. (MCB), First Private Bank Ltd. (FPB), and TMH Telecom Public Co., Ltd. (TMH). *See* the Myanmar Times website https://www.mmtimes.com/news/myanmars-400m-stock-market-open foreigners.html?fbclid=IwAR2823HyH8cbzMCBmvh7O6-IFEPzsXhn_fk002MaJVoyUcut5wE5VNbQNno.

[71] § 1 (xiv) of the Companies Law (2017). "Foreign company" means a company incorporated in the Union in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent.

to invest without all the restrictions imposed by the DICA and the MIC.[72] A foreigner investor will be able to operate directly as a minority shareholder without any need to wait for the MIC permit and authorization.[73] The absence of bureaucracy should encourage the investor who wishes to operate quickly in a local economy. For the investors who wish to get more than 35% of the ownership rights of a company, the new Companies Law does not change the process—they will still need to create a joint venture company with a local company.[74] For the moment, it does not seem that a modification of these rules is being planned.

Another change set up by the new Companies Law is with regard to the permit of trade. This permit was a compulsory requirement imposed by the previous Companies Act of 1914. It stated that the company should operate in accordance with the scope as described in the permit of trade. The permit of trade should no longer be necessary; however, its waiving does not have the effect of also waiving the licences given by the different ministries.[75]

The new text allows the possibility of getting a single shareholder, which was not possible under the previous text.[76] This provision is an adaptation of the modern mechanism of corporate shareholding structures, which is particularly relevant for holding companies. These companies are useful as they allow the control of other companies by buying and owning their shares. Although the Companies Act of 1914 required at least two shareholders, this text was stringent with regard to the development of corporate group structures. This was one of the reasons that led the lawmakers to change this rule. This new provision will permit the emergence of important groups of companies with a better structure. This type of company group is very useful when a shareholder wants to provide greater flexibility in the management of the assets of the group. By implementing such measure, the lawmakers provide the single shareholder a better risk management policy. This new rule will offer some important opportunities for the business community. Because of the strict rules under the Companies Act of 1914, this kind of company structure was not possible to create.

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[72] Except activities listed in the MIC Notification No. 15/2017, § 1(B).

[73] MIC Notification No. 15/2017, § 1(D).

[74] Investment activities allowed only in the form of a joint venture with any citizen owned entity or any Myanmar citizen in the MIC Notification No. 15/2017, § 1(C).

[75] *See* MIC Notification No. 15/2017, § 1(D).

[76] § 4 (a) of the Companies Act (2017). A company registered under this Law must have: (i) a name; (ii) a constitution; (iii) at least one share in issue (provided that a company limited by guarantee need not have a share capital); (iv) at least one member; (v) subject to sub-section (vi), at least one director who must be ordinarily resident in the Union; (vi) if the company is a public company, at least three directors, at least one of whom must be a Myanmar citizen who is ordinarily resident in the Union; and (vii) a registered office address in the Union.

In a private company, another important change also concerns the possibility of having only one director present on the territory—he only needs to be a local resident[77] since the criterion of nationality is not relevant under the new Companies Law. Therefore, the director can be a foreigner even though the other directors live abroad. The only requirement for the private company is to have at least one resident director. Regarding public companies, the requirement is to have a minimum of three directors with at least one citizen resident.[78] Regarding overseas companies, the text is currently being drafted in order to modify the current situation where this kind of company must have an authorised officer. This potential modification seems to be encouraging for investors in Myanmar.

The text codifies the duties of directors,[79] i.e., they must disclose any potential conflict of interest.[80] In such a situation, the director concerned by the conflict shall not take part in the vote or decision. Although the text opens this possibility, it is unfortunate that it does not clearly define the notion of conflict of interest under Myanmar Law. Is a conflict of interest characterized by a certain amount of ownership in the company or by family members with close ties that work in the company? The sanction contained in the text is strictly interpreted. If there is no evidence, no sanction can be pronounced. In such a situation, and according to the draft of the current Companies Law, directors' family members are not concerned by what the text defines as "material personal interest."

Before 2011, foreigners and foreign companies were not allowed to own land in Myanmar or lease land for a term exceeding one year, unless specifically permitted by the Government, according to the Transfer of Immovable Property Restriction Law of 1987.[81] Exemptions were allowed for a foreign government to use its diplomatic

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[77] § 1 (c) (xix) of Part I of the Companies Act (2017). "Ordinarily resident" means a person who is permanent resident of the Union under an applicable law or is resident in the Union for at least 183 days in each 12 month period commencing from: (A) in the case of an existing company or a body corporate registered under a repealed law, the date of commencement of this Law; and (B) in the case of any company or body corporate registered under this Law, the date of registration of the company or body corporate. *See also* § 4 (a) (v) of the Companies Act (2017).

[78] § 4 (a) (iv) of the Companies Act. If the company is a public company, at least three directors, at least one of whom must be a Myanmar citizen who is ordinarily resident in the Union.

[79] §§ 165-172 of the Companies Act (2017). Duty to act with care and diligence; duty to act in good faith in the company's best interest; duty regarding use of position; duty regarding use of information; duty to comply with the New Companies Law and constitution; duty to avoid reckless trading; duty in relation to obligations (of a company); and duty to disclose certain interests.

[80] § 172 of the Companies Act (2017).

[81] § 3 of the Transfer of Immoveable Property Restriction Act of 1987. No person shall sell, buy, give away, pawn, exchange or transfer by any means immovable property with a foreigner or foreigner owned company. § 4 of the Transfer of Immoveable Property Restriction Act of 1987. No foreigner or foreign

mission accredited to the Union of Burma, United Nations organizations, or to any other organizations of individuals.[82] This Act does not apply to companies or organizations that have relevant beneficial contracts with the State.[83] However, under Section 464 of the Companies Law, the provisions of this Law relating to foreign companies shall not affect the operation of any provision of the Transfer of Immovable Property Restriction Law of 1987.[84] Consequently, a Myanmar-registered company with more than 35% foreign shareholders needs to fully comply with the Transfer of Immovable Property Restriction Act.

V. CONCLUSION

The new Companies Law (2017) improves corporate governance and enhances the transparency and accountability of public administration.[85] However, the transitional period is a time of uncertainty due to the lack of clear guidance. Myanmar is ranked 171 among 190 economies in ease of doing business, according to the latest World Bank annual ratings. The rank of Myanmar remained unchanged at 171 in 2018 from 171 in 2017.[86]

Moreover, the business environment is doing better, but further changes must be done: for example, a more transparent, clearer, and codified property law in Myanmar. Nowadays, the DICA is revising the Partnership Act (1932) and seeks comments from the public on the Burmese draft of the Act[87] which can be uploaded.

In the near future, it may be possible to consider that other fields of law will be overruled, such as contract law and land law. Thus, it could be an opportunity for Myanmar to adopt a Civil Code according to the written legal tradition of codification.[88]

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owned company shall acquire immovable property by way of purchase, gift, pawn, exchange or transfer. § 5 of the Transfer of Immoveable Property Restriction Act of 1987.

[82] § 14 of the Transfer of Immoveable Property Restriction Act of 1987.

[83] § 15 of the Transfer of Immoveable Property Restriction Act of 1987.

[84] § 464 of the Companies Act (2017).

[85] Aung Naing Oo & W. Wicklein, *Transforming Myanmar's Corporate Landscape.*

[86] *Available at* http://www.doingbusiness.org/content/dam/doingBusiness/country/m/myanmar/MMR.pdf.

[87] Draft of the Partnership Act (May 2018).

[88] R. Nguyen, *Réflexion sur la codification du droit civil en Birmanie,* Université de Bourgogne-Franche Comté, 2018.