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*

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ABSTRACT

Through the years, the Supreme Court has rendered decisions acquitting public officials of graft and corruption charges for violation of their right to speedy disposition, triggered by inordinate delays in the preliminary proceedings before the Office of the Ombudsman ("Ombudsman"). This Article examines the current framework employed by the Court in dealing with such cases, particularly involving public officials, and compares it with the respective approaches in select jurisdictions. Drawing from the experience of the United States, South Africa, and Indonesia, it identifies alternative remedies and possible solutions that legislators may explore to achieve a more balanced speedy case disposition in the country. It concludes that to attain the goal of a more balanced speedy disposition, a two-pronged approach is necessary: first, to consider dismissal of the case as the last resort among a battery of other remedies; and second, to institute reforms in the Ombudsman.

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I. INTRODUCTION

Recently, the constitutional right to speedy disposition has been the subject of much interest and discussion after the Supreme Court ordered the dismissal of corruption charges against the persons implicated in the multi-billion coco levy fund scam.[1] In *Republic v. Desierto*,[2] the Court ruled that there was a violation of the accused's right to speedy disposition after finding an inordinate delay of eight years in the preliminary proceedings conducted by the Office of the Ombudsman ("Ombudsman"), thus warranting the dismissal of the charges. *Desierto* is just one of the many cases where the Court ordered the dismissal of charges against alleged corrupt public officers for violation of the right.

This Article attempts to contribute to the growing discussion on the right to speedy disposition, particularly in cases involving public officials, by examining the current framework employed by the Court in dealing with such cases. This framework is then compared with the respective approaches in other jurisdictions, specifically in the United States, where the original test for the right to speedy disposition originated, and South Africa, which offers a multitude of remedies for violations of the said right. Further, the experience of Indonesia as regards its equivalent Ombudsman office is examined, in order to determine potential measures to strengthen our own Ombudsman. Overall, possible solutions and alternative remedies derived from the experiences of these countries are explored to arrive at a more balanced and holistic approach to speedy case disposition, taking into account not only the interest of the accused, but also of the victims and the State.

The Article is divided into five parts: Part I introduces the subject of the Article and outlines its contents; Part II lays down the current framework used by the Court in analyzing alleged violations of the right to speedy disposition; Part III examines the duty of the Ombudsman in relation to the right to speedy disposition; Part IV presents a survey of the relevant cases involving the right; Part V explores the respective approaches utilized in other

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[1] *See* Tina Santos, *Supreme Court Dismisses Coco Levy case vs Enrile, et al.*, INQUIRER.NET, Feb. 9, 2023, *at* https://newsinfo.inquirer.net/1727325/sc-dismisses-coco-levy-case-vs-jpe-et-al; Rey Panaligan, *SC Dismisses Graft Charges Filed 30 Years Ago vs Enrile, Others in P840-M Coconut Levy Funds*, MANILA BULL., Feb. 9, 2023, *at* https://mb.com.ph/2023/02/08/sc-dismisses-graft-charges-filed-30-years-agovs-enrile-others-in-p840-m-coconut-levy-funds/; Jairo Bolledo, *SC Junks Graft Charges vs Enrile in Relation to Coco Levy Fund Scam*, RAPPLER, Feb. 8, 2023, *at* https://www.rappler.com/nation/supreme-court-decision-graft-charge-enrile-coco-levy-fund-scam/.

[2] [Hereinafter "*Desierto*"], G.R. No. 136506, Jan. 16, 2023. (slip op.)

jurisdictions; Part VI assesses the applicability of the said approaches to the Philippine setting and presents possible solutions and alternative remedies for a more balanced approach to speedy case disposition in the country; and Part VII concludes the Article with the submission that a two-pronged approach is necessary to best achieve a more balanced speedy case disposition in cases involving public officials in the Philippines.

II. THE RIGHT TO SPEEDY DISPOSITION OF CASES IN GENERAL

The right to speedy disposition of cases is guaranteed by Section 16, Article III of the 1987 Constitution: "All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies."[3]

This right was first integrated into the Philippine legal system upon its inclusion in Section 16, Article IV of the 1973 Constitution.[4] The same provision was thereafter reproduced in Section 16, Article III of the 1987 Constitution.[5] The protection granted under this right extends to all parties in all cases, including civil and administrative cases, and in all proceedings, including judicial and quasi-judicial hearings. Thus, "any party to a case may demand swift action on all officials tasked with the administration of justice."[6]

Significantly, the right to speedy disposition of cases is most often invoked in fact-finding investigations and preliminary investigations by the Ombudsman.[7] Once a court determines that there is inordinate delay in the resolution and termination of a preliminary investigation, the dismissal of the case against the accused is in order.[8]

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[3] CONST. art. III, § 16.

[4] Republic v. Sandiganbayan, [hereinafter "*Sandiganbayan (2020)*"], G.R. No. 231144, slip op. at 10, Feb. 19, 2020.

[5] *See* CONST. art. III, § 16.

[6] Binay v. Sandiganbayan, G.R. No. 120681, 316 SCRA 65, 93, Oct. 1, 1999, *citing* Cadalin v. Phil. Overseas Emp't Admin. [hereinafter "*Cadalin*"], G.R. No. 104776, 238 SCRA 721, 765, Dec. 5, 1994.

[7] *Sandiganbayan (2020)*, G.R. No. 231144, *citing* Cagang v. Sandiganbayan [hereinafter "*Cagang*"], G.R. No. 206438, 875 SCRA 374, 413, Jul. 31, 2018.

[8] Tatad v. Sandiganbayan [hereinafter "*Tatad*"], G.R. No. 72335, 159 SCRA 70, Mar. 21, 1988.

A. The Right to Speedy Disposition of Cases *vis-a-vis* the Right to Speedy Trial

The right to speedy disposition of cases is often discussed in conjunction with, and sometimes even mistaken for, the right to speedy trial. The right to speedy trial is enshrined in Section 14(2), Article III of the Constitution:

> In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, *to have a speedy, impartial, and public trial,* to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.[9]

Both rights to speedy trial and to speedy disposition were designed to prevent the oppression of individuals from an indefinitely looming criminal prosecution over their persons, and to curb delays in the administration of justice, by mandating the courts to proceed with reasonable dispatch in the trial of criminal cases.[10] They are both deemed violated when the proceedings are attended by "vexatious, capricious, and oppressive delays."[11]

However, while the right to a speedy trial is invoked against the courts in criminal prosecutions, the right to speedy disposition of cases has a broader scope and may be "invoked even against quasi-judicial or administrative bodies in civil, criminal, or administrative cases before them."[12]

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[9] CONST. art. III, § 14(2). (Emphasis supplied.)

[10] Malones v. Sandiganbayan [hereinafter "*Malones*"], G.R. No. 226887, slip op. at 8, July 20, 2022, *citing* Corpuz v. Sandiganbayan [hereinafter "*Corpuz*"], G.R. No. 162214, 442 SCRA 294, 312, Nov. 11, 2004.

[11] Dela Peña v. Sandiganbayan [hereinafter "*Dela Peña*"], G.R. No. 144542, 360 SCRA 478, 485, June 29, 2001, *citing* Cojuangco v. Sandiganbayan [hereinafter "*Cojuangco*"], G.R. No. 134307, 300 SCRA 367, 393, Dec. 21, 1998; Blanco v. Sandiganbayan [hereinafter "*Blanco*"], G.R. No. 136757, 346 SCRA 108, 114, Nov. 27, 2000.

[12] *Cagang*, 875 SCRA at 411.

B. Rationale

The right to speedy disposition of cases is paramount in the administration of justice and recognizes that "justice delayed can mean justice denied."[13] Aside from society's interest in bringing swift prosecutions and averting the precipitate loss of rights, the right to speedy disposition of cases finds more significant application in criminal cases, where the life and liberty of the accused are at stake.[14] Prolonged inaction on the part of the government to resolve cases against individuals prevents them from clearing their name and may have financial ramifications, such as preventing persons from receiving their retirement benefits despite their long service in the government.[15]

Moreover, inordinate delay in the resolution of cases impairs an individual's right to mount an effective defense due to the passage of time. According to the Court, such impairment must be weighed against the government rather than the individual since "[m]emories fade, documents and other exhibits can be lost and vulnerability of those who are tasked to decide increase with the passing of years. In effect, there would be a general inability to mount an effective defense."[16]

C. Tests and Criteria

The Court has time and again noted that the concept of speedy disposition is relative, and "facts peculiar to each case must be taken into account."[17] Through the years, several criteria have been applied in case law in determining whether an individual's right to speedy disposition of cases has been violated.

1. Inordinate Delay

The concept of inordinate delay was first introduced in the 1998 case of *Tatad v. Sandiganbayan.*[18] The Court therein noted that the inordinate delay in terminating the preliminary investigation and filing the information violated

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[13] *Malones*, G.R. No. 226887, slip op. at 6, *citing* Caballero v. Alfonso, G.R. No. 45647, 153 SCRA 153, 162, Aug. 21, 1987.

[14] *Id.* at 7, *citing* Cabarles v. Maceda, G.R. No. 161330, 516 SCRA 303, 319, Feb. 20, 2007.

[15] Angchangco v. Ombudsman, G.R. No. 122728, 268 SCRA 301, Feb. 13, 1997.

[16] *Desierto*, G.R. No. 136506, slip op. at 50–51.

[17] *Sandiganbayan (2020)*, G.R. No. 231144.

[18] *Cagang*, 875 SCRA 374, 414.

the right of the petitioner to due process and to a speedy disposition of the cases against him, warranting the dismissal of said cases.[19] The Court held that inordinate delay is present when "the proceedings are 'attended by vexatious, capricious, and oppressive delays; or when unjustified postponements of the trial are asked for and secured, or when without cause or unjustifiable motive, a long period of time is allowed to elapse without having the case tried.'"[20]

More recently, the Court explained that delay shall be deemed inordinate not through mere mathematical reckoning, but through the examination of the facts and circumstances surrounding each case.[21] The courts are tasked to appraise a reasonable period of how much time a competent and independent public officer would need in relation to the complexity of a given case.[22]

For the purpose of determining whether inordinate delay exists, "a case is deemed to have commenced from the filing of the formal complaint and the subsequent conduct of the preliminary investigation."[23] Should the alleged delay occur within the periods provided by law or procedural rules, the burden is on the respondent or the accused to prove that delay was inordinate; otherwise, the burden shifts to the prosecution to prove that the delay was reasonable under the circumstances and that no prejudice was suffered by the accused as a result of delay.[24] The timely invocation of the accused's constitutional rights must also be examined on a case-to-case basis.[25]

2. The Barker Balancing Test

The balancing test was first adopted by the US Supreme Court in *Barker v. Wingo*.[26] Again, in assessing whether there has been a violation of the right, a mere mathematical reckoning of the time involved is not sufficient. The Court weighs the facts and circumstances peculiar to each case and considers the following factors: "(1) the length of the delay; (2) the reasons for the delay; (3) the assertion or failure to assert such right by the accused;

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[19] *Tatad*, 159 SCRA 70, 82.

[20] *Sandiganbayan (2020)*, G.R. No. 231144, *citing* Ty-Dazo v. Sandiganbayan [hereinafter "*Ty-Dazo*"], G.R. No. 143885, 374 SCRA 200, 203, Jan. 21, 2002.

[21] *Id.*

[22] *Id.*

[23] *Id.*, *citing Cagang*, 875 SCRA 374, 436. *See also* RULES OF COURT, Rule 110, § 1.

[24] *Id.*

[25] *Id.*

[26] [Hereinafter "*Barker*"], 407 U.S. 514 (1972).

and (4) the prejudice caused by the delay."[27] The Court must assess these factors, along with the other circumstances of the case, in their totality.[28]

3. Other Factors

Other factors are also considered in determining whether the right has been violated, such as: (a) the complexity of issues,[29] (b) the "amendments of procedural laws, the structural reorganizations in existing prosecutorial agencies, and the creation of new ones […], resulting in the change of personnel, preliminary jurisdiction, and functions and powers of prosecuting agencies,"[30] and (c) political interference.[31]

While the Court in a number of cases has ruled that the right may be waived by the parties for failure to timely invoke the right,[32] the Court has likewise noted that "mere inaction on the part of the accused, without more, does not qualify as an intelligent waiver of the right to speedy disposition of cases."[33] Moreover, the accused or respondent's contribution to the delay is weighed heavily against such person.[34]

4. The Cagang *Guidelines*

While there are many earlier cases that dealt with the right to speedy disposition, it was only in 2018 that the Court came up with a more comprehensive set of guidelines on the matter. Drawing from jurisprudential developments, the Court in *Cagang v. Sandiganbayan* formulated the *Cagang* guidelines.

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[27] Ombudsman v. Jurado, G.R. No. 154155, 561 SCRA 135, 151, Aug. 6, 2008, *citing Dela Peña*, 360 SCRA 478, 485.

[28] *Sandiganbayan (2020)*, G.R. No. 231144, *citing* Tumbocon v. Sandiganbayan, G.R. No. 235412, 884 SCRA 231, 238, Nov. 5, 2018.

[29] *Cadalin*, 238 SCRA 721, 722.

[30] Alvizo v. Sandiganbayan [hereinafter "*Alvizo*"], G.R. No. 101689, 220 SCRA 55, 64, Mar. 17, 1993.

[31] *Tatad*, 159 SCRA 70.

[32] *See* Tello v. People, G.R. No. 165781, 588 SCRA 519, June 5, 2009; Perez v. People [Hereinafter "*Perez*"], G.R. No. 164763, 544 SCRA 532, Feb. 12, 2008; Tilendo v. Ombudsman, G.R. No. 165975, 533 SCRA 331, Sept. 13, 2007; Guiani v. Sandiganbayan, G.R. No. 146897, 386 SCRA 436, Aug. 6, 2002; *Alvizo*, 220 SCRA 55.

[33] *Desierto*, G.R. No. 136506, slip op. at 50, *citing* Lorenzo v. Sandiganbayan [hereinafter "*Lorenzo*"], G.R. No. 242506, slip op. at 18, Sept. 14, 2022.

[34] *See* Albert v. Sandiganbayan, G.R. No. 164015, 580 SCRA 279, Feb. 26, 2009; *Ty-Dazo*, 374 SCRA 200.

The first guideline deals with the fundamental difference between the right to speedy disposition and right to speedy trial. As discussed, while both rights are designed to prevent the oppression of individuals, the right to speedy disposition of cases is broader in scope in that it is invoked not only against courts in criminal prosecutions—like the right to speedy trial—but also against courts and quasi-judicial or administrative bodies in civil, criminal, and administrative cases.[35]

The second guideline lays down the rule on when a case is deemed initiated, i.e., only upon the filing of a formal complaint. Re-examining the earlier case of *People v. Sandiganbayan*,[36] where the Court held that the period taken for fact-finding investigation should be included in counting the period of delay, the Court in *Cagang* ruled that only the period for preliminary investigation (when there is already a formal complaint) should be included.[37] The reason is that fact-finding investigations are not yet adversarial in nature and are merely preparatory.[38] At that point, there is no determination of probable cause yet.[39] It is only when a formal complaint is filed that the case is deemed initiated and the period of delay, if any, should commence.[40]

The third guideline summarizes the rule on burden of proof. If the alleged delay occurred within the period set by the rules, the defense must show that the right was justifiably invoked, in that "the case took much longer than was reasonably necessary to resolve" and that "efforts were exerted to protect [the accused or respondent's] constitutional rights."[41] In addition, the defense must also prove that (1) the case is motivated by malice or politics and "is attended by utter lack of evidence[,]" and (2) "that the defense did not contribute to the delay."[42]

On the other hand, if the alleged delay occurred beyond the given time periods, the prosecution becomes burdened with justifying the delay. In such case, the prosecution must prove three things: (1) that it followed the prescribed procedure in the conduct of preliminary investigation and in the prosecution of the case; (2) that the complexity of the issues and the volume of evidence made the delay inevitable; and (3) that "no prejudice was suffered

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[35] *Cagang*, 875 SCRA 374, 411.
[36] G.R. No. 188165, 712 SCRA 359, 415, Dec. 11, 2013.
[37] *Cagang*, 875 SCRA at 435–36.
[38] *Id.* at 435.
[39] Id.
[40] *Id.* at 436.
[41] *Id.*
[42] *Id.* at 450.

by the accused as a result of the delay."[43] If the prosecution is able to prove the foregoing elements, delay is justified and there is no violation of the accused or respondent's right to speedy disposition.

The fourth guideline provides the rule on determination of delay and the exceptions thereto. In general, courts must consider the circumstances of each case in making a decision.[44] There are two exceptions: (1) when there is an allegation of malice- or politics- induced prosecution, in which case the court must automatically dismiss the case, and (2) when there is waiver of the right by the respondent or accused, in which case the right to speedy disposition may no longer be invoked.[45] The first exception was impelled by the *Tatad* ruling where the Court found that "political motivations played a vital role in belatedly activating and propelling the prosecutorial process" against the accused.[46]

The fifth guideline deals with waiver of rights. Drawing from the earlier cases of *Alvizo v. Sandiganbayan, Dela Peña v. Sandiganbayan,* and *Duterte v. Sandiganbayan*,[47] the Court held that "the respondent or the accused must file the appropriate motion on or before the lapse of the statutory or procedural periods. Otherwise, they are deemed to have waived their right to speedy disposition of cases."[48]

Significantly, there is disagreement on the rule on waiver of rights as applied to speedy disposition cases. In his dissenting opinion, Associate Justice Alfredo Benjamin Caguioa opined that a respondent has no duty to follow up on the prosecution of his or her case as it is incumbent on the State *alone*, given its vast resources, to ensure a speedy disposition. However, Senior Associate Justice Marvic M.V.F. Leonen, through the majority opinion, pointed out the reality of institutional delay, in that the prosecution is staffed by overworked and underpaid government lawyers with mounting caseloads, and that the courts' dockets are congested. For the majority, delay, in the proper context, should not be taken against the State.[49]

The foregoing guidelines continue to be used by the Court in analyzing speedy disposition cases. Although *Cagang* involved a case within

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[43] *Id.* at 442–43.
[44] *Id.* at 446.
[45] *Id.* at 451.
[46] *Id.* at 416.
[47] [Hereinafter "*Duterte*"], G.R. No. 130191, 289 SCRA 721, Apr. 27, 1998.
[48] *Cagang*, 875 SCRA 374, 451, 437–40.
[49] *Id.* at 442.

the jurisdiction of the Ombudsman, the Court has already applied the guidelines in criminal cases pending before the regular courts to determine whether the right to speedy disposition has been violated.[50]

III. THE OFFICE OF THE OMBUDSMAN

One of the key constitutional bodies that play an important role in implementing and safeguarding the people's right to speedy disposition of cases is the Office of the Ombudsman, created under Section 5, Article XI of the Constitution: "There is hereby created the independent Office of the Ombudsman, composed of the Ombudsman to be known as *Tanodbayan*, one overall Deputy and at least one Deputy each for Luzon, Visayas, and Mindanao. A separate Deputy for the military establishment may likewise be appointed."[51]

The Office of the Ombudsman is tasked to act on complaints against public officials and employees of the government.[52] As part of its powers, it may prosecute such officials and employees for any illegal, unjust, improper, or inefficient conduct, and direct them to stop, prevent, or correct such conduct.[53] It gives priority to complaints against high-ranking and supervisorial officials, complaints involving grave offenses, and complaints involving large sums of money or properties.[54]

A. The Ombudsman's Duty to Resolve Cases Promptly

In relation to the right to speedy disposition of cases, the Constitution mandates the Ombudsman to act *promptly* on complaints, thus:

> The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and shall, in appropriate cases, notify the complainants of the action taken and the result thereof.[55]

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[50] Batungbacal v. People, G.R. No. 255162, Nov. 28, 2022.
[51] CONST. art. XI, § 5.
[52] Art. XI, § 12.
[53] Rep. Act No. 6770 (1989), §§ 15(1), (2). Ombudsman Act of 1989.
[54] § 15.
[55] CONST. art. IX, § 12.

The same duty is enshrined in Republic Act No. 6770 or the Ombudsman Act of 1989:

> Section 13. *Mandate.* — The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and enforce their administrative, civil and criminal liability in every case where the evidence warrants in order to promote efficient service by the Government to the people.[56]

Administrative Order No. 1-2020[57] provides guidance on what *promptly* means. It prescribes the periods in which the Ombudsman must conduct and conclude its fact-finding investigations, preliminary investigations, and administrative adjudication. As mentioned, for purposes of determining whether the right to speedy disposition had been violated, only the period of delay during the preliminary investigation is relevant. The period taken for fact-finding investigations is not counted since there is no determination of probable cause yet at that point.[58]

Under Administrative Order No. 1-2020, the period for completion of the preliminary investigation is 12 or 24 months, depending on the complexity of the case.[59] Such period may be extended for justifiable reasons upon written authority of the Ombudsman or the Overall Deputy Ombudsman or Deputy Ombudsman concerned.[60] The extension, however, shall not exceed one year.[61]

Before the issuance of Administrative Order No. 1-2020, the Court relied on the periods provided in the Rules of Court to determine the reasonable amount of time for the Ombudsman to conduct and conclude its investigations. Under Section 3, Rule 112 of the Rules of Court, the investigating officer has a maximum of 10 days from the filing of the complaint to either dismiss the same or issue a subpoena, and another 10 days after the investigation to determine whether or not there is sufficient ground

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[56] Ombudsman Act of 1989, § 13.
[57] Ombud. Adm. Order No. 1 (2020).
[58] *Cagang*, 875 SCRA 374, 456–58.
[59] Ombud. Adm. Order No. 1, § 8.
[60] § 8(c).
[61] § 8(c).

to hold the respondent for trial.[62] Further, under Section 4 of the same rule, the prosecutor has a maximum of five days to forward the records of the case to the provincial or city prosecutor or chief state prosecutor, who shall act on the resolution within 10 days from receipt thereof.[63]

Despite the specific periods in Administrative Order No. 1-2020 and the Rules of Court, the Court has held that failure to conclude investigations within the mandated period is not sufficient in itself to support a finding of violation of the right to speedy disposition of cases.[64] "The Court recognizes that there are constraints in the Ombudsman's resources [that hamper] its capacity to timely carry out its mandates [and] increasing caseload."[65] Thus, rather than relying on a mathematical computation to determine whether there has been a violation of the right to speedy disposition, the Court carefully weighs the facts and circumstances surrounding each case.[66]

B. Ombudsman Statistics on Caseload

One of the reasons often invoked by the Ombudsman when there is delay in its disposition of cases is its heavy caseload.[67] The Court has recognized the reality of clogged dockets that is partly responsible for institutional delays,[68] and that this problem must be addressed:

> [I]nstitutional delay [is] a reality that the court must address. The prosecution is staffed by overworked and underpaid government lawyers with mounting caseloads. The courts' dockets are congested. This Court has already launched programs to remedy this situation, such as the Judicial Affidavit Rule, Guidelines for Decongesting Holding Jails by Enforcing the Right of the Accused to Bail and to Speedy Trial, and the Revised Guidelines for Continuous Trial. These programs, however, are mere stepping stones. The complete eradication of institutional delay requires these sustained actions.[69]

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[62] RULES OF COURT, Rule 112, § 3.

[63] Rule 112, § 4.

[64] Ombud. Adm. Order No. 1, § 8(c). *See* Daep v. Sandiganbayan [hereinafter "*Daep*"], G.R. No. 244649, June 14, 2021.

[65] *Lorenzo*, G.R. No. 242506, slip op. at 15.

[66] *Cagang*, 875 SCRA 374, 446.

[67] *See Lorenzo*, G.R. No. 242506.

[68] Javier v. Sandiganbayan [hereinafter "*Javier*"], G.R. No. 237997, 937 SCRA 367, 380, June 10, 2020.

[69] *Cagang*, 875 SCRA at 441. (Citations omitted.)

The latest Ombudsman Annual Report reflects the Ombudsman's claim of heavy caseload. In 2019, the Office received a total of 9,251 new complaints on top of the 2,430 cases pending for evaluation, resulting in an 11,681 total case workload.[70] It also received 2,595 requests for assistance, in addition to the 549 carry-over cases from the previous year.[71] The case workload consisted of 4,205 administrative cases, 62 forfeiture cases, and 3,947 criminal cases.[72] As a consequence of the piling up of these cases, the disposition rate stood only at 15% in administrative cases, 16% in criminal cases, and 10% in forfeiture cases.[73] The complaints evaluation rate and requests for assistance disposition rate are however higher at 77% and 86%, respectively.[74]

IV. SURVEY OF CASES

Through the years, the Court has decided many cases involving high-ranking public officials who invoked a violation of their right to speedy disposition as a defense in instances where there was alleged delay in the Ombudsman proceedings. These cases often involve graft and corruption charges under Republic Act No. 3019 or the Anti-Graft and Corrupt Practices Act, and other crimes committed by public officers under the Revised Penal Code. In many of these suits, the Court ruled in favor of the government officials and ordered the dismissal of the complaints after finding that the Ombudsman failed to justify the delay. In the cases where the Court favored the prosecution, it found that the delay was not inordinate; that the delay was justified by the complex nature of the case; or that there was a waiver of such right on the part of the person invoking it.

A. Cases Where the Court Found a Violation of the Right to Speedy Disposition

Most recently, the Court resolved *Desierto,* one of the cases that arose out of the "Coco Levy Fund Scam."[75] The controversy involves the alleged

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[70] OFFICE OF THE OMBUDSMAN, ANNUAL REPORT 12 (2019), *available* at https://www.ombudsman.gov.ph/docs/08%20Resources/2019%20Ombudsman%20Annual%20Report.pdf.

[71] *Id.* at 15.

[72] *Id.* at 13.

[73] *Id.*

[74] *Id.* at 12, 15.

[75] Camille Elemia, *Coco Levy Fund Scam: Gold for the Corrupt, Crumbs for Farmers*, RAPPLER, Jan. 21, 2017, at https://www.rappler.com/newsbreak/in-depth/158066-coco-levy-fund-scam-coconut-farmers-quezon/.

diversion of multi-billion coconut levy funds exacted from farmers during the administration of then-President Ferdinand Marcos.[76] In *Desierto*, the Court resolved a complaint filed in 1990 against the supposed cronies of President Marcos, including respondents Juan Ponce Enrile and Eduardo Cojuangco Jr., alleging that they took advantage of their close relationship with the President to enter into a contract that was disadvantageous to the government. The complaint alleged that the acts were done in violation of Republic Act No. 3019.[77]

In resolving the case, the Court applied the third *Cagang* guideline, which deals with the determination of which party carries the burden of proof. Finding that the specified periods for preliminary investigation under the Rules of Court and Administrative Order No. 1-2020 had been exceeded, the Court ruled that the burden of proof shifted to the Republic. However, the Republic failed to overcome such burden, as it did not establish that the delay was reasonable and justified. Thus, the Court held that the delay should be taken against the government and in favor of the respondents:

> *With this case pending for over 30 years and possibly more without assurance of its resolution, the Court recognizes that the tactical disadvantages carried by the passage of time should be weighed against petitioner Republic and in favor of the respondents.* Certainly, if this case were remanded for further proceedings, the already long delay would drag on longer. Memories fade, documents and other exhibits can be lost and vulnerability of those who are tasked to decide increase with the passing of years. In effect, there would be a general inability to mount an effective defense.[78]

Considering that the respondents were able to invoke their right to speedy disposition in a timely manner pursuant to the fifth *Cagang* guideline, and considering further that the Republic failed to show the lack of prejudice against such them, the Court held that the respondent's right to speedy disposition of cases had been violated. Accordingly, the Court ordered the Ombudsman to dismiss the case.[79]

Aside from *Desierto*, speedy disposition cases arose from another controversy, i.e., the "Fertilizer Fund Scam."[80] The controversy involves the

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[76] *See* Republic v. Sandiganbayan, G.R. No. 166859, 648 SCRA 47, Apr. 12, 2011. *See also* Elemia, *supra* note 75.

[77] *Desierto*, G.R. No. 136506, slip op. at 2.

[78] *Id.* at 50–51. (Emphasis supplied, citations omitted.)

[79] *Id.* at 51.

[80] *See Daep*, G.R. No. 244649.

alleged misappropriation of 728 billion pesos in fertilizer funds intended for Filipino farmers, in order to back the campaign of then-President Gloria Macapagal-Arroyo.[81] The scandal impelled the formation of the Ombudsman's *Task Force Abono*, tasked to investigate the officials implicated in the scam.[82] This resulted in the indictment of several national and local public officials and employees, as well as private individuals, for graft and corruption relating to anomalies in the procurement of fertilizers. The finding of probable cause was supported by the audit findings of the Commission on Audit.[83]

In these cases, the Court often rejected the Ombudsman's justification for delay, i.e., heavy caseload or complexity of the case. For instance, in *Javier v. Sandiganbayan*, high-ranking provincial officials were charged with graft and corruption for overpricing and lack of public bidding in the purchase of fertilizers, with the damage to the government estimated to be about 9.4 million pesos.[84] Applying the second *Cagang* guideline which deems the case initiated only upon the filing of a formal complaint, the Court did not count the period before the filing of such complaint in determining the amount of delay.[85] Nevertheless, it still found that there was a delay of five years from the time the counter-affidavits were filed up to the termination of the preliminary investigation.[86] Such delay was unjustified, considering that the prosecution did not discharge its burden under the third *Cagang* guideline, which requires proving that (1) the prosecution followed the prescribed procedure in the conduct of preliminary investigation and in the prosecution of the case; (2), that the complexity of the issues and the volume of evidence made the delay inevitable; and (3) that no prejudice was suffered by the accused as a result of the delay. More particularly, the prosecution failed to substantiate its defense of voluminous records and merely relied on the Court's previous recognition of the office's heavy workload.[87] Because of such failure, the Court found petitioners' right to speedy disposition to have been

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[81] Inquirer Research, *WHAT WENT BEFORE: Fertilizer Fund Scam*, INQUIRER, Dec. 13, 2016, *at* https://newsinfo.inquirer.net/853086/what-went-before-fertilizer-fund-scam-2. *See* People v. Sandiganbayan [hereinafter "*Sandiganbayan (2022)*"], G.R. No. 233059, Feb. 16, 2022.

[82] *Sandiganbayan (2022)*, G.R. No. 233059, slip op. at 2.

[83] Catamco v. Sandiganbayan [hereinafter "*Catamco*"], G.R. No. 243560, 945 SCRA 548, 553, July 28, 2020.

[84] *Javier*, 937 SCRA 367, 370–71.

[85] *Id.* at 375–76.

[86] Id.

[87] *Id.* at 377–78.

violated and accordingly ordered the Sandiganbayan to dismiss the complaint.[88]

Many other fertilizer funds cases were decided in a similar fashion. Some of these are listed as follows:

TABLE 1. Delays in Fertilizer Funds Cases

Case	Length of Delay in the Ombudsman Proceedings	Amount involved
Martinez v. People[89]	Almost 5 years	6 million pesos
People v. Sandiganbayan[90]	6 years, 2 months, and 7 days	4.998 million pesos
Camsol v. Sandiganbayan[91]	Approximately 6 years	1.05 million pesos
People v. Sandiganbayan[92]	5 years and 6 months	3 million pesos
Lerias v. Ombudsman[93]	3 years, 9 months, and 1 day	3.25 million pesos
People v. Sandiganbayan[94]	4 years and 6 months	4.268 million pesos

Another important case is *Tatad*, which served as basis for the fourth *Cagang* guideline that when the case is maliciously-motivated, it should automatically be dismissed.[95] In *Tatad,* then Secretary and Head of the Department of Public Information Francisco S. Tatad was charged with violations of Sections 3 (b), 3 (e), and 7 of Republic Act No. 3019 for giving unwarranted benefits to a relative, among others.[96] In finding a violation of petitioner's right to speedy disposition, the Court found that political motivations played a vital role in belatedly activating and propelling the prosecutorial process.[97] Further, there were deviations from the established procedures prescribed by law for preliminary investigation. The Court declared that it would not hesitate to grant "'radical relief' and [ ] spare the accused from undergoing the rigors and expense of a full-blown trial where it is clear that he has been deprived of due process of law or other constitutionally guaranteed rights."[98]

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[88] *Id.* at 383.
[89] G.R. No. 232574, 921 SCRA 242, Oct. 1, 2019.
[90] G.R. No. 239878, Feb. 28, 2022.
[91] G.R. No. 242892, July 6, 2022.
[92] *Sandiganbayan (2022)*, G.R. No. 233059.
[93] G.R. No. 241776, Mar. 23, 2022.
[94] G.R. No. 229656, 914 SCRA 445, Aug. 19, 2019.
[95] *Tatad*, 159 SCRA 70.
[96] *Id.* at 71.
[97] *Id.* at 81.
[98] *Id.* at 80.

The foregoing represents only a small part of cases where the Court ruled in favor of the officials who invoked their right to speedy disposition of cases. There are several more that illustrate how delay in the Ombudsman proceedings resulted in the dismissal of the complaints against such officials despite the gravity of the offense and the huge sums of public funds involved.

B. Cases Where the Court Found No Violation of the Right to Speedy Disposition

While there are many cases upholding the respondent or the accused's right to speedy disposition, there are also many others where the Court favored the prosecution despite the delay in the Ombudsman's proceedings. In these cases, the Court observed the presence of one or more circumstances:

1) The prosecution followed the prescribed procedure in the conduct of preliminary investigation and in the prosecution of the case;
2) The complexity of the issues and the volume of evidence made the delay inevitable;
3) No prejudice was suffered by the respondent or the accused as a result of the delay;
4) The case was not maliciously or politically motivated by malice;
5) The respondent or the accused contributed to the delay; and
6) The respondent or the accused waived their right to speedy disposition of cases.

For instance, in *Salcedo v. Sandiganbayan*,[99] several municipal officials were charged in relation to the alleged illegal releases of government funds intended for local government projects. A total of 92 informations were filed before the Sandiganbayan for violation of Republic Act No. 3019 and Malversation.[100] When the case reached the Court, the municipal mayor invoked his right to speedy disposition and claimed that the conduct of the preliminary investigation spanned for a long period of four years and three months.[101] However, despite such delay, the Court ruled that the right had not been violated since the mayor failed to seasonably assert his right, applying the *Cagang* guideline that if it can be proven that the accused acquiesced to the delay, the right can no longer be invoked.[102]

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[99] [Hereinafter "*Salcedo*"], G.R. No. 223869, 893 SCRA 25, Feb. 13, 2019.
[100] *Id.* at 32.
[101] *Id.* at 37.
[102] *Id.* at 45–47.

Similarly, in the fertilizer funds case of *Daep v. Sandiganbayan*, local government officials were charged with violation of Section 3(e) of Republic Act No. 3019 for the anomalous disbursement of 2.9 million pesos allotted for fertilizers.[103] While the preliminary investigation lasted for approximately three years, the Court did not order the dismissal of the complaint after considering other factors, such as the several people involved, the volume of the documents, the intricacy of issues, and the fact that the influx of cases arising from the scam congested the Ombudsman's docket. The Court stressed that the right to speedy disposition of cases is a relative and flexible concept and that the assertion of the right depends on the peculiar circumstances of the case, consistent with the rule that determination of the length of delay is never mechanical.[104] Such was also the ruling of the Court in many other cases.[105]

V. APPROACHES TO SPEEDY CASE DISPOSITION IN OTHER JURISDICTIONS

The right to speedy disposition is not unique to the Philippines. Other jurisdictions have similar or related rights intended to ensure that proceedings are swiftly concluded and not delayed. In this section, the respective approaches to speedy case disposition in the US and South Africa will be examined in order to determine possible solutions and alternative remedies that may help ensure a more balanced and holistic approach to speedy case disposition. Further, the experience of Indonesia as to its anti-corruption agency will also be considered to determine potential measures to strengthen our own Ombudsman.

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[103] *Daep*, G.R. No. 244649.

[104] *Id.*

[105] *See* Gonzales v. Sandiganbayan, G.R. No. 94750, 199 SCRA 298, July 16, 1991; Binay v. Sandiganbayan [Hereinafter "*Binay*"], G.R. No. 120681, 316 SCRA 65, Oct. 1, 1999; Castillo v. Sandiganbayan. G.R. No. 109271, 328 SCRA 69, Mar. 14, 2000; Rodriguez v. Sandiganbayan, G.R. No. 141710, 424 SCRA 236, Mar. 3, 2004; Bernat v. Sandiganbayan, G.R. No. 158018, 428 SCRA 787, May 20, 2004; Mendoza-Ong v. Sandiganbayan, G.R. No. 146368, 440 SCRA 423, Oct. 18, 2004; Bautista v. Sandiganbayan, G.R. No. 238579, 588 SCRA 279, July 24, 2019; People v. Sandiganbayan, G.R. No. 240776, 925 SCRA 678, Nov. 20, 2019; Republic v. Sandiganbayan, G.R. No. 231144, Feb. 19, 2020; Pancho v. Sandiganbayan, G.R. No. 234886, 938 SCRA 487, June 17, 2020; Baya v. Sandiganbayan, G.R. No. 204978, 941 SCRA 69, July 6, 2020; Grageda v. Fact-Finding Investigation Bureau, G.R. No. 244042, Mar. 18, 2021; Palacpac v. Sandiganbayan, G.R. No. 249243, Nov. 10, 2021; Arroyo v. Sandiganbayan, G.R. No. 210488, Dec. 1, 2021; Chingkoe v. Sandiganbayan [hereinafter "*Chingkoe*"], G.R. No. 232029, Oct. 12, 2022; People v. Sandiganbayan, G.R. No. 233557, June 19, 2019; Doroteo v. Sandiganbayan, G.R. No. 232765, Jan. 16, 2019.

A. United States of America

There are two important constitutional rights in the United States that protect against inordinate delays in proceedings: the right to speedy trial, which attaches after a person is officially charged in a criminal proceeding,[106] and the right to due process, which applies to pre-indictment delays or delays prior to the official charging or accusation of the person.[107] Both rights are relevant to our own right to speedy disposition of cases: while the right to due process as applied to pre-indictment delays corresponds to our own right to speedy disposition,[108] the right to speedy trial served as the initial basis of our Supreme Court in defining the parameters of the right to speedy disposition of cases.[109] Thus, both of these rights will be discussed in this section.

1. The Right to Speedy Trial in the United States

The Sixth Amendment guarantees the right of the accused to speedy trial in criminal prosecutions: "[i]n all criminal prosecutions, *the accused shall enjoy the right to a speedy and public trial*."[110]

The balancing test, which was first used by the Philippine Supreme Court to analyze an alleged violation of the right to speedy disposition under the 1987 Constitution, was formulated by the US Supreme Court in *Barker*, a case involving the right to speedy trial.[111] In formulating the test, the US Supreme Court considered the opposing interests of the parties involved in a

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[106] *See* United States v. Marion [hereinafter "*Marion*"], 404 U.S. 307, 318–19 (1971).

[107] Pre-indictment delay is defined as "transpir[ing] between the occurrence of the criminal offense and the arrest, indictment, or other formal charging of the suspect." Joseph Davis, *Pre-Accusation Delay - Constitutional Limitations*, 45 FBI L. ENF'T BULL. 11, 11 (1976). It has also been defined as "occur[ing] when there is a time lapse between completion of a prosecution's investigation of a case and notification of the defendant of the charges to be brought against him [or her]." Janis Merle Caplan, *Better Never Than Late: Pre-Arrest Delay as a Violation of Due Process*, 1978 DUKE L.J. 1041, 1041. "Pre-arrest, pre-indictment, and pre-accusation delay are synonymous […]." Juanita Dean, *Pre-Arrest Delay: A Problem of the Potential Defendant*, 31 HOW. L.J. 381, 381 (1988).

[108] The concept of pre-indictment delay is broader in scope compared to the delay covered by the right to speedy disposition of cases. Pre-indictment delay covers the duration of the prosecution's investigation in general. Caplan, *supra* note 107, at 1041. On the other hand, the delay covered by the right to speedy disposition pertains to the duration of preliminary investigations only, not fact-finding investigations. *Cagang*, 875 SCRA 374, 456–58.

[109] *Barker*, 407 U.S. 514.

[110] U.S. CONST. amend. VI. (Emphasis supplied.)

[111] *Barker*, 407 U.S. 514.

speedy trial case, which are also similar to the interests of the parties in a speedy disposition case. The accused's interest lies in preventing oppressive incarceration, minimizing anxiety and concern, and limiting the possibility that the defense will be impaired.[112] The society's interest, on the other hand, lies in preventing a backlog of cases, persons awaiting trial from committing more crimes, delay from being used as a defense tactic, and witnesses from becoming unavailable or from losing their memory.[113]

The Court also considered other approaches in analyzing an alleged speedy trial violation. These approaches include (1) mandating a fixed period within which to conclude the trial, and (2) applying the demand-waiver rule, under which the accused is considered to have waived the right for all the times that he or she did not demand trial. After considering the first approach as an encroachment upon legislative prerogative, the Court rejected setting a fixed period.[114] It also refused to apply the demand-waiver rule for being inconsistent with the nature of waiver as an *intentional* relinquishment or abandonment of a known right, and for burdening the accused with the State's duty to conduct the trial promptly.[115] In the end, the Court settled on the assessment of the four factors.[116]

Significantly, *Barker* declared that the only possible remedy to a violation of the right to speedy trial is dismissal of the case. The remedy is rooted in the fundamental belief that the right to speedy trial is different from other criminal procedural rights and that unlike other rights of the accused, a violation thereof cannot be cured by a new trial.[117] Thus, even if dismissal is "more serious than an exclusionary rule or a reversal for a new trial, […] it is the only possible remedy."[118]

The Philippine Supreme Court has adopted the same remedy to a violation of the right to speedy disposition of cases. In cases of inordinate delays in preliminary investigation, the Court has ordered the dismissal of the charges.[119] Despite the similarity in remedy, however, the Court has repeatedly stressed that the rights are different, thus:

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[112] *Id.* at 532.

[113] *Id.* at 519–21.

[114] *Id.* at 523.

[115] *Id.* at 525–27.

[116] *Id.* at 530.

[117] Brian Brooks, *A New Speedy Trial Standard for* Barker v. Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 601–02 (1994).

[118] *Barker*, 407 U.S. 514, 522. (Citation omitted.)

[119] *See supra* Part IV.

> First, the right to speedy disposition of cases is different from the right to speedy trial. While the rationale for both rights is the same, the right to speedy trial may only be invoked in criminal prosecutions against courts of law. The right to speedy disposition of cases, however, may be invoked before any tribunal, whether judicial or quasi-judicial. What is important is that the accused may already be prejudiced by the proceeding for the right to speedy disposition of cases to be invoked.[120]

Considering this fundamental difference, and despite its initial reliance on *Barker*, the Philippine Supreme Court has since formulated its own guidelines in analyzing speedy disposition cases, taking into account the Philippine experience. This resulted in the *Cagang* guidelines currently used by the Court in deciding such cases.

As for the US, while the Sixth Amendment does not apply to pre-indictment proceedings,[121] the US Supreme Court has pronounced that persons are nevertheless protected from pre-indictment delays by the due process clause of the US Constitution, as well as by the different statutes of limitations in every state.[122]

2. Pre-indictment Delays in the US

In *Ross v. United States*,[123] the US Court of Appeals for the District of Columbia Circuit declared that while the right to speedy trial does not apply to pre-indictment delays, a person may be protected from such delay by the due process clause of the Constitution, based on the proposition that "due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused."[124]

The applicability of the right, however, is limited—due process is violated only when the defendant's ability to defend against the charge is impaired by the delay and the reason for the delay is improper.[125] This

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[120] *Cagang*, 875 SCRA 374, 449–501.

[121] *Marion*, 404 U.S. 307, 318–19, *but see* Caplan, *supra* note 107, at 1047–48, where it was noted that the US Supreme Court, in *Marion*, left "open the possibility that pre-arrest delay could constitute a fifth amendment violation in other factual contexts."

[122] *See Marion*, 404 U.S. at 322; Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).

[123] 349 F.2d 210 (D.C. Cir. 1965).

[124] *Id.* at 211, *citing* Nickens v. United States, 323 F.2d 808, 810 n.2 (1963).

[125] *See* United States v. Lovasco [hereinafter "*Lovasco*"], 431 U.S. 783, 790 (1977).

limitation emanates from the view that pre-indictment delay is not harmful *per se* and is even sometimes beneficial to both the defendant and the investigator, thus:

> It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists, but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself[.]" *From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried.* These costs are by no means insubstantial, since, as we recognized in Marion, a formal accusation may "interfere with the defendant's liberty, … disrupt [their] employment, drain [their] financial resources, curtail [their] associations, subject [them] to public obloquy, and create anxiety in [them], [their] family and [their] friends." *From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable, because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts.* Thus, no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so.[126]

For the due process clause to afford protection, defendants must strictly show (1) that they suffered from actual prejudice, and (2) that the reason for the delay is improper.[127] To show actual prejudice, defendants must demonstrate that the delay "impaired [their] ability to defend against the charge."[128] "General allegations that the passage of time has caused memories to fade are insufficient[.] […] Instead, the defendant must establish that pre-accusation delay caused the loss of significant and helpful testimony or evidence."[129] They must also prove that the delay was attributable to "investigation, negligence, administrative considerations, or an improper

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[126] *Id.* at 791–92. (Emphasis supplied, citations omitted.)

[127] *Id.* at 790. *See* I JOHN RUBIN, PHILLIP DIXON, & ALYSON GRINE, UNC SCHOOL OF GOVERNMENT, NORTH CAROLINA DEFENDER MANUAL 7-13 (2013), *available at* https://defendermanuals.sog.unc.edu/pretrial/72-pre-accusation-delay.

[128] *Id.*

[129] RUBIN, DIXON, & GRINE, *supra* note 127, at 7-13 to 7-14.

attempt to gain some advantage over the defendant,"[130] and that such delay was "intentional or at least the result of gross negligence or deliberate indifference on the part of a state actor."[131]

Aside from the due process clause, statutes of limitations also protect against pre-indictment delays.[132] These statutes fix the period of time in which criminal prosecution may be pursued following the commission of the crime.[133]

Similar to the remedy to speedy trial, dismissal is also the remedy to pre-indictment delays.[134] Rule 48(b) of the Federal Rules of Criminal Procedure states that "court[s] may dismiss an indictment, information, or complaint if unnecessary delay occurs in presenting a charge to a grand jury; filing an information against a defendant; or bringing a defendant to trial."[135] The reason for the rule is the same as in *Barker*: pre-indictment delay is a matter that is "beyond the power of the [State] to cure since reindictment would not [be] permissible under such ruling."[136]

3. The Public Integrity Section of the Department of Justice

One of the bodies tasked to ensure that pre-indictment proceedings are not delayed in the US is the Department of Justice's Public Integrity Section, the office which oversees the investigation and prosecution of all federal corruption cases in the US.[137] While in name, there is an Office of the Ombudsman in the US, its mandate differs from our own Ombudsman. The Office of the Ombudsman in the US "handles workplace conflicts [in the US State Department] and helps employees identify mutually satisfactory solutions."[138]

On the other hand, the Public Integrity Section supervises the prosecution of criminal abuses by government officials in the US. It has the following mandate:

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[130] *Id.* at 7-14.

[131] *Id.*

[132] *Marion*, 404 U.S. 307, 322–23.

[133] *Id.*

[134] *See Lovasco*, 431 U.S. 783.

[135] FED. R. CRIM. P. 48(b).

[136] *Marion*, 404 U.S. at 312.

[137] *About the Public Integrity Section*, US DEP'T OF JUST. WEBSITE, *at* https://www.justice.gov/criminal-pin/about (last updated Aug. 11, 2023).

[138] *Office of the Ombudsman*, US DEP'T OF STATE WEBSITE, *at* https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-ombudsman/.

> The [Public Integrity Section] investigates and prosecutes alleged misconduct of public officials in all three branches of the federal government, as well as state and local public officials. [The Public Integrity Section] has exclusive jurisdiction over allegations of criminal misconduct on the part of federal judges and also supervises the nationwide investigation and prosecution of election crimes. The Election Crimes Branch, created in 1980, oversees the Department's response to election crimes, such as voter fraud and campaign-financing offenses.[139]

Significantly, a survey of US Supreme Court federal cases reveals that pre-indictment delay in cases prosecuted by the Public Integrity Section does not appear to be a problem in the United States. Unlike in the Philippines where there are many cases involving inordinate delays in Ombudsman proceedings, there is a dearth of cases involving pre-indictment delay in those handled by the Public Integrity Section.

In general, the dearth of cases involving pre-indictment delays may be attributed to the US Supreme Court's treatment of pre-indictment delay as not harmful *per se*, as enunciated in *United States v. Lovasco*. As mentioned, the accepted view is that pre-indictment delay is sometimes necessary for effective prosecution.[140] Thus, the applicability of the right to due process as a protection against pre-indictment delay is limited only to cases where the defendant's ability to defend against the charge is impaired by the delay and the reason for the delay is improper.[141] Absent such prejudice or improper reason for the delay, the due process clause will not provide any redress.[142]

Additionally, the dearth of cases may be attributed to the following:

First, the office gives the highest priority to cases involving public corruption. Based on its report, "most of [its] resources are devoted to investigations involving alleged corruption by government officials and to prosecutions resulting from these investigations."[143]

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[139] US DEP'T OF JUST. WEBSITE, *supra* note 137.

[140] *See Lovasco*, 431 U.S. 783, 791–95.

[141] *Id.* at 790.

[142] *See also* Davis, *supra* note 107, at 14, where it was noted that courts in the US "have generally been sympathetic to the need for some delay […]."

[143] PUBLIC INTEGRITY SECTION, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2021, at 1 (2021), *at* https://www.justice.gov/criminal-pin/file/1548051/download.

Second, the US Justice Department's Principles of Federal Prosecution, which the Public Integrity Section follows, provides a mechanism to ensure prompt resolution of cases.[144] Notably, in decision-making, prosecutors are mandated to take into account how the decision would affect the speedy disposition of the case. For instance, in plea agreements, the Principles of Federal Prosecution directs prosecutors to "make clear to [the] defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date, and well in advance of the trial date."[145] Further, prosecutors are required to consider the need to avoid delay in the disposition of other pending cases.[146]

Third, the office accords great import to public perception, ensuring that the way it handles cases gives the "appearance and the reality of fairness[,]"[147] which may include promptly conducting its proceedings.

Because of the way it handles its cases, the Public Integrity Section regularly reports good statistics. Based on its 2021 Annual Report, out of the 646 persons charged, 598 were convicted,[148] resulting in a 92.57% conviction rate. In the past five years, it has also reported a relatively high conviction rate, i.e., 74.68% in 2020, 94.10% in 2019, 90.85% in 2018, 96.99% in 2017, and 90.22% in 2016.[149]

B. South Africa

The Constitution of the Republic of South Africa recognizes the right to a fair trial, which expressly includes the right to have the trial begin and conclude without unreasonable delay.[150] In line with this, South African courts

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[144] US DEP'T OF JUST., JUSTICE MANUAL (2018), *available at* https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

[145] *Id.* at tit. 9-27.420

[146] *Id.*

[147] PUBLIC INTEGRITY SECTION, *supra* note 143, at 1.

[148] *Id.* at 23.

[149] *Id.* at 25. Conviction rates are extrapolated from the following data:
2020: Charged: 628; Convicted: 469
2019: Charged: 780; Convicted: 734
2018: Charged: 765; Convicted: 695
2017: Charged: 863; Convicted: 837
2016: Charged: 982; Convicted: 886

[150] Sanderson v. Attorney Gen., Eastern Cape [hereinafter "*Sanderson*"], 1998 (2) SA 38, ¶ 20–21 (1997).

recognize that "a speedy conclusion to criminal proceedings [is] critical to a fair trial."[151]

This right to speedy trial is also protected under Criminal Procedure Act 51 of 1977, which allows courts to grant various remedies in the event of unreasonable delays during trial. Individuals who are prejudiced by unreasonable delay in investigations prior to commencement of trial may likewise request for a permanent stay of prosecution, on the ground of the violation of their right to have the trial begin without unreasonable delay.

1. Right to Speedy Trial in South Africa

Section 35(3)(d) of the South African Constitution states that "[e]very person has the right to a fair trial, which includes the right […] to have their trial begin and conclude without unreasonable delay."[152] This right is placed under the backdrop of a severely clogged criminal justice system, caused in part by financial constraints, forensic backlog, the "loss of experienced police officers at the start of the democrati[z]ation of South Africa," and inept presidential appointments.[153]

There is no strict formula to determine a violation of an individual's right to speedy trial under Section 35(3)(d), and the imposition by courts of rigid timeframes on the prosecuting authority is considered inappropriate.[154] The "critical question" in such determination is whether the lapse of time in question is reasonable.[155] The test utilized for this purpose is the *Barker* balancing test[156] which involves weighing different factors, such as:

> (a) prejudice to the accused, duration of the delay, the accused's waiver of certain time periods, and the State's reasons for the delay;[157]

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[151] Pumza Nomnganga, The Right to a Speedy Trial for Crime Victims in South Africa (Mar. 2022), at 23 (dissertation for Ll.M., Walter Sisulu University), *at* http://vital.seals.ac.za:8080/vital/access/services/Download/vital:49307/SOURCE1.

[152] S. AFR. CONST. ch. 2, § 35(3)(d).

[153] Delano Cole Van der Linde, *Once, Twice, Three Times Delayed: Considering a Permanent Stay of Prosecution in Rodrigues v. The National Director of Public Prosecutions*, 25 POTCHEFSTROOM ELEC. L.J. 1, 2–3 (2022).

[154] *Id.* at 5–6.

[155] *Sanderson*, 1998 (2) SA 38, ¶ 25.

[156] *Id.*

[157] Van der Linde, *supra* note 153, at 6.

(b) the accused's contribution or consent to the delays or postponements;[158]
(c) the interest of society to prosecute and punish individuals who potentially committed an offense *vis-à-vis* the debasement of the presumption of innocence caused by an ongoing trial;[159]
(d) the nature[160] and complexity[161] of the case; and
(e) witnesses' availability and willingness to cooperate and systemic factors, such as resource limitations of police stations and backlogged courts.[162]

The burden of proof "rests on the person who avers that there have been unreasonable delays."[163] The application for a stay of prosecution has been rejected in cases for as long as 47 years[164] or 37 years.[165] However, 7 years previously proved to be sufficient for the Court to order a permanent stay of execution considering the circumstances.[166]

In the event a High Court finds a violation of an individual's constitutional right to speedy trial under Section 35(3)(d), it may order a permanent stay of prosecution, pursuant to the courts' powers to grant appropriate relief for a violation of a right under the Bill of Rights under Section 38 of the Constitution.[167] Only a High Court may grant a permanent stay of prosecution, subject to appeal.[168] A permanent stay of prosecution is

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[158] *Id.* at 7.
[159] *Id.*, *citing Sanderson*, 1998 (2) SA 38, ¶ 36.
[160] Nomnganga, *supra* note 151, at 61.
[161] *Id.* at 26; Van der Linde, *supra* note 153, at 7.
[162] Van der Linde, *supra* note 153, at 7.
[163] Nomnganga, *supra* note 151, at 60.
[164] Rodrigues v. Nat'l Dir. of Pub. Prosecutions, 3 SA 775 (2021).
[165] Bothma v. Els [hereinafter "*Bothma*"], 2010 (2) SA 622 (2009).
[166] Broome v. Dir. of Pub. Prosecutions, Western Cape [hereinafter "*Broome*"], 2008 (1) SACR 178 (2007).
[167] Van der Linde, *supra* note 153, at 4.
[168] Nomnganga, *supra* note 151, at 61–62. South Africa's judicial system comprises the Supreme Court of Appeal, High Court, and magistrates' courts, as well as several special courts. "The High Court deals with appeals from the magistrates' courts and the most serious civil and criminal cases, [and] other less serious cases by the magistrates' courts. Cases before the High Court are heard by a single judge, appeals by at least two judges." *Judicial System of South Africa*, COMMONWEALTH GOVERNANCE WEBSITE, *at* https://www.commonwealthgovernance.org/countries/africa/south_africa/judicial-system/#:~:text=Judicial%20System%20of%20South%20Africa&text=The%20judicial%20system%20comprises%20the,courts%2C%20and%20Land%20Claims%20Court.

a common law remedy[169] and has the same effect as acquittal, i.e., the termination of the proceedings, but sans a ruling by the Court on the evidentiary aspect of the charge.[170]

The Constitutional Court of South Africa has cautioned that in determining what constitutes a reasonable lapse of time, "courts must [always be] mindful of the profound social interest in bringing a person charged with a criminal [offense] to trial," especially when considering applications for a permanent stay of prosecution.[171] "A criminal trial is intended to afford justice not only to the accused person but also to the victim of crime and society[,]"[172] and a permanent stay of prosecution will result in alleged perpetrators, who amassed their wealth at the expense of ordinary citizens, to walk away with impunity,[173] which undermines public confidence in the criminal justice system and adversely impacts democratic institutions. Thus, it is considered an extreme and "drastic remedy" to be employed only when the delay has "caused irreparable prejudice to the accused."[174]

In connection with the foregoing, South African courts recognize three forms of prejudice caused by inordinate delays in trial: (a) loss of personal liberty, (b) impairment of personal security due to reputational harm, ostracism, and unemployment, and (c) trial-related prejudice, such as the degradation of evidence and witness memory, death, or unavailability.[175] To justify a permanent stay of prosecution, there must be trial-related prejudice and/or exceptional circumstances that would warrant its grant.[176] Significantly, an accused who applies for a permanent stay of prosecution may not simply make "vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses […] [as] trial-related prejudice must be definite and not speculative."[177]

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[169] Nomnganga, *supra* note 151, at 59.

[170] Londeka Zandile Ngalo, *The Right to A Fair Trial: An Analysis of s342 (A), s168 of the Criminal Procedure Act and a Permanent Stay of Prosecution,* at 52 (July 2017) (research project in partial fulfillment of an LL.M. degree, University of Kwazulu-Natal), *available at* https://researchspace.ukzn.ac.za/bitstream/handle/10413/16139/Ngalo_Londeka_2018.pdf?sequence=1&isAllowed=y.

[171] *Sanderson*, 1998 (2) SA 38, ¶ 36.

[172] Nomnganga, *supra* note 151, at 3.

[173] Van Der Linde, *supra* note 153, at 5, *citing Broome*, 2008 (1) SACR 178, ¶ 81.

[174] *Id.* at 4, *citing Bothma*, 2010 (2) SA 622, ¶ 18.

[175] *Id.* at 3, *citing State v. Jackson*, 2008 (2) SACR 274, ¶ 31 (2007).

[176] Ngalo, *supra* note 170, at 48; *See also Wild v. No*, 1998 (3) SA 695 (1998).

[177] *Id.* at 46, *citing* Zanner v. Dir. of Pub. Prosecutions, Johannesburg [hereinafter "*Zanner*"], 2006 (2) All SA 588, ¶ 16 (2006). *See also* Nomnganga, *supra* note 151, at 60.

Significantly, the Criminal Procedure Act No. 51 of 1977 expressly empowers South African courts to investigate delays in the proceedings, and to grant remedies to address and/or minimize delays in trial other than drastically granting a permanent stay of prosecution. Section 342A(1) of the Act states:

> A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.[178]

The above section was crafted "based on a study of the factors that contribute to delays in the resolution of criminal cases."[179] For courts to determine whether the delay is unreasonable, Section 342A(2) enumerates several factors to be considered.[180] Upon determining "that the completion of the proceedings is being delayed unreasonably, [courts are empowered under Section 342A(3)] to issue [orders] to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice."[181] Such orders include:

(a) refusing further postponement of the proceedings;
(b) granting a postponement, subject to any such conditions as the court may determine;
(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;
(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed

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[178] Criminal Procedure Act No. 51 of 1977 (S. Afr.) § 324A(1).

[179] Nomnganga, *supra* note 151, at 5.

[180] These factors include: (a) The duration of the delay; (b) the reasons advanced for the delay; (c) whether any person can be blamed for the delay; (d) the effect of the delay on the personal circumstances of the accused and witnesses; (e) the seriousness, extent or complexity of the charge or charges; (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost; (g) the effect of the delay on the administration of justice; (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; and (i) any other factor which in the opinion of the court ought to be taken into account. § 342A(2).

[181] § 342A(3).

> of as if the case for the prosecution or the defence, as the case may be, has been closed;
> (e) that -
> (i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;
> (ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or
> (f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.[182]

Significantly, under Section 342A(4), an order contemplated in (a), where the accused has pleaded to the charge, and an order contemplated in (d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defense or the State has given notice beforehand that it intends to apply for such an order.[183] Moreover, in the event of a cost order under subsection (e), the cost order shall have the effect of a civil judgment of that court.[184]

2. Applications for Permanent Stay of Prosecution on the Ground of Unreasonable Delay in the Commencement of Criminal Proceedings

Significantly, a permanent stay of prosecution may also be granted for unreasonable delays in investigations. However, the reliefs in Section 342A, which apply only to assuage delays during trial, are not available.

In *Broome v. Director of Public Prosecutions, Western Cape*, an application for a permanent stay of prosecution was filed on account of delay which occurred before the commencement of trial.[185] The court therein noted that there was an inadequately explained time lapse between the completion of the investigation, the referral of the case to the Director of Public Prosecutions ("DPP"), and the accused's first appearance in court, which took approximately seven years.[186] The court also considered the State agents' consequential loss of audit documents, which were vital for the accused to mount a proper defense and would thus cause irreparable trial-related

[182] § 342A(3).
[183] § 342A(4).
[184] § 342A(5)(b).
[185] *Broome*, 2008 (1) SACR 178, ¶ 3.
[186] *Id.*, ¶ 57.

prejudice against the accused.[187] The inadequately-explained delay, coupled with the consequential loss of documents, was considered irreparable trial prejudice, warranting the grant of a permanent stay of prosecution.[188]

However, the court in *Broome* also noted that a permanent stay of prosecution was granted only due to the extraordinary circumstances therein and stressed that South African courts have "constantly sought not to bar the prosecution before the trial begins[,]" as granting a permanent stay of prosecution "prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct" which may "undermine public confidence in the criminal justice system and […] adversely impact [the] the functions of democratic institutions in [the] country."[189]

In *Naidoo v. State*,[190] the Court also considered an application for a permanent stay of prosecution on account of delay which occurred before the commencement of criminal proceedings.[191] The Court observed that an application for a permanent stay of prosecution on account of delays that occurred *before* the commencement of trial proceedings, i.e., extra-curial delays, are not within the ambit of Section 342(a); hence, jurisdiction for such applications is only with the High Courts, to the exclusion of magistrate courts.[192] In contrast, applications for a permanent stay of prosecution on account of delays that occur *after* the commencement of criminal proceedings, i.e., intra-curial delays, may be resolved by the court seized with the criminal proceedings.[193] The Court in *Naidoo* likewise noted that an order granting a permanent stay of prosecution by reason of an unreasonable delay in the commencement of criminal proceedings has previously been granted only once before, in *Broome*, not only due to the unreasonable delay in the institution of criminal proceedings, but also the considerable amount of the documentary evidence confiscated from the applicants that were essential in their defense, but which had been lost by State agents.[194]

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[187] *Id.*, ¶¶ 66–78.
[188] *Id.*, ¶¶ 81–83.
[189] *Id.*, ¶ 80.
[190] 2012 (2) SACR 126 (2011).
[191] *Id.*, ¶ 4.
[192] *Id.*, ¶¶ 14, 18.
[193] *Id.*, ¶ 18.
[194] *Id.*, ¶¶ 30–31.

Moreover, in *Van der Walt v. Director of Public Prosecutions*,[195] several individuals were investigated for alleged violations of the Income Tax Act. The investigation took seven years from the time the individuals were investigated in 2006 and 2007 until they were arrested, charged, and appeared in Court for the first time in 2013.[196] The High Court noted therein that there was no unreasonable delay given the complexity of the charges, the magnitude of the case, and the substantial documentation that required analysis and proper investigation. The Court therein emphasized that a properly-conducted investigation is necessary to protect people from the humiliation and cost of a public trial.[197]

Despite the abovementioned remedies, delays in trials persist in South Africa.[198] Lack of staff and financial resources in administering criminal justice is a major cause,[199] in addition to a "culture of delay […] [among] cops, prosecutors, and lawyers[;]" absenteeism; and a "negative attitude toward service delivery."[200]

3. Public Protector of South Africa

The Public Protector of South Africa ("PPSA") was established to address the abuse of power and chronic maladministration of the government and ignorance of basic human rights, and to "maintain and sustain constitutional democracy in South Africa by all governmental institutions, agencies, and enterprises attached to the government[,]"[201] among others. The agency's mandate is to "investigate improper dishonest acts, or omission or corruption, with respect to public money as well as improper or unlawful enrichment by public servants."[202] Its jurisdiction includes "all organs of state, any institution in which the state is the majority or controlling shareholder[,] and any public entity or parastatal as defined in [South Africa's] Public Finance Management Act"[203] and the provision of administrative support for such investigations.[204]

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[195] 2021 (4) All SA 251, ¶ 17.

[196] *Id.*, ¶ 39.

[197] *Id.*, ¶¶ 41–45.

[198] Nomnganga, *supra* note 151, at 23, 36.

[199] *Id.* at 30.

[200] *Id.* at 31.

[201] Moses Montesh, *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?*, 28 TRANSYLVANIAN REV. ADM. SCI. 194, 201, *at* https://rtsa.ro/tras/index.php/tras/article/download/34/30.

[202] *Id.* at 206.

[203] *Id.* at 202.

[204] *Id.*

The PPSA is also required to perform their constitutional obligations diligently and without delay.[205] In support of its investigation, the PPSA is granted broad powers to fulfill its mandate.[206] Significantly, the Constitution provides that "other state institutions must, through legislative and other measures, assist and protect the Public Protector to ensure […] the effectiveness of the institution."[207]

In its early years, the PPSA suffered budgetary difficulties, limited resources, and resultant limited capacity, which prevented it from effectively complying with its mandate. During this period, the PPSA faced a significant backlog of pending cases and took an average of eight months to resolve complaints. [208] The budget and workforce of the institution were gradually increased.[209] Challenges similarly encountered by the PPSA include: (a) lack of power and authority to enforce its findings on the entities it reviewed, in light of its inability to bring any institution to court for failure to implement its findings; and (b) the public's reservations on the independence and impartiality of the incumbent Public Protector, who is appointed by the President in conjunction with Parliament and resultantly a political appointee from the ruling political party.[210]

At present, the PPSA's service standards indicate a turnaround time for investigations from 6 to 36 months.[211] Investigators are given six months

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[205] S. AFR. CONST. §§ 237, 195.

[206] The PPSA is empowered to, among others, (a) request any person at any level of government, or who is performing a public function, or who is otherwise subject to the jurisdiction of the Public Protector, to assist him or her in an investigation; (b) designate any person to conduct an investigation on his [or her] behalf and to report to him or her; and (c) direct any person to submit an affidavit or to appear before him [or her] to give evidence or to produce documents relevant to the investigation and examine such person. Moreover, the South African Constitution provides that "no person or institution of state may interfere with the functioning of the […] Public Protector, and the 1998 Amendment Act makes such interference a culpable [offense]. Moreover, "if any person does anything in connection with an investigation, which if that investigation were a proceeding in a court of law would constitute contempt of court, he/she shall be guilty of an offense." Dirk Brynard, *Supporting Constitutional Democracy in South Africa: An Assessment of the Public Protector (Ombudsman)*, 34(1) SAIPA 7, 14–15, (1999), *available at* https://uir.unisa.ac.za/bitstream/handle/10500/7837/supportingconstitutionaldemocracy.pdf?sequence=1. (Citations omitted.)

[207] *Id.* at 19–20. (Citations omitted.)

[208] *Id.* at 16.

[209] *Id.*

[210] Montesh, *supra* note 201, at 204–05.

[211] PUBLIC PROTECTOR SOUTH AFRICA, ANNUAL PERFORMANCE PLAN 2022/2023, at 7 (2022), *available at* https://www.pprotect.org/sites/default/files/Strategic_plan/APP%202022%EF%80%A223%20%28002%29.pdf.

to resolve Early Resolution Matters, while complex matters must be settled within three years.[212] However, the PPSA noted that in due consideration of the realities of investigation, such as lack of cooperation of respondents, the PPSA's target is to stay within the aforestated timelines for at least 80% of the matters brought before the agency.[213] In terms of speedy resolution of complaints, the PPSA noted the agency's performance in terms of the number of investigation reports it finalized, as well as the cases it finalized within the aforestated turnaround times:[214]

TABLE 2. Statistics on Investigation Reports and Cases from 2018 to 2022

Year	Number of investigation reports finalized	Cases finalized within approved turnaround times
2018-2019	46	99% (4,757 out of 4,803 cases)
2019-2020	137	95% (7,112 out of 7,515 cases)
2020-2021	50	95% (4,532 out of 4,754 cases)
2021-2022	50	80% (estimated)

The PPSA intends to continue to work closely with Parliament and other state organs to ensure speedy resolution of all complaints, submit quarterly reports to Parliament for such purpose,[215] and start testing its new Case Management Application in lieu of its current inefficient manual case management system.[216] However, the PPSA noted that its approved organizational structure "has never been fully funded, which hampers its ability to rigorously investigate and [finalize] cases on time" and accomplish its broad mandate to investigate any conduct in state affairs over 1,000 organs of state within the government.[217]

Previously proposed solutions to strengthen the PPSA's effectiveness include: (a) legislative reforms to supply it with powers necessary to accomplish its objectives, i.e., the power to challenge government agencies in a court of law; (b) the creation of a body that can make recommendations to

[212] *Id.* Early Resolution matters refer to "simple matters […] such as […] undue delay in processing […] application[s] […]." *Id.* at 25. "Service delivery cases deal with alleged failure by organs of state to deliver services to communities […]." *Id.* "Good governance […] cases [focus] on conduct failure investigations, where allegations such as tender irregularities and the conduct of members of the Executive are investigated." *Id.*

[213] *Id.* at 7.

[214] *Id.* at 32.

[215] *Id.* at 9.

[216] *Id.* at 26.

[217] *Id.* at 27.

parliament for the appointment of a Public Protector and can also be empowered to challenge Parliament in case deviations have been made from a preferred candidate, to solve political deployment by the ruling party through Parliament; and (c) making the Public Protector independent from the Department of Justice and Constitutional Development, instead of an entity subsumed under the Department.[218]

Similarly, it has been suggested that delays in the administration of criminal justice may be addressed by better case flow management, trained court personnel, and implementation of virtual proceedings, and the improvement of the legal framework for delays in criminal proceedings, such as the implementation of cost orders so that "the responsible party for the delays in criminal proceeding[s] must be held liable and compensate the aggrieved party."[219]

C. Indonesia

The challenge of capacitating the Ombudsman in both speed and effectiveness in investigating and prosecuting corruption cases is not unique to the Philippines. In some developing countries, the Ombudsman or its equivalent operates as an ineffective shield against corruption, to appease international sponsors and provide a veneer of respectability to public administration.[220] Other anti-corruption agencies of low to middle-income countries are considered ineffective and may even be abolished, such as the Kenya Anti-Corruption Authority and the Portuguese High Authority against Corruption.[221]

However, some anti-corruption agencies have been considered effective with a good track record in curbing corruption in their own countries, such as the Corruption Eradication Commission of Indonesia or *Komisi Pemberantasan Korupsi* ("KPK").[222] A study of the KPK may aid our

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[218] Montesh, *supra* note 201, at 205–06.

[219] Nomnganga, *supra* note 151, at 83–84.

[220] Marc Hertogh & Richard Kirkham, *The Ombudsman and Administrative Justice: From Promise to Performance*, *in* RESEARCH HANDBOOK ON THE OMBUDSMAN 4 (Marc Hertogh ed., 2018), *available at* https://www.elgaronline.com/view/edcoll/9781786431240/9781786431240.00008.xml. (Citation omitted.)

[221] Emil Bolongaita, *An Exception to the Rule? Why Indonesia's Anti-Corruption Commission Succeeds Where Others Don't – A Comparison with the Philippines' Ombudsman*, 4 U4 ISSUE 1, 5 & n.1 (2010).

[222] The *Komisi Pemberantasan Korupsi* ("KPK") was established by law in 2003 under Law Number 30 of 2002, and was modelled after the Hong Kong Independent Commission against Corruption ("ICAC"). It was triggered by the strong consensus between the

legislators in crafting legislative reforms that can strengthen our own Ombudsman's ability to both quickly and effectively investigate and prosecute cases under its jurisdiction.

Similar to our Ombudsman, the KPK also has a broad anti-corruption mandate—receiving and handling corruption complaints, investigating corruption cases, and prosecuting them before a special anti-corruption court.[223] It is also authorized to examine systems and procedures of government agencies to identify their vulnerability to corruption, and "to recommend corresponding measures for corruption prevention and education."[224]

With the foregoing context, a 2010 study compared the success of Indonesia's KPK with the performance of the Philippine Ombudsman at the time. The author, Emil Bolongaita, highlighted that only a few years into its establishment, the KPK had already prosecuted and sent over a hundred high-ranking officials to prison, "won all its cases in the corruption court[ ] with all appealed verdicts upheld by the Supreme Court […] [,] conducted extensive corruption prevention activities[,] and recovered substantial state assets."[225] In contrast, Bolongaita averred that the Ombudsman at the time had a low conviction rate and poor performance.[226] Bolongaita attributed the relative success of the KPK *vis-à-vis* our Ombudsman to several key differences, which include:

1. *Investigatory Power*: The KPK has all the investigative powers of a law enforcement agency and may, on its own accord, conduct wiretaps on suspects, examine their bank accounts and tax records, freeze suspects' assets, issue hold orders, and make arrests.[227] Bolongaita submitted that the KPK is effective in prosecuting the cases it investigates, since effective prosecution relies on strong evidence.[228] In contrast, he considers the Ombudsman to be ineffective in gathering the requisite evidence for the cases it prosecutes, since it cannot wiretap, examine bank

Indonesian government and the general public that the "corruption, collusion, and nepotism" that thrived during the term of President Soeharto played a major part in the economic struggle faced by Indonesia during the 1997 Asian Financial Crisis, and that drastic measures were vital to address the same. *Id.* at 7–8.

[223] *Id.* at 6.

[224] *Id.* at 6–7.

[225] *Id.* at 5.

[226] *Id.*

[227] *Id.* at 14.

[228] *Id.*

accounts, freeze assets, or make arrests on its own accord, unlike the KPK.[229]

2. *Coordination between the KPK Investigators and Prosecutors*: Prior to the decision to prosecute a case under investigation, "investigators and prosecutors work closely to ensure that an investigation gathers sufficient evidence for prosecution."[230] Upon agreement by the prosecutors and investigators to prosecute before the *Tipikor* Court,[231] the case "undergoes a three-stage panel review conducted by the KPK Commissioners […] to ensure that [the] case […] is winnable."[232] In contrast, "Ombudsman investigations do not take into account prosecutors' inputs."[233] The investigators decide when to prosecute and recommend the same to the Ombudsman, and "[i]f the Ombudsman decides to prosecute, the case is then forwarded to the Ombudsman's Office of the Special Prosecutor."[234] This gives rise to a situation where prosecutors are "assigned cases to prosecute without, in their view, sufficient evidence;" dismissal of these cases is then attributed to the failure of investigators who did not recover the required evidence.[235]

3. *Human Resources*: KPK's investigators and prosecutors are selected from applicants from the Indonesian National Police, Attorney General's Office, Ministry of Finance, and the Financial and Development Supervisory Board and are subjected to a highly selective recruitment process consisting of thorough background checks and technical and psychological tests.[236] "Employment in KPK is remarkably sought after" and is "managed by a private

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[229] *Id.* (Citations omitted.)

[230] *Id.*

[231] "The Court for Corruption Crimes (*Pengadilan Tindak Pidana Korupsi*, commonly known as *Pengadilan Tipikor*, or *Tipikor* court) was established by law in 2002 as part of the general court system, and began operating in 2004." Sofie Arjon Schütte, Specialised Anti-corruption Courts: Indonesia, at 1 (July 8, 2016), *at* https://www.u4.no/publications/specialised-anti-corruption-courts-indonesia. It has "jurisdiction to hear all corruption cases (as well as cases involving money laundering and the underlying predicate offenses), whether investigated and prosecuted by the KPK or by the public prosecution service." *Id.* at 2.

[232] Bolongaita, *supra* note 221, at 14.

[233] *Id.* at 15.

[234] *Id.*

[235] *Id.*

[236] *Id.* at 16.

human resource management firm that is competitively procured by […] KPK."[237]

In contrast, investigators and prosecutors of the Ombudsman are recruited at large, and prior to 2002, the qualifications for hiring put an emphasis on law degrees without prioritizing investigative or prosecutorial experience.[238] At the time, the Ombudsman does not offer a competitive compensation package nor is it considered a good training ground compared to the private sector or other agencies that are deemed less risky to work for.[239] While a previous Ombudsman sought to hire individuals from different disciplines outside the law that could help "tackle the multidisciplinary characteristics of corruption" and "address the narrow investigation skills within the [Ombudsman]", the Ombudsman at the time resigned and this approach was allegedly abandoned.[240]

4. *Performance Measurement*: Bolongaita noted that the KPK is results-oriented and monitors its conviction rates and the performance criteria of each staff to "ensure that their work is aligned with organi[z]ational goals." On the other hand, the author asserted that the Ombudsman's main performance indicator as of 2010 was its case disposal rates. "No emphasis or notice was given to [...] convictions or acquittals in the Sandiganbayan.".[241]

5. *Leadership*: While the Ombudsman is led by an individual who decides "policy and major decisions in the organization" and is appointed for a term of seven years,[242] the KPK operates as a collegial body composed of a five-person commission, with commissioners appointed to serve a maximum of two four-year terms.[243] The collegial composition of the KPK results in greater efficiency and sustainability, and enhances "greater accountability among the commissioners."[244]

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[237] *Id.* at 16–17.
[238] *Id.* at 16.
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 17–18.

6. *Macro-political Factors*: Bolongaita likewise noted that three macro-political factors affect the performance of the KPK and Ombudsman alike, namely: (a) "strong external monitoring and advocacy of anti-corruption [Non-Governmental Organizations (NGOs),] civil society organizations (CSOs)[,] and the presence of a vigorous free press;" (b) "widespread public anger [against] corruption at both the grand and petty levels;" and (c) "high-level political support [from] key [government] officials."[245] The KPK rated high on all these factors – "daily media reports on corruption cases handled by the KPK [and its] success[ ] have fostered strong public affinity and support for the [KPK];" NGOs and CSOs are effective in influencing the government to establish strong anti-corruption measures, there is widespread public anger against corruption in the Indonesian government, and the KPK itself has high-level political support from the government. [246]

Thus, Bolongaita submitted that the performance of anti-corruption agencies may be improved through, among others, (1) the grant of appropriate jurisdiction and autonomy; (2) the grant of standard powers of criminal investigation to ensure that the agency gathers the necessary evidence for effective prosecution; (3) the endowment of the agency with both investigative and prosecutorial capacity, and shared responsibility between the investigative and prosecutorial units for prosecutorial decisions; (4) the establishment of an independent process to hire and compensate the personnel of the agency; (5) the provision of the organization with adequate resources; (6) the measurement of the agency and personnel's performance on suitable outcome and impact indicators; and (7) the establishment of a collegiate leadership for the anti-corruption agency to spread leadership risks and workload and foster internal checks and balances.[247]

Within the context of the Philippines, Bolongaita suggested providing technical assistance and training to the Ombudsman for its possible restructuring, establishing mechanisms ensuring close coordination between the investigators and prosecutors, and "establish[ing] a cooperation agreement with the National Bureau of Investigation (NBI) to draw on the latter's pool of […] investigators, [which would allow it to] quickly scale up its investigative capacity […] on NBI's law enforcement powers[.]"[248] Another proposed

[245] *Id.* at 19–20.
[246] *Id.*
[247] *Id.* at 25–27.
[248] *Id.* at 27.

option is to "work with the executive and legislature to give the agency strong investigation and law enforcement powers, [and] review [the agency's structure to enhance] institutional independence and financial autonomy, leadership configuration, personnel size, organisational structure, and operating systems outside national civil service rules."[249]

However, despite the KPK's effectiveness in combating corruption, it has also faced criticism for not respecting the human rights of the accused.[250] To address the foregoing, and in a bid to uphold the rights of accused in corruption cases handled by the KPK, Indonesia's Law Number 19 of 2019 imposed several changes on the structure and mandates. The principle of respect for human rights was introduced in the amendment, and the *Dewan Paengawas*[251] was established to act as a supervisory organ of the KPK and ensure due process in anti-corruption proceedings.[252] Moreover, several powers of the KPK were restricted to the investigation and prosecution phases, and could no longer be utilized in the preliminary investigation stage.[253] These changes caused controversy in view of its perceived dilution of the power and authority of the KPK in eradicating corruption and provoked various demonstrations in the country.[254]

Considering the foregoing, any legislative reforms modeled after the KPK's robust institutional design aimed at strengthening the powers of the Ombudsman to investigate cases and gather evidence must ultimately be carefully calibrated, in due consideration of the State's interest in respecting the human rights of individuals and as mandated under our Constitution.

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[249] *Id.* at 28.

[250] Ratna Juwita, *The Amendment of Anti-corruption Law in Indonesia: The Contribution to the Development of International Anti-Corruption Law*, 25 ASIAN Y.B. INT'L L. 130, 146–49 (2019).

[251] The *Dewan Paengawas* is tasked "to monitor the implementation of tasks and authorities of the KPK; to issue permission [to the KPK] concerning wiretapping [and] search[es] and seizures; to formulate a code of conduct for Commissioners and employees of the KPK; to receive, examine[,] and follow up reports from civil society concerning allegations of abuse of power by Commissioners and employees of the KPK or any other similar allegation; [and] to conduct work evaluations of the Commissioners and employees of KPK annually." *Id.* at 140–41.

[252] *Id.* at 139–41.

[253] *Id.* at 142. These measures include: (a) instructing the relevant agency to issue a travel ban on certain individuals; (b) requesting banks or other financial institutions for information about the financial situation of the accused; (c) instructing banks to block certain accounts allegedly used for money laundering; (d) instructing the supervisor of the suspect to suspend the suspect from his/her position; and (e) requesting for the wealth and taxation data of the accused from the relevant agency.

[254] *Id.* at 143.

VI. ALTERNATIVE REMEDIES AND POSSIBLE SOLUTIONS

Guided by the experience of the United States, South Africa, and Indonesia, Philippine legislators may consider alternative remedies and other possible solutions that may aid in ensuring that our approach to speedy case disposition is balanced and holistic, and that our own Ombudsman is fully capacitated and empowered to handle corruption cases against high-ranking government officials. These include (1) expediting the case and refusing further postponement instead of automatic dismissal; (2) requiring the respondent to exert reasonable efforts to invoke the right to speedy disposition at the prosecutor level before the same may be invoked before the courts; (3) requiring the respondent or the accused to prove actual prejudice before courts sustain a violation of the right; (4) allowing the respondent or accused to seek compensation on the ground of prejudice caused by delays in the proceedings; (5) empowering courts to recommend the conduct of an investigation on persons accountable for any unreasonable delay during the investigation; and (6) instituting potential measures to strengthen the Ombudsman.

A. Expedite the Case and Refuse Further Postponements Instead of Automatic Dismissal

As mentioned, the remedy to a violation of the right to speedy disposition in the Philippines is the dismissal of the case. This is similar to the remedy to a violation of the right to speedy trial in the United States, and even against inordinate delays in pre-indictment proceedings. In the same vein, High Courts in South Africa can grant a permanent stay of prosecution upon a finding of unreasonable delay in the trial, which terminates the proceedings and has the same effect as an acquittal.[255]

In *Barker*, the US Supreme Court noted that the remedy of dismissal is severe and serious as it may free a person who is possibly guilty of a crime, thus:

> The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence, because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. *Such a remedy is more serious than*

[255] Ngalo, *supra* note 170, at 52.

> *an exclusionary rule or a reversal for a new trial, but it is the only possible remedy*.[256]

Similarly, case law and commentators in South Africa have emphasized that granting a permanent stay of prosecution is a radical and extraordinary remedy.[257] The same observation was echoed by the Philippine Supreme Court in *Salcedo*, where it characterized the remedy of dismissal as "drastic and radical."[258]

Notably, the severity of the remedy becomes more pronounced when the nature of the cases handled by the Ombudsman is considered. These cases often deal with corruption and the diversion of huge sums of public funds. Dismissing the case would thus mean that a corrupt government official could simply wait out the resolution of his or her case and, after undue delay, walk free with impunity.

Due to this risk, commentators propose an alternative remedy to dismissal. They suggest that instead of aborting the proceedings because of delay, the same should instead be expedited.[259] This is referred to as "judicial acceleration," a solution that aims to combat protractive administrative delay, "which can be achieved by enjoining agency activity that is purposeless, unduly oppressive, or repetitive, by a remand to the agency with directions to proceed with all deliberate speed[.]"[260]

Similarly, Section 342(A)(3)(a) of South Africa's Criminal Procedure Act allows courts various remedies aside from the drastic resort of the dismissal of the case. This includes the power to refuse further postponements when all other remedies under Section 342(A) have been exhausted and all attempts to speed up the proceedings have been tried. In practice, if the State asks the court for further postponement and the defense objects to the same under the argument that proceedings have been unreasonably delayed and the delay is causing prejudice to the accused, the

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[256] *Barker*, 407 U.S. 514, 522. (Emphasis supplied, citation omitted.)

[257] Van Der Linde, *supra* note 153, at 4, *citing Bothma*, 2010 (2) SA 622, ¶ 18.

[258] *Salcedo*, 893 SCRA 25, 43.

[259] Anthony Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 534–35 (1975). Amsterdam notes that the view that dismissal is the only remedy to a violation of the right to speedy trial is "incredible."

[260] Steven Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423, 1453 (1967). (Citation omitted.) Goldman notes that judicial acceleration may also be done "by mandamus requiring the agency to approve party action or show cause why no approval should be forth-coming." *Id.*

South African courts may deny any further postponements under this provision.[261]

As applied to the Philippine setting, this proposition would entail that once the period for preliminary investigation lapses and delay begins to set in, the Court would simply order the Ombudsman to expedite the resolution of the case and/or refuse any further postponements.

Undeniably, this proposition would preserve the interest of the State in ensuring that guilty persons are prosecuted. This proposition may also be a more nuanced approach to balancing the interest of the accused, the victims, and the State. The danger that guilty persons will be freed because of delay in Ombudsman proceedings, at the expense of the victims and the State, would be eliminated.

Nevertheless, this may be criticized on the ground that expediting the case would only prolong the proceedings, further aggravating the prejudice caused to the respondent or the accused. The dangers associated with inordinate delays will continue to exist and the right against such will continue to be violated. To address this shortcoming, it may be helpful to balance the respective interests of the parties when deciding if this remedy should apply. The Court may weigh the State's interest in ensuring that guilty persons are prosecuted and punished, against the respondent or the accused's interest in not being subjected to anxiety and public accusation and in maintaining his or her possible defenses. As noted by a commentator:

> Surely, the primary form of judicial relief against denial of a speedy trial should be to expedite the trial, not to abort it. *Where expedition is impracticable for some reason, the Supreme Court's repeated recognition of the several distinct interests protected by a right to speedy trial suggests the propriety of fashioning various remedies responsive to the particular interest invaded in any particular case.*[262]

Another risk in expediting the case or refusing further postponements is the detriment to the prosecution's ability to secure sufficient evidence and witnesses vital to the case, which may lead to the unwitting acquittal of the accused on the ground of insufficient evidence. Thus, if this option is utilized, it must also be carefully applied since it may have serious consequences on the verdict in the case.[263]

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[261] Nomnganga, *supra* note 151, at 51.
[262] Amsterdam, *supra* note 259, at 535. (Emphasis supplied, citation omitted.)
[263] Nomnganga, *supra* note 151, at 57.

Another variation of this proposition is for the Court to resolve the case on the merits if the same is "sufficiently well[-]founded to be instituted"[264] or if there is an adequate basis for the case to be filed.

As applied, this would mean that once the case reaches the Court, instead of ordering the Ombudsman to expedite the resolution of the case, the Court itself would determine if there is a sufficient basis for the case to be instituted and if so, it would proceed to resolve the case on the merits.

In determining whether a case is sufficiently well-founded to be instituted, the Ombudsman's standard of probable cause is applicable. Probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he [or she] was prosecuted."[265]

Using this standard, it can be inferred that many of the speedy disposition cases in the Philippines may be considered sufficiently well-founded to be instituted. The charges in these cases, especially those involving fertilizer funds, are supported by Commission on Audit findings baring the irregularities in the subject transactions.[266] Thus, the suggestion to resolve the case on the merits finds relevance. It may be argued that the gravity of the offense, the huge sums of public funds involved, and the presence of probable cause, in their totality, warrant the resolution of the case on its merits, rather than a dismissal by reason of inordinate delay.

It should be noted, however, that there are still exceptional instances wherein dismissal may be warranted, especially when "considerations of fairness or integrity of the criminal justice system require that prosecutions be halted for reasons unrelated to the guilt or innocence of the defendant or to the appropriateness of subjecting him [or her] to criminal processes or sanctions."[267] In the Philippines, these exceptional instances may include maliciously- or politically-motivated cases, such as in *Tatad*.

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[264] Amsterdam, *supra* note 259, at 536.

[265] Espinosa v. Ombudsman, G.R. No. 135775, 343 SCRA 744, 751, Oct. 19, 2000, *citing* Cruz v. People, G.R. No. 110436, 233 SCRA 439, 459, June 27, 1994.

[266] *Catamco*, 945 SCRA 548, 553.

[267] Amsterdam, *supra* note 259, at 536. *See also* Derek Obadina, *The Right to Speedy Trial in Namibia and South Africa*, 41 J. AFR. L., 229, 233 (1997).

B. Require the Respondent or Accused to Exert Reasonable Efforts to Invoke the Right to Speedy Disposition at the Prosecutor Level Before the Same may be Invoked Before the Courts

Another observation in other jurisdictions is that there are cases wherein "the defense […] could [have] act[ed] affirmatively to prevent the delay from occurring but [did] not do so."[268] Since dismissal is the remedy for inordinate delays, the accused or the defendant may even welcome the delay.[269]

In the Philippines, *Cagang* holds that when the respondent is aware of the Ombudsman proceedings, the right to speedy disposition must be invoked at the earliest possible opportunity, i.e., at the Ombudsman or prosecutor level. Otherwise, the accused is considered to have acquiesced to the delay, thus:

> The defense must also prove that it exerted meaningful efforts to protect accused's constitutional rights. In *Alvizo v. Sandiganbayan, the failure of the accused to timely invoke the right to speedy disposition of cases may work to his or her disadvantage, since this could indicate his or her acquiescence to the delay*[.][270]

This ruling was reiterated in the 2022 case of *Chingkoe*, which cited the 2020 case of *Baya*, thus:

> In *Baya v. Sandiganbayan*, we also found no violation of petitioner's right to speedy disposition of cases. *For failure to assert his right to speedy disposition of cases at the prosecutor level, the petitioner was found to not have been prejudiced by the six years of preliminary investigation, and that he welcomed the delay.* We also considered the nature of the "Aid to the Poor" program, the sheer number of respondents, and the voluminous testimonial evidence involved in justifying the six years it took the Office of the Ombudsman to file cases in court.
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> Here, petitioners filed their Motion to Quash after the lapse of almost six years, after their arraignment, and only after public respondent rendered its Resolutions. *It can be reasonably assumed that the filing of the Motion is a mere afterthought, and not because they experienced*

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[268] Gregory Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 634 (1980).

[269] Obadina, *supra* note 267, at 233.

[270] *Cagang*, 875 SCRA 374, 437. (Emphasis supplied, citation omitted.)

> *"vexatious, capricious, and oppressive delays" during the preliminary investigation before the Office of the Ombudsman.*[271]

Despite such ruling, however, there are still cases wherein the respondent did not attempt to follow up on the Ombudsman proceedings, but the Court still upheld a violation of their right based on the doctrine that the respondents have no duty to expedite or follow up on the case against him or her at the prosecutor level. Such was the ruling in the 2020 case of *Perez*:

> In ruling that Perez should have moved for the early resolution of his case, the *Sandiganbayan* effectively shifted the burden back to the accused, despite the manifest delay on the part of the prosecution to terminate the preliminary investigation. The filing of a motion for early resolution is not a mandatory pleading during a preliminary investigation. With or without the prodding of the accused, the Rules of Procedure of the OMB, as well as Section 3, Rule 112 of the Rules of Court, fixed the period for the termination of the preliminary investigation. In other words, the OMB has the positive duty to observe the specified periods under the rules. The Court's pronouncement in *Coscolluela v. Sandiganbayan (First Division)*, which was not abandoned in *Cagang*, remains good law[.]
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> *The Court cannot emphasize enough that Perez'[s] supposed inaction — or, to be more accurate, his failure to prod the OMB to perform a positive duty — should not be deemed as nonchalance or acquiescence to an unjustified delay.* The OMB is mandated to "act promptly on complaints filed in any form or manner against officers and employees of the Government, or of any subdivision, agency or instrumentality thereof, in order to promote efficient service." *In conjunction with the accused's constitutionally guaranteed right to the speedy disposition of cases, it was incumbent upon the OMB to adhere to the specified time periods under the Rules of Court. Mere inaction on the part of the accused, without more, does not qualify as an intelligent waiver of this constitutional right.*[272]

The Court in *Perez* cited *Coscolluela v. Sandiganbayan*,[273] which in turn cited *Duterte*. In both *Coscolluela* and *Duterte*, however, the Court held that there was no opportunity to follow up on the Ombudsman proceedings because

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[271] *Chingkoe*, G.R. No. 232029, slip op. at 22. (Emphases supplied, citations omitted.)

[272] Perez v. Sandiganbayan [hereinafter "*Perez*"], G.R. No. 245862, 960 SCRA 194, 230–32, Nov. 3, 2020. (Emphases supplied, citations omitted.)

[273] G.R. No. 191411, 701 SCRA 188, July 15, 2013.

the respondents were unaware thereof.[274] Notwithstanding the lack of a similar pronouncement in *Perez*, the Court still cited *Coscolluela*.[275]

With the *Perez* ruling, the recommendation to require the respondent to exert reasonable efforts (possibly in the form of a motion for early resolution or any other similar motion) at the prosecutor level finds relevance. This would ensure that respondents are truly interested in the speedy disposition of their cases and that delay is not utilized as a strategy. Likewise, it would solidify the *Cagang* guideline that failure to invoke the right at the prosecutor level leads to a waiver thereof.

This proposition may be criticized, however, on the ground that it transfers the State's burden to speedily dispose of the case to the respondent or the accused. As mentioned in his dissenting opinion in *Cagang*, Justice Caguioa posits that it is incumbent on the State *alone* to ensure the speedy disposition of cases because it is the State which has vast resources to undertake such a task, thus:

> It is thus not the respondent's duty to follow up on the prosecution of his [or her] case, for it is the prosecution's responsibility to expedite the same within the bounds of reasonable timeliness. Considering that the State possesses vast powers and has immense resources at its disposal, it is incumbent upon it *alone* to ensure the speedy disposition of the cases it either initiates or decides.
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> * * *
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> *Proceeding therefrom, I find the adoption of the third factor in Barker's balancing test improper. Instead, I respectfully submit that in view of the fundamental differences between the scope of the Sixth Amendment right to speedy trial on one hand, and the right to speedy disposition on the other, the third factor in Barker's balancing test (that is, the assertion of one's right) should no longer be taken against those who are subject of criminal proceedings*.[276]

This point has nevertheless been addressed in *Cagang*:

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[274] *Id.* at 198; *Duterte*, 289 SCRA 721, 744.

[275] *Perez*, 960 SCRA at 231.

[276] *Cagang*, 875 SCRA 374, 474–75 (Caguioa, *J.*, *dissenting*). (Emphases in the original, citations omitted.)

> The reality is that institutional delay [is] a reality that the court must address. The prosecution is staffed by overworked and underpaid government lawyers with mounting caseloads. The courts' dockets are congested. This Court has already launched programs to remedy this situation, such as the Judicial Affidavit Rule, Guidelines for Decongesting Holding Jails by Enforcing the Right of the Accused to Bail and to Speedy Trial, and the Revised Guidelines for Continuous Trial. These programs, however, are mere stepping stones. The complete eradication of institutional delay requires these sustained actions.
>
> *Institutional delay, in the proper context, should not be taken against the State. Most cases handled by the Office of the Ombudsman involve individuals who have the resources and who engage private counsel with the means and resources to fully dedicate themselves to their client's case. More often than not, the accused only invoke the right to speedy disposition of cases when the Ombudsman has already rendered an unfavorable decision. The prosecution should not be prejudiced by private counsels' failure to protect the interests of their clients or the accused's lack of interest in the prosecution of their case.*
>
> For the court to appreciate a violation of the right to speedy disposition of cases, delay must not be attributable to the defense. Certain unreasonable actions by the accused will be taken against them. This includes delaying tactics like failing to appear despite summons, filing needless motions against interlocutory actions, or requesting unnecessary postponements that will prevent courts or tribunals to properly adjudicate the case. When proven, this may constitute a waiver of the right to speedy trial or the right to speedy disposition of cases.[277]

Thus, despite its drawbacks, this alternative finds further justification against the backdrop of various litigants utilizing several dilatory tactics in a bid to secure eventual dismissal of their cases on the ground of speedy disposition of cases. Adopting this can serve as a balancing measure and an institutional safeguard to prevent the abuse of the right to speedy disposition of cases. It protects the State's interest to prosecute crimes, especially those that involve huge amounts of public funds.

Interestingly, in the United States, "prior demand" for early resolution of the proceedings is necessary when a party seeks judicial relief from delay in administrative proceedings.[278] This requirement is based on the theory that such prior demand is a form of exhaustion of an administrative remedy, thus:

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[277] *Id.* at 441–42. (Emphasis supplied, citations omitted.)

[278] Goldman, *supra* note 260, at 1441.

> Judicial relief has also been withheld when the injured party has not first sought acceleration of the action within the agency. *This requirement is apparently a form of the exhaustion of administrative remedies doctrine.* […] The court also observed that the proper remedy for unwarranted delay is a court order to expedite the proceeding, not a decree terminating it altogether. This judicially imposed requirement of prior demand seems eminently sensible. Such a requirement gives the agency a last opportunity to alleviate the delay. Moreover, this practice may facilitate the desirable development of internal review boards with authority to rule on the question of agency delay.[279]

In the Philippines, requiring the respondent to exert reasonable efforts at the prosecutor level may be viewed as a form of administrative remedy that must be exhausted first before judicial intervention may be resorted to. This would certainly give the Ombudsman a last opportunity to alleviate the delay before the Court orders the termination of the proceedings.

C. Require the Respondent or Accused to Prove Actual Prejudice Before Courts Sustain a Violation of the Right to Speedy Disposition

In the US, for pre-indictment delay to be actionable, defendants must show that they sustained actual prejudice as a result of the delay, in that their ability to defend against the charge was impaired. Mere allegations are insufficient; the impairment must be demonstrated with particularity. This may be done by proving that the "delay caused the loss of significant and helpful testimony or evidence."[280]

The same requirement holds true in South Africa before relief may be granted through a permanent stay of prosecution or through the remedies stated in 342(A) of the CPA. The *onus* is on the party alleging delay to establish actual prejudice, as opposed to speculative and vague allegations of prejudice incurred.[281]

In the Philippines, prejudice against the respondent or the accused is also considered by the Court in determining whether the right to speedy

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[279] *Id.* (Emphasis supplied.)

[280] RUBIN, DIXON, & GRINE, *supra* note 127, at 7-14.

[281] Ngalo, *supra* note 170, at 46, *citing Zanner*, 2006 (2) SACR 45. *See also* Nomnganga, *supra* note 151, at 60.

disposition is violated.[282] However, under the *Cagang* guidelines, it is the prosecution which has the burden to show the lack of prejudice against the respondent or the accused once delay is established and the burden of proof has shifted (i.e., after the defense successfully proves that the case is politically or maliciously motivated and that the accused did not contribute to the delay).[283]

Within this framework of analysis, it becomes the State's duty to prove that the accused was not oppressively incarcerated; that his or her anxiety is minimized; and that his or her defense is not impaired, in view of how prejudice is assessed in our jurisdiction:

> Prejudice should be assessed in the light of the interest of the defendant that the speedy trial was designed to protect, namely: *to prevent oppressive pre*[-]*trial incarceration; to minimize anxiety and concerns of the accused to trial; and to limit the possibility that his* [or her] *defense will be impaired.* Of these, the most serious is the last, because the inability of a defendant adequately to prepare his [or her] case skews the fairness of the entire system. There is also prejudice if the defense witnesses are unable to recall accurately the events of the distant past. Even if the accused is not imprisoned prior to trial, he [or she] is still disadvantaged by restraints on his [or her] liberty and by living under a cloud of anxiety, suspicion and often, hostility. His [or her] financial resources may be drained, his [or her] association is curtailed, and he [or she] is subjected to public obloquy.[284]

However, it may be argued that between the accused and the State, it is the accused who is in a better position to establish prejudice, such prejudice being personal to him or her. Arguably, it is the accused who has the capacity to prove that the delay caused serious anxiety and impaired his or her defenses. Thus, the United States and South African rule on who should establish prejudice appears to be more practicable.[285]

This proposition may be criticized on the same ground as the second proposition, i.e., it places the burden on the accused to prove prejudice resulting from the State's delay even if it is the State which is responsible for

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[282] *Cagang*, 875 SCRA 374, 443.

[283] *Id.* at 450–51.

[284] *Id.* at 443, *citing Corpuz*, 442 SCRA 294, 313. (Emphasis supplied.)

[285] In the Philippine setting, it is worth noting that there are available remedies to the accused to prevent the impairment of his or her defenses caused by failing memory of witnesses, such as perpetuating testimony under Rule 24 of the Rules of Court. *See* RULES OF COURT, Rule 24.

promptly resolving the case.[286] Further, it adds to the already heavy burden of the accused who must, in order to shift the burden of proof to the prosecution, prove that the case is maliciously or politically motivated, attended by an utter lack of evidence, and that the defense did not contribute to the delay.[287] Nevertheless, this solution would prevent litigants from indiscriminately invoking the right to the speedy disposition of cases like a magic wand to secure the dismissal of their cases regardless of the actual prejudice incurred, as is the prevalent practice. If implemented, the right to the speedy disposition of cases will still be upheld for individuals who incurred actual prejudice in view of the delay of their cases, and simultaneously ensure that the State can prosecute and punish individuals who potentially committed an offense but did not incur prejudice on account of the State's delay.

D. Allow the Respondent or Accused to Seek Compensation on the Ground of Prejudice Caused by Delays in the Proceedings

To recall, Section 342(A)(3)(e) of South Africa's Criminal Procedure Act empowers courts to issue a cost order, where either the State or the accused shall pay the wasted costs incurred by the other party as a result of an unreasonable delay caused by an officer employed by the State, the accused, or his or her legal adviser, as the case may be.[288] This creates a mechanism by which the State, which caused the delay, may compensate the victim of the unreasonable delay, and would caution all parties in criminal proceedings to be circumspect in causing such.

As an alternative to the outright dismissal of the case, our legislators may also consider expressly granting the aggrieved respondent or the accused the option to seek damages through a motion or a separate proceeding on the basis of unreasonable delays on the part of the State. For such purpose, the establishment of a fund for payment of such claims, as well as the codification of the *Barker* balancing test in our legal framework and other relevant principles entrenched in our jurisprudence, may be considered. The respondent or the accused may be required to establish actual prejudice caused to him or her on account of unreasonable delays, similar to any other action for recovery of damages. This remedy finds precedent in our jurisdiction, in the form of the Assurance Fund under Presidential Decree No. 1529 which

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[286] *See Cagang*, 875 SCRA 374, 474–75 (Caguioa, *J.*, *dissenting*).

[287] *Id.* at 450.

[288] *But see* Nomnganga, *supra* note 151, at 57. The grant of a cost order has not yet taken effect in South Africa and it is not yet clear when the remedy will take effect.

was created to grant relief to those unjustly deprived of their rights over real property by reason of the operation of our registration laws.[289]

The creation of a fund to compensate victims of undue delay may be a more pragmatic remedy in ensuring that the competing interests involved are both met, as this will allow the accused to secure *restitution* for the prejudice caused to him or her due to prolonged proceedings but would not frustrate the interest of the State to prosecute cases into finality. For while it is true that undue delay in the conduct of a preliminary investigation may no longer be corrected,[290] the aggrieved party may be compensated for the prejudice caused to him by the delay. Moreover, this option may be more favorable to the State, especially in crimes involving millions of state funds which may otherwise be lost in the event there is a violation of the right to speedy disposition of the accused.

E. Empower Courts to Recommend the Conduct of an Investigation on Persons Accountable for any Unreasonable Delay during the Investigation

Section 342(A)(3) of the CPA empowers courts that determine the existence of unreasonable delay and prejudice arising therefrom to refer the matter to the appropriate authority for an administrative investigation and possible disciplinary action against the person responsible for the delay. The courts may also hold the agent of delay in contempt of court.[291] Relevantly, a commentator has suggested that "in terms of accountability, the [concerned official] should be held vicariously liable for the negligence that led to the violation or infringement of the right to a speedy trial for crime victims[, if] the crime victim can prove that the [concerned official] has been reckless or grossly negligent in allowing unreasonable delays to occur […]."[292] *Public Protector v. South African Reserve Bank*, where the court ordered the public protector to pay personal fees while litigating on behalf of the state, was cited as an example.[293]

This measure may also be considered by our legislators in crafting or amending our laws, to ensure accountability on the part of State actors, as well as any accused who may attempt to delay the proceedings to his or her benefit.

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[289] Pres. Dec. No. 1529 (1978), §§ 93–102; Stilianopoulos v. Reg. of Deeds for Legazpi City, G.R. No. 224678, 870 SCRA 215, July 3, 2018.

[290] *Tatad*, 159 SCRA 70, 83.

[291] Nomnganga, *supra* note 151, at 58.

[292] *Id.* at 82.

[293] *Id.*

This would discourage any unnecessary postponements or delaying tactics on the part of stakeholders, and help in identifying systemic issues that cause delays in investigations and proceedings. However, it is noted that this measure may be subject to abuse unless clear guidelines on what constitutes unreasonable delay are also codified or legislated. Otherwise, such a remedy may be utilized as leverage and amount to harassment and undue pressure on the part of the investigators and prosecutors involved in the case, which may be counterproductive since it may hamper the independence of the Office of the Ombudsman.

F. Institute Potential Measures to Strengthen the Office of the Ombudsman

Aside from the foregoing, measures to strengthen our own Office of the Ombudsman may be explored by our legislators to ensure speedy case disposition. Lessons may be gathered from (a) the success of other jurisdictions in the conduct of the investigations of their Ombudsman equivalent, and (b) the review of international authors on possible measures that may strengthen the institution, for purposes of exploring and developing far-reaching institutional reforms for our own Ombudsman.

While these collated measures are not specifically geared to expedite investigations, these suggestions may aid our legislators in conducting extensive consultations with the Office of the Ombudsman and in subsequently crafting legislative measures that can further enhance our own Ombudsman's ability to both quickly and effectively investigate and prosecute cases under its jurisdiction.

1. *Ensuring the Ombudsman is equipped with adequate powers to investigate and gather evidence.* Broad powers are necessary to ensure the Ombudsman accomplishes its mandate.[294] This is illustrated by the KPK, with its broad powers of investigation and law enforcement. Congress may explore expanding the powers of investigation granted to the Ombudsman to ensure speedy and effective completion of investigations.

2. *Revisiting the Congressional allocation of State resources to the Ombudsman to enhance its conduct of effective investigations.* The Public Integrity

[294] INT'L OMBUD. INST., IOI BEST PRACTICE PAPER—ISSUE 7: HYBRID CORRUPTION OMBUDSMAN, 4 (2022), *at* https://www.theioi.org/downloads/7at8n/Issue%207%20%E2%80%93%20Hybrid%20corruption%20Ombudsman%20%28March%202023%29.pdf

Section in the US may owe part of its success to the allocation of most of its resources "to investigations involving alleged corruption by government officials and to prosecutions resulting from these investigations."[295] Moreover, in South Africa, lack of financial resources in the administration of criminal justice is a major cause of unreasonable delays in proceedings[296] and has hampered the Public Protector's ability to rigorously investigate and finalize cases on time.[297]

3. *Enhancing human resources of the Ombudsman by increasing personnel and compensation, improving the recruitment process, increasing emphasis on investigative skills, and building technical and professional capacities.* The effectiveness of any agency is highly reliant on the competence and skills of its personnel. Relevantly, successful anti-corruption institutions "have been building [the] technical capacities [of their personnel] through training officers on short-term courses, temporary secondments to other organi[z]ation[s,] and visits to anti-corruption agencies in countries where the fight against corruption is advanced such as Malaysia, Singapore, and Hong Kong."[298] Congress may consider increasing the resources available to the Office of the Ombudsman for such purpose.

   As discussed, the KPK also owes its success to its highly selective recruitment process and the high demand for jobs in the agency. Congress may consider increasing the compensation for positions within the Ombudsman, or encouraging the capacity-building of existing personnel, to attract more talent. The previous practice of the Office of the Ombudsman in hiring individuals from different disciplines to tackle the multidisciplinary characteristics of corruption may be continued and expanded. Further study should also be conducted on whether additional *plantilla* positions should be added within the Office of the Ombudsman to help ensure the accomplishment of its mandate.

4. *Changing leadership of the Ombudsman from one individual to a collegial body.* The KPK is led by a five-person commission that operates as a collegial body, with commissioners appointed to serve a maximum of two four-year terms. It is submitted that

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295 PUBLIC INTEGRITY SECTION, *supra* note 143, at 1.
296 Nomnganga, *supra* note 151, at 30.
297 *Id.* at 26–28.
298 INT'L OMBUD. INST., *supra* note 294, at 11.

constitutional amendments may be considered to establish a collegial body that can lead the Ombudsman, which may improve efficiency since the workload would be divided among several commissioners. The independence of the institution as well as greater accountability among members of the collegial body may be further enhanced.

5. *Securing awareness and public support*. The effectiveness of the Ombudsman also rests on the full support of the media, and the ability of the people to understand their role.[299] It is thus vital that the Ombudsman pursues anti-corruption educational activities and information drives to raise public awareness of the evils of corruption and its deleterious effects on society as a whole.[300] Moreover, the Ombudsman should publish its annual reports and ensure wide dissemination of the same to relevant authorities and the public, to enable stakeholders and the general public to understand the vital role of the Ombudsman.[301]

6. *Government commitment and political will*. The executive and legislative arm must take active measures to fight corruption by adequately equipping the Ombudsman with the budget, resources, and technical capacity it needs to fight corruption, whether through public declarations of support, legislative reforms, or other means.[302]

It should be noted that the aforecited remedies and solutions are not meant to be taken as conclusive recommendations. It is recognized that the specific systems in place in every foreign jurisdiction play a substantial role in the effectiveness of a particular remedy or solution. For instance, in the US, the remedy of requiring the defendant to show actual prejudice may be effective because of the US courts' general treatment of pre-indictment delay as not evil *per se*. Further, in South Africa, resorting to dismissal as a last remedy is made possible by its Criminal Procedure Act, which provides for a multitude of remedies aside from such. Ultimately, the objective of this Article is to identify and explore possible solutions and alternative remedies employed in other jurisdictions to catalyze the reformation of our own approach to speedy disposition. While a more extensive study is needed to

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[299] *Id.* at 8.

[300] *Id.*

[301] *Id.* at 9. *See also* Jose Patricio Medalla, *Reimagining the Philippine Ombudsman as an Investigator, Critic and Reformer*, 96 PHIL. L.J. 277, 300–08 (2023).

[302] INT'L OMBUD. INST., *supra* note 294, at 11–13.

carefully assess the viability of each enumerated solution or remedy and to pinpoint its optimal application in the Philippine context, recognizing the existence of such remedies and identifying noteworthy alternatives serve as a first and crucial step towards a more balanced speedy disposition.

Further, while the analysis of the Article is primarily focused on cases involving the Ombudsman and crimes involving public officials as reflected in Parts II and IV as well as the discussion on anti-corruption agencies in Part V, it is worthy to emphasize that the approaches to speedy case disposition in Part V, where the first five aforecited alternatives were derived, were applied by the respective foreign jurisdictions to criminal cases *in general* and not just to crimes involving public officials. The right to the speedy disposition of cases apply to all accused regardless of the nature of the charge, and while crimes within the jurisdiction of the Ombudsman and/or involving public officials are arguably a special class of cases that merit a distinct analysis, the State's interest in prosecuting other crimes that are equally deleterious to public welfare and interest serves as more than sufficient pretext to consider exploring the application of the first five alternatives discussed herein. Thus, subject to further study, it is submitted that the first five proposed alternatives may also find beneficial application to all criminal cases and serve as viable alternatives to outright dismissal of criminal cases involving a violation of the right to speedy disposition.

VII. CONCLUSION

In sum, the authors submit that a two-pronged approach is necessary to best achieve a more balanced speedy case disposition in cases involving public officials in the Philippines and to protect two seemingly competing interests therein—the right of the accused to the speedy disposition of their cases, and the right of the State and the victims to ensure that crimes are prosecuted.

First, solutions from the United States and South Africa in their defense of an individual's right to speedy disposition of cases may find beneficial application, in the form of alternative remedies the courts may grant to accord relief to the aggrieved party. The authors note that the dismissal of a case on the basis of the right to the speedy disposition of cases should be a last resort among a battery of other remedies, and courts may consider requiring the person invoking a violation of his or her right to speedy trial to show actual, as opposed to generalized, prejudice, lest the right to speedy

disposition be considered a tool in the hands of the entrenched and the powerful to avoid prosecution and escape liability.

Second, beyond the courts granting relief belatedly to the accused who may have been a victim of delay (at the potential cost of any relief to the State or to the victims of the crime), the Legislature and the Ombudsman must spearhead the review and proposition of institutional reforms in the Ombudsman to curb delays at its source and minimize, if not prevent, any unreasonable delay that would violate an individual's right to the speedy disposition of cases. For this purpose, lessons may be taken from the best practices and institutional design of the Public Integrity Section, PPSA, and KPK.

Ultimately, the authors conclude that the ideal legal framework to ensure the speedy disposition of cases involving the Ombudsman and/or public officials, including any legislative or judicial rule crafted in pursuit of this right, must serve the interests and administer justice for *all stakeholders*—the victims, the public, and the State. After all, the right to the speedy disposition of cases of all parties in litigation must be protected, and not just the right of the accused to the exclusion of other parties.

Moreover, while this Article aims to contribute to the growing discussion on this matter, any lasting and effective reform to address this challenge before us must begin through the initiative of State actors, and a careful and calibrated review of Congress, the Judiciary, and other stakeholders on the best measures to take moving forward.

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