FOREWORD

SISYPHUS' LAMENT, PART VIII: THE PLJ'S RISING INFLUENCE*

*Bryan Dennis G. Tiojanco***

The PHILIPPINE LAW JOURNAL made possible one of my proudest moments as a young legal scholar. It was when I first met Francis Jardeleza, who at that time was an Associate Justice of our Supreme Court.[1] I remember being nervous about it. We were at a dinner following the recognition rites for U.P. Law's Class of 2015. He was the guest of honor, having delivered the commencement address to the graduates. I on the other hand was a last-minute invitee: a former lecturer who had happened to be back home on summer break. After mustering enough courage, I approached him, offering a handshake, to introduce myself.

"Good evening, Justice. I am Bo Tiojanco. It is an honor to meet you."

"Mr. Tiojanco. I know you," he replied–to my astonishment. "Your article on legal standing[2] is the best on the topic."

A surprised smile sprang on my face. He said he was planning to use my article for the *Torre de Manila* case[3] which was all over the news back then.

---

* *Cite* as Bryan Dennis G. Tiojanco, Foreword*, Sisyphus' Lament, Part VIII: The PLJ's Rising Influence*, 96 PHIL. L.J. viii, [page cited] (2023).

Sisyphus' Lament is a series of essays on the JOURNAL, beginning with Oscar Franklin B. Tan*, Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Academic Legal Writing*, 79 Phil. L.J. 7 (2004) and with the latest installment published in Volume 88, Oscar Franklin B. Tan, *Sisyphus' Lament, Part VII: The Death of the Philippine Law Journal*, 88 Phil. L.J. 539 (2014).

I thank former JOURNAL Chairs Rudyard A. Avila III and Oscar Franklin B. Tan, both of whom are my brother Sigma Rhoans, for instilling in me a passion for legal writing.

** Project Associate Professor of Transnational Law, University of Tokyo. J.S.D., Yale Law School (2018). Ll.M., Yale Law School (2014). J.D., *cum laude*, University of the Philippines College of Law (2009). Editor, Student Editorial Board, PHILIPPINE LAW JOURNAL Vols. 80 (2005) & 82 (2007).

[1] I thank Justice Francis J. Jardeleza for giving me his blessing to share this anecdote in print.

[2] Bryan Dennis G. Tiojanco, *Stilted Standards of Standing, The Transcendental Importance Doctrine, and the Non-Preclusion Policy they Prop*, 86 PHIL. L.J. 606 (2012).

[3] Knights of Rizal v. DMCI Homes, Inc., 809 Phil. 453 (2017).

My giddy heart started dancing. I thanked him profusely and we chatted a bit. After I took my leave, he asked me to keep in touch and to drop by his office if ever I was in Padre Faura. (Embarrassing confession: the following month I went to visit him twice but shied away both times at the last minute.)

No doubt Justice Jardeleza saw my article because it was published in the JOURNAL, the premier law review in our country. And, as I had excitedly learned, it continues to be read by both law students and legal luminaries alike. It has also been a trusty launchpad for many young careers.[4] I should know: I owe my first fulltime job, as writer for the Supreme Court, to an invitation to work there from two of the then Chief Justice's law clerks whose co-authored JOURNAL article I had edited. Justice Jardeleza himself had also served as Vice-Chair of the JOURNAL's Student Editorial Board in 1972.

The issue of legal standing was dropped midway through the oral arguments for Torre de Manila. It was not discussed in the eventual decision, which turned on a different issue.[5] And so, as it happens, I can now only dream that *Stilted Standards of Standing* has given some small service to our jurisprudence. It has never been cited by our Supreme Court. Sadly this is something we can say about most PLJ articles. Historically the Supreme Court sparsely cites the JOURNAL: only about twice a year from 1991 to 2003,[6] and about once a year from 2004 to 2013.[7] For a law review which aims to enrich our jurisprudence, this is (as Oscar Tan dubs it) a "damning statistic."[8] Hence the lamentations of Sisyphus.[9]

But the citations are trending upwards. In the last decade our Supreme Court's citations to the JOURNAL have notably risen. This uptrend started in 2014, the very year the Ephyran king lamented the once-a-year rate of

---

[4] *See* Oscar Franklin B. Tan, Foreword, *Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Legal Writing* [hereinafter "*Sisyphus I*"], 79 PHIL. L.J. 7, 12 (2004).

[5] Instead, the Court asked, "Can the Court issue a writ of mandamus against the officials of the City of Manila to stop the construction of DMCI-PDI's Torre de Manila project?" Knights of Rizal v. DMCI Homes, 809 Phil. at 521.

[6] *Sisyphus I*, *supra* note 4, at 10.

[7] Oscar Franklin B. Tan, *Sisyphus' Lament, Part VII: The Death of the Philippine Law Journal* [hereinafter "*Sisyphus VII*"], 88 PHIL. L.J. 539, 545 (2014).

[8] *Id.* at 541.

[9] *See Sisyphus I*, *supra* note 4; Oscar Franklin B. Tan, *Sisyphus' Lament, Part II: Editing, or the Student's Art of Not Being One's Own Worst Enemy*, 79 PHIL. L.J. 233 (2004); Oscar Franklin B. Tan, *Sisyphus' Lament, Part III: Citation and the Little Black Book*, 79 PHIL. L.J. 541 (2004); Oscar Franklin B. Tan, *Sisyphus' Lament, Part IV: Style and the Seduction of the Supreme Court*, 79 PHIL. L.J. 876 (2004); Juan Paolo F. Fajardo, *Sisyphus' Lament, Part V: Reinvigorating the Philippine Law Journal as the Crucible of Legal Writing*, 83 PHIL. L.J. 5 (2008); Johann Carlos S. Barcena, *Sisyphus' Lament, Part VI: Laying Foundations and Reinforcing an Institution Through an Effective Internship Program*, 84 PHIL. L.J. i (2009); *Sisyphus VII*, *supra* note 7.

Supreme Court citations to the PLJ.[10] That year this dismal rate doubled: a main opinion and a separate opinion each cited one PLJ article.[11] Astoundingly, in the following year, 2015, this doubled citation rate again more than doubled: three main opinions and two separate opinions cited one JOURNAL article each.[12] This rate remarkably rose once again in 2016: one separate opinion cited two JOURNAL articles,[13] while two main opinions and three separate opinions cited one JOURNAL article each[14] (with one of them citing the article four times[15]).

---

[10] *Sisyphus VII*, *supra* note 7.

[11] *See* SR Metals, Inc. v. Reyes, G.R. No. 179669, 735 Phil. 54, 69 n.30 (2014), *citing* Antonio GM. La Viña, Alaya M. de Leon & Gregorio Rafael P. Bueta, *Legal Responses to the Environmental Impacts of Mining*, 86 PHIL. L.J. 284 (2012); Soc. Just. Soc'y Officers v. Lim, G.R. No. 187836, 748 Phil. 25, 167 n.176 (2014) (Leonen, *J.*, *concurring and dissenting*), *citing* R. B. Deloso, *The Precautionary Principle: Relevance in International Law and Climate Change*, 80 PHIL. L.J. 644 (2006).

[12] *See* Casumpang v. Cortejo, G.R. No. 171127, 755 Phil. 466, 487 n.45 (2015), *citing* Darwin P. Angeles, *Dissecting Philippine Law and Jurisprudence on Medical Malpractice*, 85 PHIL. L.J. 895 (2011); Sec'y of Dep't of Pub. Works & Highways v. Sps. Heracleo, G.R. No. 179334, 758 Phil. 604, 666 n.32 (2015) (Brion, *J.*, *concurring*), *citing* J.B.L. Reyes, *The Trend Towards Equity versus Positive Law in Philippine Jurisprudence*, 58 PHIL. L.J. 1 (1983); People v. Wahiman, G.R. No. 200942, 760 Phil. 368, 387 n.35 (2015) (Leonen, *J.*, *concurring*), *citing* Romeo C. Buenaflor, *Estimating Life Expectancy and Earning Capacity: Observations on the Supreme Court's Determination of Compensatory Damages for Death and Injury*, 70 PHIL. L.J. 99 (1995); Sec. & Exch. Comm'n v. Laigo, G.R. No. 188639, 768 Phil. 239, 255 n.21 (2015), *citing* Vicente Abad Santos, *Trusts: A Fertile Field for Philippine Jurisprudence*, 25 PHIL. L.J. 519 (1950); Carpio-Morales v. Ct. of Appeals, G.R. No. 217126, 772 Phil. 672, 756–57 n.252 (2015) *citing* Miguel U. Silos, *A Re-examination of the Doctrine of Condonation of Public Officers*, 84 PHIL. L.J. 22 (2009).

[13] *See* Poe-Llamanzares v. Comm'n on Elections, G.R. No. 221697, 782 Phil. 292, 859–60 (2016) (Carpio, *J.*, *dissenting*), *at* nn.11–12 *citing* Eduardo Abaya, *A Critical Study on the Effect of Adoption on Citizenship Status in the Philippines*, 23 Phil. L.J. 444 (1948) & n.15 *citing* Irene R. Cortes & Raphael Perpetuo M. Lotilla, *Nationality and International Law from the Philippine Perspective*, 60 PHIL. L.J. 18 (1985).

[14] *See* Luriz v. Republic, G.R. No. 208948, 781 Phil. 729, 731 nn.65, 67–69 (2016), *citing* Lino M. Patajo, *Application of the Trading with the Enemy Act in the Philippines*, 26 PHIL. L.J. 305 (1951); Intell. Prop. Ass'n of the Phil. v. Ochoa, G.R. No. 204605, 790 Phil. 276, 308 n.12 (2016) (Brion, *J.*, *concurring*), *citing* Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practice*, 85 PHIL. L.J. 1 (2010); Poe-Llamanzares v. Comm'n on Elections, 782 Phil. at 533 n.228 (Sereno, *C.J.*, *concurring*), *citing* Alejandro E. Sebastian, *The Philippine Law on Legitimacy*, 11 PHIL. L.J. 35 (1931); Enrile v. Sandiganbayan, G.R. No. 213847, 789 Phil. 679, 705 n.16 (2016) (Brion, *J.*, *concurring*), *citing* Reyes, *supra* note 12; Dy v. People, G.R. No. 189081, 792 Phil. 672, 676 n.1 (2016), *citing* Antonio R. Bautista, *The Confusing Fusion of a Civil Claim in a Criminal Proceeding*, 79 PHIL. L.J. 640 (2004).

[15] Luriz v. Republic, 781 Phil. at 729, 731 nn.65, 67–69 (2016), *citing* Patajo, *supra* note 14.

In 2017, one separate opinion cited two JOURNAL articles[16] and a main opinion one article.[17] In 2018, three opinions cited one PLJ article each.[18] In 2019, one main opinion and one separate opinion each cited one PLJ article, and another separate opinion cited three PLJ articles.[19]

Looking at just the number of PLJ articles cited, 2020 would seem like a dip in citations. The number of times each article was cited, however, was impressive. A main opinion cited the article of former Supreme Court Justice Irene Cortes a notable one dozen times.[20] A separate opinion cited two PLJ articles from Owen Lynch, Jr.'s series on indigenous peoples and land rights a combined six times.[21] Both are not surprising, considering Justice

---

[16] *See* Land Bank of the Phil. v. Dalauta, G.R. No. 190004, 815 Phil. 740, 804 (2017) (Jardeleza, *J.*, *concurring & dissenting*), *at* n.23 *citing* Theodore O. Te, *Stare (In(Decisis): Some Reflections on Judicial Flip-Flopping in League of Cities v. Comelec and Navarro v. Ermita*, 85 PHIL. L.J. 785 (2011) & n.24 *citing* Emiliano M. Lazaro, *The Doctrine of Stare Decisis and the Supreme Court of the Philippine Islands*, 16 PHIL. L.J. 404 (1937).

[17] *See* Ce Constr. Corp. v. Araneta Ctr, Inc., G.R. No. 192725, 816 Phil. 221, 250 n.105 (2017), *citing* Irene R. Cortes, *Executive Legislation: The Philippine Experience*, 55 Phil. L.J. 1 (1979).

[18] *See* Sec. & Exch. Comm'n v. Coll. Assurance Plan Phil., G.R. No. 202052, 827 Phil. 339, 353 (2018). Although the Supreme Court did not identify the article, this appears to be Abad Santos, *supra* note 12; Republic v. Sereno, G.R. No. 237428, 831 Phil. 271, 420 n.182 (2018), *citing* Paolo O. Celeridad, *Evidence of Character: The Burden of Proving the Truth with respect to the Political Nature of Impeachment Trials by Means of Substantial Evidence*, 87 PHIL. L.J. 985 (2013); Union Sch. Int'l v. Dagdag, G.R. No. 234186, 843 Phil. 858, 871 n.9 (2018) (Jardeleza, *J.*, *concurring*), *citing* Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78 (2008).

[19] *See* Marquez v. Comm'n on Elections, G.R. No. 244274, 861 Phil. 667, 699 n.16 (2019) (Leonen, *J.*, *separate*), *citing* Lazaro, *supra* note 16; Pimentel v. Legal Educ. Bd., G.R. No. 230642, 862 Phil. 120, 418, 427 (2019) (Jardeleza, *J.*, *concurring & dissenting*), *at* n.8 *citing* Pacifico A. Agabin, *Academic Freedom and the Larger Community*, 52 PHIL. L.J. 336 (1977); n.9 *citing* Enrique Fernando, *Academic Freedom as a Constitutional Right*, 52 PHIL. L.J. 289 (1977); & n.36 *citing* Pacifico A. Agabin, *Comparative Developments in the Law of Academic Freedom*, 64 PHIL. L.J. 139 (1989); De Lima v. Duterte, G.R. No. 227635, 865 Phil. 578, 591 n.29 (2019), *citing* Pacifico A. Agabin, *Presidential Immunity and All the King's Men: The Law of Privilege as a Defense to Actions for Damages*, 62 PHIL. L.J. 113 (1987).

[20] *See* Beltran v. Sandiganbayan, G.R. No. 201117, 869 Phil. 18, 33–36 nn.74–82, 88, 91–92 (2020), *citing* Irene R. Cortes, *Redress of Grievances and the Philippine Ombudsman (Tanodbayan)*, 57 PHIL. L.J. 1 (1982).

[21] *See* Fed'n of Coron v. Sec'y of the Dep't of Env't & Nat. Res., G.R. No. 247866, 884 Phil. 564 (2020) (Leonen, *J. concurring*), *at* 606–607 nn.49, 53, 55 *citing* Owen J. Lynch, Jr., *Land Rights, Land Laws and Land Usurpation: The Spanish Sea (1565-1898)* [hereinafter *"Land Rights"*], 63 PHIL. L.J. 82 (1988); 613 n.74, 622 n.96 *citing* Owen J. Lynch, Jr., *Native Title, Private Right and Tribal Land Law: An Introductory Survey* [hereinafter "*Native Title*"], 57 PHIL. L.J. 268 (1982).

Cortes's reputation as a legal genius, and Lynch's series comprises the Supreme Court's most recently cited PLJ articles.[22]

This uptrend peaked with the inordinate number of Supreme Court citations to the JOURNAL in 2021. The year began with the concurrence in *Sama v. People*[23] of Justice Leonen, who cited six PLJ Articles (though one was his own; the other five from Lynch's series). The following week, Justice Leonen's main opinion in *Tulfo v. People*[24] repeatedly cited three JOURNAL articles a total of eleven times. In November that year, another main opinion penned by Justice Leonen[25] cited a relatively recent JOURNAL article six times (by Gerard Joseph Jumamil, who was on the same PLJ Student Editorial Board with me in 2008). Rounding out 2021 are two *ponencias* and three separate opinions which cited one PLJ article each.[26]

After 2021, the citations went back down. In 2022, there were two separate opinions which cited one PLJ article each.[27] And as of this writing

---

[22] *Sisyphus I*, *supra* note 4, at 10.

[23] G.R. No. 224469, 892 Phil. 614 (2021), *citing* Lynch, *Native Title*, *supra* note 21; Owen J. Lynch, Jr., *The Philippine Indigenous Law Collection: An Introduction and Preliminary Bibliography*, 58 PHIL. L.J. 457 (1983); Owen J. Lynch, Jr., *The Legal Bases of Philippine Colonial Sovereignty: An Inquiry*, 62 PHIL. L.J. 279 (1987); Lynch, *Land Rights*, *supra* note 21; Owen J. Lynch, Jr., *Invisible Peoples and a Hidden Agenda: The Origins of Contemporary Philippine Land Laws*, 63 PHIL. L.J. 249 (1988); and Marvic M.V. F. Leonen, *Law at Its Margins: Questions of Identity, Rights of Indigenous Peoples, Ancestral Domains and the Diffusion of Law*, 83 PHIL. L.J. 787 (2009).

[24] G.R. No. 187113, 967 SCRA 415, Jan. 11, 2021, *citing* Perfecto V. Fernandez, *Freedom of the Press in the Philippines*, 33 PHIL. L.J. 473 (1958); Bienvenido C. Ambion, *Liability for Libel Under the Present State of Philippine Jurisprudence*, 19 Phil. L.J. 316 (1939–1940); & Miriam Defensor Santiago, *The Supreme Court Applies "Clear and Present Danger": But Which One?*, 60 PHIL. L.J. 57 (1985).

[25] Malaki v. People, G.R. No. 221075, Nov. 15, 2021, *citing* Gerard Joseph M. Jumamil, *Islamic Conversion as Alternative to Civil Divorce: Addressing Tensions between Freedom of Religion and the Inviolable Institution of Marriage*, 86 PHIL. L.J. 864 (2012).

[26] *See* Tan-Andal v. Andal, G.R. No. 196359, slip op. at 36 n.249, 38 n.260, May 11, 2021 (Perlas-Bernabe, *J.*, *concurring*), *citing* Michael Anthony Dizon, *Psychological Incapacity and the Canon Law on Marriage: An Exegesis on the Psychological Element of Matrimonial Consent*, 75 PHIL. L.J. 365 (2000); Acharon v. People, G.R. No. 224946, slip op. at 3 n.9, Nov. 9, 2021 (Leonen, *J.*, *concurring*), *citing* E. (Leo) D. Battad, Review, *The Continuing Narrative of the Economic Emancipation of Filipino Working Women*, 88 PHIL. L.J. 601 (2014); Republic v. Sadca, G.R. No. 218640, slip op. at 14 n.61, Nov. 29, 2021, *citing* Lynch, *Native Title*, *supra* note 21; (4) Aquino v. Aquino, G.R. No. 208912, slip op. at 24 n.177, Dec. 7, 2021, *citing* Sandra M.T. Magalang, *Legitimizing Illegitimacy: Resisting Illegitimacy in the Philipines and Arguing for Declassification of Illegitimate Children as a Statutory Class*, 88 PHIL. L.J. 467 (2014); Calleja v. Exec. Sec'y, G.R. No. 252578, slip op. at 21 n.78, Dec. 7, 2021 (Caguioa, *J.*, *concurring & dissenting*), *citing* Solomon F. Lumba, *Understanding Facial Challenges*, 89 PHIL. L.J. 596 (2015).

[27] *See* Republic v. Pasig Rizal Co., Inc., G.R. No. 213207, Feb. 15, 2022 (Leonen, *J.*, *concurring*), *citing* Lynch, *Native Title*, *supra* note 21; Buenafe v. Comm'n on Elections, G.R. No.

(October 2023), two Supreme Court decisions have cited one JOURNAL article each.[28]

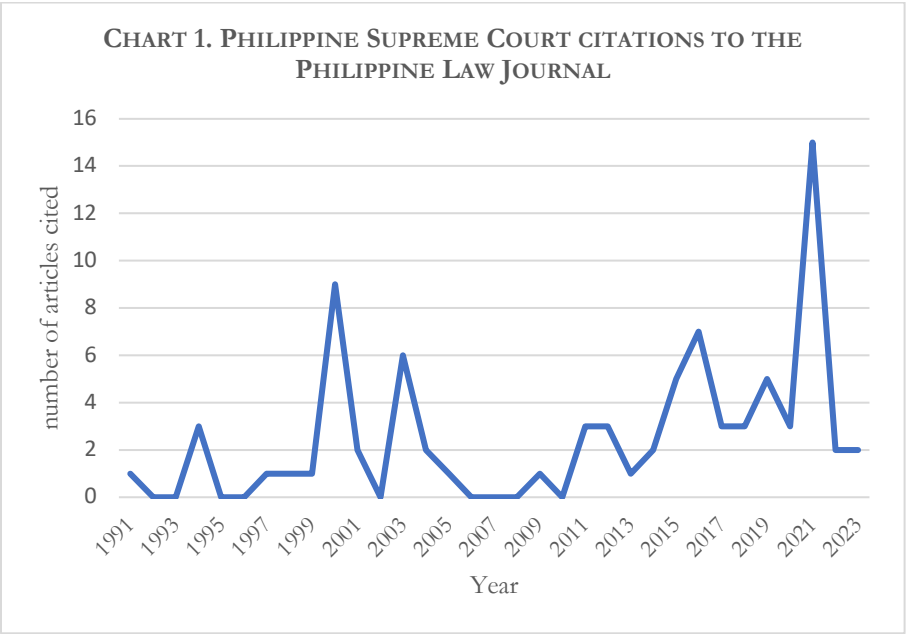

Chart 1 shows the number of JOURNAL articles cited by the Supreme Court yearly since 1991. These numbers likely understate the upturn in the PLJ's influence. First, I used an online search to count the citations for the years 2014 to 2023.[29] Since I did not leaf through every decision from that decade I may have missed some citations. Second, the chart does not capture how many times a certain article was cited. As mentioned earlier, several articles were cited three, six, or up to a dozen times in a single decision. Third, obviously the chart does not track the PLJ's influence outside of the Supreme Court. For example, a PLJ article was a main influence on the seismic 2022 Department of Justice opinion excluding solar, wind, hydro and ocean or tidal energy from the Constitution's foreign equity limits on the exploration, development, and utilization of the country's natural resources.[30]

260374, June 28, 2022 (Gaerlan, *J.*, *concurring*), *citing* Teresita J. Herbosa & Corazon Paredes, *Comments on Crime Involving Moral Turpitude*, 51 PHIL. L.J. 124 (1976).

[28] *See* Ocampo v. Macapagal-Arroyo, G.R. No. 182734, Jan. 10, 2023, *citing* Antonio T. Carpio, *The South China Sea Dispute: Philippine Sovereign Rights and Jurisdiction in the West Philippine Sea*, 90 PHIL. LJ. 459 (2017); Diclas v. Bugnay, G.R. No. 209691, Jan. 16, 2023, *thrice citing* Lynch, *Native Title, supra* note 21.

[29] As mentioned above, I rely on Tan's data for the years 1991 to 2013.

[30] Sec'y of Justice Op. No. 21 (Sept. 29, 2022), *at* 1 n.1, *citing* Joseph Emmanuel L. Angeles, *Revisiting Foreign Investment Limits on Renewable Energy Contracts in Light of the Text and*

Will the present JOURNAL issue help continue this uptrend? I am hopeful. Some trends within the uptrend suggest this. First, 41% (14 of the 34) of the decisions citing the PLJ, including those that cite multiple articles or that cite an article up to a dozen times, were penned by Justice Leonen, who at sixty years old still has almost a decade of tenure left in the Court.[31] Second, five of the 32 (16%) of the authors cited were or are Supreme Court Justices, and in this issue Vicente V. Mendoza, one of the 8 (13%) authors, is a revered retired Justice of the Supreme Court. Third, 16 of the 38 (42%) articles cited are recent, published from the year 2000 onwards. Fourth, all the cited articles take legal reasoning seriously and pursue accepted modes of legal argument, and in this issue all except one of the articles do just that. Fifth, and most importantly, the quality of this issue's articles that take legal reasoning seriously are impressively high. They are all well written and argued and so ably address Sisyphus's lament that there is "a lack of academic criticism of arguably questionable doctrine."[32] I applaud the editorial board for its remarkable job curating this issue. It will have the Ephyran King wrinkling the corners of his eyes with a relieved grin.

Justice Mendoza's short essay is the first, as it should be. It is no secret that I admire my former judicial review professor, whom I have called a true constitutional prophet of our country.[33] In his essay, he says that "the art of free society" is to regard the Constitution as a "'living organism,' capable of adaptation and change."[34] I agree. And this living organism, I argue, is nourished by a living originalism.[35] The 1986 Constitutional Commission followed revolutionary President Corazon Aquino's exhortation to leave the Constitution "open-ended" by giving "[f]uture Filipinos and their legislatures and supreme courts […] the widest latitude of thought and action" to flesh out its provisions over time.[36] In doing so it enabled future Filipinos to practice the art of free society, or, in Justice Mendoza's words, of "[t]aking the Constitution seriously and changing it whenever necessary without changing its essential nature." Justice Mendoza discusses several formal and informal means of Constitutional change: amendment and revisions, judicial review,

Context of the 1987 Constitution, 93 PHIL. L.J. 962 (2020); *See* CONST. art. XII, § 2. I thank Paolo Tamase for pointing this out to me.

[31] *See* CONST. art. VIII, § 11.

[32] Tan, *Sisyphus VII*, *supra* note 7.

[33] Bryan Dennis G. Tiojanco, *The Constitutional Prophet*, 1(1) PHIL. L. REG. 23, 25 (2016).

[34] Vicente V. Mendoza, *The Art of Free Society*, 96 PHIL. L.J. 467, 471 (2023).

[35] *See* JACK BALKIN, LIVING ORIGINALISM (2011).

[36] Bryan Dennis G. Tiojanco, *The Making of the 1987 Philippine Constitution*, *in* I ASIAN COMPARATIVE CONSTITUTIONAL LAW: CONSTITUTION-MAKING 238 (Ngoc Son Bui & Mara Malagodi eds., 2023).

and administrative rulemaking, guidance, and enforcement. To these we should add the 1987 Constitution's more than a hundred *by-law* clauses, which explicitly delegate the fleshing out of its provisions to future legislation. These *by-law* clauses cover everything: structure, civil, political, social, and economic rights, duties, powers, authorizations, limitations, qualifications, policies, programs, procedure, mechanisms, timing, remuneration, and various other matters like official language.[37]

The second entry is Maria Patricia Santos and Enrico Caldona's essay—*Beyond the Record: The Admissibility of Dying Declaration and the First Kind of Res Gestae Made Through Electronic Means*,[38] which suggests how courts should deal with what they acknowledge is an "obscure situation."[39] The situation is where a dying declaration or statement part of *res gestae* made through electronic means (such as a mobile phone) is offered not as documentary evidence of its contents but as testimonial evidence of the facts it asserts. As "no clear parameters"[40] exist in Philippine law for this hypothetical case, the authors turn for guidance to perhaps the most exhaustive US court opinion on the issue, *Lorraine v. Markel American Insurance Co.*,[41] decided in 2007 by the Maryland District Court. American case law has long been considered persuasive authority in our jurisprudence, for two reasons: first, it is proper, under Philippine law, to interpret borrowed legal provisions in light of their judicial interpretation in the country from which they are taken; and second, most Supreme Court Justices who have foreign law degrees obtained them from the United States.[42] Both considerations remain relevant. First, as Santos and Caldona note, our Supreme Court has recognized that both our constitutional right of the accused to confront witnesses and our evidentiary rules on dying declarations and *res gestae* "were adopted from the US" and "can be traced back to the American Federal Rules."[43] Second, several incumbent Justices have studied law in the U.S. either as a graduate student (for example, Justice Leonen, who holds an Ll.M. degree from Columbia University) or on a learning visit (for example the Chief Justice Alexander Gesmundo, who has

---

[37] Bryan Dennis G. Tiojanco & Paolo S. Tamase, *Parrying Amendments: The Philippines' Multitiered System of Constitutional Change*, *in* II ASIAN COMPARATIVE CONSTITUTIONAL LAW: CONSTITUTIONAL AMENDMENTS (Ngoc Son Bui & Mara Malagodi eds., forthcoming 2024).

[38] Maria Patricia DV. Santos & Enrico C. Caldona, *Beyond the Record: The Admissibility of Dying Declaration and the First Kind of Res Gestae Made Through Electronic Means*, 96 PHIL. L.J. 475 (2023).

[39] *Id.* at 480.

[40] *Id.* at 493.

[41] 241 F.R.D. 534 (D. Md. 2007), May 4, 2007.

[42] Bryan Dennis G. Tiojanco & Ronald Ray K. San Juan, *Importing Proportionality through Legislation: A Philippine Experiment*, *in* PROPORTIONALITY IN ASIA 252–54 (Po Jen Yap ed., 2020).

[43] Santos & Caldona, *supra* note 38, at 485.

visited Harvard Law School, Georgetown University Law Center, and Suffolk University School of Law).[44] From *Lorraine,* Santos and Caldona derive a thoughtful "two-pronged test that will subject electronic evidence both to hearsay analysis and authentication."[45] Their proposed test aims to harmonize our constitutional rights with our evidentiary rules.

The third article, Karina Mae Garcia and Pamela Marie Marcelo's co-authored essay—*Pursuing a Balanced Approach to Speedy Case Disposition: An Analysis of Possible Solutions and Alternative Remedies to Ensure the Speedy Disposition of Cases for the Accused, the Victims, and the State*,[46] looks not only to the United States but also to South Africa and Indonesia for guidance on how to construe the constitutional right of all persons to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.[47] This right has of late led to the notorious "dismissal of charges against alleged corrupt public officers for violation of the right."[48] Our Supreme Court, as already noted, has especially looked to US jurisprudence for guidance when we have borrowed from it the legal norm under consideration. As Garcia and Marcelo note, the U.S. is "where the original test for the right to speedy disposition originated."[49] Crucially they also point out two pertinent differences between US law and ours. First, under US jurisprudence a prior demand for early resolution is considered part of the requirement of exhaustion of administrative remedies, another borrowed American legal doctrine that has long been part of Philippine law. Garcia and Marcelo juxtapose this doctrine with some recent Philippine Supreme Court decisions which upheld "the doctrine that the respondents have no duty to expedite or follow up the case against him or her at the prosecutor level."[50] Second, in the U.S. (and South Africa) there is a requirement that the accused prove actual prejudice to substantiate a claim of violation of the right to a speedy disposition of cases. In the Philippines, the burden of proof is on the other side, namely the State.

---

[44] *Incumbent Justices,* SUPREME COURT OF THE PHIL. WEBSITE, *at* https://sc.judiciary.gov.ph/incumbent-justices/.

[45] Santos & Caldona, *supra* note 39, at 504.

[46] Karina Mae P. Garcia & Pamela Marie T. Marcelo, *Pursuing a Balanced Approach to Speedy Case Disposition: An Analysis of Possible Solutions and Alternative Remedies to Ensure the Speedy Disposition of Cases for the Accused, the Victims, and the State*, 96 PHIL. L.J. 515 (2023).

[47] CONST. art. III, § 16. *See* CONST. art. III, § 14(2), on the constitutional right of the criminally accused to have a speedy trial.

[48] Garcia & Marcelo, *supra* note 46, at 516.

[49] *Id.*

[50] *Id.* at 560.

Worldwide, the influence of the United States as a model for constitutionalism is perhaps waning.[51] The influence of South Africa, on the other hand, has long been on the rise. It is the rare non-Western state in the coterie of countries scholars and judges draw on for comparative constitutional insight.[52] South Africa is in fact the main inspiration for an influential book on constitutional *fourth branch* institutions for protecting democracy (like our Ombudsman).[53] It has also been a wellspring of ideas for creative judicial remedies.[54] In their essay, Garcia and Marcelo draw on South Africa's judicial toolbox for inspiration. Instead of outright dismissal, they propose alternative remedies found in South Africa's Criminal Procedure Act, which both empowers courts to deny further postponements to a laggard case ("judicial acceleration") and allows the accused to seek compensation for wasted costs incurred due to the delay.

A malady of comparative constitutional law is what Ran Hirschl labels the "'World Series' syndrome": the idea that the constitutional experience of a small coterie of countries is representative of constitutionalism worldwide.[55] It is refreshing therefore that Garcia and Marcelo turn to our neighboring archipelago Indonesia, an important but understudied constitutional democracy,[56] for guidance. As Garcia and Marcelo note, the Corruption Eradication Commission of Indonesia (*Komisi Pemberantasan Korupsi*) is a rare anti-corruption agency in a developing country that has been doing a good job. And from it they draw lessons on possible measures to strengthen the Ombudsman, including ensuring that it is "equipped with adequate powers to investigate and gather evidence," "increasing personnel and compensation, improving recruitment process and increasing investigative skills, and building their technical and professional capacity," and "[c]hanging leadership of the Ombudsman from one individual to a collegial body."[57]

---

[51] David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 766–67 (2012).

[52] RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 213 (2014).

[53] MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY (2021).

[54] *See, e.g.,* Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT'L J. CONST. L. 1429, 1435–37 (2020); ROSALIND DIXON, RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE ch. 7 (2023).

[55] HIRSCHL, *supra* note 52, at 192.

[56] Thankfully there are some notable exceptions. *See e.g.,* CONSTITUTIONAL DEMOCRACY IN INDONESIA (Melissa Crouch ed., 2022); SIMON BUTT, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS (2012).

[57] Garcia & Marcelo, *supra* note 46, at 568. (Emphasis omitted.)

Legal acumen is largely a matter of making the most appropriate distinctions,[58] and in the fourth article, *The Three Body Problem in Quasi-Delicts: Determining Liability when Multiple Parties are Negligent*,[59] Maria Patricia Valeña showcases hers by drawing a crucial distinction our Supreme Court often fails to make: the distinction between antecedent negligence and contributory negligence. The first is negligence that had raised the risk of the litigated injury, the second negligence that exacerbated that injury. Drawing this distinction makes it easier to assign liability for injury occasioned by the corresponding negligence of opposing litigants.

Take the hypothetical case of racecar driver Rodimus and truck owner Optimus. The doctrine of last clear chance would hold Rodimus solely liable for crashing into the jutting-out-on-the-highway fender of Optimus' carelessly parked truck.[60] The doctrine of intervening cause on the other hand would hold Optimus liable for all the damages. In imputing all liability to either Rodimus or Optimus, both doctrines contradict Article 2179 of our Civil Code, which commands courts to "mitigate the damages to be awarded" to a litigant whose "negligence was […] contributory" to but not "the immediate and proximate cause of the injury."[61] In doing so, Valeña sensibly says, both doctrines defeat the jurisprudentially recognized aim of the law on quasi-delicts, which is to promote proper behavior by making everyone answerable for the foreseeable consequences of their own negligence.[62] If Rodimus is adjudged solely liable, then "negligent persons are effectively permitted to create or cause dangerous situations or place others at risk, without incurring any liability." If sole liability falls on Optimus, then "people may be encouraged to willfully ignore risks created by the antecedent negligence of others."

Valeña also rejects the scenario where Rodimus and Optimus are considered concurrently negligent. She defines "concurring negligence" as "situations where more than one negligent actor is the proximate cause of the injury." This is because under Article 2179, "[w]hen the plaintiff's own negligence was the immediate and proximate cause of his injury, he cannot recover damages." If Rodimus and Optimus are concurrently negligent then "neither party can recover damages, effectively equating the gravity and legal consequences of two negligent acts." She asserts, rather opaquely, that "this

---

[58] ALAN WATSON, THE SPIRIT OF ROMAN LAW 15 (paperback ed., 2008).

[59] Maria Patricia S. Valeña, *The Three Body Problem in Quasi-Delicts: Determining Liability when Multiple Parties are Negligent*, 96 PHIL. L.J. 572 (2023).

[60] Extrapolating the logic of *Picart v. Smith*, G.R. No. 12219, 37 Phil. 809 (1918).

[61] CIVIL CODE, art. 2179.

[62] Phoenix Constr., Inc. v. Intermed. App. Ct. [hereinafter "*Phoenix Construction*"], G.R. No. 65295, 232 Phil. 327, 365 (1987).

does not appear to be a feasible solution" (I wonder how she regards the doctrine of *in pari delicto*[63]).

Whose negligence, then, should be considered the proximate cause, and whose merely contributory? Valeña dusts off a landmark Philippine Supreme Court decision from 1907[64] to argue that contributory negligence here refers only to "negligence that contributes to the plaintiff's injury, and *not* the event itself"[65] that caused the injury. She argues that we should distinguish contributory negligence thus narrowly understood from what she terms "antecedent negligence, which is necessarily negligence that contributed to the event itself and not merely to the first negligent actor's injury."[66] This is an illuminating distinction. It allows her to pinpoint Optimus' "first negligent act" of parking his truck askew as the proximate cause of the car crash because "it did not contribute to the injury but to the event itself." She collapses the distinction, however, by proposing a rule where, she says, "antecedent and contributory negligence will have the same effect": "mitigation of damages." Rodimus' fast driving, she says, should be considered what she terms a *pseudo-efficient intervening cause*, "where the chain of causation between the first negligent act and the injury is not completely severed by the intervening negligence of the second negligent actor, and both parties are made to share liability for the injury in the form of mitigated damages for the first negligent actor."[67] She says that "it is the second negligent actor," namely the fast-driving Rodimus, who should be "primarily held liable for the injury." Nonetheless, Optimus, "the first negligent actor," should also "bear a portion of the liability in the form of mitigated damages." In short: Optimus wins but doesn't get much.

Here is where I part ways with Valeña. I think it is Rodimus who should win, though he also shouldn't get much. Valeña rightly emphasizes the Supreme Court's recognition that the equitable function of the doctrine of last clear chance is inapplicable to Philippine law. The doctrine was fashioned to make up for the common law rule barring recovery by negligent plaintiffs no matter how miniscule their contributory negligence; this rule was rejected by Article 2179, which provides that contributory negligence merely mitigates (not bars) an award of damages.[68] But the distinction Article 2179 demands for assigning liability is between contributory negligence and "the immediate and proximate cause of the injury." By excluding "negligence that contributed

---

[63] CIVIL CODE, arts. 1411–12.
[64] *See* M.H. Rakes v. Atlantic, Gulf & Pacific Co., G.R. No. 1719, 7 Phil. 359 (1907).
[65] Valeña, *supra* note 59, at 592.
[66] *Id.*
[67] *Id.* at 596.
[68] *Phoenix Construction*, 232 Phil. 327, 368–69.

to the event itself" from the term contributory negligence, Valeña helps make clear that Optimus' antecedent negligence was the proximate cause of the injury. It fits the classic definition in *Vda. de Bataclan v. Medina*: "that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."[69] As the Supreme Court explained in *Phoenix Construction v. Intermediate Appellate Court*, "a foreseeable consequence of the risk" created by an antecedent negligence is "within the scope of the original risk" and hence not an efficient intervening cause; "one who leaves an obstruction on the road […] should foresee that a vehicle […] will run into it."[70] Awarding damages to Rodimus under Article 2179, instead of under the doctrine of intervening cause, will also likely not encourage people to willfully ignore risks created by the antecedent negligence of others. Rodimus' foreseeable intervening negligence is still contributory negligence (having occurred later, it cannot be called antecedent) so that courts should award him less than the actual damages he suffered. Arguably the rule also lowers the risk of traffic accidents and hence of insurance costs of driving, and so is Kaldor-Hicks efficient while being wealth neutral (assuming individual income does not affect insurance costs).[71]

The fifth article is Angelo Karl Doceo's exhaustive essay on the auditorial and rulemaking powers of the Commission on Audit (COA)—*Reexamining the Power of the Commission on Audit to Disallow Illegal, Irregular, Unnecessary, Excessive, Extravagant or Unconscionable Expenditures*.[72] Doceo's first-rate expertise shines through in his essay. His discussion seamlessly knits together the 1987 Constitution and previous charters, the State Auditing Code and other presidential decrees and statutes, case law including separate opinions, COA circulars and other issuances, and the Records of the 1986 Constitutional Commission. It focuses on the power of the COA to disallow illegal, irregular, unnecessary, excessive, extravagant, or unconscionable government expenditures. Formerly a statutory power, this power of the COA is now recognized by our Supreme Court as a constitutionally protected one; Doceo's essay examines how this came about. His essay ends by proposing a workable four-step approach for determining liability for disallowed government expenditures that incorporates the relevant rules and principles

---

[69] Vda. de Bataclan v. Medina, G.R. No. 10126, 102 Phil. 181 (1957).

[70] *Phoenix Construction*, 232 Phil. at 368.

[71] *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018). *See also* RICHARD POSNER, THE ECONOMICS OF JUSTICE ch. 4 (1983).

[72] Angelo Karl C. Doceo, *Reexamining the Power of the Commission on Audit to Disallow Illegal, Irregular, Unnecessary, Excessive, Extravagant or Unconscionable Expenditures*, 96 PHIL. L.J. 601 (2023).

found in pertinent statutory provisions and Supreme Court precedents.[73] It is perhaps the most comprehensive discussion of the COA's auditorial and rulemaking powers and would be a helpful guide to anyone who wishes to study the COA in depth.

The last article—*Of Monsters in Men: Ideology Behind Legal Standing in Environmental Cases*[74]—is Enrico Caldona's essay on legal standing in environmental cases. As my anecdote above suggests, it is a topic I have long been keen on.[75] Alas, Caldona's essay disappointed my initial hopes for it.

Consider two of Caldona's central premises. First, he lumps together as "Western governments […] the United States and the European Union"[76] and presumes that their environmental policies both not only "almost exclusively require[ ] cases of environmental harm to be brought under violations of individual property rights, tort law, or the public trust doctrine"[77] but are also equally "'backward-looking' because harms are only addressed after they are committed."[78] Second, from the premise that "legal standing reflects environmental agenda," Caldona concludes that "[t]he West puts people's affairs at the center of environmental relations."[79] However true these twin premises may be about the United States, they are demonstrably false about the European Union (E.U.).

First, when it comes to regulating conduct, the E.U., unlike the U.S., prefers administrative rulemaking to private litigation. Second, administrative rulemaking in the E.U. takes the precautionary approach to environmental protection, unlike in the U.S. where cost-benefit analysis is used.[80] These are in tune with the low tolerance of Europeans to environmental risks.[81] Most Europeans rank climate change as the third most serious global problem (after poverty and transnational terrorism) and hence support an expansive governmental role in environmental protection.[82] European politicians of all

---

[73] *Id.* at 606.

[74] Enrico C. Caldona, *Of Monsters in Men: Ideology Behind Legal Standing in Environmental Cases*, 96 PHIL. L.J. 669 (2023).

[75] Tiojanco, *supra* note 2. I have also written about environmental litigation: *See* Bryan Dennis G. Tiojanco, *Integrated diversity: A pluralist argument for the Philippine Writ of Continuing Mandamus*, *in* CONSTITUTIONAL REMEDIES IN ASIA 155 (Po Jen Yap ed., 2019).

[76] Caldona, *supra* note 74, at 675–76.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 680.

[80] ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD 41–43 (2020).

[81] *Id.*

[82] *Id.*

stripes have internalized these public preferences, which civil society groups also actively pursue. All these have led to the enactment of a set of stringent E.U. regulations such as the Restriction of Hazardous Substances Directive[83] (which bans the use of hazardous substances in electronics) and the E.U.'s emissions trading scheme (which imposes a limit on greenhouse gas emissions).[84] Contrary to Caldona's premises, these regulations are neither conditioned on individual harm nor backward looking. The environmental agenda they implement puts the environment and not people at the center and is independent of any rule on legal standing.

Lastly, Caldona's essay propounds a moral, not legal, argument. A "necessary condition" for the existence of a legal system, says H.L.A. Hart, is the presence of "common standards of legal validity."[85] These standards comprise rules and principles both the bench and the bar (and perhaps plenty enough citizens) generally accept.[86] Of course there may be theoretical disagreements over the exact content of these standards, but there is always some consensus on the core legal rules and principles.[87] Otherwise the law will fail in what Scott Shapiro calls its "settlement function": law is supposed to settle many of a community's variegated moral disputes.[88] While this does not eliminate moral reasoning from legal argument, it "takes certain issues 'off the table'"[89] and makes claims about the law answerable to the demands of legal practice.[90]

Caldona frames his argument outside of the terms of our legal practice. He believes that when it comes to environmental protection "both the Western and Global South approaches miss the point" and consequently are "incomplete and inadequate frameworks."[91] Now to be sure these are valid objections that the law must address. His approach, however, rejects the common standards of legal validity under Philippine law–disregarding accepted rules of statutory construction (e.g., *ejusdem generis*, *verba legis*, *expressio unius est exclusio alterius*, etc.) or modalities of constitutional argument (originalism, intratextualism, *ut magis valeat quam pereat*, etc.).[92] He does not anchor his claims about the law on any legal rule or principle. Instead he

---

[83] 2011 O.J. (L 174) 88 (EU). Restriction of Hazardous Substances Directive.
[84] BRADFORD, *supra* note 80, at 208–212.
[85] H.L.A. HART, THE CONCEPT OF LAW 116 (2nd ed. 1994).
[86] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14–45 (1977).
[87] RONALD DWORKIN, LAW'S EMPIRE 5 & 65–67 (1986).
[88] SCOTT SHAPIRO, LEGALITY 311 (2011).
[89] *Id.* at 276.
[90] DWORKIN, *supra* note 86, at 13.
[91] Caldona, *supra* note 74, at 703.
[92] *See, generally,* RUBEN AGPALO, STATUTORY CONSTRUCTION (6th ed., 2009).

suggests that we attune our environmental laws to the ideas of foreign philosophers: the Slovenian Slavoj Žižek, the Russian Oxana Timofeeva, the Englishman Gilbert Keith Chesterton, among others.

Perhaps Caldona is more interested in social criticism than legal interpretation. But isn't interpretation the most persuasive sort of social criticism? "Criticism works best...if the critic is able to invoke local values," or, in the case of the bench and the bar, legal values.[93] As rhetoricians advise, if you wish to be more persuasive, "you need to determine your audience's values and then appear to live up to them".[94] For judges and lawyers this means adherence to accepted grounds of law and modes of legal argumentation. Of course, it is reasonable for Caldona to think all this unnecessary. His view, which is that "anyone may bring an environmental suit to court because everyone should enforce environmental laws, which should contain people's duties to the environment," already jibes with the Rules of Procedure for Environmental Cases, which allows "Any Filipino citizen in representation of others, including minors or generations yet unborn" to "file an action to enforce rights or obligations under environmental laws."[95] And so he consults philosophy, as he says, more because of "the enlightenment that it evokes" rather than the "concrete legal solutions" that can "spring directly" from it. That is, of course, in itself a worthy goal. But it probably will not help alleviate Sisyphus' lament. I doubt it would contribute as much as this issue's five other articles in continuing the PLJ's rising influence.

- o0o -

[93] MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 62 (1987).

[94] JAY HEINRICHS, THANK YOU FOR ARGUING: WHAT ARISTOTLE, LINCOLN, AND HOMER SIMPSON CAN TEACH US ABOUT THE ART OF PERSUASION 60 (2007).

[95] A.M. No. 09-6-8-SC, Rule 2, §5.