MOOT BUT ACADEMIC:
AN EXEGESIS OF *PANGILINAN V. CAYETANO*

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Introduction

Perhaps the most significant international law-related case decided by the Philippine Supreme Court in 2021 was *Pangilinan v. Cayetano* (Decision).[1] This case was triggered by President Duterte's decision to withdraw from the Rome Statute, which was announced on March 15, 2018.[2]

Barely five paragraphs into the Decision, the Court ruled that the petitions were "moot when they were filed"[3] and that "[t]he International Criminal Court's subsequent consummate acceptance of the withdrawal all but confirmed the futility of this Court's insisting on a reversal of completed actions."[4] The Court noted that "the Philippines completed the requisite acts of withdrawal" in a manner that "was all consistent and in compliance with"[5] the Rome Statute. Thus, "all that were needed to enable withdrawal have been consummated."[6] Therefore, this "foreclosed the existence of a state of affairs correctible by this Court's finite jurisdiction."[7]

Furthermore, the Court pointed out that "the Senate never sought to enforce what would have been its prerogative to require its concurrence for withdrawal."[8] It noted that Resolution No. 249, which sought "to express the

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1 Pangilinan v. Cayetano, G.R. Nos. 238875, 239483 & 240954,(Mar. 16, 2021).

2 On March 16, 2018, it formally submitted its Notice of Withdrawal through a Note Verbale to the United Nations Secretary-General's Chef de Cabinet. The Secretary General received this communication the following day, March 17, 2018. Id at 1.

3 *Id.* at 3.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*at 4.

chamber's position on the need for concurrence, ha[d] yet to be tabled and voted on."[9]

Thus, the Court concluded that it could not "compel or annul actions where the relevant incidents are moot" and it could not "without due deference to the actions of a co-equal constitutional branch, act before the Senate has acted."[10] Yet the Court stated:

> Nonetheless, the President's discretion on unilaterally withdrawing from any treaty or international agreement is not absolute.[11]

After making this statement, the Court went on to discuss various international law issues and concepts at great length. The discussion following the conclusion that the case was moot is a treasure trove for an academic in the field of international law. It offers insight into the current state of the Philippine Practice of International Law.[12] This article analyzes this academic discussion and compares it with the current state of objective international law.[13] Hence, while the issue before the Court was decided to be moot, the case itself offers a rich academic discussion.

Because of the length and structure of the Decision, it is possible that contradictory interpretations may emanate from it. For example, citing the Decision as a basis for conflicting conclusions is possible simply by quoting from different parts of the paper. These contradictions may also arise when parts are analyzed apart from the context of the whole Decision or its immediate context. Thus, this article hopes to provide some clarity by identifying what might appear to be contradictions. Moreover, because of the Decision's structure, the Court's statements regarding a particular topic may be found in different parts of the Decision. Therefore, it is important to take individual statements in their proper context. Furthermore, this article hopes to clarify the meaning of separate

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Merlin M. Magallona, The Supreme Court and International Law: Problems and Approaches in Philippine Practice (2010). (This term is borrowed from Prof. Merlin M. Magallona. He refers to the status of the norms of international law "when they are incorporated into Philippine law").

[13] *Id.* (This term is also borrowed from Prof. Magallona. Her refers to it as the "norms of international law").

statements by recognizing their place in the logical flow of the Court's reasoning and by organizing such statements into themes or topics.

Thus, the goal of this paper is exegesis, a theological term that refers to bringing out the meaning of a text by understanding the original intent. Part I begins with a discussion on the authority of the President of the Philippines to withdraw from a treaty which is the main issue in *Pangilinan v. Cayetano*. It is divided into two parts (a) when the President cannot unilaterally withdraw and (b) when the president can unilaterally withdraw. Part II consists of the Court's discussion on the importance of Senate concurrence. Part III analyzes the Court's statements regarding the status of treaties in relation to statutes. Part IV comments on the Court's statements regarding International Human Rights Law and International Humanitarian Law. Part V examines other international law concepts mentioned by the Court, including (a) transformation of international law into domestic law; (b) treaties and executive agreements; (c) status of ratified treaties without Senate concurrence; (d) sources of international law; (e) general principles of law and generally accepted principles of law; and (f) the necessity of the Rome Statute.

I. The Authority of the President to Withdraw from a Treaty

A. When the President Cannot Unilaterally Withdraw

1. Constitutional and Statutory Limits of Presidential Power

According to the Court, while "the president enjoys a degree of leeway to withdraw from treaties [it] "cannot go beyond the president's authority under the Constitution and the laws."[14] Thus, it would be important to know the extent of the president's authority under the Constitution and the law.

a. Cases Where Congress is Involved

After reviewing the development of the Treaty Clause in the 1935, 1973, and 1987 Constitutions, the Court quoted from Justice Leonen's Concurring Opinion in *Intellectual Property Association v. Ochoa,* where the Court said that "[t]he power

[14] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 4.

and responsibility to enter into treaties is now shared by the executive and legislative departments."[15] It would seem that based on this statement, the Court considers treaty-making as not purely within the president's domain. In fact, it noted that "the role of the legislative department is expanded to cover not only treaties but international agreements in general as well."[16]

The Court also ruled that "[i]n appropriate cases, legislative involvement is imperative"[17] and thus "[t]he president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it."[18]

These two statements merit closer scrutiny.

i. Legislative Involvement

The first statement implies that there are certain cases where the legislative[19] must participate in the withdrawal and cases where participation is not required. So, it is important to know what these cases are. The Court said:

> Considering that effecting treaties is a shared function between the executive and the legislative branches, Congress may expressly authorize the president to enter into a treaty with conditions or limitations as to negotiating prerogatives.[20]

It further said:

> When a treaty was entered into upon Congress's express will, the president may not unilaterally abrogate that treaty. In such an instance, the president who signed the treaty simply implemented

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[15] Intellectual Property Association v Ochoa, 790 Phil. Rep. 276, 344 (2016) (Leonen, *J., concurring*).

[16] *Id.* at 344-345. *See* United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 333 (entered into force 27 January 1980).(It must be noted that unlike the accepted definition under international law under Philippine Law a treaty is merely a subset of international agreements. This is further discussed later in the article).

[17] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 4.

[18] *Id.*

[19] The term "legislative" may be interpreted as referring to the Senate only. However, if the second statement (referring to cases with subsequent legislation) is an example of the first statement then it may be referring to both houses of Congress.

[20] *Id.* at 54.

> the law enacted by Congress. While the president performed his or her function as primary architect of international policy, it was in keeping with a statute. The president had no sole authority, and the treaty negotiations were premised not only upon his or her own diplomatic powers, but on the specific investiture made by Congress. This means that the president negotiated not entirely out of his or her own volition, but with the express mandate of Congress, and more important, within the parameters that Congress has set.[21]

This scenario seems to be an example of a case where legislative involvement is imperative. Thus, when the executive department negotiates a treaty based on a law enacted by Congress, the president cannot unilaterally withdraw. It is not clear, however, whether this is the sole example. Furthermore, it must be noted that most, if not all, treaty negotiations are initiated by the executive and not the legislative branch.[22]

After the paragraph quoted earlier, the Court said: "While this distinction is immaterial in international law, jurisprudence has treated this as a class of executive agreements."[23]

The "distinction" referred to appears to mean that under international law, it does not matter whether the president negotiated the treaty of his own volition or with the express instructions of Congress.

By "this," the Court seems to be referring to the former case (i.e., international agreement upon the express instructions of Congress). So the Court is saying that an executive agreement is an example of an international agreement that may be entered into with express instructions from Congress. However, it is unclear how executive agreements are relevant to this discussion, considering that they are, by definition, international agreements that do not require Senate concurrence. Its inclusion in a discussion about the necessity of legislative

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[21] *Id.*

[22] There is no treaty in recent memory ever negotiated in this manner. A cursory review of recent treaties would indicate that none of them were negotiated upon the instructions of Congress in the form of a law.

[23] *Id.* at 54.

involvement in treaty withdrawal seems unnecessary.[24] That is, not unless the Court limits the first statement's application (i.e., cases where legislative participation is imperative) to executive agreements only.[25]

If so, one curious implication of the Court's statement is that in certain cases, executive agreements would be "more binding" than treaties. For example, a treaty entered into without a prior legislative mandate but with Senate concurrence can be unilaterally withdrawn. On the other hand, a mere executive agreement that was entered into without Senate concurrence but with a prior legislative mandate cannot be unilaterally withdrawn.

Another matter that needs to be clarified is the application of the *mirror principle.* According to the Court, this principle states that the "degree of legislative approval needed to exit an international agreement must parallel the degree of legislative approval originally required to enter it."[26] After discussing rules found in other jurisdictions regarding this principle and how these rules have been used in Philippines cases, the Court concluded:

> All told, the president, as primary architect of foreign policy, negotiates and enters into international agreements. However, the president's power is not absolute, but is checked by the Constitution, which requires Senate concurrence. Treaty-making is a power lodged in the executive, and is balanced by the legislative branch. The textual configuration of the Constitution hearkens both to the basic separation of powers and to a system of checks and balances. Presidential discretion is recognized, but it is not absolute. While no constitutional mechanism exists on how the Philippines withdraws from, an international agreement, the president's unbridled discretion vis-a-vis treaty abrogation may run counter to the basic

[24] The issue after all is whether Senate concurrence for entering into treaties implies Senate concurrence also for withdrawing from treaties. As executive agreements by definition do not require Senate concurrence, they are irrelevant in this discussion.

[25] If this is the case, then such rule (i.e., cases where legislative involvement is imperative) does not apply to treaties as defined under Philippine law (i.e., international agreements which require Senate concurrence).

[26] *Id.* at 44.

> prudence underlying the entire system of entry into and domestic operation of treaties.[27]

This conclusion seems to be an implied acceptance of the *mirror principle.* Later in the Decision, the Court appears to adopt the mirror principle. It stated:

> Consistent with the mirror principle, **any withdrawal from an international agreement must reflect how it was entered into.** As the agreement was entered pursuant to congressional imprimatur, withdrawal from it must likewise be authorized by a law.[28] (emphasis supplied)

Taking this statement alone as an explicit adoption of the *mirror principle* would mean that if concurrence is required to make a treaty binding under domestic law, then the same concurrence is necessary to make the treaty non-binding. However, this statement must be taken into context. This statement was part of the discussion on when legislative involvement is imperative. Thus, the "congressional imprimatur" refers to a statute mandating the president to enter into a treaty and not to Senate concurrence. Therefore, this statement which appears to adopt the *mirror principle,* cannot be interpreted as requiring Senate concurrence for withdrawal.

ii. Implementing Legislation is Passed

The second statement refers to a situation where subsequent legislation affirms or implements the treaty.[29] Because there is subsequent legislation implementing the treaty, Congress may need to enact a law in connection with the withdrawal. The Court said:

> Similarly, a statute subsequently passed to implement a prior treaty signifies legislative approbation of prior executive action. This lends greater weight to what would otherwise have been a course of action pursued through executive discretion. When such

[27] *Id.* at 50.

[28] *Id.* at 55.

[29] The Court said "[t]he president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it."

> a statute is adopted, the president cannot withdraw from the treaty being implemented **unless the statute itself is repealed.**[30] (emphasis supplied)

Thus, if there is legislation implementing a treaty, Congress should enact a law repealing such legislation. It seems insufficient that Congress passes a law authorizing the executive to withdraw from the treaty. However, it is unclear whether such repealing act should be effective before any withdrawal can be made.

Another possible complication is when the implementing law governs scenarios beyond treaty implementation. In this case, the implementing legislation, or at least portions of it, can exist apart from the treaty. In such a case, it is unclear whether an amendment stating that it is no longer implementing a treaty or a partial repeal would be sufficient.

iii. Express declaration from the Senate Requiring Concurrence for Withdrawal

The Court said:

> The Senate may concur with a treaty or international agreement expressly indicating a condition that withdrawal from it must likewise be with its concurrence. It may be embodied in the same resolution in which it expressed its concurrence. It may also be that the Senate eventually indicated such a condition in a subsequent resolution. Encompassing legislative action may also make it a general requirement for Senate concurrence to be obtained in any treaty abrogation. This may mean the Senate invoking its prerogative through legislative action taken in tandem with the House of Representatives—through a statute or joint resolution—or by adopting, on its own, a comprehensive resolution. Regardless of the manner by which it is invoked, what

[30] *Id.* at 54.

> controls is the Senate's exercise of its prerogative to impose concurrence as a condition.[31]

Under this rule, Senate concurrence is necessary if it expressly indicates that it is required for withdrawal. Such a condition need not be made in the same resolution for concurrence. Congress may also pass a law requiring such concurrence.

This rule may urge the Senate to make it a matter of practice to indicate a requirement for Senate concurrence for treaty withdrawal in every resolution. This rule, however, implies that the Senate has the power to require concurrence for withdrawal but can only exercise that power subject to reserving it. This means that the Senate is estopped from invoking the power if it fails to indicate it as a condition in a resolution. This implication raises a few questions.

First, what would be the basis of the Senate's power to require concurrence for withdrawal? The basis may be the Constitutional provision requiring Senate concurrence for a treaty to be binding. This is also known as the Treaty Clause. But suppose the basis of the power of concurrence for the effectivity of a treaty is constitutionally mandated and requires no reservation. Why does the concurrence requirement to withdraw from a treaty necessitate reservation to be exercised? The response to this is perhaps the silence of the Constitution on this matter. If that is the case, then the exercise of the power of the president to withdraw from a treaty that has been concurred in by the Senate should also be reserved. The Constitution is also silent on this point; therefore, the same rule should apply.

Second, the Court requires the Senate to issue a resolution "expressly indicating a condition that withdrawal from it must likewise be with its concurrence." Therefore, it is a conditional concurrence. But is it legally possible for such kind of concurrence to exist? Does the Constitution grant the Senate the power to concur conditionally with the president's ratification? Isn't the Senate only given two options: to concur or not concur?

Third, what is the effect if the condition is not complied with? Suppose the Senate does issue a resolution requiring that withdrawal from a treaty requires Senate concurrence. What happens when the president disregards such a condition and unilaterally withdraws from a treaty? Ordinarily, the non-

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[31] *Id.* at 55.

fulfillment of a condition terminates the rights based on it. In this case, what does the condition support? It is the Senate's concurrence concerning the treaty. So what is the effect of non-fulfillment of the condition? The concurrence is withdrawn. This result is exactly what the president wanted and what the Senate sought to avoid without its consent. Thus, the rule mentioned in this case offers no protection from unilateral action on the president's part.

B. When the President Can Unilaterally Withdraw

The Court said that "[w]hen the president enters into a treaty that is inconsistent with a prior statute, the president may unilaterally withdraw from it, unless the prior statute is amended to be consistent with the treaty."[32] The Court stated that: "[T]he president enjoys some leeway in withdrawing from agreements which he or she determines to be contrary to the Constitution or statutes."[33]

There are a few questions regarding the application of this guideline.

1. Presidential Determination of Constitutionality of a Treaty

First, can the president or the executive branch make this unilateral determination of the unconstitutionality of a treaty? This act would be a usurpation of judicial authority.

This alleged power to determine appears to be based on the president's mandate "to 'ensure that the laws be faithfully executed.'"[34] This justification is understandable in the context of negotiating treaties. A president must not ratify a treaty that blatantly contradicts the Constitution.

However, the Court also said that "the president should not be bound to abide by a treaty previously entered into, should it be established that such treaty runs afoul of the Constitution and our statutes."[35] International law principles

[32] *Id.* at 4.
[33] *Id.* at 51.
[34] CONST. art. VII, § 17.
[35] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 51.

aside,[36] only the judiciary can determine whether a treaty is inconsistent with the Constitution or a statute.

Later in the Decision, the Court said:

> These premises give the president leeway in withdrawing from treaties that he or she determines to be contrary to the Constitution or statutes.
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> In the event that courts determine the unconstitutionality of a treaty, the president may unilaterally withdraw from it. [37]

The first paragraph only requires that only the president determines the unconstitutionality of a treaty before s/he can unilaterally withdraw from it. But the following paragraph requires judicial determination. However, later the Court also said:

> Thus, even **sans a judicial determination** that a treaty is unconstitutional, the president also enjoys much leeway in withdrawing from an agreement which, in his or her judgment, runs afoul of prior existing law or the Constitution." (emphasis supplied)

While recognizing judicial review, this is a definite statement from the Court that it recognizes presidential determination of the unconstitutionality of a treaty or that the treaty is inconsistent with a statute. The justification is compliance with the Constitution. The Court said: "In ensuring compliance with the Constitution and the laws, the president performs his or her, sworn duty in abrogating a treaty that, per his or her bona fide judgment, is not in accord with the Constitution or a law."

However, whether the rule applies regardless of the extent of the unconstitutionality or inconsistency is uncertain. For example, suppose only one

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[36] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 339 (entered into force 27 January 1980) (For example, a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

[37] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 53.

treaty provision is unconstitutional or inconsistent with a statute. Would this be a ground for withdrawal of the entire treaty?

Furthermore, it may also be argued that a review of the constitutionality of treaties or inconsistency with statutes is granted solely by the Constitution to the judiciary. Therefore, exercising such judicial power by the president is non-compliance with the Constitution.

The Court seems to resolve this issue by saying that "withdrawal under this basis may be relatively more susceptible of judicial challenge."[38] It added: "This may be the subject of judicial review, on whether there was grave abuse of discretion concerning the presidents arbitrary, baseless, or whimsical determination of constitutionality or repugnance to statute."[39]

But the possibility of judicial review does not detract from the fact that the Court is suggesting a power not granted to the President by the Constitution.

Yet another question, however, is whether this ground (i.e., unconstitutionality or inconsistency with a statute) can be invoked even if it falls under one of those cases where legislative involvement is imperative or when legislation to implement the treaty was enacted. When the treaty is entered into with legislative imprimatur or when implementing legislation is passed, can the President unilaterally withdraw if s/he believes that the treaty is unconstitutional or violative of a statute?

2. Subsequent Enactment of Law Inconsistent with a Treaty

The Court further said that:

> Owing to the preeminence of ·statutes enacted by elected representatives and hurdling the rigorous legislative process, the **subsequent enactment of a law that is inconsistent with a treaty** likewise allows the president to withdraw from that treaty.[40] (emphasis supplied)

[38] *Id.* at 53.
[39] *Id.* at 53-54.
[40] *Id.*at 53.

Thus, should Congress pass a law subsequent to a treaty that is inconsistent with the latter, the President is authorized to withdraw from a treaty. The basis for this rule cited by the Court is the "preeminence of statutes enacted elected representatives and hurdling the rigorous legislative process."[41]

However, could this not infringe on the president's power to determine foreign policy? Assume a treaty that establishes rights and obligations on the part of the Philippines with respect to other state parties. Undoubtedly, such a treaty would be an exercise of the right of the President as the architect of foreign policy. Will the enactment of a subsequent law by Congress that contradicts such a treaty not infringe on the president's right to determine foreign policy?

Furthermore, the exercise by the president of the power to determine the inconsistency of a treaty with a subsequent statute would be an encroachment of judicial authority. The proper procedure would be to allow the judiciary to determine (i) when the treaty is inconsistent with the law and (ii) the exact remedy. It may be that it is the statute that must be struck down. One scenario when this may be the case is when the treaty is pursuant to a constitutional mandate.

II. The Senate's Concurrence

The Court ruled that:

> In consonance with the Constitution and existing laws, presidents act within their competence when they enter into treaties. However, for treaties to be effective in this jurisdiction, Senate concurrence must be obtained. The president may not engage in foreign relations in direct contravention of the Constitution and our laws.[42]

It quoted from *Pimentel v. Executive Secretary*:

> The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive

[41] *Id.*
[42] *Id.* at 39.

> in the field of foreign relations. By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation's pursuit of political maturity and growth.[43]

The Court concluded:

> In sum, treaty-making is a function lodged in the executive branch, which is headed by the president. Nevertheless, a treaty's effectivity depends on the Senate's concurrence, in accordance with the Constitution's system of checks and balances.[44]

The Court argued that "[w]hile Senate concurrence is expressly required to make treaties valid and effective, no similar express mechanism concerning withdrawal from treaties or international agreements is provided in the Constitution or any statute."[45] But it also admitted that "[s]imilarly, no constitutional or statutory provision grants the president the unilateral power to terminate treaties."[46]

But in the absence of an explicit rule, isn't it sufficient to apply the rationale for concurrence, as mentioned in the decisions quoted by the Court? Furthermore, in the absence of a rule granting the president the authority to withdraw from treaties without Senate concurrence, should it not be considered that such power should not exist? Why does the silence of the Constitution be interpreted to mean that the Senate has no authority to require its concurrence for the withdrawal of treaties, and yet at the same time, such silence is also interpreted to mean that the President has the power to withdraw unilaterally in certain cases?

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[43] Pimentel v. Executive Secretary, 501 Phil. 303, 317 (2005).
[44] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 41.
[45] *Id.*
[46] *Id.*

III. The Status of Treaties in Relation to Statutes

A. Primacy of Statutes Over Treaties

The Court said that "a treaty cannot amend a statute."[47] The Court further stated, "[a] statute enjoys primacy over a treaty."[48] These statements appear to be a departure from jurisprudence that a treaty is at the same level as a statute. Some of these cases are found in the Decision itself.

In *David vs. Senate Electoral Tribunal,*[49] the Court said: "The Senate's ratification of a treaty makes it legally effective and binding by transformation. It then has the force and effect of a statute enacted by Congress." The Court quoted this portion of this Decision in *David vs. Senate Electoral Tribunal* in the Decision also.[50]

Furthermore, in the context of discussing the nature of generally accepted principles of law which in the Court's own interpretation includes custom and general principles of law, the Court favorably quoted from Justice Vitug's Separate Opinion in *US vs. Purganan*.[51] The said quote stated:

> Clarifying the term "generally-accepted principles of international law" during the deliberations of the 1987 Constitutional Commission, Commissioner Adolfo S. Azcuna points out that "(w)hen we talk of generally-accepted principles of international law as part of the law of the land, we mean that it is part of the statutory part of laws, not of the Constitution.
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> The remark is shared by Professor Merlin M. Magallona who expresses that the phrase "as part of the law of the land" in the incorporation clause refers to the levels of legal rules below the Constitution such as legislative acts and judicial decisions. (citation omitted)

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[47] *Id.*at 4.

[48] *Id.*

[49] David v. Senate Electoral Tribunal, 795 Phil. 529 (2016).

[50] Interestingly, the ponente for both cases is Justice Leonen.

[51] Government of the United States of America v. Purganan, G.R. No. 148571 (Resolution), (December 17, 2002).

Thus, the quoted portion indicates that custom and general principles of law, which comprise generally-accepted principles of law, are equal to statutes. So if treaties are inferior to statutes, then there is an anomalous situation wherein treaties become inferior to custom and general principles of law in the Philippine jurisdiction.

Furthermore, ruling that a statute enjoys primacy over a treaty further complicates the already complicated relationship between treaties and executive agreements.

In *Saguisag v. Ochoa*,[52] the Court said:

> [T]reaties are, by their very nature, considered superior to executive agreements. Treaties are products of the acts of the Executive and the Senate unlike executive agreements, which are solely executive actions. Because of legislative participation through the Senate, a treaty is regarded as being on the same level as a statute. If there is an irreconcilable conflict, a later law or treaty takes precedence over one that is prior. An executive agreement is treated differently. Executive agreements that are inconsistent with either a law or a treaty are considered ineffective. (footnotes omitted)

Thus, one of the differences between a treaty and an executive agreement is that while a treaty is equal to a statute, an executive agreement is inferior to a statute. Making a treaty also inferior to a statute, as the Decision suggests, removes this distinction.

B. Basis of Primacy of Statutes Over Treaties

The Court explained the primacy of statutes over treaties by pointing out that the former is "passed by both the House of Representatives and the Senate, and is ultimately signed into law by the president. In contrast, a treaty is negotiated by the president, and legislative participation is limited to Senate

[52] Saguisag v. Ochoa, 777 Phil. 280, 389 (2016).

concurrence."[53] Later in the Decision, the Court elaborated on the process of passage of bills into law.[54] The Court contrasted this with the process of concurrence:

> In contrast, in the case of a treaty or international agreement, the president, or those acting under their authority, negotiates its terms. It is merely the finalized instrument that is presented to the Senate alone, and only for its concurrence. Following the president's signature, the Senate may either agree or disagree to the entirety of the treaty or international agreement. It cannot refine or modify the terms. It cannot improve what it deems deficient, or tame apparently excessive stipulations.[55]

The Court further stated that "[t]he legislature's highly limited participation means that a treaty or international agreement did not weather the rigors that attend regular lawmaking."[56] Moreover, the Court added:

> Having passed scrutiny by hundreds of the people's elected representatives in two separate chambers which are committed—by constitutional dictum—to adopting legislation, statutes enacted by Congress necessarily carry greater democratic weight than an agreement negotiated by a single person. This is true, even if that person is the chief executive who acts with the aid of unelected subalterns.[57]

Thus, the Court explains that the primacy of statutes is because "there is greater participation by the sovereign's democratically elected representatives in the enactment of statutes."[58]

However, the mere fact that only the Senate concurs does not mean that treaties are less important than statutes. Based on the Records of the

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[53] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 4.
[54] *Id.*at 52.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*at 4.

Constitutional Commission, there was a proposal to include the House of Representatives in the concurrence process.[59] However, the Commission retained the original rule requiring only Senate concurrence. Commissioner Ople stated the argument mentioned in favor of the old rule:[60]

> I always thought that the Senate and the House enjoy a kind of symmetry of exclusive powers. Appropriations bills may originate only in the House but by tradition, the Senate is the treaty-ratifying Chamber.

Thus, the rationale for the Senate to have the power of concurrence is lodged in the symmetry of powers between the two houses. It does not in any way depict the inferior nature of treaties over statutes.

As to the sovereign will of the people, the best evidence for this is the Constitution itself and not the number of Congressmen involved. As the Constitution itself has prescribed that treaties be concurred in the Senate alone, then that expression of sovereign will ought to be respected. While hundreds of Congressmen may deliberate on a statute, the entire Filipino people ratified the Constitution.

IV. Human Rights and Humanitarian Law

The fields of International Human Rights Law ("IHRL") and International Humanitarian Law ("IHL") are two distinct fields. However, the Decision does not seem to distinguish between the two. The Court said that a statute, Republic Act No. 9851 (also known as the "Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity") may effectively implement "may effectively implement the constitutional imperative to protect human rights." From the statute's title alone, it is clearly a law pertaining to IHL and not IHRL. While the statute contains a few provisions that may protect human rights, it mainly criminalizes war crimes, genocide, and other crimes against humanity. To say that Republic Act No. 9851 implements human rights is to imply that IHL is merely a subset of IHRL. Any international law expert

[59] R.C.C. No. 036, July 22, 1986.
[60] *Id.*

will point out that while there may be overlaps between IHL and IHRL, one is certainly not the subset of the other.

The Court found that despite the withdrawal from the Rome Statute, there was "no lesser protection of human rights."[61] It also disagreed with the petitioners' implied argument that "without the treaty, the judiciary will not be able to fulfill its mandate to protect human rights."[62] Perhaps it was wrong for the petitioners to categorize the Rome Statute as a human rights treaty. But maybe the Court could have pointed this error out.

Later in the Decision, the Court did recognize that the Rome Statute "represented the Philippines' commitment to the international community to prosecute individuals accused of international crimes."[63] The Court understood that the Rome Statute created the International Criminal Court and gave it jurisdiction to "'investigate, prosecute, and try individuals accused of international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression."[64]

Considering, therefore, that the treaty in question was created under the regime of International Criminal Law or International Humanitarian Law, characterizing it as a means to protect human rights would be inappropriate.

V. Other Issues

A. Transformation into Domestic Law

The Court ruled that "[t]hrough Article VII, Section 21 of the Constitution, the Rome Statute, an international instrument, was transformed and made part of the law of the land."[65] Article VII, Section 21 states: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

If it is by this provision that a treaty is transformed into domestic law, then the operative act is the concurrence by at least two-thirds of all the Members of the Senate.

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[61] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 3.
[62] *Id.*
[63] *Id.* at 12.
[64] *Id.* at 14.
[65] *Id.* at 12.

If the treaty becomes "transformed" into domestic law by Senate action, isn't it reasonable to require Senate action for such law to be "repealed?" If a treaty is transformed into domestic law by Senate concurrence, it shouldn't be possible for the president to terminate it unilaterally. Certainly, the executive department cannot infringe upon the authority of the legislative.

Furthermore, if a treaty becomes domestic law through transformation, does such law lose its force and effect simply upon notice by the President? Even assuming that such a process is sufficient under international law to withdraw from a treaty, it is the Constitution that determines how domestic law ceases to have force and effect.

B. Treaties and Executive Agreements

The Court recognized the definition of treaties under the Vienna Convention on the Law of Treaties ("VCLT") as "international agreement[s] concluded between states in written form and governed by international law."[66] Then it stated that in the Philippines the term treaties are limited to "international agreements entered into by the Philippines which require legislative concurrence after executive ratification."[67]

It must be noted that under the VCLT, a treaty has three characteristics:

- It must be concluded between states;
- It must be in written form;[68] and
- It must be governed by international law.

Such characteristics are not replicated in the Philippine definition of treaties. However, these characteristics are found in the definition of "International Agreement" under EO 459. It states:

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[66] *Id.* at 26.

[67] *Id.*

[68] *See* United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 333 (entered into force 27 January 1980) (Note that the VCLT is only defining treaty in the context of its coverage. It recognizes that treaties may be entered into orally, such type of treaties are not covered by the VCLT.).

> International Agreement—shall refer to a contract or understanding, regardless of nomenclature, entered into between the Philippines and another government in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments.[69]

Therefore, what International Law defines as "treaties," Philippine law defines as "international agreements." "Treaties" under Philippine law are limited to international agreements requiring ratification and concurrence. Thus, "treaties" under Philippine law are only a subset of treaties under international law.

The Court further points out that "Philippine law distinguishes treaties from executive agreements."[70] EO 459 defines "executive agreements" as "similar to treaties except that they do not require legislative concurrence."[71]

The Court ruled that "[t]reaties and executive agreements are equally binding on the Philippines."[72]

Citing *China Machinery vs. Santamaria,*[73] the Court identified three distinguishing marks of executive agreements:

(a) does not require legislative concurrence;
(b) is usually less formal; and
(c) deals with a narrower range of subject matters.

Citing *Saguisag vs. Ochoa*,[74] the Court explained that "[e]xecutive agreements dispense with Senate concurrence 'because of the legal mandate with which they are concluded.'"[75] It added that executive agreements "simply implement existing policies" and are thus entered into:

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[69] Exec. Order No. 459 (1997), § 2(a) (Nov. 25, 1997) [hereinafter E.O. 459].
[70] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 27.
[71] E.O. 459, *supra* note 69 at § 2(c).
[72] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 27.
[73] China National Machinery & Equipment Corp. v. Santamaria, 681 Phil. 198, 225 (2012).
[74] Saguisag, 777 Phil. Rep. 280 (2016).
[75] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 27.

> (1) to adjust the details of a treaty;
> (2) pursuant to or upon confirmation by an act of the Legislature; or
> (3) in the exercise of the President's independent powers under the Constitution.
>
> The *raison d'être* of executive agreements hinges on prior constitutional or legislative authorizations.[76]

Quoting from *Saguisag vs. Ochoa*[77] again, the Court argued that this "difference in form is immaterial in international law:"[78]

> The special nature of an executive agreement is not just a domestic variation in international agreements. International practice has accepted the use of various forms and designations of international agreements, ranging from the traditional notion of a treaty—which connotes a formal, solemn instrument—to engagements concluded in modern, simplified forms that no longer necessitate ratification. An international agreement may take different forms: treaty, act, protocol, agreement, concordat, *compromis d' arbitrage*, convention, covenant, declaration, exchange of notes, statute, pact, charter, agreed minute, memorandum of agreement, modus vivendi, or some other form. Consequently, under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations.[79]

The quoted portion of *Saguisag* claims that "international practice" accepts "the use of various forms and designations of international agreements."[80]

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[76] *Id.*
[77] Saguisag, 777 Phil. 280 (2016).
[78] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 27.
[79] Saguisag, 777 Phil. 280, 387-388.
[80] *Id.* at 387.

It also said that "[a]n international agreement may take different forms: treaty, act, protocol, agreement."[81]

International law does not require a treaty to be called a "treaty." However, an instrument must have the three distinguishing marks listed earlier to be considered a treaty under the VCLT. Thus, to be binding as a treaty under the VCLT, an executive agreement must have these characteristics and comply with the other rules under the VCLT.

Finally, the Court clarified "that this local affectation does not mean that the constitutionally required Senate concurrence may be conveniently disregarded."[82] The Court seems to be saying that even if executive agreements do not require Senate concurrence, it does not mean that such could be easily dispensed with. This is perhaps why the Court added this discussion on the distinction between treaties and executive agreements under international law. It is perhaps to argue that although there are cases where Senate concurrence is not required, it cannot be ignored.

Regarding executive agreements, the Court said such agreements must comply with two conditions to do away with Senate concurrence. It said:

> First, executive agreements must remain traceable to an express or implied authorization under the Constitution, statutes, or treaties. The absence of these precedents puts the validity and effectivity of executive agreements under serious question for the main function of the Executive is to enforce the Constitution and the laws enacted by the Legislature, not to defeat or interfere in the performance of these rules. In turn, executive agreements cannot create new international obligations that are not expressly allowed or reasonably implied in the law they purport to implement.[83]

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[81] *Id.* at 387-388.

[82] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 28.

[83] *Id.*

C. Status of Ratified Treaties Without Senate Concurrence

In the context of discussing the necessity of Senate concurrence, the Court quoted the Separate Opinion of Justice Brion in *Intellectual Property Association v. Ochoa.*[84] The Separate Opinion was quoted as stating:

> [W]hile a treaty ratified by the President is binding upon the Philippines in the international plane, it would need the concurrence of the legislature before it can be considered as valid and effective in the Philippine domestic jurisdiction. Prior to and even without concurrence, the treaty, once ratified, is valid and binding upon the Philippines in the international plane. But in order to take effect in the Philippine domestic plane, it would have to first undergo legislative concurrence as required under the Constitution.

The quoted paragraph explicitly states that once ratified by the President of the Philippines, a treaty becomes binding under international law. This rule means that the Philippines is bound by the law of treaties such as *pacta sunt servanda* even before Senate concurrence for as long as the President ratifies the treaty. The purpose of Senate concurrence is to make the treaty binding domestically.

D. Treaties and Generally Accepted Principles of International Law

1. Sources of International Law

The Court stated that treaties must be distinguished from "generally accepted principles of law" even though both are "sources of international law."[85] The Court uses a term that appears in the Incorporation Clause of the Philippine Constitution.[86] This term (i.e., "generally accepted principles of international

[84] Intellectual Property Association v Ochoa, 790 Phil. 276, 309 (2016) (Brion, *J., concurring*).

[85] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 29.

[86] CONST. art. II § 2. (The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.).

law") differs from "the general principles of law of civilized nations" found in Article 38 of the ICJ Statute. That is why it may be confusing that the Court immediately quotes Article 38 of the ICJ Statute immediately after the said statement. The question arises whether the Court is conflating the two concepts. The following discussion discusses this issue further.

Immediately after quoting Article 38, the Court quotes the Incorporation and Treaty Clauses of the Constitution, identifying them as the provisions that "incorporate or transform portions of international law into the domestic sphere."[87]

The Court then went on to say that: "The sources of international law—international conventions, international custom, general principles of law, and judicial decisions—are treated differently in our jurisdiction."[88]

Noticeably, the Court included judicial decisions among the sources of law. This inclusion implies that judicial decisions are at the same level as international conventions (or treaties). But under Article 38, while international conventions, international custom, and general principles of law are formal sources of international law, judicial decisions and teachings of the most highly qualified publicists are merely material sources. The latter two are only "subsidiary means for the determination of the rules of law."[89] A material source refers to "the place, normally a written document, where the terms of the rule can be found conveniently stated,"[90] while "the legal element that gives the rule its quality as law"[91] is the formal source. A judicial decision is merely a material source, while international conventions, international customs, and general principles of law are formal sources.

Perhaps what the Court meant by the quoted statement is that how sources of international law become binding in the Philippines are different. But it must be noted that while international conventions, customs, and general principles of law have constitutional mechanisms through which they become binding in the Philippine jurisdiction, there is no such mechanism for judicial decisions.

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[87] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 29.
[88] *Id.* at 30.
[89] Statute of the International Court of Justice., art. 38 ¶ 1.
[90] Hugh Thirlway, The Sources of International Law 6 (2019).
[91] *Id.*

2.General Principles of Law and Generally Accepted Principles of Law

As alluded to earlier, there seems to be a conflation of the concepts of the generally accepted principles of law found in the Incorporation Clause of the Philippine Constitution and the general principles of law found in Article 38 of the ICJ Statute.

After declaring that both custom and general principles of law are adopted as part of the law of the land through the Incorporation Clause, the Court quoted from *Pharmaceutical v. Duque.*[92] The quote consists of two paragraphs. The first paragraph appears to be discussing what generally accepted principles of international law mean. It said:

> "Generally accepted principles of international law" refers to norms of general or customary international law which are binding on all states, 17 i.e., renunciation of war as an instrument of national policy, the principle of sovereign immunity, 18 a person's right to life, liberty and due process, 19 and *pacta sunt servanda*, 20 among others. The concept of "generally accepted principles of law" has also been depicted in this wise.

Footnotes 17 to 20 indicate that Philippine sources were used.[93] This is to be expected since what is being discussed is a Philippine law concept found in the Philippine Constitution.

Furthermore, the last sentence of the first paragraph suggests that the next paragraph discusses "generally accepted principles of law."

However, the second paragraph states:

> Some legal scholars and judges look upon certain "general principles of law" as a primary source of international law because **they have the "character of jus rationale" and are "valid through all kinds of human societies."** (Judge Tanaka in his dissenting

[92] Pharmaceutical and Health Care Ass'n of the Philippines v. Duque, G.R. No. 173034, (Oct. 9, 2007).

[93] Specifically, footnotes 17 and 18 cite, Merlin M. Magallona, Fundamentals of Public International Law, 2005 Ed as its source. Footnote 19 indicates, Government of Hong Kong Special Administrative Region v. Olalia, G.R. No. 153675, (April 19, 2007). Footnote 20 indicates, Tañada v. Angara, 338 Phil. 546, 592 (1997).

> opinion in the 1966 South West Africa Case, 1966 I.C.J. 296). O'Connell holds that certain principles are part of international law **because they are "basic to legal systems generally" and hence part of the jus gentium.** These principles, he believes, are established by a process of reasoning based on the common identity of all legal systems. If there should be doubt or disagreement, one must look to state practice and determine whether the municipal law principle provides a just and acceptable solution.... (Emphasis in the original)

Noticeably, what is being discussed is the concept of general principles of law. First of all, it uses the term "general principles of law" and not "generally accepted principles of law." Second, it describes the term as being valid through all kinds of human societies and that they are basic to all legal systems generally. This depiction is exactly how general principles of civilized nations are described. Third, footnote 21 indicates that the source is a treatise by foreign authors.[94] Certainly, one would not expect such authors to discuss a Philippine law concept in an international law book.

Thus, the Court in the *Pharmaceutical case* appears to conflate the concepts of *generally accepted principles of law* and *general principles of law*. Unfortunately, this flawed portion of the *Pharmaceutical case* was quoted in the Pangilinan case.

The Court in Pangilinan then discussed the Separate Opinion of Justice Vitug *in US v. Purganan*.[95] The Court said that in the Separate Opinion, Justice Vitug "underscored that as a source of international law, general principles of law are only secondary to international conventions and international customs. He stressed that while international conventions and customs are 'based on the consent of nations,' general principles of law have yet to have a binding definition." This comment suggests that general principles of law are not based on the consent of nations. But what Justice Vitug actually said was:

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[94] Louis Henkin, Richard C. Pugh, Oscar Schachter, Hans Smit, International Law, Cases and Materials 96 (2nd ed. 1980).

[95] Government of the United States of America v. Purganan, G.R. No. 148571 (Resolution), (Dec. 17, 2002).

> Article 38 (1) (c) of the Statute of the International Court of Justice refers to the "general principles of law" recognized by civilized nations as being a source of law which comes after customary law, international conventions and treaties, all of which are based on the consent of nations.

Justice Vitug did say that "Article 38 (1)(c) is identified as being a 'secondary source' of international law and, therefore, not ranked at par with treaties and customary international law." However, the use of the term "secondary source" is misleading. It may be misinterpreted to mean that general principles of law are merely a material source or a subsidiary means of determining the rules of law. It has long been settled that general principles of law are a formal source of law, just like treaties and customs.[96] Perhaps what is meant by "secondary source" is the argument made by some scholars that general principles of law can only apply if there are no applicable treaties or customs.[97]

Justice Vitug did say the term general principles of law "is innately vague; and its exact meaning still eludes any general consensus."[98] However, he did admit that "[t]he widely preferred opinion, however, appears to be that of Oppenheim which views "general principles of law" as being inclusive of principles of private or municipal law when these are applicable to international relations." While there is no universal consensus, there is a majority view on the definition of general principles of law.

The Court then discussed *Rubrico vs. Arroyo*,[99] where in her Separate Opinion, Justice Carpio-Morales "conceded that the Constitution's mention of generally accepted principles of international law was 'not quite the same' as, and was not specifically included in Article 38's "general principles of law recognized

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[96] *See* Statute of the International Court of Justice., art. 38.

[97] This view is based on the original rationale for including general principles of law in the statute which is to prevent non-liquet. The idea is that general principles of law are intended to apply in case there is no treaty or customary rule that applies.

[98] Government of the United States of America v. Purganan, G.R. No. 148571 (Resolution), (Dec. 17, 2002).

[99] Rubrico v. Arroyo, 627 Phil. 37, 80 (2010) (*Carpio-Morales,J., concurring & dissenting*).

by civilized nations."[100] Unfortunately, the Court quoted Justice Carpio-Morales' succeeding statement:

> Renowned publicist Ian Brownlie suggested, however, that "general principles of international law" may refer to rules of customary law, to general principles of law as in Article 38 (1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies.

Justice Carpio Morales seems to suggest that the term "general principles of international law" found in international law is the same as the concept of "generally accepted principles of international law" found in the Philippine Constitution. However, as explained by the International Law Commission,[101] the term "general principles of international law" is used in various contexts. But in no way can the term be equated with the Philippine concept of generally accepted principles of international law.

The Court also quoted the Separate Opinion when it said that: "Indeed, judicial reasoning has been the bedrock of Philippine jurisprudence on the determination of generally accepted principles of international law and consequent application of the incorporation clause."

The earlier quoted paragraph argued that judicial reasoning could be considered a general principle of international law. But in this subsequent paragraph, judicial reasoning is a means of determining generally accepted principles of law. Suppose generally accepted principles of international law are the same general principles of law as implied by the Separate Opinion. How can judicial reasoning (which is a kind of general principle of law) also be the means of determining it?

The Court concluded that generally accepted principles of international law under the Incorporation Clause include custom and general principles of law. The relevance of this to the treaty withdrawal issue is not immediately apparent. Perhaps the intention was to draw a distinction between custom and general

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[100] This is quite an understatement considering the magnitude of the difference between the two concepts.

[101] UNGA, Report of the International Law Commission General Principles of Law Memorandum by the Secretariat Geneva, UNGAOR, 72nd Sess., UN Doc 13-60 A/CN.4/742 (2020).

principles of law which become domestic law by mere constitutional declaration and treaties which require Senate action.

E. Necessity of the Rome Statute

The Court seems to be arguing that the Philippines need not be a party to the Rome Statute to implement constitutional mandates. It argues that becoming a party to the Rome Statute is only one means "but so is passing a law that … replicates many of the Rome Statute's provisions and even expands its protections."[102] It added that: "In such instances, it is not for this Court—absent concrete facts creating an actual controversy-to make policy judgments as to which between a treaty and a statute is more effective, and thus, preferable."[103]

The Court is referring to Republic Act No. 9851. However, it must be noted that this law was passed before the Philippines became a party to the Rome Statute. Therefore, the Philippine government made a policy judgment to enter into the treaty despite the existence of the law. It would appear that the Philippine government did not find entering into the treaty redundant.

Conclusion

A distinction must be made between domestic law requirements to remove the binding effect of a treaty and international law requirements for withdrawing from a treaty. The treaty will govern the latter and suppletorily by the VCLT. On the other hand, the former will be governed solely by Philippine law, the foremost of which is the Philippine Constitution. What is at issue in this case is the former, not the latter. There is no question as to whether the Philippines complied with the requirements for withdrawal under the Rome Statute. The Court is only tasked to determine whether the President's withdrawal from the Rome Statute was valid under Philippine law.

The main problem is caused by the silence of the Constitution as to whether Senate concurrence is required for treaty withdrawal. Does the silence imply that such concurrence is required or not required? In response, the Court opined on rules that would apply in the absence of Constitutional powers.

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[102] Pangilinan, G.R. Nos. 238875, 239483 & 240954 at 51.

[103] *Id.*

However, there seems to be a problem with some of these rules, as discussed in this article. A further complication is the fact that the Court considered the issue moot. If that is the case, what would be the binding effect of the rules stated by the Court after it ruled on the mootness of the petitions? Only time will tell if future Decisions consider the pronouncements in *Pangilinan vs. Cayetano* as moot and only relevant for academics.