COMMENT:

EROTIC DUE PROCESS, UNJUST TAKINGS AND UNEQUAL PROTECTION: PROTECTING MOTEL OWNERS IN *CITY OF MANILA V. LAGUIO*

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As far back as 1967, in the case of *Ermita Malate Hotel and Motel Operators v. City of Manila*,[1] the city council had the occasion to speak of "the alarming increase in the rate of prostitution, adultery and fornication in Manila traceable in great part to the existence of motels."[2]

Flash back to the early 1900s, when America was at the cusp of the second industrial revolution: To protect its rising economic competitiveness, the government allowed business establishments to move freely. The courts wielded a powerful tool called substantive due process to strike down any law which threatened these businesses.[3]

Then jump forward to 2005, a few dozen years after *Ermita*. The Philippine Supreme Court strikes down a law that prohibits motels from being erected in a popular (and familiar) red-light district.

Jump forward a few months to December: Angelo King, owner of the famous chain of Anito motels, closes down one of his branches in the Ermita-Malate area. He erects a banner which reads "For the Greater Glory of God."[4]

Jump back again to April 12, 2005: In *City of Manila v. Laguio*,[5] the Supreme Court says, "I know only that what is moral is what you feel good after and what is immoral is what you feel bad after."[6]

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[1] 127 Phil. 306 (1967).

[2] *Id.* at 317.

[3] See the classic case on economic due process, Lochner v. New York, 198 U.S. 45 (1905). For a more thorough discussion, see also, Agricultural Credit and Cooperative Financing Administration v. Confederation of Unions in Government Corporations and Offices, 141 Phil. 334, 353-396 (1969) (Fernando J., *concurring*).

[4] Carlos Celdran, *No Comment...*, available at <http://celdrantours.blogspot.com/2005/12/no-comment.html> May 2, 2006.

[5] City of Manila v. Laguio, G.R. No. 118127, April 12, 2005.

[6] *Ibid.*

I. THE STORY

In 1993, the City Council of Manila enacted Ordinance no. 7783.[7] The ordinance prohibits the establishment and operation of beerhouses, night clubs, motels and other similar establishments in the Ermita-Malate area.

The private respondent is the Malate Tourist Development Corporation (MTDC). It is a corporation "engaged in the business of operating hotels, motels, hostels and lodging houses. It built and opened Victoria Court in Malate which was licensed as a motel although duly accredited with the Department of Tourism as a hotel."[8] The MTDC filed a petition with the Regional Trial Court of Manila for declaratory relief, a writ of preliminary injunction and a temporary restraining order.

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[7] The ordinance reads:

An Ordinance Prohibiting the Establishment of Operation of Businesses Providing Certain Forms of Amusement, Entertainment Services and Facilities in the Ermita-Malate Area, Prescribing Penalties for Violation Thereof and Other Purposes:

Sec. 1. Any provision of existing laws and ordinances to the contrary notwithstanding, no person, partnership, corporation or entity shall, in the Ermita-Malate area bounded by Teodoro M. Kalaw Sr. Street in the North, Taft Avenue in the East, Vito Cruz Street in the South and Roxas Boulevard in the West, pursuant to P.D. 499 be allowed or authorized to contract and engage in, any business providing certain forms of amusement, entertainment, services and facilities where women are used as tools in entertainment and which tend to disturb the community, annoy the inhabitants, and adversely affect the social and moral welfare of the community, such as but not limited to: (1) Sauna Parlors ; (2) Massage Parlors; (3) Karaoke Bars; (4) Beerhouses; (5) Night Clubs; (6) Day Clubs; (7) Super Clubs; (8) Discotheques; (9) Cabarets; (10) Dance Halls; (11) Motels; (12) Inns.

Sec. 2 The City Mayor, the City Treasurer or any person acting in behalf of the said officials are prohibited from issuing permits, temporary or otherwise, or from granting licenses and accepting payments for the operation of business enumerated in the preceding section.

Sec. 3. Owners and/or operator of establishments engaged in, or devoted to, the businesses enumerated in Section 1 hereof are hereby given three (3) months from the date of approval of this ordinance within which to wind up business operations or to transfer to any place outside of the Ermita-Malate area or convert said businesses to other kinds of business allowable within the area, such as but not limited to: (1) Curio or antique shop; (2) Souvenir Shops; (3) Handicrafts display centers; (4) Art galleries; (5) Records and music shops; (6) Restaurants; (7) Coffee shops; (8) Flower shops; (9) Music lounge and sing-along restaurants, with well-defined activities for wholesome family entertainment that cater to both local and foreign clientele; (10) Theaters engaged in the exhibition, not only of motion pictures but also of cultural shows, stage and theatrical plays, art exhibitions, concerts and the like; (11) Businesses allowable within the law and medium intensity districts as provided for in the zoning ordinances for Metropolitan Manila, except new warehouse or open-storage depot, dock or yard, motor repair shop, gasoline service station, light industry with any machinery, or funeral establishments.

Sec. 4. Any person violating any provisions of this ordinance, shall upon conviction, be punished by imprisonment of one (1) year or fine of FIVE THOUSAND (P5,000.00) PESOS, or both, at the discretion of the Court, PROVIDED, that in case of juridical person, the President, the General Manager, or person-in-charge of operation shall be liable thereof; PROVIDED FURTHER, that in case of subsequent violation and conviction, the premises of the erring establishment shall be closed and padlocked permanently.

Sec. 5. This ordinance shall take effect upon approval.

Enacted by the City Council of Manila at its regular session today, March 9, 1993.

Approved by His Honor, the Mayor on March 30, 1993.

[8] City of Manila v. Laguio, *supra*.

They impleaded as defendants: the City of Manila, Mayor Alfredo S. Lim, Vice-mayor Joselito L. Atienza, and the members of the City Council of Manila (City Council). The MTDC argued that motels and inns such as "Victoria Court" were "not establishments for 'amusement' or 'entertainment' and they were not 'services or facilities for entertainment,' nor did they use women as 'tools for entertainment,' and neither did they 'disturb the community,' 'annoy the inhabitants' or 'adversely affect the social and moral welfare of the community.'"[9] The MTDC also challenged the constitutionality of the ordinance claiming that:

> (1) The City Council has no power to prohibit the operation of motels as Section 458 (a) 4 (iv) of the Local Government Code of 1991 (the Code) grants to the City Council only the power to regulate the establishment, operation and maintenance of hotels, motels, inns, pension houses, lodging houses and other similar establishments; (2) The Ordinance is void as it is violative of Presidential Decree (P.D.) No. 499 which specifically declared portions of the Ermita-Malate area as a commercial zone with certain restrictions; (3) The *Ordinance* does not constitute a proper exercise of police power as the compulsory closure of the motel business has no reasonable relation to the legitimate municipal interests sought to be protected; (4) The *Ordinance* constitutes an *ex post facto* law by punishing the operation of Victoria Court which was a legitimate business prior to its enactment; (5) The *Ordinance* violates MTDC's constitutional rights in that: (a) it is confiscatory and constitutes an invasion of plaintiff's property rights; (b) the City Council has no power to find as a fact that a particular thing is a nuisance *per se* nor does it have the power to extrajudicially destroy it; and (6) The *Ordinance* constitutes a denial of equal protection under the law as no reasonable basis exists for prohibiting the operation of motels and inns, but not pension houses, hotels, lodging houses or other similar establishments, and for prohibiting said business in the Ermita-Malate area but not outside of this area.[10]

The Regional Trial Court ruled for the respondents on the grounds that (1) the ordinance was an oppressive exercise of police power, (2) that it amounted to an unjust taking without compensation and (3) that it was enacted *ultra vires* being contrary to PD 499.[11]

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[9] *Ibid.*

[10] *Ibid.*

[11] Presidential Decree No. 499 (1974) is entitled "Declaring Portions of the Ermita-Malate Area as Commercial Zones with Certain Restrictions." It reads in full:

> WHEREAS, the government is committed to the promotion and development of tourism in the country, particularly in the City of Manila which is the hub of commercial and cultural activities in Manila Metropolitan Area;
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> WHEREAS, certain portions of the districts of Ermita and Malate known as the Tourist Belt are still classified as Class "A" Residential Zones and Class "B" Residential Zones where hotels and other business establishments such as curio stores, souvenir shops, handicraft display centers and the like are not allowed under the existing zoning plan in the City of Manila;
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> WHEREAS, the presence of such establishments in the area would not only serve as an attraction for tourists but are dollar earning enterprises as well, which tourist areas all over the world cannot do without;
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> NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me under the Constitution as Commander-in-Chief of all the Armed Forces of the Philippines and pursuant to Proclamation No. 1081, dated

The Supreme Court affirmed the Regional Trial Court on five grounds: First, it held that the ordinance violated substantive due process because it did not meet the requisites of a valid exercise of police power. Second, the order for closure and transfer, or conversion to a legal business amounted to an unjust taking which requires just compensation. Third, the ordinance violates the equal protection clause because (1) it discriminates against motels and inns but not against hotels and pension houses, (2) it discriminates against men and women, and (3) there is no distinction between the Ermita-Malate zone and other areas. Fourth, the city council only has the authority to "regulate" and not "prohibit" the operation and maintenance of establishments. Lastly, that the ordinance is contrary to P.D. 499.

In the following pages, the author wishes to criticize the main arguments forwarded by the Supreme Court in defense of motel owners.

II. EROTIC DUE PROCESS

The Supreme Court held that the ordinance was an invalid exercise of police power because there was no reasonable relationship between the means and the substantial governmental interest.

As every law student knows, police power is the least limitable of all the powers of government. It is justified by nothing less than the spirit of self-preservation inherent in all states. The police power of the state is "properly exercised where it appears (1) that the interests of the public generally as distinguished from those of a particular class, require such interference, and (2) that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."[12] This class of limitations is what is referred to as substantive due process.

There are basically two levels of analysis in substantive due process, (1) the rational basis of review and (2) strict scrutiny. Strict scrutiny is applied if the exercise of police power affects a "fundamental" right. If it does not, then rational basis is used. A strict scrutiny mode of analysis means that the Court will require an "overriding" or

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September 21, 1972, and General Order No. 1, dated September 22, 1972, as amended, do hereby order and decree the classification as a Commercial Zone of that portion of the Ermita-Malate area bounded by Teodoro M. Kalaw, Sr. Street in the north; Taft Avenue in the east; Vito Cruz Street in the south and Roxas Boulevard in the west. PROVIDED, HOWEVER, That no permit shall be granted for the establishment of any new warehouse or open storage depot, dump or yard, motor repair shop, gasoline service station, light industry with any machinery or funeral establishment in these areas, and PROVIDED, FURTHER, That for purposes of realty tax assessment on properties situated therein, lands and buildings used exclusively for residential purposes by the owners themselves shall remain assessed as residential properties.

All laws, ordinances, orders, rules and regulations which are inconsistent with this Decree are hereby repealed or modified accordingly.

This Decree shall take effect immediately.

Done in the City of Manila this 28th day of June in the year of Our Lord, nineteen hundred and seventy-four.

[12] Fabie v. City of Manila. 21 Phil. 486 (1912), citing US v. Toribio 15 Phil. 92 (1910).

"compelling" governmental interest, and that the means to achieve that interest must be "narrowly tailored" to achieve such interests.[13] In contrast, a rational basis of review will only look for a "legitimate" governmental interest, and the means must only have a "rational relationship" to the purpose. Strict scrutiny is often "strict in theory, but fatal in fact"[14] because most government measures cannot stand up to it. It is often employed in cases involving free speech.

In *Laguio*, the Court applied the strict scrutiny mode of analysis because the ordinance violates "the constitutional guarantees of a person's fundamental right to *liberty* and *property*."[15]

There are two problems here. First, the right to property cannot be a "fundamental" right that deserves the highest protection of the courts. As early as the 1955 case of *Co Kiam v. City of Manila*[16] the Court declared:

> [T]he mere fact that some individuals in the community may be deprived of their present business or a particular mode of earning a living can not prevent the exercise of the police power. As was said in a case, persons licensed to pursue occupations which may in the public need and interest be affected by the exercise of the police power embark in those occupations subject to the disadvantages which may result from the legal exercise of that power.[17]

The era of economic due process is long over. It has been pronounced time and again by our Courts that the country does not support a Laissez-Faire policy, and that government has the right to regulate property for the public welfare.[18] Also, it is a fundamental notion that the right to property "implies a social obligation on the part of the owner to exercise such right without causing injury to others, and looking to the attainment of the common good."[19]

Second, the *ponencia* boldly announces that the right to liberty also includes the right of the people to have sexual relations inside motels. It explained in this wise:

> Motel patrons who are single and unmarried may invoke this right to autonomy to consummate their bonds in intimate sexual conduct within the motel's premises - be it stressed that their consensual sexual behavior does not contravene any fundamental state policy as contained in the Constitution. Adults have a right to

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[13] Roe v. Wade 410 U.S. 113 (1973).

[14] See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Although the phrase was coined in reference to equal protection and not substantive due process. It would be later employed in the latter sense by Professor Eugene Volokh in his article *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2427 (1996).

[15] City of Manila v. Laguio, G.R. No. 118127, April 12, 2005.

[16] 96 Phil. 649 (1955) , citing City of New Orleans v. Stafford, 27 L. Ann. 417.

[17] *Id.* at 654.

[18] Agricultural Credit and Cooperative Financing Administration v. Confederation of Unions in government Corporations and Offices. (Fernando, J. *concurring*) 141 Phil. 334 (1969); , Ermita-Malate Hotel and Motel Operators v. City of Manila, 127 Phil. 306 (1967)..

[19] Tan Chat v. Municipality of Iloilo, 60 Phil. 465 (1934) (J, Villareal, Dissenting) , Civil Code, Art. 431.

> choose to forge such relationships with others in the confines of their own private lives and still retain their dignity as free persons. The liberty protected by the Constitution allows persons the right to make this choice. Their right to liberty under the due process clause gives them the full right to engage in their conduct without intervention of the government, as long as they do not run afoul of the law.[20]

But that is beside the point. The ordinance does not prohibit people from entering motels, much less from having sexual intercourse. It prohibits land owners from erecting motels only in the Ermita-Malate area. If people want to go to a motel, they may do so in other areas.

The author does not see how the closure and prohibition of motels and inns will lead to the invasion of privacy of any individual. The leading case of strict scrutiny applied to a privacy interest is *Griswold v. Connecticut*.[21] There, the challenged ordinance prohibited the *use* of contraceptives. The United States Supreme Court found this problematic because the enforcement of the ordinance would mean that the police would have to search the private bedrooms of the couples. This amounted to a clear interference with one's marital privacy. In the case of Victoria Court, the enforcement involved here is simply the closure of the establishment. There is no need to venture inside its dark crevices. It can be done outside the building, without interfering whatsoever with anyone's privacy.

In fact, in the case of *Ermita-Malate Hotel and Motel Operators v. City of Manila*,[22] the ordinance involved there *required* motels to procure certain data from customers before they were allowed to enter. Such acts definitely involve an intrusion into one's privacy and yet, the court upheld the ordinance.

With its decision in *Laguio*, the Court may have successfully implanted a very specific kind of privacy interest in our legal system: the right to frequent motels.

III. MORALITY AND WOMEN

The Court hypothetically acknowledged that the ordinance was promoting the moral welfare of the community. It admitted that morality *was* a compelling governmental interest. However, after applying strict scrutiny, it decided that the means employed was not narrowly tailored in order to advance such interest:

> The closing down and transfer of businesses or their conversion into businesses "allowed" under the Ordinance have no reasonable relation to the accomplishment of its purposes. Otherwise stated, the prohibition of the enumerated establishments will not per se protect and promote the social and moral welfare of the community; it will not in itself eradicate the alluded social ills

[20] City of Manila v. Laguio, G.R. No. 118127. April 12, 2005.
[21] 381 US 479 (1965).
[22] 127 Phil. 306 (1967).

> of prostitution, adultery, fornication nor will it arrest the spread of sexual disease in Manila.[23]

It is humbly submitted that the Court made an error with regard to the characterization of the governmental interest involved. If one revisits the text of the ordinance, it reads "any business providing certain forms of amusement, entertainment, services and facilities where women are used as tools in entertainment *and* which tend to disturb the community, annoy the inhabitants, and adversely affect the social and moral welfare of the community."[24] (emphasis supplied) Since it uses the word "and" and not "or," we should construe the sentence as mutually inclusive. Having said that, it stands to reason that the ordinance does not legislate against immorality or the welfare of the community *per se*. Instead, it seeks *to protect women* from being used as tools for entertainment *in such a way* that it tends to disturb the community, annoy the inhabitants, and adversely affect the social and moral welfare of the community.

Thus, while it may be correct to say that the closure and prohibition of such establishments in the area will not *per se* promote morality, the same is not true with regard to the protection of women. Justice Tinga , in *Laguio* says: "The problem, it needs to be pointed out, is not the establishment, which by its nature cannot be said to injurious to the health or comfort of the community and which in itself is amoral, but the deplorable human activity that may occur within its premises."[25]

The author begs to disagree. Motels, by their very nature, are conducive to the "deplorable" human activities that occur inside them. From their back-alley locations, to the staff trained not to ask too many questions, to the excessive obsession with privacy, to their discount cards and limited hours, these establishments are havens for the objectification and abuse of women.[26] It must also be remembered that the Philippines has a constitutional[27] and international[28] obligation to protect women.

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[23] City of Manila v. Laguio, G.R. No. 118127. April 12, 2005.

[24] Manila Ordinance no. 7783, June 28, 1974, sec. 1.

[25] City of Manila v. Laguio, *supra.*

[26] Maricel Cruz, Jena Balaoro & Inday Espina-Varona, *Night falls and the flesh trade opens in Manila's tourist strip*, available at <http://www.manilatimes.net/others/special/2002/oct/02/20021002spe1.html> May 1, 2006.

[27] CONST. art. II, sec. 14 & art. XIII, sec. 11 & 14.

[28] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Philippines signed the CEDAW during the United Nations Decade for Women on July 15, 1980 and ratified it in August, 1981. The pertinent provisions are as follows:

> Art. 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:...(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise
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> Art. 5. States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women....
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> Art. 6. States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

While it is true that illicit relations and prostitution may occur in places other than motels, it does not detract from the fact that *most* of these incidents occur inside or within the immediate vicinity of motels. It does not detract from the fact that motels and inns provide the perfect venue for such indulgence.[29] Under Republic Act No. 7610 or the Child Abuse Act of 1992 for example, it is illegal for a person to bring a minor into any motel, subject to exceptions.[30] This is because there is no real reason to bring a minor into such areas of debauchery. These establishments are also often the site of heinous crimes like rape.[31]

Why is there a need for outright prohibition? Since 1967, the most well-crafted regulations notwithstanding, the city of Manila has not been able to remove the stigma attached to the Ermita-Malate area. It just goes to show that while there may be more than one way to skin a cat, some ways are better than others. Regulation has not been effective in policing motels and such establishments. It may be high time for more permanent measures. In fact, in various parts of the United States, local governments are already cracking down on these so-called "hot-sheet motels."[32]

At the very least, it should be conceded that a reasonable relationship exists between the prohibition of motels and the abolition of discrimination and exploitation of women, particularly in the Ermita-Malate area. The Court would have reached this conclusion if they had only used a rational basis mode of review.

IV. AN UNJUST TAKING?

The Supreme Court held that the Ordinance is "unreasonable and oppressive as it substantially divests the respondent of the beneficial use of its property."[33]

> The Ordinance in Section 1 thereof forbids the running of the enumerated businesses in the Ermita-Malate area and in Section 3 instructs its owners/operators to wind up business operations or to transfer outside the area or convert said businesses into allowed · businesses. An ordinance which permanently restricts the use of property that it can not be used for any reasonable purpose goes beyond regulation and must be recognized as a taking of the

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[29] Karin Schmerler, *"Disorder at Budget Motels" Center for Problem-Oriented Policing*, available at <http://www.popcenter.org/problems/problem-budget_motels.htm> May 2, 2006.

[30] Rep. Act No. 7610 (1991), sec. 10(b).

[31] See instances where a crime was committed in a motel: People v. Rapisora, G.R. No. 138086, January 25, 2001; People v. Lo-ar, 345 Phil. 429 (1997); People v. Cabaluna, 332 Phil. 653 (1996); People v. Abutin, 328 Phil. 862 (1996); People v. Padilla, 312 Phil. 721 (1995); People v. Balajadia, G.R. No. 96988, August 2, 1993; People v. Angeles, G.R. No. 104285, May 21, 1993; Bunag Jr. v. Court of Appeals, G.R. No. 101749. July 10, 1992; Castillo v. Calanog, A.M. No. RTJ- 90-447 July 12, 1991; People v. Tan, G.R. No. 89316, July 12, 1990; & People v. Puzon, G.R. No. L-60559, December 2, 1987.

[32] See John Desio, *Sheriff Adolfo vs. 'Hot-Sheet' Motels,'* available at <http://gothamgazette.com/community/12/news/95> May 1, 2006; Kevin Aldridge, *Trustees want to close crime motel*, available at <http://www.enquirer.com/editions/2004/06/12/loc_loc1bmotel.html> May 1, 2006; Brian Hamrick, *Prosecutor Shuts Down Motel As Nuisance* <http://www.channelcincinnati.com/news/4519281/detail.html> May 1, 2006.

[33] City of Manila v. Laguio, G.R. No. 118127, April 12, 2005.

> property without just compensation. It is intrusive and violative of the private property rights of individuals.[34]

The City of Manila argued that the ordinance should be classified as a zoning regulation, but the court refused to accept the argument:

> Petitioners cannot take refuge in classifying the measure as a zoning ordinance. A zoning ordinance, although a valid exercise of police power, which limits a "wholesome" property to a use which can not reasonably be made of it constitutes the taking of such property without just compensation. Private property which is not noxious nor intended for noxious purposes may not, by zoning, be destroyed without compensation. Such principle finds no support in the principles of justice as we know them. The police powers of local government units which have always received broad and liberal interpretation cannot be stretched to cover this particular taking.[35]

To support its argument, the Court cites the ruling in *Lucas v. South Carolina Coastal Council.*[36] In that case, Lucas was the owner of two residential lots situated near the coastline of Charleston City. At the time he purchased the lots, there were no restrictions imposed upon the use of such property. However, subsequent to the purchase, the city council enacted an ordinance, which prohibited the construction of occupable improvements along the coastline and unfortunately covered the lots owned by Lucas. The case went all the way up to the U.S. Supreme Court, which held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[37] But in the same breath, the Court also went on to qualify the statement by saying that "harmful or noxious uses of property may be proscribed by government regulation without the requirement of compensation."[38]

The key word here is *all* — *all* economically beneficial use of the property. In the case of *Lucas*, the ordinance rendered the lot practically worthless. Lucas could not have constructed anything at all and in effect he was deprived of *all* economically beneficial use of the land. In contrast, the Manila ordinance merely prohibits a few uses for the property. It does not deprive motel owners of *all* economically beneficial use of their property. They are welcome to convert their properties into residences, theaters, curio shops or other commercial ventures. They are not prohibited from using the property. The property will not be left economically idle.

In *Tan Chat v. Municipality of Iloilo*,[39] the municipality of Iloilo enacted an ordinance which prohibited sawmill and lumber stores in certain areas because they

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[34] *Ibid.*
[35] *Ibid.*
[36] 505 U.S. 1003 (1992).
[37] City of Manila v. Laguio, *supra.*
[38] *Ibid.*
[39] 60 Phil. 465 (1934).

posed a nuisance to the people in the vicinity. The prohibited businesses were given six months to relocate their business elsewhere *with no alternative of converting their property to another use.* This ordinance was upheld by the Court in this wise:

> The argument that the provision of ordinance giving the plaintiffs a fixed period to move their sawmill and lumber stores to some other adequate place is unconstitutional, on the ground that said measure is confiscatory and does not provide adequate compensation, is untenable, for the reason that in this case the city of Iloilo *does not take over the ownership of said business but simply prohibits the conduct of said industry or business within the limits established in the ordinance, and said prohibition is within the powers conferred upon the municipality.* In enacting the ordinance in question the city of Iloilo has done nothing but to *safeguard the health, safety, and welfare of its inhabitants*, and it is perfectly fair that the herein plaintiffs should abide by the provisions thereof which are in accordance with the old and well-known maxim: salus populi suprema lex.[40] (emphasis supplied)

The case was affirmed by a unanimous court in *People v. De Guzman.*[41]

The doctrine is that zoning is a permissible form of police power exercised by municipalities and cities for the general welfare of the people. Zoning may amount to a "taking" only if it limits the property to a use which can not reasonably be made of it. In other words, it deprives the owner of any reasonable use of his property. In this case, the ordinance in question gives the owner several alternatives. The ordinance explicitly allows the conversion of the prohibited establishments into allowed establishments. Justice Tinga says that: "The conversion into allowed enterprises is just as ridiculous. How may the respondent convert a motel into a restaurant or a coffee shop, art gallery or music lounge without essentially destroying its property?" The author begs to disagree once again. Almost all zoning ordinances entail some kind of conversion. It is quite reasonable to convert a motel into a performance theater or family karaoke bar. In fact, the most practical option of the owner is simply to convert the motel into a legitimate hotel.

V. UNEQUAL PROTECTION

HOTELS AND MOTELS

In the Court's view, there are no substantial distinctions between motels, inns, pension houses, hotels, lodging houses or other similar establishments. By definition, all are commercial establishments providing lodging, meals and other services for the public. No reason exists for prohibiting motels and inns but not pension houses, hotels, lodging houses or other similar establishments. By unduly discriminating against these establishments, the ordinance is violative of the equal protection clause.

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[40] *Id.* at 480.

[41] 90 Phil. 132 (1951).

In the author's point of view, motels and hotels have several significant distinctions. First, motels charge an hourly rate, while hotels tend to charge nightly rates. This increases the tendency of people to enter motels for "short-time" flings. It is an ideal venue for prostitution since it is cheaper than renting a hotel room. Second, motels tend to be located in discreet areas, while hotels tend to be located in prime locations. Motels tend to cater to clientele located in the C-D brackets. To be more accessible to them, motels are set up near areas which they frequent. Third, "at motels, the guests can directly access rooms without having to enter the motel lobby or main building. At hotels, guests and visitors must pass through the front lobby or enter the building through an outside door and an interior corridor to get to the rooms."[42] This further encourages prostitution and other crimes against women since there are fewer witnesses. Once safely inside a room, the occupants are free to do whatever they want.

GENDER

The Court also said that the standard "where women are used as tools for entertainment" is discriminatory because

> ...prostitution — one of the hinted ills the Ordinance aims to banish — is not a profession exclusive to women. Both men and women have an equal propensity to engage in prostitution. It is not any less grave a sin when men engage in it. And why would the assumption that there is an ongoing immoral activity apply only when women are employed and be inapposite when men are in harness?[43]

Again, the ordinance seeks to protect women, not to promote morality. Laws that specifically protect women cannot be struck down because they discriminate against men. As explained before, the legal system of the Philippines has a bias for women, especially in areas where they experience discrimination. In the 1996 case of *U.S. v. Virginia*,[44] the United States Supreme Court also had an opportunity to articulate its policy on sex discrimination:

> Sex Classification may be used to compensate women "for particular economic disabilities [they have] suffered", to "promot[e] equal employment opportunity,", to advance full development of the talent and capacities of our nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.[45]

The *ponencia* is correct in saying that there are male prostitutes. However, it fails to look at the bigger picture. Prostitution is just one form of exploitation against women. Other forms of abuse against women such as rape and harassment also occur inside motels. By focusing only on prostitution, the court fails to see that the ordinance

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[42] K. Schmerler, *op. cit. supra* note 28.

[43] City of Manila v. Laguio, G.R. No. 118127, April 12, 2005.

[44] US v. Virginia, 518 U.S. 515 (1996).

[45] *Id.* at 533-534, citing Califano v. Webster, 430 U.S. 313, 320, 97 S.Ct. 1192, 1196, 51 L.Ed.2d 360 (1977); California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 289, 107 S.Ct. 683, 693-694, 93 L.Ed.2d 613 (1987); & Goesaert v. Cleary, 335 U.S. 464, at 467, 69 S.Ct., at 200 (1948).

also seeks to protect women against other forms of abuse. Therefore the equal protection challenge must fail.

The author would also like to point out that the problem of prostitution is rampant first and foremost among women. Also there are specific dangers connected to prostitution which affect only women. These include physical battering by some customers, and forced oral or anal sex. There is still a real and tangible distinction. Such classifications should not be struck down because of some legal incompatibility. This would only lead to a distortion of "equal protection". The Supreme Court's decision in *Laguio* suggests that progressive legislation such as Republic Act No. 9262[46] or the Anti-violence against Women and Children Act of 2004 may also be considered void as violative of the equal protection clause. The Constitution allows for exemptions. It is not gender-neutral, but is responsive to the real and specific needs and concerns of each sex.

GEOGRAPHY

The Court held that there is no substantial distinction between the Ermita-Malate area and other parts of the city: "The Court likewise cannot see the logic for prohibiting the business and operation of motels in the Ermita-Malate area but not outside of this area. A noxious establishment does not become any less noxious if located outside the area."[47]

If one applies the rational basis level of review, it is quite clear that a reasonable distinction exists.

First, the Ermita-Malate area is populated with a score of universities, colleges, and high schools. If there ever was a need to inculcate respect for women, it must start with the youth. The proliferation of such establishments in close proximity to these institutions, affects the social and moral welfare of the student community

Second, the Ermita-Malate area is a tourist destination. It is a prime commercial zone. Establishments which openly show how we treat our women, send a bad message to foreigners and affect the reputation of the city and the country as a whole. It is bad enough that the Philippines is often cited as a prime destination for "sex tours." The Ermita-Malate area does nothing to change that fact.

Third, ironically, the area also houses several non-governmental organizations ("NGOs") which advocate women's rights such as the Remedios AIDS foundation, and the Pinoy Plus Association. Some of these organizations choose Malate as their base of operations precisely because of the number of women who are being exploited in the area. Suffice to say that these establishments are there to bolster the government's lackadaisical efforts at curbing the flesh trade and other forms of abuse against women.

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[46] Rep. Act No. 9262 (2004).

[47] City of Manila v. Laguio, *supra*.

VI. ULTRA VIRES: REGULATION VS. PROHIBITION

The Supreme Court also invalidated the Manila Ordinance because the Local Government Code only "empowers local government units to regulate, and not prohibit, the establishments enumerated in Section 1 thereof." The court, in making a distinction between the power to regulate, and the power to prohibit, cited *Kwong Sin v. City of Manila*:[48] "The word 'regulate,' as used in subsection (l), section 2444 of the Administrative Code, means and includes the power to control, to govern, and to restrain; but 'regulate' should not be construed as synonymous with 'suppress' or 'prohibit.'"[49]

It is the author's submission that the ordinance does not seek to prohibit the establishment of motels, but merely regulates them. As mentioned before, the ordinance partakes of a zoning regulation. Zoning has been defined in the case of *Pampanga Bus Co. v. Municipality of Tarlac*[50] in this wise:

> The term "zoning," ordinarily used with the connotation of comprehensive or general zoning, refers to governmental *regulation* of the uses of land and buildings according to districts or zones. This regulation must and does utilize classification of *uses within districts* as well as classification of districts, inasmuch as it manifestly is impossible to deal specifically with each of the innumerable uses made of land and buildings. Accordingly, (zoning has been defined as the confining of certain classes of buildings and uses to certain localities, areas, districts or zones.) It has been stated that zoning is the regulation by districts of building development and uses of property, and that the term "zoning" is not only capable of this definition but has acquired a technical and artificial meaning in accordance therewith. Zoning is the separation of the municipality into districts and the *regulation* of buildings and structures within the districts so created, in accordance with their construction, and nature and extent of their use. It is a dedication of districts delimited to particular uses designed to subserve the general welfare.) Numerous other definitions of zoning more or less in accordance with these have been given in the cases.[51] (emphasis supplied)

Zoning is not prohibition. It merely "confines" certain classes of uses to certain localities or areas. People are not prohibited from erecting motels. The Manila ordinance merely seeks to confine the use of certain property within duly established districts. It regulates the location where motels and inns may be maintained and operated. It does not prohibit their establishment.

As such, the city council steps well within its bounds in enacting the ordinance. One needs to go no further than section 3 of Republic Act No. 2264,[52] otherwise known as the Local Autonomy Act, which empowers the city council "to adopt zoning

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[48] 41 Phil. 103 (1920).

[49] *Id.* at 108.

[50] 113 Phil. 789 (1961).

[51] *Id.* at 800-801, citing EUGENE MCQUILLIN, 8 LAW ON MUNICIPAL CORPORATIONS 11-12, 27-28 (3rd ed.).

[52] Rep. Act No. 2264 (1959), "An Act Amending the Laws Governing Local Governments by Increasing their Autonomy and Reorganizing Provincial Governments."

and subdivision ordinances or regulations". Additionally, section 458[53] of the Local Government Code also bolsters the city council's authority to regulate property.

VII. *ULTRA VIRES*: P.D. 499

Finally, the Court held that the ordinance ran counter to the provisions of Presidential Decree No. 499 ("P.D. 499"):[54]

> As correctly argued by MTDC, the statute had already converted the residential Ermita-Malate area into a commercial area. The decree allowed the establishment and operation of all kinds of commercial establishments except warehouse or open storage depot, dump or yard, motor repair shop, gasoline service station, light industry with any machinery or funeral establishment. The rule is that for an ordinance to be valid and to have force and effect, it must not only be within the powers of the council to enact but the same must not be in conflict with or repugnant to the general law. [55]

The author does not see how the ordinance violates P.D. 499. The decree classified the Ermita-Malate areas as a commercial zone. According to its whereas clauses, the decree seeks to promote and develop tourism in Manila. It also deplores the fact that "hotels and other business establishments such as curio stores, souvenir shops, handicraft display centers and the like are not allowed under the existing zoning plan in the City of Manila."[56] It stands to reason therefore that the decree was enacted precisely to allow these kinds of establishments to flourish in the area, as well as to promote tourism.

Ordinance No. 7783 *does not* prohibit the same establishments from being erected inside the area. In fact, it *explicitly* allows it under section 3. The ordinance merely relocates or converts certain establishments, which are *not* enumerated in P.D. 499. Does the ordinance change the commercial character of the area? No. Does the ordinance run contrary to the development of tourism? No. Does the ordinance add or subtract to the establishments which must be granted a permit? Admittedly, yes.

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[53] Said section provides:

> Sec. 458. *Powers, Duties, Functions and Compensation.* (a) The sangguniang panlungsod, as the legislative body of the city, shall enact ordinances, approve resolutions and appropriate funds for the general welfare of the city and its inhabitants pursuant to Section 16 of this Code and in the proper exercise of the corporate powers of the city as provided for under Section 22 of this Code, and shall:...
>
> (2) Generate and maximize the use of resources and revenues for the development plans, program objectives and priorities of the city as provided for under Section 18 of this Code, with particular attention to agro-industrial development and city-wide growth and progress, and relative thereto, shall:...(vi) Prescribe reasonable limits and restraints on the use of property within the jurisdiction of the city;...

(4) Regulate activities relative to the use of land, buildings and structures within the city in order to promote the general welfare and for said purpose shall:... (iv) Regulate the establishment, operation and maintenance of cafes, restaurants, beerhouses, hotels, motels, inns, pension houses, lodging houses, and other similar establishments, including tourist guides and transports...

[54] *Supra* at note 10.

[55] City of Manila v. Laguio, G.R. No. 118127, April 12, 2005.

[56] Pres. Decree No. 499, *supra*.

However the Local Government Code[57] was enacted in 1991, way after the date of effectivity of P.D. 499 which was in 1974. Any inconsistencies between the two should be judged in favor of the former. Otherwise, it would lead to an absurd situation where city councils are left helplessly at the mercy of a zoning law enacted almost 20 years ago.

VIII. CONCLUSION

It is quite unfortunate that the Courts have decided to accord the highest constitutional protection to the owners of motels rather than to women. Ironically this decision comes at the heels of a crucial sea change in gender sensitivity with regard to legislation and policy-making.[58]

Even in the United States, the legal system has been increasingly adopting a more pro-women stance. In 1996, the U.S. Supreme Court struck down a military institute's male-only admissions policy in the case of *U.S. v. Virginia*.[59] In doing so, the Court created a new standard of analysis called "skeptical scrutiny,"[60] available exclusively to women. Anita K. Blair, an *Amicus Curae* in the case, explains it in this wise:

> Skeptical scrutiny is distinguished from strict scrutiny, the equal protection standard applicable to race classifications, in several ways. Strict scrutiny applies both ways; that is, classifications favoring racial minorities are judged by the same

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[57] Rep. Act No. 7160 (1991).

[58] In the case of Philippine Telegraph & Telephone Company v. NLRC, 338 Phil. 1093 (1997), the Court discussed the evolution of our legal system towards a more gender-sensitive position: "Corrective labor and social laws on gender inequality have emerged with more frequency in the years since the Labor Code was enacted on May 1, 1974 as Pres. Decree No. 442, largely due to our country's commitment as a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Principal among these laws are Republic Act No. 6727 which explicitly prohibits discrimination against women with respect to terms and conditions of employment, promotion, and training opportunities; Republic Act No. 6955 which bans the "mailorder-bride" practice for a fee and the export of female labor to countries that cannot guarantee protection to the rights of women workers; Republic Act No. 7192, also known as the "Women in Development and Nation Building Act," which affords women equal opportunities with men to act and to enter into contracts, and for appointment, admission, training, graduation, and commissioning in all military or similar schools of the Armed Forces of the Philippines and the Philippine National Police; Republic Act No. 7322 increasing the maternity benefits granted to women in the private sector; Republic Act No. 7877 which outlaws and punishes sexual harassment in the workplace and in the education and training environment; and Republic Act No. 8042, or the "Migrant Workers and Overseas Filipinos Act of 1995," which prescribes as a matter of policy, inter alia, the deployment of migrant workers, with emphasis on women, only in countries where their rights are secure. Likewise, it would not be amiss to point out that in the Family Code. women's rights in the field of civil law have been greatly enhanced and expanded.

In the Labor Code, provisions governing the rights of women workers are found in Articles 130 to 138 thereof Article 130 involves the right against particular kinds of night work while Article 132 ensures the right of women to be provided with facilities and standards which the Secretary of Labor may establish to ensure their health and safety. For purposes of labor and social legislation, a woman working in a nightclub, cocktail lounge, massage clinic, bar or other similar establishments shall be considered as an employee under Article 138. Article 135. on the other hand, recognizes a woman's right against discrimination with respect to terms and conditions of employment on account simply of sex. Finally, and this brings us to the issue at hand, Article 136 explicitly prohibits discrimination merely by reason of the marriage of a female employee.

[59] 518 U.S. 515 (1996).

[60] Traditionally, gender classifications were analyzed using "intermediate" or "heightened" scrutiny, *see* Craig v. Borhen 429 U.S. 190 (1976), and Michael M v. Superior Court of Sonoma County 450 U.S. 464 (1981).

> standard as those operating against racial minorities. Skeptical scrutiny, as defined by Justice Ginsburg, favors the female sex only. *Thus, it affords women (as a class) a degree of legal protection not available to any other group in American society — not even the descendants of former slaves, the original intended beneficiaries of the Fourteenth Amendment.*
>
> Skeptical scrutiny also provides an unprecedented degree of legal protection to individuals, without regard to the needs of society or civilization itself. Under skeptical scrutiny, no qualified individual may be denied an opportunity on the basis of his or her sex. *The only exceptions relate to "inherent differences" (apparently limited to sex organs) and compensatory privileges for women only, based on past discrimination....*
>
> The new skeptical scrutiny test focuses on the phrase "exceedingly persuasive justification." This has appeared in earlier cases where it seemed to be interpreted simply as a shorthand synonym for the phrase "substantially related to achieving an important governmental objective." Now the shorthand phrase has an independent meaning, superseding the old inquiry into important objectives and substantial relations.
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> An exceedingly persuasive justification, as defined by Justice Ginsburg, "must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[61] (emphasis supplied)

While it is true that the mere erection of motels *per se* will not translate to the abuse and exploitation of women, it cannot be denied that they play a major part. This rings true especially with regard to the Ermita-Malate area. In the end, the resolution of the entire case hinges on just one question: Will the barring of motels potentially contribute to the protection of women?

If motel owners themselves acknowledge the negative impact of their businesses, why can't the Supreme Court follow suit?

Jump back to the present, life after *Laguio.*

> *The fool who has not sense to discriminate between what is good and what is bad is well nigh as dangerous as the man who does discriminate and yet chooses the bad.*
> — *Theodore Roosevelt*[62]

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[61] Anita K. Blair, *US v Virginia: The New and Improved Equal Protection Clause*, The Federalist Society, available at <http://www.fed-soc.org/Publications/practicegroupnewsletters/civilrights/cr010203.htm> May 2, 2006.

[62] Speech by Theodore Roosevelt, *The Man With a Muck-Rake*, April 15, 1906.