THE BLURRING OF THE PUBLIC/PRIVATE DISTINCTION: OBSOLESCENCE OF THE STATE ACTION DOCTRINE*

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ABSTRACT

The traditional view assumes that the state is the only threat to our constitutional rights. Hence, the Bill of Rights operates to constrain government action alone. This view, embodied in the *state action doctrine*, is under siege from progressive forces wishing to confront the shift of economic and political power into private hands, away from democratically elected or constitutionally accountable state agencies. Today, we recognize that private actors too can be the source of abuse. This article looks at emerging legal concepts that erode the state action requirement by recognizing various ways in which the state and private actors are tightly intertwined. These concepts do not abandon the *state action doctrine* altogether, but transform it to address both public evils and private wrongs.

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* *Cite* as Raphael Lorenzo A. Pangalangan, *Blurring of the Public/Private Distinction: Obsolescence of the State Action Doctrine*, 90 PHIL. L.J. 154, (page cited) (2016).

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The author would like to acknowledge his professors: Maximo Paulino Sison, Ma. Carolina Legarda, Linda Hornilla, Rosa Maria Juan-Bautista, January Sanchez, Anthony Charlemagne Yu, Jay Batongbacal, Augusto Jose Arreza, Carmelo Sison, Emerson Banez, Jose Layug, Hector De Leon, Rommel Casis, Chryilla Carissa Bautista, Mark Bocobo, Stephanie Gomez-Somera, Dean Salvador Carlota, Dan Calica, Dean Danilo Concepcion, Jose Jesus Disini, Hermino Harry Roque, Dean Merlin Magallona, James Dennis Gumpal, Serafin Salvador, Dante Gatmaytan, Augusto San Pedro, Ma. Elizabeth Loriega, Eduardo Juan Abella, Solicitor General Florin Hilbay, Victorino Mamalateo, Rafael Morales, Rogelio Quevedo, Crisostomo Uribe, Arnel Paciano Casanova. Mr. Pangalangan most especially thanks Professor Gwen Grecia-De Vera, who first introduced to him the study of the Bill of Rights, Professor Patricia Rosalind Daway, adviser whose guidance was invaluable to his research and writing of this paper, and his parents, Judge Raul C. Pangalangan and Professor Elizabeth Aguiling-Pangalangan, who continue to teach him the ways of law and life, in and out of the classroom.

> *"[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."*
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> — Sutherland, *J.*,[1]

> *"[The Constitution] must grow with the society it seeks to re-structure and march apace with the progress of the race, drawing from the vicissitudes of history the dynamism and vitality that will keep it, far from becoming a petrified rule, a pulsing, living law attuned to the heartbeat of the nation."*
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> — Panganiban, *J.*,[2]

I. INTRODUCTION

The Constitution purports to govern the relationship between the state and the individual; it has traditionally served as a constraint on government action alone. That premise however is now radically transformed because today we realize that the rights "We the People" believe to be fundamental can be harmed not just by the state but also by other people. This paper deals with the doctrinal and structural challenges in reserving the application of the Bill of Rights to public actors.

This doctrine is called the *state action*[3] *doctrine*, and the structure is known as the *public/private distinction*.[4]

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[1] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[2] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 23, May 2, 1997, *citing* ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 13 (1995).

[3] Duncan Ass'n of Detailman-PTGWO v. Glaxo Wellcome Philippines, Inc. [hereinafter "*Duncan*"], G.R. No. 162994, 438 SCRA 343, 354, Sept. 17, 2004. *See* BLACK'S LAW DICTIONARY 1444 (8th ed. 2004); BOUVIER'S LAW DICTIONARY 1051 (2011).

[4] Raul C. Pangalangan, *Property as a Bundle of Rights*, 70 PHIL. L.J. 141, 152 (1996), *citing* Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982). *See* BOUVIER'S LAW DICTIONARY 890 (2011).

The traditional doctrine of state action has served as the premise of constitutional protections in the Philippine legal system.[5] As echoed through both Philippine and U.S. case laws, under this doctrine, the Bill of Rights is understood to restrain the government alone.[6] In what is commonly cited as the doctrine's origin, the U.S. Supreme Court ruled in the *Civil Rights Cases*[7] that the Fourteenth Amendment of the U.S. Constitution protected individuals from the State alone, and not from each other.[8] A century later, the Philippine Supreme Court likewise held in *People v. Marti* (hereinafter, "*Marti*") that constitutional guarantees could only be invoked against public impairments, and not private wrongs.[9]

The dichotomy of government and non-government action reflected in these cases is embodied in the *public/private distinction.* The distinction was drawn for two reasons: first, on the assumption that only the State was in the position to violate fundamental rights;[10] and second, to afford the private sphere the freedom to structure itself as it sees fit, subject only to the constraints of legislation.[11]

These considerations no longer hold true today. Political and economic powers have veered from "government control to deregulation, from state ownership to privatization, and from national sovereignty to globalization and liberalization."[12] The force of law has since shifted from the

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[5] Joaquin G. Bernas, S.J., Sponsorship Remarks, I RECORD CONST. COMM'N 674 (July 17, 1986). "The protection of fundamental liberties is the essence of constitutional democracy. Protection against whom? Protection against the state. The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder."

[6] People v. Marti [hereinafter "*Marti*"], G.R. No. 81561, 193 SCRA 57, Jan. 18, 1991. *See Duncan*, 438 SCRA 343.

[7] Civil Rights Cases, 109 U.S. 3 (1883).

[8] *Id.* at 17. *See* Terri Peretti, *Constructing the State Action Doctrine*, 35 LAW & SOC. INQUIRY 273 (2010); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 72 (1989), *citing* DeShaney v. Winnebago County Dep't of Social Services, 109 S.Ct. 998 (1989).

[9] *Marti*, 193 SCRA 57, 67.

[10] Serrano v. Nat'l Lab. Rel. Comm'n [hereinafter "*Serrano*"], G.R. No. 167614, G.R. No. 117040, 323 SCRA 445, 542, Jan. 27, 2000 (Panganiban, *J.*, *separate opinion*).

[11] *See* Pangalangan, *supra* note 4, at 146, *citing* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AN AMERICAN CULTURE (1986).

[12] Artemio V. Panganiban, *Old Doctrines and New Paradigms*, 75 PHIL. L.J. 513, 551, *citing* Pacifico A. Agabin, Globalization and the Judicial Function, Lecture Delivered During the Chief Justice Andres R. Narvasa Centennial Lecture Series (October 29, 1998), *in* ODYSSEY AND LEGACY: THE CHIEF JUSTICE ANDRES R. NARVASA CENTENNIAL LECTURE SERIES (Antonio M. Elicano ed., 1998).

sovereign people to the individual oligarch.[13] Furthermore, fundamental freedoms have been the subject of abuse even within the private sphere.[14] Clearly, the assumptions of the *state action doctrine* are no longer on point.

The Bill of Rights was crafted to place fundamental rights beyond the vicissitudes of political controversies,[15] without regard to its provenance. Indeed, the Constitution does not say that it cannot be claimed against private individuals and entities.[16] Yet the Court has interpreted the Constitution's ambiguity to exclude private wrongs from its regulatory ambit. This traditional interpretation of the Constitution does not find basis in either the letter or spirit of the Bill of Rights. On one hand, an objective reading of the same shows that its protections are not limited to government action alone.[17] On the other hand, as enunciated in *Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co.*, the Bill of Rights was crafted as a code of fair play[18] "designed to preserve the ideals of liberty, equality and security against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, and the scorn and derision of those who have no patience with general principles,"[19] without regard to its public or private nature.

As a matter of course, the *state action doctrine* cuts both ways. In protecting individual rights from government action alone, the doctrine allows private individuals to shield themselves from liability for their own acts of abuse—some that may be just as coercive as any public wrong.[20] Further, as a matter of form, the doctrine is intrinsically flawed in oversimplifying

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[13] *See* PACIFICO A. AGABIN, MESTIZO: THE STORY OF THE PHILIPPINE LEGAL SYSTEM 289 (2011).

[14] *See for instance*, Zulueta v. Ct. of Appeals [hereinafter "*Zulueta*"], G.R. No. 107383, 253 SCRA 699, Feb. 20, 1996.

[15] Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., Inc. [hereinafter "*Philippine Blooming Mills*"], G.R. No. L-31195, 51 SCRA 189, June 5, 1973.

[16] *Serrano*, 323 SCRA 445, 545. (Panganiban, *J.*, *separate opinion*).

[17] *Id.*

[18] *Philippine Blooming Mills*, 51 SCRA 189, 220.

[19] *Id.* 200-201, *citing* BENJAMIN CARDOZO, NATURE OF JUDICIAL PROCESS 90, 93 (1921); and TAÑADA AND FERNANDO, CONSTITUTION OF THE PHILIPPINES 71 (1952).

[20] David L. Bazelon, *Civil Liberties – Protecting Old Values in the New Century*, 51 N.Y.U. L. REV. 505, 512-13 (1976), *citing* Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 353 (1977).

complex realities as either public or private.[21] This is especially true in the advent of liberalization, deregulation and privatization[22] where classifying actors and spaces as either public or private *per se* is no longer so simple.[23]

With the shifting of the paradigms[24] from state-monopolized power to the proliferation of the market forces, the *state action doctrine* fails to justify that it should remain as binding rule.[25] It is in this light that we revisit the state action requirement from the lens of policy science,[26] comparing and contrasting traditional notions with emerging legal concepts of the Constitution.[27]

Following the *Path of Law* laid down by Oliver Wendell Holmes, Jr., this paper will "follow the existing body of dogma into its highest generalizations by the help of jurisprudence [...] to discover from history how it has come to be what it is."[28] Chapter I will begin with the doctrine's common law roots. Chapter II will address the traditional application of the doctrine under the old paradigm, as reflected in Philippine case law. Chapter III will focus on the transition stage from old to new paradigms, which applies the Constitution to the private sphere. Further, it will address the common misconceptions of constitutional torts and the novel issue of *state inaction liability* as protections of fundamental rights. In light of the shifting of paradigms, Chapter IV will recommend possible modifications to the *state action doctrine* to enable the judiciary to cope with the new paradigm and new

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[21] OWEN J. LYNCH, COLONIAL LEGACIES IN A FRAGILE REPUBLIC: A HISTORY OF PHILIPPINE LAND LAW AND STATE FORMATION WITH EMPHASIS ON THE EARLY U.S. REGIME, 1898-1913, at xix (2011). *See also* Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1980).

[22] *See* AGABIN, *supra* note 13, at 284.

[23] Paul. M. Schoenhard, *A Three-Dimensional Approach to the Public and Private Distinction*, 2008 UTAH L. REV. 635, 642 (2008).

[24] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

[25] *See* Panganiban, *supra* note 12, at 551.

[26] LYNCH, *supra* note 21, at xix. "Policy scientists define law as 'a process of making decisions in conformity with the expectations of appropriateness of those who are politically relevant more concisely: a process of authoritative decision making.' [...] Policy scientists view law as an interwoven array of social processes whereby values are allocated. [...] This conforms to the ultimate goal of policy science, the promotion of human dignity[.]"

[27] *See* Ryan Hartzell C. Balisacan, *Claiming Personal Space in a Globalized World*, 82 PHIL. L.J. 67, 73 (2008), *citing* Goldman v. United States, 316 U.S. 129, 141 (1941) (Murphy, *J.*, *dissenting*).

[28] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

forms of abuse. Conscious of the dangers posed by men of zeal,[29] the article will close by defining possible confines to the expansion of the Constitution's scope of application.

II. LEGAL ETYMOLOGY

A. The Bill of Rights

The Constitution was crafted to allow the government to control the governed, but in that same breadth, oblige it to control itself.[30] To that end, the Bill of Rights incorporates what the government cannot do.[31]

The Bill of Rights is not a technical concept unrelated to time, place or circumstance,[32] but one designed to preserve the ideals of liberty of every individual beyond the expediency of the passing hour.[33] It is a code of fair play that safeguards "the right to exist and the right to be free from arbitrary personal restraint."[34] Yet notwithstanding the Bill of Rights' far-reaching purpose, jurisprudence has for the most part taken a conservative approach in its discharge.

In both Philippine and U.S. jurisdictions, it is long established doctrine that the liberties guaranteed by the Constitution can only be invoked against the State;[35] though case law has made clear that this rule is in no way absolute. U.S. jurisprudence provides for various exceptions to the state action

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[29] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, *J.*, *dissenting*). "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

[30] Pangalangan, *supra* note 4, at 146 *citing* The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal constraints on government would be necessary. In forming a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

[31] *Id.* at 142.

[32] Morfe v. Mutuc, G.R. No. L-20387, 22 SCRA 424, Jan. 31, 1968.

[33] *Philippine Blooming Mills*, 51 SCRA 189.

[34] Rubi v. Provincial Board of Mindoro, 39 Phil. 660, 705 (1919). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), where the U.S. Supreme Court declared that the idea that a "man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

[35] *See Marti*, 193 SCRA 57.

requirement, such as *Public Function*,[36] *State Compulsion*,[37] *Nexus*,[38] *State Agency*,[39] *Entwinement*,[40] *Symbiotic Relationship*,[41] *Joint Participation*,[42] and *State Inaction Liability*.[43]

These exceptions were greatly limited in the Philippine legal system. In *Duncan Association v. Glaxo Wellcome Philippines*[44] (hereinafter, "*Duncan*"), the Philippine Supreme Court dealt with the competing demands of management prerogative and an employee's right to personal autonomy. Petitioner, Pedro Tecson, claimed that the company policy requiring his "voluntary resignation" for entering into a relationship with an employee of a competing drug company[45] violated his equal protection rights. The Court rejected this contention, explaining: "The equal protection clause erects no shield against merely private conduct, however, discriminatory or wrongful. The only exception occurs when the state in any of its manifestations or actions is entwined or involved in the wrongful private conduct. Obviously, however, the exception is not present in this case."[46]

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[36] Marsh v. Alabama [hereinafter *Marsh*], 326 U.S. 501-502, 505 (1946). *See also* Julie K. Brown, *Less is More: Decluttering the State Action*, 73 MO. L. REV. 561, 566 (2008), *citing* Wolotsky v. Huhn, 960 F.2d 1331, 1335 (1992).

[37] Brown, *supra* note 36, at 565, *citing* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1965).

[38] *Id.*, *citing* Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992); Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1990); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[39] *Id.*, *citing* Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

[40] *Id.*, *citing* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

[41] *Id.*, *citing* Gregory D. Malaska, American Manufacturers Mutual Insurance Co. v. Sullivan: *"Meta-Analysis" as a Tool to Navigate through the Supreme Court's "State Action" Maze*, 17 J. CONTEMP. HEALTH L. & POL'Y 619, 651 (2001).

[42] *Id.*, *citing* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

[43] Lenahan v. United States [hereinafter "Lenahan"], Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11.

[44] *Duncan*, 438 SCRA 343.

[45] Oscar Franklin B. Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82 PHIL. L.J. 78, 102 (2008). "The contract provision on marrying a competitor's employee provided: 'You agree to disclose to management any existing or future relationship you may have, either by consanguinity or affinity with co-employees or employees of competing drug companies. Should it pose a possible conflict of interest in management discretion, you agree to resign voluntarily from the Company as a matter of Company policy.'"

[46] *Duncan*, 438 SCRA 343, 354-55.

Duncan spurned considering a violation of constitutional rights absent government action, or, by way of the "only exception", entwinement or involvement of government action in Pedro's profession. On its face, *Duncan* exemplifies the impracticalities of the *state action doctrine* in oversimplifying substantive rights as matters of form.[47] Furthermore, *Duncan* overlooked precedence that recognized one's employment or profession a property right as within the ambit of constitutional protections.[48]

It is said that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white [...] [but in] a penumbra shading gradually from one extreme to the other."[49] Yet the *state action doctrine* does the opposite; reducing penumbral questions of fundamental rights to monochromatic concerns. Traditional doctrine has conditioned legal minds to appreciate the Constitution as mere black letter law, rather than a living document.[50] Effectively, the issue at the nub of constitutional rights is not one of substance, i.e. whether there was a violation of substantive rights; but one of form, i.e. whether the violation was the result of government action.[51]

This paper seeks to address the irony of protecting substantive rights through questions of form. Philippine constitutional law having its roots in American constitutional tradition,[52] the latter, Pax Americana, being the dominating milieu,[53] the proceeding segment will begin its study of state action from its common law etymology.[54]

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[47] HECTOR S. DE LEON, 1 PHILIPPINE CONSTITUTIONAL LAW, PRINCIPLES AND CASES 159 (1991).

[48] Wallem Maritime Services, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 108433, 263 SCRA 174, 182, Oct. 15, 1996, *citing* Callanta v. Carnation Philippines, Inc., G.R. No. L-70615, 145 SCRA 275, Oct. 28, 1986.

[49] Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, *J., dissenting*).

[50] *But see Scalia Jeers Fans of 'Living' Charter*, THE WASHINGTON TIMES, Feb. 14, 2006, *available at* http://www.washingtontimes.com/news/2006/feb/14/20060214-110917-5396r/ (last visited Jan. 4, 2016).

[51] DE LEON, *supra* note 47, at 150.

[52] VICENTE V. MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS OF THE PHILIPPINE CONSTITUTIONAL SYSTEM (1978).

[53] Panganiban, *supra* note 12, at 515; AGABIN, *supra* note 13, at 278.

[54] JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: THE ABBREVIATED ESTRADA PRESIDENCY 5 (2003).

B. *Barron v. Baltimore*: Federal-State Government Liabilities

The matter of state action liability was first tackled by the U.S. Supreme Court in *Barron v. Mayor & City Council of Baltimore*[55] (hereinafter, "*Barron*"). Plaintiffs John Barron and John Craig, co-owners of a profitable wharf in the Baltimore harbor, sued the mayor of Baltimore for allegedly violating the Takings clause of the Fifth amendment.[56] Speaking through Chief Justice Marshall, the Court unanimously rejected this contention:

> The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. [...] If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.[57]

The Constitution having purportedly drawn a "plain and marked line of discrimination between the limitations on the powers of the General Government and on those of the State," [58] the U.S. Supreme Court distinguished Federal government action from State action liability. Allegedly, when the Constitution "intended to act on State power, words [were] employed which directly express[ed] that intent".[59] Hence, unless expressly provided, "no limitation of the action of government on the people would apply to the State government."[60]

C. Interpretation of the "No State shall" Clause

Taking a "plain meaning" interpretation of the Constitution, *Barron* adopted the *literal approach* of statutory construction,[61] similar to the *verba legis non est recedendum* (hereinafter, *verba legis*) rule of interpretation adopted in the Philippine legal system. As enunciated in *Francisco v. NMMPI*:

> Wherever possible, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed. [...] We look to the language of the document itself in our search for its meaning. We do not of course stop there, but that

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[55] Barron v. Mayor & City Council of Baltimore [hereinafter "*Barron*"], 32 U.S. 243 (1833).
[56] U.S. CONST. amend. V.
[57] *Barron*, 32 U.S. 243, 247.
[58] *Id.* at 249.
[59] *Id.*
[60] *Id.* at 248-49
[61] *Id.* at 250.

> is where we begin. It is to be assumed that the words in which constitutional provisions are couched express the objective sought to be attained. They are to be given their ordinary meaning except where technical terms are employed in which case the significance thus attached to them prevails. As the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, its language as much as possible should be understood in the sense they have in common use. What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say. Thus these are the cases where the need for construction is reduced to a minimum.[62]

The nuances between the *literal approach* and the *verba legis* rule is but nomenclature, both of which refer to the same "plain meaning" rule of interpretation. Simply put, "if the words are clear, the words should be followed".[63] It was with this view that *Barron* decided that in the absence of a "No State shall" clause in the Fifth Amendment, only the Federal government was bound.[64]

Barron's conclusion is counterintuitive. A "plain meaning" construction of the Fifth Amendment should have in fact resulted in an antithetical view. The provision did not specify who should not take private property—whether the Federal or State governments.[65] Pursuant to the "plain meaning" rule, hand in hand with the principle of *ubi lex non distinguit nec nos distinguere debemos*,[66] the law not having distinguished, neither should have the Court. The provision's ambiguity should have been construed as the imprimatur to apply the Takings clause generally, to both the Federal and the State government, rather than specifically, to only either of the two.

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[62] Francisco v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc., G.R. No. 160261, 415 SCRA 44, 126, Nov. 10, 2003, *citing* J.M. Tuazon & Co., Inc. v. Land Tenure Administration, G.R. No. L-21064, 31 SCRA 413, 422-23, June 30, 1970.

[63] Araceli T. Baviera, *Teaching Civil Law in the Grand Manner*, *in* IN THE GRAND MANNER: LOOKING BACK, THINKING FORWARD 43 (Danilo L. Concepcion et al. eds., 2013), *citing* Queen v. Judge, 1 QB 273 (1982).

[64] *See Barron*, 32 U.S. 243, 250.

[65] Schoenhard, *supra* note 23, at 640.

[66] Bagong Alyansang Makabayan v. Zamora, G.R. No. 138570, 342 SCRA 449, 484, Oct. 10, 2000.

D. State Liability by Incorporation

If the Court in *Barron* had accurately interpreted the Fifth Amendment according to its "plain meaning", distinguishing Federal and State governments' liabilities would not have been necessary. Notwithstanding, in the absence of a "No State shall" clause, the *Barron* dichotomy remained the controlling doctrine. It was not until the ratification of the Fourteenth Amendment in 1868 that State governments were deemed bound by the U.S. Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[67]

The Fourteenth Amendment having expressed a "No State shall" clause deemed obsolete the Federal-State government dichotomy enunciated in *Barron*. As evidenced by *Chicago Co. v. Chicago* (hereinafter, "*Chicago*"), Federal government limitations were incorporated[68] under the Fourteenth Amendment, and made enforceable against the State acting through its legislative, executive, or judicial authorities.[69]

This shift in U.S. Constitutional law is embodied in the *incorporation doctrine* and has been viewed through two perspectives: *selective incorporation*[70] and *total incorporation*.[71] *Selective incorporation* opposes the notion that the Bill of Rights in its entirety is made applicable to the States.[72] Rather, only "those parts of the Bill of Rights which are of fundamental importance" should be

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[67] U.S. CONST. amend. XIV.

[68] Richard J. Hunter, Jr. and Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 Okla. City U. L. Rev. 365, 365 (2010), *citing* MICHAEL KENT CURTIS, *Incorporation Doctrine*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 491 (Kermit L. Hall ed., 2nd ed. 2005).

[69] Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 227 (1897), *citing* Scott v. McNeal, 154 U.S. 34 (1894).

[70] United States v. Cruikshank, 92 U.S. 542 (1875).

[71] Adamson v. California, 32 U.S. 46, 71-72 (1937) (Black, *J.*, *dissenting*).

[72] Palko v. Connecticut, 302 U.S. 319, 323 (1937). "The Fourteenth Amendment does not guarantee against state action all that would be a violation of the original bill of rights if done by the Federal Government."

considered as "selectively" integrated.[73] This approach, however, is criticized for giving "too much scope to the personal views of the individual justices"[74] to roam "all too freely on the legislative domain."[75] On the other hand, *total incorporation* sustains the view that "all of the guarantees of the Bill of Rights are made applicable against the states."[76] However, this approach too has been denounced for not being "any less vague than the selective incorporation approach," having merely shifted "broad judicial discretion from the general concept of liberty to the individual guarantees of the Bill of Rights."[77]

The U.S. Courts generally adhere to the *selective incorporation* approach, but only in theory.[78] Case law shows that most of the provisions of the Bill of Rights have been made to apply to State governments, save for the Trial and Punishment and Trial by Jury clauses of the Fifth and Seventh Amendments.[79] Hence, whether *selective incorporation* or *total incorporation* were to be recognized as the controlling approach, the *Barron* doctrine would have been inevitably superseded by history.

Taking into account the doctrines established in *Barron* and *Chicago*, it is observed that since the Bill of Rights' humble beginnings, the Court interpreted its provisions according to its plain, ordinary and common meaning. *Barron* ruled that the Takings clause applied only to the General government absent a "No State shall"[80] clause. This remained good law only until the ratification of the Fourteenth Amendment, which, as recognized in *Chicago*, incorporated Federal Government liabilities against State governments.[81] In both cases, the Court took a literal approach in constitutional interpretation, recognizing a distinction only when one was expressly made.

The shift from *Barron* to *Chicago* may seem of minor relevance to the field of Philippine Constitutional law. Unlike the U.S. government which abides by both horizontal and vertical governmental structures, the Philippines abides by a unitary governmental system where constitutional

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[73] STEVEN L. EMANUEL, CONSTITUTIONAL LAW OUTLINES 129 (7th ed. 1983).
[74] *Id.*
[75] Harper v. Virginia Board of Elections, 383 U.S. 663, 676 (1966).
[76] EMANUEL, *supra* note 73, at 129.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Barron*, 32 U.S. 243, 248 (1833).
[81] Hunter, *supra* note 68, at 371, *citing* KEVIN R. C. GUTZMAN, THE POLITICALLY INCORRECT GUIDE TO THE CONSTITUTION (2007).

limitations are applied to both the national government and local government units (LGU).[82] But as a matter of both legal history and method, U.S. jurisprudence nonetheless sheds light on Philippine notions of state action.

Adopting the views of *Barron* and *Chicago*, following the "plain meaning" approach, one could argue against state action as a *sine qua non* for the application of the Philippine Bill of Rights. In contrast with the Fifth and Fourteenth Amendments of the U.S. Constitution, the 1987 Philippine Constitution provides, "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."[83] Furthermore, "[p]rivate property shall not be taken for public use without just compensation."[84]

Similar to their U.S. counterparts, the Due Process and Takings clauses of the Philippine Constitution do not specify an addressee.[85] Pursuant to the literal approach in constitutional interpretation as adopted in *Barron* and *Chicago*, the aforementioned provisions should therefore apply generally and without distinction, there being no express prohibition on the application of the Bill of Rights. Pursuant to the principle of *ubi lex non distinguit non distingere debemos*, the Bill of Rights not having distinguished between the National Government and LGUs, its provisions are applied to both systems. Neither do these provisions discern between the public and private spheres.[86]

III. THE OLD PARADIGM

A. Origin and Context of State Action "Only" Liability

The common law doctrine of state action was enunciated at the onset of the Philippine Constitution.[87] Commissioner Fr. Joaquin Bernas, speaking before the 1986 Constitutional Commission, pronounced that the protection of the Bill of Rights "governs the relationship between the individual and the State and not the relationship between private individuals."[88]

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[82] BERNAS, *supra* note 54, at 2.
[83] CONST. art. III, § 1.
[84] Art. III, § 9.
[85] *Serrano*, 323 SCRA 445, 545 (Panganiban, *J.*, *separate opinion*).
[86] *Id.*
[87] *See Duncan*, 438 SCRA 343.
[88] Bernas, *supra* note 5, at 674.

The reason for this was "simple: Only the State ha[d] authority to take the life, liberty, or property of the individual."[89] Solely the "Government [was] powerful [and] when unlimited, it [became] tyrannical."[90] Hence, the Bill of Rights was construed to guarantee a person's life, liberty, and property against the only power holder of that time: the State.[91]

B. *People v. Marti*: Traditional Notions of State Action

In *Marti*, Mr. Job Reyes, the private proprietor of the "Manila Packing and Export Forwarders," noticed a peculiar odor emitting from certain packages consigned to him for delivery. Following standard operating procedure, he "opened the [consigned] boxes for final inspection [and discovered] dried leaves inside."[92] Suspecting these to be cannabis, "Job Reyes brought out the box [...] in the presence of the NBI (National Bureau of Investigation) agents, opened the top flaps, removed the styro-foam and took out the cellophane wrappers from inside the gloves. Dried marijuana leaves were found[.]" The NBI agents "made an inventory and took charge of the box and of the contents thereof, after signing a 'Receipt' acknowledging *custody* of the said effects."

The accused, Andre Marti, "contend[ed] that the evidence [...] had been obtained in violation of his constitutional rights against unreasonable search and seizure and privacy of communication and [was] therefore [...] inadmissible in evidence."[93]

The Philippine Supreme Court categorically rejected this contention ruling that "[i]n the absence of governmental interference, the liberties guaranteed by the Constitution cannot be invoked." The search having been "made at the behest or initiative of the proprietor of a private establishment for its own and private purposes [...] and without the intervention of police authorities, the right against unreasonable search and seizure cannot be invoked."[94]

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[89] *Serrano*, 323 SCRA 445, 468.

[90] JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: NOTES AND CASES PART II, at 1 (1997).

[91] Bernas, *supra* note 5, at 674.

[92] *Marti*, 193 SCRA 57, 61.

[93] *Marti*, 193 SCRA 57, 62.

[94] *Id.* at 64-65.

Andre Marti further argued that when the 1987 Constitution "expressly [declared] as inadmissible any evidence obtained in violation of the constitutional prohibition against illegal search and seizure, it [mattered] not whether the evidence was procured by police authorities or private individuals."[95] However, in line with the traditional notions of the old paradigm, the Court rejected Marti's contention because the Constitution did "not govern relationships between individuals [...] and the modifications introduced [to the 1987 Constitution] deviate[d] in no manner as to whom the restriction or inhibition against unreasonable search and seizure is directed against. The restraint stayed with the State and did not shift to anyone else."[96]

The public and private contrast reflected in *Marti* is embodied in the *public/private distinction*—a threshold question that is part and parcel of the *state action doctrine*.[97] The distinction facilitates the determination of the applicable rules, whether constitutional or merely statutory, and the concomitant remedies available to the parties.[98] Pursuant to these rules, the private sphere, such as family or the economic market,[99] would not be subjected to constitutional limitations. In contrast, the public sphere, which is generally synonymous with the government, would be so bound.[100]

The Philippine legal system adheres to the distinction. As enunciated in *Villanueva v. Querubin* (hereinafter, "*Villanueva*"), constitutional rights refer to the immunity of one's person from interference by the government alone.[101] As cited in *Marti*, "in a number of cases, the Court [has] strictly adhered to the exclusionary rule and has struck down the admissibility of evidence obtained in violation of the constitutional safeguard against unreasonable searches and seizures."[102] In these cases, the evidence so

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[95] *Id.* at 96, *citing* Appellant's Brief, p. 8, *Rollo*, p. 62.

[96] *Id.* at 68.

[97] Brown, *supra* note 36, at 561. *See also* Hester Lessard, *The Idea of the "Private": A Discussion of State Action Doctrine and Separate Sphere Ideology*, 10 DALHOUSIE L.J. 107, 110 (1986).

[98] *See* Brown, *supra* note 36, at 563.

[99] Hila Shamir, *Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 5 THEORETICAL INQ. L. 1, 4-5 (2014).

[100] Brown, *supra* note 36.

[101] *Marti*, 193 SCRA 57, *citing* Villanueva v. Querubin, G.R. No. 26177, 8 SCRA 345, Dec. 27, 1972.

[102] *Id.* at 64, *citing* Bache & Co. (Phil.), Inc., v. Ruiz, G.R. No. L-32409, 37 SCRA 823, Feb. 27, 1971; Lim v. Ponce de Leon, G.R. No. L-22554, 66 SCRA 299, Aug. 29, 1975; People v. Burgos, G.R. No. L-68955, 144 SCRA 1, Sept. 4, 1986; Roan v. Gonzales, G.R. No. 71410, 145 SCRA 687, Nov. 25, 1986.

obtained were invariably procured by the State acting through the medium of its law enforcers or other authorized government agencies.[103]

The Supreme Court has ruled comparably with *Marti* and *Villanueva.* In *Waterous Drug Corp. v. National Labor Relations Commission*[104] (hereinafter "*Waterous*"), the contents of an envelope opened by a co-employee without the authority of the letter's owner was not barred from evidence under the exclusionary rule of the Constitution.[105] The Court opined that rather than seeking the inadmissibility of evidence on constitutional grounds, the party's remedy was to pursue criminal and civil liabilities through statutory law.

In *People v. Mendoza*[106] (hereinafter, "*Mendoza*") the accused argued that certain documents (a memorandum receipt and mission order authorizing him to carry the subject weapon) were illegally procured in violation of his constitutional rights against unlawful search and seizure and therefore inadmissible. The Court summarily dismissed the contention because the documents were "discovered by accused-appellant's father-in-law [...] a private citizen. [Hence], a search warrant [was] dispensable."[107]

The ratio behind the delineation of the public and private spheres finds basis in both law and reason. As enunciated in *Marti*, "to agree that an act of a private individual in violation of the Bill of Rights should also be construed as an act of the State would result in serious legal complications and an absurd interpretation of the constitution."[108] Although reasonable, the *public/private distinction* comes not without criticism.

C. Tradition and the Quasi-Public/Quasi-Private Spheres

The *public/private distinction* is a principle of 19th century legal thought.[109] Central to the distinction is the separation of private law from public law.[110] Private law, centered on individual autonomy,[111] generally

[103] *Id.* at 82.

[104] G.R. No. 113271, 280 SCRA 735, Oct. 16, 1997.

[105] CONST. art. III, § 3.

[106] G.R. No. 109279, 301 SCRA 66, Jan. 18, 1999.

[107] Tan, *supra* note 45, at 137.

[108] *Marti*, 193 SCRA 57, 68.

[109] Derek McKee, *The Public/Private Distinction in* Roncarelli v. Duplessis, 55 MCGILL L.J. 461 (2010), *citing* BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2nd ed. 2002).

[110] *Id.*

[111] *Id.* at 473.

coordinates the relations among individuals.[112] On the other hand, public law[113] traditionally "governs the relationship between the individual and the State."[114]

Marti's ratio provided for the skeletal framework as to whom the Bill of Rights may be enforced and its practical reason. This was further elaborated by Chief Justice Panganiban in his separate opinion in *Serrano v. National Labor Relations Commission*: "Traditional doctrine holds that constitutional rights may be invoked only against the State. This is because in the past, only the State was in a position to violate these rights, including the due process clause."[115]

"[W]ith the advent of liberalization, deregulation and privatization," however, "the State tended to cede some of its powers to the 'market forces,'"[116] opening the floodgates to new sources of abuse and threats to human rights and liberties.

The rise of the corporate behemoth captures the paradigm shift from state-monopolized power to the invigoration of the private sphere. In its early history, corporations were chartered only to serve public functions.[117] Unlike the public-private corporate dichotomy reflected in contemporary realities,[118] in former times there was no policy promoting private industrialization.[119] Rather, the practice was to create corporate bodies "exclusively through state

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[112] 1 ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 4 (1992). "Individual or private law: (a) Civil law, or that which regulates the relations of individuals with other individuals for purely private ends; (b) Mercantile law, or that which regulates the special relations produced by commercial transactions; (c) Procedural law, or that which provides for the means by which private rights may be enforced." BLACK'S LAW DICTIONARY 1234 (8th ed. 2004).

[113] *Id.* at 3. "General or public law: (a) International law, or that which governs the relations between nations or states, that is, between human beings in their collective concept; (b) Constitutional law, or that which governs the relations between human beings as citizens of a state and the governing power; (c) Administrative law, or that which governs the relations between the officials and employees of the government; (d) Criminal law, or that which guaranties the coercive power of the law so that it will be obeyed; (e) Religious law, or that which regulates the practice of Religion." BLACK'S LAW DICTIONARY 1267 (8th ed. 2004).

[114] Bernas, *supra* note 5, at 674.

[115] *Serrano*, 323 SCRA 445, 542 (Panganiban, *J.*, *separate opinion*).

[116] *Id.*

[117] CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA (1991).

[118] JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (2003), *citing* CONST. art. XII, § 16; National Development Co. v. Philippine Veterans Bank, G.R. No. 84132-33, 192 SCRA 257, Dec. 10, 1990.

[119] LYNCH, *supra* note 21, at 274, *citing* Shirley Jenkins, AMERICAN ECONOMIC POLICY TOWARD THE PHILIPPINES 41 (1954).

charters [to be] held under the direct control of the state"[120] for the sole purpose of enlisting private capital for public facilities.[121] Hence, prior to the advent of corporate emancipation from state control,[122] it was not only reasonable but also natural to put fundamental rights beyond the reach of the only power holder that posed a threat at the time: the State.[123]

Presently, the roles of the public and private spheres have greatly changed. Corporate bodies are no longer created solely for public functions, but "for the private purpose, benefit, aim and end of its members or stockholders."[124] As private entities, its constituents are given a free hand to choose the interests to pursue and the ventures to forego.[125] The role of "the state has been reduced and some of its powers ceded to the market forces," thereby "empowering corporate behemoths and private individuals to be sources of abuse[.]"[126]

The traditional notion that only the State was in a position to violate fundamental rights[127] no longer holds true. In the advent of the private sphere's emancipation from government control,[128] it is only a matter of consequence therefore to expand constitutional protections to include private evils that have fallen within its scope.

D. Challenges to the Public/Private Distinction

The *public/private distinction* faces two challenges amidst a paradigm shift. The first is with regard to the restrictive nature of the test in light of the growing complexities of the public and private spheres. The second challenge concerns the incongruity in thwarting public evils to the exclusion of private wrongs.

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[120] SELLERS, *supra* note 117.

[121] *See* LYNCH, *supra* note 21, at 271, *citing* Shirley Jenkins, AMERICAN ECONOMIC POLICY TOWARD THE PHILIPPINES 39-41 (1954); FRANK H. GOLAY, "MANILA AMERICANS" AND PHILIPPINE POLICY 1-13 (1983); SELLERS, *supra* note 117.

[122] John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43 (2011-2012).

[123] Bernas, *supra* note 5, at 674.

[124] Davao City Water District v. CSC, G.R. No. 95237-38, 201 SCRA 593, 606, Sept. 13, 1991.

[125] Feliciano v. COA, G.R. No. 147402, 419 SCRA 363, Jan. 14, 2004.

[126] Panganiban, *supra* note 12, at 552.

[127] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

[128] Powell & Menendian, *supra* note 122, at 510.

1. Public and Private Spheres Entwined

The *distinction* categorizes the world into two spheres: the public—the government—and the private—everything else.[129] However, amidst the growing complexities of human relations, constitutional protections may no longer rest solely on such rigid standards.[130] In drawing a purported bright line between the traditional spheres, the *distinction* fails to consider novel domains of the quasi-public[131] and the quasi-private.[132]

The quasi-public sphere refers to public functions that are assumed by private actors and spaces.[133] When private property is used for a public purpose, "it ceases to be *juris privati* only and becomes subject to [public] regulation."[134] Such a case is aptly illustrated in *Marsh v. Alabama* (hereinafter, "*Marsh*"), where the U.S. Supreme Court addressed the public and private status of a company-owned town of Chicksaw in rural Alabama.[135] The Court, through Justice Black, enunciated the *public function*[136] exception to state action and ruled that though the property is ostensibly privately owned, it could nonetheless be made the subject of constitutional limitations when, first, it is opened to the general public;[137] and second, when the private actor or spaces assumes public responsibilities. Consequently, the ostensibly private nature of the actor or land becomes public.[138]

The Philippine Supreme Court has adopted a similar doctrine. In *Kilusang Mayo Uno Labor Center v. Garcia*, involving a public utility, the Court declared that quasi-public property is subjected to regulatory standards, such as due process, because when "one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use,

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[129] Duncan Kennedy, *The Stages of the Decline of the Public/Private*, 130 U. PA. L. REV. 1349 (1982).

[130] Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329 (1993).

[131] Schoenhard, *supra* note 23, at 644, *citing Marsh*, 326 U.S. 501, 502, 505.

[132] *Id.* at 646.

[133] Lloyd Corp. v. Tanner, 407 U.S. 551, 561-62 (1972).

[134] Republic v. Manila Electric Co., G.R. No. 141314, 391 SCRA 700, 706, Nov. 15, 2002; *See also* Munn v. Illinois, 94 U.S. 113 (1876); North Negros Sugar Co. v. Hidalgo, 63 Phil. 664 (1936); Luque v. Villegas, G.R. No. L-22545, 30 SCRA 408, Nov. 28, 1969.

[135] *Marsh*, 326 U.S. 501, 502, 505.

[136] "[T]he doctrine that a private person's actions constitute state action if the private person performs functions that are tranditionally reserved to the state." BLACK'S LAW DICTIONARY 1266 (8th ed. 2004).

[137] Schoenhard, *supra* note 23, at 644, *citing Marsh*, 326 U.S. 501, 502, 505.

[138] *Id.*

and must submit to the control by the public for the common good, to the extent of the interest he has thus created."[139] Accordingly, the Department of Transportation and Communications (DOTC) and Land Transportation and Regulatory Board (LTFRB) circulars were declared void for having invalidly delegated the authority to adjust transportation fares to a private party, in violation of due process.[140] The high court reasoned:

> To do away with such a procedure and allow just one party, an interested party at that, to determine what the rate should be, will undermine the right of the other parties to due process. The purpose of a hearing is precisely to determine what a just and reasonable rate is. Discarding such procedural and constitutional right is certainly inimical to our fundamental law and to public interest.[141]

The same may be said for the Manila Electric Company (MERALCO). In *Freedom from Debt Coalition v. Energy Regulatory Commission,* in the aim of addressing "the right of the consuming public to due process,"[142] the Philippine Supreme Court directed MERALCO to comply with the due process requirements found in the Electric Power Industry Reform Act (EPIRA), [143] as fleshed out in its Implementing Rules and Regulations (IRR).[144]

On the other hand, quasi-private property refers to property that "is publicly owned but is not open for public use."[145] Such is a situation of the lands owned by the Manila International Airport Authority (MIAA)—a "government corporate entity."[146] As established in the case of *MIAA v. The Airport Lands,* MIAA's properties "are devoted to public use and thus are properties of public dominion." [147] Its public character notwithstanding, the

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[139] Kilusang Mayo Uno Labor Center v. Garcia, G.R. No. 115381, 239 SCRA 386, 391, Dec. 23, 1994, *citing* Pantranco v. Public Service Commission, 70 Phil. 221 (1940).

[140] *Id.* at 413.

[141] *Id.* at 409-10, *citing* Ynchausti Steamship Co. v. Public Utility Comm'r, 42 Phil. 621, 631 (1922).

[142] Freedom from Debt Coalition v. Energy Regulatory Commission, G.R. No. 161113, 432 SCRA 157, June 15, 2004.

[143] Rep. Act No. 9136 (2001), § 43.

[144] Freedom from Debt Coalition v. Energy Regulatory Commission, G.R. No. 161113, 432 SCRA 157, 193, June 15, 2004.

[145] Schoenhard, *supra* note 23, at 646.

[146] Exec. Order No. 596 (2006), § 1.

[147] Manila Int'l Airport Authority v. Ct. of Appeals, G.R. No. 155650, 495 SCRA 591, 623, July 20, 2006.

MIAA is considered neither a traditional public forum[148] nor a designated public forum[149] due to the "strict requirements placed on [its] access."[150] There being only a *selective access* rather than a *general access* to the MIAA properties, the same is considered as a non-public forum and thereby, a quasi-private entity.[151]

The emergence of the quasi-private and quasi-public domains results in the obsolescence of the *public/private distinction.* Unlike the presumptions of the old paradigm, the private sphere today is no longer the disempowered domain it was purported to be. Private actors are not only emancipated from state control[152] but are now engaged in traditionally public functions.[153] As typified by the public-private partnership, public functions are contracted away to private persons.[154] Furthermore, corporations are no longer created for public purposes alone and are in fact split into a public/private dichotomy.[155] On the other hand, government entities too, though retaining their public nature, delve into proprietary functions.[156]

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[148] "Public property that has by long tradition—as opposed to governmental designation—been used by the public for assembly and expression, such as a public street, public sidewalk, or public park." BLACK'S LAW DICTIONARY 1266 (8th ed. 2004). *See also* Int'l Society for Krishna Consciousness v. Lee, 505 U.S 672 (1992).

[149] "Public property that has not traditionally been open for public assembly and debate but that the government has opened for use by the public as a place for expressive activity, such as a public-university facility or a publicly owned theater. Unlike a traditional public forum, the government does not have to retain this open character of a designated public forum." BLACK'S LAW DICTIONARY 1266 (8th ed. 2004). *See also Int'l Society for Krishna Consciousness*, 505 U.S. 672.

[150] Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 73 U.S. 788, 790, 802 (1985).

[151] Arkansas Educational Television Commission v. Forbes, 23 U.S. 666, 669-72 (1998).

[152] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*); Panganiban, *supra* note 12.

[153] *See e.g* Richard J. Horwitz & David J. Miller, *Student Due Process in the Private University: The State Action Doctrine*, 20 SYRACUSE L. REV. 911, 916-17 (1968-1969), *citing* Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La. 1962). *See also* Non v. Danes II, G.R. No. 89317, 185 SCRA 523, May 20, 1990, *citing* Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

[154] Republic of the Philippines Public-Private Partnership Center, *What is PPP?* (2013), *available at* https://ppp.gov.ph/?page_id=27574 (last visited Jan. 4, 2016). "The Philippine Public-Private Partnership Program: 'Public-Private Partnership (PPP) is broadly defined as a contractual agreement between the Government and a private firm towards financing, implementing, and operating infrastructure facilities and services that were traditionally provided by the public sector.'"

[155] LYNCH, *supra* note 21, at 271, *citing* Shirley Jenkins, AMERICAN ECONOMIC POLICY TOWARD THE PHILIPPINES 39-41 (1954); Golay, *supra* note 121; SELLERS, *supra* note 117.

[156] Liban v. Gordon, G.R. No. 175352, 593 SCRA 68, July 15, 2009.

The entanglement of the spheres is a formula for inevitable conflicts which the *public/private distinction* fails to address.[157] Indeed, the traditional *distinction* did not contemplate the new generation of complex relationships that have blurred the once crisp boundaries drawn between the public and the private.[158] In light of these changes, the *public/private distinction* of the old paradigm no longer cuts quite as fine.

2. Superior Public Evils, Inferior Private Wrongs

The Constitution protects individuals against abridgement of fundamental rights at the hands of state actors[159] on the presumption that only the State was in a position to do so.[160] In the advent of the de-monopolization of political and economic powers from the State to the private sphere, it is questionable whether this premise still holds true.[161] Contrary to the old paradigm, the private sphere has evolved to become a threat to fundamental freedoms. Corporate powers have been used to subvert principles of individual autonomy and impair relationships of transcendental importance.[162] Further, the "inherent economic inequality between labor and management,"[163] whether in the the public or private sphere, has also been given recognition in law and jurisprudence.[164]

With the rise of private behemoths comes the concomitant threat of abuse. Constitutional rights being exposed to abuse within the private sphere,

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[157] Freedom from Debt Coalition v. Energy Regulatory Commission, G.R. No. 161113, 432 SCRA 157, June 15, 2004, *citing* Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 291 (1923).

[158] Schoenhard, *supra* note 23 at 636.

[159] Bernas, *supra* note 5, at 674; *See also* Brown, *supra* note 36, *citing* 16B Am. Jur. 2d *Constitutional Law* § 800 (1998).

[160] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

[161] AGABIN, *supra* note 13, at 296, *citing* Peter F. Drucker, *The Global Economy and the Nation State*, 76 FOREIGN AFFAIRS No. 5, 167 (1997).

[162] *Duncan*, 438 SCRA 343; *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*); Panganiban, *supra* note 12; Powell & Menendian, *supra* note 122. *See, e.g.* Maynard v. Hill, 125 U.S. 190 (1888); De Santos v. Angeles, G.R. No. 105619, 251 SCRA 206, Dec. 12, 1995.

[163] Ledesma v. Nat'l Lab. Rel. Comm'n, G.R. No. 174585, 537 SCRA 358, 371, Oct. 19, 2007, *citing* JPL Marketing Promotions v. Ct. of Appeals, G.R. No. 151966, 463 SCRA 136, 149-50, July 8, 2005. *See also* Lochner v. New York, 198 U.S. 45, 69 (1905) (Harlan, *J.*, *dissenting*).

[164] Pure Foods Corp. v. Nat'l Lab. Rel. Comm'n, 347 Phil. 434, 444 (1997); GMA Network, Inc. v. Pabriga, G.R. No. 176419, 710 SCRA 690, Nov. 27, 2013; Panuncillo v. CAP Philippines, Inc., G.R. No. 161305, 515 SCRA 323, Feb. 9, 2007; Philippine Geothermal, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 106370, 236 SCRA 371, 378-79, Sept. 8, 1994; Homeowners Savings and Loan Ass'n v. Nat'l Lab. Rel. Comm'n, 330 Phil. 979, 985 (1996).

fundamental, albeit traditional, Bill of Rights protections must be modified to address not only public evils but also private wrongs.[165] Such a modification is not expressly prohibited within the Philippine legal system, but is in fact buttressed by both legislation and jurisprudence that subject private actors and spaces to constitutional limitations.

IV. PARADIGM SHIFT: THE TURNING OF THE TIDE

A paradigm shift is described as a fundamental change in approach or underlying assumption.[166] The Philippine legal system has endured and continues to undergo such a change—from a plight of state-monopolized power to the modern-day forms of privatization.[167]

Traditional doctrine provides that constitutional rights may be invoked only against the State because, in the past, only the State was in a position to violate these rights.[168] However, "in the e-age, [where] there is an unmistakable shift of power from the state to the private sector,"[169] the *public/private distinction* has been ineluctably blurred.

The Philippine Supreme Court has put on two hats with the turning of the tide. In *Marti* and *Duncan*, the Court stood its ground and ruled in line with tradition, denying the application of the Constitution within the private sphere. Yet in other cases, the Court circumvented state action pre-requisites by establishing exceptions to age-old doctrine, effecting constitutional limitations regardless of the actor's public or private nature.

A. Exceptions to the State Action Requirement

U.S. jurisprudence is replete with case law where ostensibly private acts were deemed bound by constitutional obligations.[170] Notwithstanding, the Court has yet to identify a condition *sine qua non* to impute public character

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[165] Bazelon, *supra* note 20, at 512-13.

[166] KUHN, *supra* note 24. *See* Thomas Nickles, *Scientific Revolutions*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Mar. 5, 2009, *available at* http://plato.stanford.edu/entries/scientific-revolutions/ (last visited Jan. 4, 2016).

[167] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*); Panganiban, *supra* note 12.

[168] Panganiban, *supra* note 12.

[169] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

[170] Sukhdev Singh & Ors v. Bagatram Sardar Singh, 1975 AIR 1331, 1975 SCR [3] 619.

to facially private matters.[171] Instead, it has relied on the interplay of circumstances in each particular case[172] as reflected through the tests of *Public Function*,[173] *State Compulsion*,[174] *Nexus Test*,[175] *State Agency*,[176] *Entwinement*,[177] *Symbiotic Relationship*,[178] *Joint Participation*,[179] and, recently, *State Inaction Liability*.[180]

The same cannot be said for the Philippine legal system. As stated, *Duncan* expressly limited these exceptions to government entwinement or involvement in private conduct.[181] *Duncan* notwithstanding, the listed tests recognized in foreign jurisprudence may nonetheless be utilized in the Philippine legal system, but only to evidence such "entwinement" or "involvement" of the State. Furthermore, despite the restrictive phraseology of *Duncan*, the Philippine Supreme Court has many a time applied constitutional standards to private actors, though without directly addressing the state action requirement traditionally sought.

The state action requirement has long been adopted in both Philippine and U.S. jurisdictions, entrenched in legal doctrine but

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[171] Brown, *supra* note 36, at 564, *citing* 16B AM. JUR. 2D Constitutional Law §800 (1998); *citing* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Newton, 382 U.S. 296 (1966); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

[172] Gilmore v. City of Montgomery, 417 U.S. 556, 573 (1974), *citing* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[173] *Marsh*, 326 U.S. 501, 502, 505 (1946); Brown, *supra* note 36, *citing* Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992). S.F. Arts & Athletics v. U.S. Olympic Commission, 483 U.S. 522, 544 (1987), *citing* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984). Nixon v. Condon, 286 U.S. 73 (1932).

[174] *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1965).

[175] *See* Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992); Manufacturers Mututal Insurance Co. v. Sullivan, 526 U.S. 40 (1999); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[176] *See* Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

[177] *See* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

[178] *See* Gregory D. Malaska, American Manufacturers Mutual Insurance Co. v. Sullivan: *"Meta-Analysis" as a Tool to Navigate through the Supreme Court's "State Action" Maze*, 17 J. CONTEMP. HEALTH L. & POL'Y 619, 651 (2001).

[179] *See* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

[180] Lenahan, Report No. 80/11.

[181] *Duncan*, 438 SCRA 343.

compromised in practice. Notwithstanding traditional notions of the Bill of Rights, the courts have at times broadened the scope of constitutional protections to encompass ostensibly private incidents. The following segment will review these decisions in Philippine case law by establishing first, the absence of state action; second, the application of the Bill of Rights within the private sphere; and third, the Court's ratio for extending public law to ostensibly private matters.

1. Private Academic Institutions

Deregulation is the hallmark of current educational policy.[182] Nonetheless, the government imposes minimum standards in academic institutions to ensure quality education, as mandated by the Constitution.[183] It is worth emphasizing that private academic institutions, though impressed with public interest, are private actors nonetheless. Though these institutions are considered private in the public-private dichotomy, the constitutional limitations have nevertheless applied.

In *Alcuaz v. Philippine School of Business Administration* (hereinafter, "*Alcuaz*"), *bona fide* students of the school were barred from re-enrolling for the subsequent semester because of their participation in student protests.[184] Ultimately, the Supreme Court was tasked with determining whether said prohibitions violated the students' rights to due process and free expression.

Deciding in favor of the PSBA under the "termination of contract" theory,[185] *Alcuaz* pitted PSBA's right to academic freedom against the students' right to enroll—allegedly, a mere contractual right. The Court ratiocinated that a student, once admitted by the school is considered enrolled, but only for one semester.[186] Thus, after the close of the contracted semester, "the PSBA-QC no longer [had] any existing contract either with the students or with the intervening teachers. Such being the case, the charge of denial of

[182] ULPIANO P. SARMIENTO, MANUAL OF REGULATIONS FOR PRIVATE SCHOOLS: ANNOTATED 5 (1998), *citing* ARMAND FABELLA, FOREWORD TO THE EIGHTH EDITION OR THE 1992 MANUAL OF REGULATIONS FOR PRIVATE SCHOOLS (1992).

[183] *Id.* at 10, *citing* II JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 511 (1988); *See* CONST. art. XIV, § 1.

[184] G.R. No. 76353, 161 SCRA 7, May 2, 1988 [hereinafter "*Alcuaz*"].

[185] Non v. Danes II [hereinafter "*Non*"], G.R. No. 89317, 185 SCRA 523, May 20, 1990, *citing Alcuaz*, 161 SCRA 7.

[186] *Id.*

due process [was] untenable. It is a time-honored principle that contracts are respected as the law between the contracting parties."[187]

Despite having characterized the *vinculum juris* between the school and petitioners-students as *ex contractu*,[188] a relationship squarely within the private sphere,[189] the Court continued to lay down the requisites to meet the constitutional demands of due process in disciplinary cases.[190]

Alcuaz is a glaring irony. On one hand, the Court "cavalierly dismiss[ed] [the] petition as a simple case of contractual relations."[191] On the other hand, it applied standards of public law by considering the right to due process. Though the court found that there was no violation of said right, due process was nonetheless a standard that needed satisfaction.

Two years subsequent to *Alcuaz*, the Supreme Court reviewed the "termination of contract" theory. In *Non v. Dames II* (hereinafter, "*Non*"), petitioners-students of Mabini College were "not allowed to re-enroll by the school for the academic year 1988-1989 for leading or participating in student mass actions against the school in the preceding semester."[192]

Contrary to *Alcuaz*, the Supreme Court found for the students. Borrowing from *Tinker v. Des Moines Community School District*, the high court ruled that the students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The "contract between school and student [being] one 'imbued with public interest [...] the authority of educational institutions over the conduct of students [...] cannot go so far as to be violative of constitutional safeguards."[193]

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[187] *Alcuaz*, 161 SCRA 7, 18, *citing* Henson v. Intermediate Appellate Court, G.R. No. 72456, 148 SCRA 11, Feb. 19, 1987.

[188] *See* Philippine School of Business Administration v. Ct. of Appeals, G.R. No. 84698, 205 SCRA 729, Feb. 4, 1992.

[189] Philippine American Life Insurance Co. v. Auditor General [hereinafter *Philippine American Life Insurance Co.*], G.R. No. L-19255, 22 SCRA 135, 146-7, Jan. 18, 1968, *citing* Nebbia v. New York, 291 U.S. 502, 523 (1934).

[190] *Alcuaz*, 161 SCRA 7, 18. "Accordingly, the minimum standards laid down by the Court to meet the demands of procedural due process are: (1) the students must be informed in writing of the nature and cause of any accusation against them; (2) they shall have the right to answer the charges against them, with the assistance of counsel, if desired: (3) they shall be informed of the evidence against them; (4) they shall have the right to adduce evidence in their own behalf and (5) the evidence must be duly considered by the investigating committee or official designated by the school authorities to hear and decide the case."

[191] *Alcuaz*, 161 SCRA 7, 22 (Sarmiento, *J.*, *dissenting*).

[192] *Non*, 185 SCRA 523, 526-27.

[193] *Id.* at 537.

Non is an outlier in the field of Constitutional law in imposing Bill of Rights protections such as due process, free expression, and free assembly to an ostensibly private actor; in this case, the Mabini College. Effectively, the Court in *Non* protected students' rights against private intrusion, though without addressing the threshold issue of state action.

Though the *state action doctrine* remains the general rule, the Supreme Court continues to intertwine public law with the private sphere. In the case of *Vivares v. St. Theresa's College of Cebu* (hereinafter, "*Vivares*"), the right to privacy of Julia and Julienne who are both minors and graduating high school students at St. Theresa's College (STC) were the subject of contention. The facts of the case provide:

> Sometime in January 2012, while changing into their swimsuits for a beach party they were about to attend, Julia and Julienne, along with several others, took digital pictures of themselves clad only in their undergarments. These pictures were then uploaded by Angela Lindsay Tan (Angela) on her Facebook profile [...] Back at the school, Mylene Rheza T. Escudero (Escudero), a computer teacher at STC's high school department, learned from her students that some seniors at STC posted pictures online, depicting themselves from the waist up dressed only in brassieres. Escudero then asked her students if they knew who the girls in the photos are. In turn, they readily identified Julia [and] Julienne.[194]

The two were called to the school principal's office, and were castigated by school officials for "engaging in immoral, indecent, and lewd acts." As a penalty, the students were barred from joining the commencement exercises later that month.[195]

Represented by their parents, Julia and Julienne sought recourse by a petition for *habeas data.*[196] The Supreme Court was tasked to determine whether the STC teachers violated the students' right to privacy in life, liberty,

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[194] G.R. No. 202666, 737 SCRA 92, 100-101, Sept. 29, 2014 [hereinafter "*Vivares*"].

[195] *Id.* at 101-102

[196] *Id.* at 103-104, *citing* Gamboa v. Chan, G.R. No. 193636, 677 SCRA 385, July 24, 2012: "The writ of *habeas data* is a remedy available to any person whose right to privacy in life, liberty or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting or storing of data or information regarding the person, family, home and correspondence of the aggrieved party."

and security.[197] The Supreme Court disagreed, ruling that one could only invoke the right to privacy online if an expectation of privacy was first established. Hence, it would be necessary for the user, in this case Julia and Julienne, to have manifested their intention to keep certain posts private through the employment of measures to limit its visibility.

Relying on the facts, the court found that "the records [were] bereft of any evidence, other than bare assertions that [the parties] utilized Facebook's privacy settings to make the photos visible only to them or to a select few. Without proof that they placed the photographs subject of [the] case within the ambit of their protected zone of privacy, they could not then insist that they [had] an expectation of privacy with respect to the photographs in question." The Court concluded that "STC [could not] be faulted for being steadfast in its duty of teaching its students to be responsible in their dealings and activities in cyberspace."[198]

The Court's ruling in *Vivares* was not a matter of legal doctrine, but one of evidence. But notice that the Court, rather than taking the *Duncan* approach in summarily dismissing the contention for the lack of state action *per se,* subjected the parties' student-teacher relationship to constitutional standards. Ultimately, there being no expectation of privacy absent a showing that Julia and Julienne utilized Facebook's security features, neither could there have been a violation of the right to privacy itself.

Similar to *Alcuaz*, which applied the standards of due process to a private institution, the Court in *Vivares* impliedly recognized the fundamental right to privacy. Parenthetically, contrary to traditional doctrine, fundamental rights such as due process and privacy exist and may be the subject of abuse within the private sphere.[199] Stating that education is more than a contract, Justice Abraham F. Sarmiento, in his dissent to the *Alcuaz* majority opinion, characterized education as follows:

> [A] concern impressed with a public interest. It is a matter of State policy enshrined in the Constitution to "protect and promote the right of all citizens to qualify education at all levels and shall take appropriate steps to make such education accessible to all." As part

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[197] *See* Ayer Productions v. Capulong, G.R. No. L-82380, 160 SCRA 861, Apr. 29, 1988; Samuel Warren and Louis Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1980); Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

[198] *Vivares*, 737 SCRA 92, 124.

[199] *See also Zulueta*, 253 SCRA 699.

> of this guaranty, the Constitution wills it that every citizen have a right to select a profession or course of study, subject to fair, reasonable, and equitable admission and academic requirements. While academic freedom, the Charter decrees, "shall be enjoyed in all institutions of higher learning," it calls upon, nonetheless, the Government to exercise reasonable supervision and regulation over all educational institutions.[200]

Like public utilities as earlier opined, academic institutions whether public or private are bound by higher standards of constitutional law.[201] Justice Sarmiento writes in his dissent that due to the "high priority" or *public interest* given by the Constitution to education,[202] academic institutions are bound by constitutional obligations.[203] However, this expansion of constitutional protections comes with three caveats: first, as to the mutable definition of "public interest"; second, as to its possible conflation with the *public function test*; and third, as to the public nature of academic institutions.

First, the Court has grappled with the meaning of public interest.[204] As observed in *Legaspi v. Civil Service Commission*:

> "[P]ublic interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case-by-case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.[205]

The definition of *public interest* being in constant flux, the courts are effectively given the discretion to determine when public or private laws would apply. But perhaps the lack of a well-defined meaning may be for the better, affording the State the flexibility to adjust with the vicissitudes of time.[206] Similarly, other than the traditional standard of state action, neither

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[200] *Alcuaz*, 161 SCRA 7, 23 (Sarmiento, *J.*, *dissenting*).

[201] Horwitz & Miller, *supra* note 153, *citing* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962).

[202] *Non*, 185 SCRA 523, 537, *citing* CONST. art. XIV, §§ 1, 2, 4(1).

[203] DE LEON, *supra* note 47, at 155.

[204] Valmonte v. Belmonte, G.R. No. 74930, 170 SCRA 256, Feb. 13, 1989.

[205] Legaspi v. CSC, G.R. No. L-72119, 150 SCRA 530, 541, May 29, 1987.

[206] *Philippine Blooming Mills*, 51 SCRA 189.

has the U.S. judiciary pointed to a *conditio sine qua non* that would trigger the application of the Constitution.[207]

Second, there is a potential, albeit inconsequential, confusion between *public interest* and *public function* as they were originally contemplated. While both terms are comparable, as implied by *Guillory v. Administrators of Tulane University* (hereinafter, "*Guillory*"), the two are nonetheless separate and distinct terms.[208] On one hand, *public interest* refers to "the general welfare of the public that warrants recognition and protection."[209] An affair is *impressed* with *public interest* when "the public as a whole has a stake" that justifies governmental regulation[210] by legislation, and not by constitutional mandate *per se*.[211] On the other hand, one is *engaged* in a *public function* when "it seeks to achieve some collective benefit for the public [...] and is accepted [...] as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."[212] Pursuant to the *public function test* of U.S. case law, "a private person's actions constitute state action if the private person performs functions that are traditionally reserved to the state."[213] Hence, when the State allows a private actor to assume public responsibilities, the ostensibly private actor or space is deemed public.[214]

As to their nature, it is well-nigh impossible to draw a line where the realm of *public interest* ends and *public function* begins. *Public functions* are after all vested with *public interest*, but the same cannot be said contrariwise.[215] But as to their effect, foreign jurists have drawn a distinction between the two. *Public interest* is said to precipitate state regulation, but only by legislation.[216] On the other hand, private actors engaged in a *public function* are treated as public *per se*, and are bound by constitutional limitations.[217]

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[207] Brown, *supra* note 171.

[208] *See* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858-9 (E.D. La. 1962).

[209] BLACK'S LAW DICTIONARY 1266 (8th ed. 2004).

[210] *Id.*

[211] Civil Rights Cases, 109 U.S. 3, 43 (1883) (Harlan, *J.*, *dissenting*); Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240, 307-308 (1935).

[212] Binny Ltd. v. V. Sadasivan, 6 SCC 657 (2005).

[213] BLACK'S LAW DICTIONARY 1266 (8th ed. 2004), *citing* Civil Rights Cases, 109 U.S. 3 (1883).

[214] Schoenhard, *supra* note 23, at 644.

[215] *See* Inter Media Publishing Ltd. v. State of Kerala, W.P.[C].No.10727/2013 (2015).

[216] Civil Rights Cases, 109 U.S. 3, 42 (1883) (Harlan, *J.*, *dissenting*).

[217] *Marsh*, 326 U.S. 501, 502, 505.

Though the nature and effect of *public interests* and *public functions* are nuanced in their common law origins, Philippine case law has conflated the two. As stated, privatized privately owned corporations and academic institutions have been subjected to higher standards of public law by reason of *public interest* alone, without regard to an assumption of public function. Hence, within the Philippine legal system, a mere interest of the state, as mutably defined by the Court, would merit the application of the Constitution.

Third, the provenance of imposing constitutional obligations on academic institutions in U.S. case law involved public, and not private, schools. In *Ingraham v. Wright* (hereinafter, "*Ingraham*"), the U.S. Supreme Court proscribed the use of corporal punishment in schools vis-à-vis the Fourteenth Amendment in light of a color of state authority: "[W]here school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated."[218]

Further, *Goss v. Lopez* (hereinafter, "*Goss*") required that due process be observed in school disciplinary processes. Rejecting the contention of the appellant-administrators of the Columbus, Ohio, Public School System (CPSS), the Court ruled that a student must be given an informal opportunity to be heard before he is disciplined by his public school.[219]

Ingraham and *Goss* evince that the initial application of constitutional protections was only with regard to public academic institutions, much in line with the *public/private distinction.* In any case, today, one doubts whether any school can ever be so "private" as to escape the reach of constitutional limitations.[220] As stated in *Guillory*:

> No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes?[221]

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[218] Ingraham v. Wright, 430 U.S. 651, 674 (1977).

[219] Goss v. Lopez, 419 U.S. 565, 569 (1975).

[220] Horwitz & Miller, *supra* note 153, *citing* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962).

[221] Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858-9 (E.D. La. 1962). (Citations omitted.)

In sum, despite the lack of traditional notions of state action in private schools, Philippine jurisprudence has extended constitutional protections such as due process, assembly, expression, and privacy on the ground of *public interest*. Hence, the fact of "private ownership or operation of a facility impressed with a public interest does not automatically insulate it from the reach [...]"[222] of the Constitution.

The application of constitutional limitations to private academic institutions is no novel issue in the Philippines. As embodied in case law, the Technological Institute of the Philippines (TIP), [223] Gregorio Araneta University Foundation (GAUF),[224] National University (NU),[225] Ateneo de Manila University (ADMU),[226] and De La Salle University (DLSU)[227] have been the subject of Bill of Rights obligations. This string of cases evinces how though the *state action doctrine* remains the general rule, it is in no sense hard and fast.

2. Labor Relations

The right to enter into contracts is a liberty protected by both constitutional[228] and statutory fiat.[229] Under our form of government, contracts are a private concern, generally free from state interference.[230] The same may be said for labor contracts which, as the term implies, are contractual in nature.[231] Though not to be disparaged as mere economic

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[222] *Id.* at 859.

[223] Villar v. Technological Institute of the Philippines, G.R. No. L-69198, 135 SCRA 706, Apr. 17, 1985.

[224] Arreza v. Gregorio Araneta Univ. Foundation, G.R. No. L-62297, 137 SCRA 94, June 19, 1985; Malabanan v. Ramento, G.R. No. L--62270, 129 SCRA 359, May 21, 1984.

[225] Guzman v. National Univ., G.R. No. L-68288, 142 SCRA 699, July 11, 1986.

[226] Ateneo de Manila Univ. v. Ct. of Appeals, G.R. No. L--56180, 145 SCRA 100, Oct. 16, 1986.

[227] De La Salle Univ., Inc. v. Ct. of Appeals, G.R. No. 127980, 541 SCRA 22, Dec. 19, 2007.

[228] *See* Lochner v. New York, 198 U.S. 45, 53, 56 (1905); CONST. art. III, § 10. *See also* BERNAS, *supra* note 90, *citing* Gonzalez v. Roman Catholic Archbishop of Manila, 51 Phil. 420 (1928).

[229] CIVIL CODE, art. 1306.

[230] *Philippine American Life Insurance Co.*, 22 SCRA 135, 146-47, *citing* Nebbia v. New York, 291 U.S. 502, 523 (1934).

[231] People v. Pomar, 46 Phil. 126 (1924), *citing* Gillespie v. People, 118 Ill. 176, 183-85 (1900).

activity, labor contracts are in the same breadth recognized to be impressed with public interest and subjected to extra-contractual limitations.[232]

In *Manila Electric Company v. National Labor Relations Commission*,[233] though the Supreme Court acknowledged the petitioner's management prerogative in terminating its employees, the Court qualified this freedom to be the subject of regulation through the police power of the State. The Court reasoned that "the preservation of the lives of the citizens is a basic duty of the State, more vital than the preservation of corporate profits."[234] Though the Court has affirmed that contracts are generally a private matter,[235] it has stated as follows:

> [P]arties may not contract away applicable provisions of law especially peremptory provisions dealing with matters heavily impressed with public interest. The law relating to labor and employment is clearly such an area and parties are not at liberty to insulate themselves and their relationships from the impact of labor laws and regulations by simply contracting with each other.[236]

Again, because of *public interest*, the Court has imposed special limitations within the private sphere.[237] In fact, the Court went as far as to hurdle state action requirements outright in ruling that one's "employment, profession, trade or calling is a property right within the protection of the constitutional guaranty of due process of law,"[238] without regard to its public or private nature.

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[232] CIVIL CODE, art. 1700. *See also Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*); Innodata Philippines, Inc. v. Ynares-Santiago, G.R. No. 162839, 504 SCRA 253, Oct. 12, 2006, *citing* Pakistan Airlines Corp. v. Ople, G.R. No. L-61594, 190 SCRA 90, Sept. 28, 1990; Magsalin v. National Organization of Working Men, 451 Phil. 254 (2003); Bernardo v. Nat'l Lab. Rel. Comm'n, 369 Phil. 443 (1999); II JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 511 (1988), referring to CONST. art. XIV, §§ 4(1), 5(2).

[233] Manila Electric Co. v. Nat'l Lab. Rel. Comm'n, G.R. No. 78763, 175 SCRA 277, July 12, 1989.

[234] *Id.* at 281.

[235] *Philippine American Life Insurance Co.*, 22 SCRA 135, 146-7, *citing* Nebbia v. New York, 291 U.S. 502, 523 (1934).

[236] Pakistan Airlines Corp. v. Ople, G.R. No. L-61594, 190 SCRA 90, 99, Sept. 28, 1990.

[237] *Id. Alcuaz*, 161 SCRA 7, 23 (Sarmiento, *J.*, *dissenting*).

[238] Wallem Maritime Services, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 108433, 263 SCRA 174, 182, Oct. 15, 1996, *citing* Callanta v. Carnation Philippines, Inc., G.R. No. L-70615, 145 SCRA 275, Oct. 28, 1986.

Notably, these progressive developments were stayed by later rulings. In *Serrano v. National Labor Relations Commission* (hereinafter, "*Serrano*"), the Court ruled that the failure to observe the "notice requirement" was not a violation of constitutional due process because said right "did not apply to the exercise of private power, such as the termination of employment under the Labor Code."[239] *Serrano* elicited dissenting opinions from then Justices Artemio Panganiban and Reynato Puno, renowned members of the judiciary who would go on to become the 21st and 22nd Chief Justice of the Supreme Court, respectively.

Chief Justice Panganiban asserted that employees are entitled to due process from their employer by virtue of the Constitution *per se*, and not on the strength of the Labor Code alone. That traditional notions of state action "should be modified to cope with [the] new paradigms and to continue protecting the people from new forms of abuse."[240]

Hand in hand with Justice Panganiban's opinion, Chief Justice Reynato Puno strongly dissented from the majority opinion and argued for "private due process." Citing *Kingsize Manufacturing Corporation v. National Labor Relations Commission*, Justice Puno penned that the notice requirement "is not a mere technicality but a requirement of due process to which every employee is entitled to insure that the employer's prerogative to dismiss or lay off is not abused or exercised in an arbitrary manner."[241] Pursuant to the doctrine of private due process, which Philippine case law has long adopted, "constitutional rights of labor should be safeguarded against assaults from both government and private parties."[242]

Four years later, in *Agabon v. National Labor Relations Commission* (hereinafter, "*Agabon*"), the Court revisited the *Serrano* doctrine. In line with the "private due process" argument of Justice Puno, the Court delineated constitutional and statutory due process: "Constitutional due process protects the individual from the government and assures him of his rights in criminal, civil or administrative proceedings; while statutory due process found in the

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[239] Panganiban, *supra* note 12, *citing Serrano*, 323 SCRA 445.

[240] *Serrano*, 323 SCRA 445, 542 (Panganiban, *J.*, *separate opinion*).

[241] *Serrano*, 323 SCRA 445, 511 (Puno, *J.*, *dissenting opinion*), *citing* Kingsize Manufacturing Corp. vs. Nat'l Lab. Rel. Comm'n, G.R. Nos. 110452-54, 238 SCRA 349, Nov. 24, 1994.

[242] *Id.*

Labor Code and Implementing Rules protects employees from being unjustly terminated without just cause after notice and hearing."[243]

The Court in *Agabon* played both sides of the argument. While recognizing private due process, the Court reduced it as a mere statutory right, different from fundamental constitutional rights which are traditionally bound by the *state action doctrine*. In making this delineation, the Court kept intact the traditional doctrine requiring prior government action, but at the same time extended due process protections against the private employer. Effectively, the Court was able to modify the impact of the *Serrano* doctrine without expressly admitting any error on its part.

However, the distinction drawn between statutory and constitutional due process is more apparent than real. Case law has already recognized that one's employment or profession falls within the realm of constitutional due process protections.[244] What is alluded to by "statutory" or "private" due process is merely "how much" process is due, rather than "from whom" it is due. Hence, notwithstanding its purported provenance, due process holdings in labor law are in fact no different from constitutional law. Ultimately, it is still the constitutional requirement that "no person [...] be deprived of life, liberty or property without due process of law" that is invoked—the Labor Code merely defining what that process is, i.e. notice and hearing.[245]

Furthermore, in line with the liberal spirit of labor,[246] the application of the Bill of Rights against the private-employer may also find a leg to stand on through *public interest* exceptions. As echoed through jurisprudence, a mere *public interest* would suffice to justify the application of constitutional limitations within the private sphere. By constitutional, statutory, and

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[243] Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573, 612, Nov. 17, 2004.

[244] Wallem Maritime Services, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 108433, 263 SCRA 174, 182, Oct. 15, 1996, *citing* Callanta v. Carnation Philippines, Inc., G.R. No. L-70615, 145 SCRA 275, Oct. 28, 1986.

[245] Nitto Enterprises v. Nat'l Lab. Rel. Comm'n, G.R. No. L-114337, 248 SCRA 654, 662, Sept. 29, 1995.

[246] Songco v. Nat'l Lab. Rel. Comm'n, G.R. No. L-50999, 183 SCRA 610, Mar. 23, 1990; Nicario v. Nat'l Lab. Rel. Comm'n, G.R. No. 125340, 295 SCRA 619, Sept. 17, 1998; Philippine Federation of Credit Cooperatives, Inc. v. Nat'l Lab. Rel. Comm'n, 360 Phil. 254, 261 (1998); Lirio v. Genovia, G.R. No. 169757, 661 SCRA 126, Nov. 23, 2011 on LABOR CODE, art. 4. *See* Kapisanang Manggagawang Pinagyakap v. Nat'l Lab. Rel. Comm'n, G.R. No. L-60328, 152 SCRA 96, July 16, 1987.

jurisprudential fiat, labor relations are recognized to be impressed with *public interest* and may therefore be subject to the Bill of Rights.[247]

Expanding the scope of Constitutional protections in labor relations between a private employer and employee would only be in consonance with the mandates of the Constitution.[248] Pursuant to its Social Justice provisions, the Court through its equity jurisdiction should favor economic and political minorities[249] and give full protection to labor.[250] These protections need not be codified in labor laws alone, but may find basis in the bundle of rights enshrined in Civil and Political laws.

3. "Justice" in the Marital Bond

The battle over the Bill of Rights is a never-ending one,[251] there being no hard and fast rule when it comes to slippery constitutional questions.[252] The *state action doctrine* is no exception.

As stated, the Supreme Court upheld the traditional notion of state action in *Marti*, *Villanueva*, *Waterous*, and *Mendoza*, all necessitating prior government action to invoke constitutional rights. In contrast, *Zulueta v. Court of Appeals*[253] (hereinafter, "*Zulueta*") took a progressive view in desisting from applying the Constitution's exclusionary rule[254] to written communications between Alfredo Martin, an adulterous husband, and his paramours. The facts of *Zulueta* are as follows:

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[247] *See Alcuaz*, 161 SCRA 7. *See also* Ateneo de Manila Univ. v. Ct. of Appeals, G.R. No. L-56180, 145 SCRA 100, Oct. 16, 1986; Arreza v. Gregorio Araneta Univ. Foundation, G.R. No. L-62297, 137 SCRA 94, June. 19, 1985; De La Salle Univ., Inc. v. Ct. of Appeals, G.R. No. 127980, 541 SCRA 22, Dec. 19, 2007; Guzman v. National Univ., G.R. No. L-68288, 142 SCRA 699, July 11, 1986; Malabanan v. Ramento, G.R. No. L-62270, 129 SCRA 359, May 21, 1984; Non v. Danes II, G.R. No. 89317, 185 SCRA 523, May 20, 1990; Villar v. Technological Institute of the Philippines, G.R. No. 69198, 135 SCRA 706, Apr. 17, 1985.

[248] CONST. art. XIII, § 3.

[249] Alberto T. Muyot, *Social Justice and the 1987 Constitution*, 70 PHIL. L.J. 310 (1995-1996), *citing* BERNAS, *supra* note 232, at 469. *See also* Pangalangan, *supra* note 4, *citing* National Sugar Refineries Corp. v. Nat'l Lab. Rel. Comm'n, G.R. No. 101761, 220 SCRA 452 Mar. 24, 1993.

[250] *Serrano*, 323 SCRA 445, 516 (Puno, *J.*, *dissenting opinion*).

[251] *Philippine Blooming Mills*, 51 SCRA 189.

[252] Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008.

[253] *Zulueta*, 253 SCRA 699.

[254] CONST. art. III, § 3.

> Petitioner Cecilia Zulueta is the wife of private respondent Alfredo Martin. On March 26, 1982, petitioner entered the clinic of her husband, a doctor of medicine, and in the presence of her mother, a driver and private respondent's secretary, forcibly opened the drawers and cabinet in her husband's clinic and took 157 documents consisting of private correspondence between Dr. Martin and his alleged paramour's, greetings cards, cancelled checks, diaries, Dr. Martin's passport, and photographs. The documents and papers were seized for use in evidence in a case for legal separation and for disqualification from the practice of medicine which petitioner had filed against her husband.[255]

If the *Marti* doctrine were applied to *Zulueta*'s facts, the contention that the Constitution's exclusionary rule barred the document's admission as evidence would have been patently rejected. Again, such was the doctrine echoed in *Waterous*, which similarly involved the opening of an envelope by a co-employee without the authority of its owner. Traditional doctrine reflected in these cases would not have applied the Constitution, there being no evidence of state action.

Precedence notwithstanding, *Zulueta* held that "any violation of [the right to privacy] renders the evidence obtained inadmissible for any purpose in any proceeding."

> Indeed the documents and papers in question are inadmissible in evidence. The constitutional injunction declaring "the privacy of communication and correspondence [to be] inviolable" is no less applicable simply because it is the wife (who thinks herself aggrieved by her husband's infidelity) who is the party against whom the constitutional provision is to be enforced. The only exception to the prohibition in the Constitution is if there is a "lawful order [from a] court or when public safety or order requires otherwise, as prescribed by law."[256]

Conventional practices of state action were set aside in *Zulueta*. Though traditionally, the litmus test for applying Constitutional protections is the presence of government action, *Zulueta*'s threshold was upon the "justness" of the act:

> The intimacies between husband and wife do not justify any one of them in breaking the drawers and cabinets of the other and in

[255] *Id.* at 701.
[256] *Id.* at 703-704.

> ransacking them for any telltale evidence of marital infidelity. A person, by contracting marriage, does not shed his/her integrity or his right to privacy as an individual and the constitutional protection is ever available to him or to her.[257]

Contrary to the general practice, the Court ruled on the substance of the right, i.e. whether the ransacking was justified, rather than merely a question of form, i.e. whether the occurrence was the product of government action.[258]

Effectively, the court gave to Alfredo Martin in *Zulueta* what it denied to Andre Marti in *Marti*. As stated, Marti argued that the phraseology of the exclusionary rule "declaring as inadmissible any evidence obtained in violation of the constitutional prohibition against illegal search and seizure [without regard to] whether the evidence was procured by police authorities or private individuals."[259] The Court summarily dismissed this contention and ruled that the modifications introduced to the 1987 Constitution did not deviate as to whom the restriction "against unreasonable search and seizure is directed against. The restraint stayed with the State and did not shift to anyone else."[260] On the other hand, the Court in *Zulueta* adopted Andre Marti's interpretation and ruled that "constitutional injunction declaring the privacy of communication and correspondence [to be] inviolable was no less applicable simply because [it was the] wife [...] against whom the constitutional provision is to be enforced."[261]

Though *Zulueta* remains aberrant in the field of jurisprudence that maintains the *status quo* of state action, the doctrine nonetheless finds bases in deeply engrained principles of Constitutional law. First, such a progressive construction of the Constitution is in harmony with the object and purpose of the Bill of Rights to "preserve the ideals of liberty, equality and security against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, and the scorn and derision of those who have no patience with general principles." [262] Furthermore, *Zulueta*'s interpretation of the Constitution is consistent with a literal or *verba legis* reading of its provisions. As earlier discussed, such an interpretation is in no

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[257] *Id.* at 704.

[258] DE LEON, *supra* note 47, at 159.

[259] *Marti*, 193 SCRA 57, 68, *citing* Appellant's Brief 8, *Rollo* 62.

[260] *Id.* at 68.

[261] *Zulueta*, 253 SCRA 699, 703.

[262] *Philippine Blooming Mills*, 51 SCRA 189, 200-201

way repugnant to the Constitution for "neither does [it] say that the right cannot be claimed against private individuals and entities."[263] On the contrary, the Constitution mandates through its social justice provisions that "when the law can be interpreted in more ways than one, an interpretation that favors the underprivileged must be followed." [264] Hence, consistent with the aforecited rules of interpretation, *Zulueta* appropriately applied Constitutional protections within the private sphere.[265]

It is said that the "journey of a thousand miles begins with one step."[266] *Zulueta*, though an outlier in Philippine Constitutional tradition, is undoubtedly one in the right direction.

B. State Inaction Liability and the Inadequacy of the Constitutional Tort

The Constitution delineates both areas of private and public life from encroachment, but only separately.[267] While the Bill of Rights has been traditionally interpreted to bind the state alone, Congress has attempted to rectify private violations of Constitutional rights through legislation.[268] Article 32 of the Civil Code,[269] a provision that deals specifically with violations of Constitutional rights,[270] provides such redress. Unlike traditional notions of the Constitution, under Article 32 even private individuals who impair fundamental rights may be held liable for constitutional torts.[271]

Article 32 expands the protections of civil liberties guaranteed by the Constitution.[272] The Civil Code Commission deemed it necessary to do so for the effective maintenance of democracy for the following reasons:

1. In most cases, the threat to freedom originates from abuses of power by government officials and peace officers. Heretofore,

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[263] *Serrano*, 323 SCRA 445, 545 (Panganiban, *J.*, *separate opinion*).

[264] BERNAS, *supra* note 232, at 46.

[265] *Zulueta*, 253 SCRA 699.

[266] Laozi, *Tao Te Chin*, Chapter 64.

[267] *See* BERNAS, *supra* note 54, at 2.

[268] CARMELO V. SISON, TORTS AND DAMAGES 623 (2003), *citing* Vinzons-Chato v. Fortune Tobacco Corp., G.R. No. 141309, 525 SCRA 11, June 19, 2007.

[269] CIVIL CODE, art. 32.

[270] SISON, *supra* note 268, at 623, *citing* Vinzons-Chato v. Fortune Tobacco Corp., G.R. No. 141309, 525 SCRA 11, June 19, 2007; FLORIN T. HILBAY, UNPLUGGING THE CONSTITUTION 230 (2009).

[271] SISON, *supra* note 268, at 604.

[272] ROMMEL J. CASIS, ANALYSIS OF LAW AND JURISPRUDENCE ON TORTS AND QUASI-DELICTS 395 (2012).

> the citizen has had to depend upon the prosecuting attorney for the institution of criminal proceedings in order that the wrongful act might be punished under the Penal Code and the civil liability exacted. But not infrequently, because the Fiscal (now Prosecutor) was burdened with too many cases or because he believed the evidence was insufficient, or as to a few fiscals, on account of a disinclination to prosecute a fellow public official, especially when he is of a high rank, no criminal action as filed by the prosecuting attorney.
>
> The aggrieved citizen was then left without redress. In this way, many individuals whose freedom had been tampered with, have been unable to reach the courts, which are the bulwark of liberty.
>
> 2. Even when the prosecuting attorney filed a criminal action, the requirement of proof beyond reasonable doubt often prevented the appropriate punishment. On the other hand, an independent, civil action, as proposed in the project of Civil Code, would afford the proper remedy by a preponderance of evidence.
>
> 3. Direct and open violations of the Penal Code trampling upon the freedoms named are not so frequent as those subtle, clever and indirect ways which do not come within the pale of the penal law. It is in these cunning devices of suppressing or curtaining freedom, which are not criminally punishable, where the greatest danger to democracy lies. The injured citizen will always have, under the Project of Civil Code, adequate civil remedies before the courts because of the independent civil action, even in those instances where the act or omission complained of does not constitute a criminal offense.[273]

The clear intention of the legislature was to "create a distinct cause of action in the nature of tort for violations of Constitutional rights."[274] Under Article 32, "the aggrieved party may file an entirely separate and distinct civil action for damages, and for other relief, which shall proceed independently of any criminal prosecution, even if the latter be instituted, and shall require only

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[273] REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 30-31 (1949); CASIS, *supra* note 272, at 395-96 (2012); HECTOR S. DE LEON, COMMENTS AND CASES ON TORTS AND DAMAGES 110 (2012).

[274] SISON, *supra* note 268, at 623.

a preponderance of evidence."[275] Hence, unlike the traditional notions of state action, both public officers and private individuals may incur civil liability for a direct or indirect violation[276] of the rights enumerated therein.[277] Furthermore, Article 32 liability does not require the individual to have acted with malice or bad faith.[278]

The Philippine constitutional tort provision, in more sense than one, runs parallel to Section 1983 of the Civil Rights Act of 1871 (hereinafter, "Section 1983"):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[279]

Similar to Article 32, Section 1983 has been employed against both public and private violations of constitutional rights of the citizenry.[280] Solicitor General Florin Hilbay points out that, though the two are similar in many ways as a liability rule, Philippine constitutional torts is designed to operate more aggressively than the latter:

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[275] DE LEON, *supra* note 273.

[276] SISON, *supra* note 268, at 610, *citing* Aberca v. Ver, G.R. No. 69866, 160 SCRA 590, Apr. 15, 1988.

[277] *Id.* at 604, 613, 621, 623; HILBAY, *supra* note 270, at 230, *citing* Lui v. Matillano, G.R. No. 141176, 429 SCRA 449, May 27, 2004; MHP Garments, Inc. v. Ct. of Appeals, G.R. No. 86720, 236 SCRA 227, Sept. 2, 1994.

[278] CASIS, *supra* note 272, at 396, *citing* REPORT OF THE SPECIAL JOINT COMMITTEE OF THE CONGRESS ON THE AMENDMENTS TO THE NEW CIVIL CODE, XVI, THE LAWYERS' JOURNAL, NO. 5, 258 (May 31, 1951).

[279] CIVIL RIGHTS ACT OF 1871, 17 Stat. 13 (1871). Civil Rights Act of 1871, U.S. Code § 1983, Title 42.

[280] SISON, *supra* note 268, at 635, *citing* Vinzons-Chato v. Fortune Tobacco Corp., G.R. No. 141309, 525 SCRA 11, June 19, 2007.

(1) Article 32 does not require bad faith or malicious intent,
(2) Article 32 covers a wider range of respondents as it does not require action "under color of any statute," and
(3) Article 32 uses terms "direct and indirect" as a mode of violating a claimant's constitutional rights, while §1983 uses the phrase "subjects, or causes to be subjected."[281]

The all-inclusiveness of Article 32 makes its message clear: "no man may seek to violate those sacred [Constitutional] rights with impunity."[282] However, while it is conceded that Article 32 provides a remedy to generally the same cherished rights and freedoms enshrined in the Constitution,[283] such does not necessarily entail the same forms of protection. The disparities between Bill of Rights and constitutional torts protections will be addressed through the following points: the scope of application, the remedy available, and the *onus probandi*.

1. Scope of Application

The Constitution was crafted to allow the State to govern, but at the same time, to oblige it to control itself.[284] It is for this reason that the Bill of Rights lists through its 22 sections what the government cannot do. These obligations, however, are crafted explicitly through negative, rather than positive, prestations.[285] Ergo, only a positive act of the State could violate the Constitution—a mere failure to act or omission being insufficient to precipitate constitutional liability.[286]

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[281] HILBAY, *supra* note 270, at 219.

[282] SISON, *supra* note 268, at 607, *citing* JOSEPH CHARMONT, FRENCH LEGAL PHILOSOPHY 72-73 (McMillan Co., New York 1921).

[283] *Id.* at 607, *citing* Aberca v. Ver, G.R. No. 69866, 160 SCRA 590, Apr. 15, 1988; HILBAY, *supra* note 270, at 223.

[284] Pangalangan, *supra* note 4, at 146, *citing* The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

[285] *Id.* at 144.

[286] DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 196-97 (1989). "A State's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the State to provide members of the general public with adequate protective services. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 57 (1989), *citing* Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

On the other hand, statutes and international conventions alike confer positive obligations. Article 32 expressly provides that both acts and omissions fall within its ambit.[287] Furthermore, the International Covenant on Civil and Political Rights (ICCPR)[288] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[289] —together, the "International Bill of Rights"[290]— require the Philippine government "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in [these] Covenant[s]."[291]

As to the ambit of protection, statutory and conventional protections go beyond the realm of the Bill of Rights. Rather than merely endowing negative prestations, Article 32 and international conventions contemplate both action and inaction in the protection of fundamental rights. Nonetheless, recent foreign jurisprudence have blurred these nuances.

In *Thurman v. City of Torrington* (hereinafter, "*Thurman*"), the Torrington Police Department's failure to respond to Tracey Thurman's reports of domestic violence gave rise to state liability. The U.S. Supreme Court ruled that such "inaction on the part of the officer is a denial of the equal protection of the laws."[292]

Another landmark decision on *state inaction liability* is that of *Lenahan v. United States* (hereinafter, "*Lenahan*"). Jessica Lenahan reported to the Castle Rock Police Department that her ex-husband, in violation of Court-issued restraining orders, abducted her three daughters. However, the police made no effort to respond. The next morning, Lenahan's daughters aged seven, nine, and ten, were found dead and trickled with bullets.[293]

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[287] *See* ROMMEL J. CASIS, ANALYSIS OF PHILIPPINE LAW AND JURISPRUDENCE ON DAMAGES 161, *citing* Manila Electric Co. v. Spouses Chua, G.R. No. 160422, 623 SCRA 81, July 5, 2010.

[288] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (hereinafter, "ICCPR"). International Convention on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 1.

[289] International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 999 U.N.T.S. 3 (hereinafter, "ICESCR").

[290] *See* Risos-Vidal v. COMELEC, G.R. No. 206666, Jan. 21, 2015; *See also* Tristan Ferraro, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, INTERNATIONAL COMMITTEE OF THE RED CROSS REPORT (2012); William Schreiber, *Realizing the Right to Water in International Investment Law: An Interdisciplinary Approach to BIT Obligations*, 48 NAT. RESOURCES J. 431 (2008).

[291] ICCPR, art. 2. *See also* ICESCR, art 2(2).

[292] 595 F. Supp. 1521, at ¶ 23 (D. Conn. 1985).

[293] Lenahan, Report No. 80/11.

Lenahan claimed before the U.S. Supreme Court that the Police Department's failure to act was a violation of her right to due process. In the case of *Town of Castle Rock v. Jessica Gonzales*, the Court disagreed, ruling that the police had no affirmative constitutional duty to enforce her restraining order because the Due Process Clause does not require the State to arrest a person for another's protection.[294] However, on appeal to the Inter-American Commission on Human Rights, the United States was found liable under the American Declaration on the Rights and Duties of Man.[295] According to the Commission, "[t]he systemic failure of the United States to offer a coordinated and effective response to protect Jessica Lenahan and her daughters from domestic violence constituted an act of discrimination [...] and a violation of their right to equality before the law under Article II of the American Declaration."[296]

The European Court of Human Rights (ECtHR) has taken a similar stance in holding States liable for failing to take reasonable measures that could have protected its citizenry. In the *Case of Opuz v. Turkey* (hereinafter, "*Opuz*"), the ECtHR found "that a State's failure to protect women from domestic violence breaches their right to equal protection of the law, and that this failure does not need to be intentional."[297]

The foregoing cases illustrate the doctrine of *state inaction liability*— a species of state action liability which acknowledges the duty of the State to act affirmatively.[298] Antithetical to traditional doctrine, *Thurman*, *Lenahan*, and *Opuz* forward that a "special relationship" between the State and the individual, such as notice of an impending danger, gives rise to a duty for affirmative State action.[299] In the case of *Lenahan,* the restraining order *per se*,

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[294] 545 U.S. 748 (2005).

[295] American Declaration of the Rights and Duties of Man [hereinafter "American Declaration"], O.A.S. Res. XXX, 9th Int'l Conference of Am. States, O.A.S. Off. Rec., OEA/Ser.L/V./II.23 doc.21 rev.6 (1948).

[296] Lenahan, Report No. 80/11, at ¶ 170. *See also* Caroline Hettinger-Lopez, *Introduction:* Jessica Lenahan (Gonzales) v. United States of America*: Implementation, Litigation, and Mobilization Strategies*, 21 AM. U. J. GENDER & SOC. POL'Y & L. 220 (2012).

[297] Case of Opus v. Turkey, European Court of Human Rights, Application No. 33401/02, 9 June 2009, at ¶ 191.

[298] Jensen v. Conrad, 747 F.2d 185, 190-94 (4th Cir. 1984).

[299] *See* Jensen v. Conrad, 747 F.2d 185, 190-94 (4th Cir. 1984); DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d at 303-304; Martinez v. California, 444 U.S. 277 (1980); Lynne Jodi Stern, *Young Lives Betrayed: DeShaney v. Winnebago County Department of Social Services*, 25 NEW ENG. L. REV. 1251 1990-1991. *See also* Marne E. Brom, *Case Notes*, 39 DRAKE L. REV. 911 (1989-1990).

as well as due notice of its violation, served as that "special relationship." Hence, the Castle Rock Police Department had a positive duty to act.

Though the adoption of *state inaction liability* through the Philippine Constitution is questionable under the *verba legis* rule vis-à-vis negative Constitutional prestations,[300] *Thurman*, *Lenahan*, and *Opuz* illustrate possible remedies to the action-inaction dichotomy. Adopting the ratio of these doctrines, one could argue that as a signatory to conventions that similarly confer positive obligations,[301] the Philippine Government's inaction in general, or more particularly, its failure to provide protections from private wrongs, may give rise to liability. However, until such a progressive reading is doctrinized in the Philippine legal system, Article 32 serves as a consolation remedy amidst private breaches of fundamental rights, whether by action or inaction.

2. Remedy Available

Article 32 does not create a cause of action against private violations of fundamental rights *per se*, but merely provides for a remedy for damages in light of impairments already made. Private violations of fundamental rights give rise to damages when:

1. There is an injury whether physical, mental, or psychological clearly sustained by the claimant;
2. There is a culpable act or omission factually established;
3. The wrongful act or omission of the defendant is the proximate cause of the injury sustained by the claimant; and
4. The award of damages is predicated on any of the cases stated in Article 2219 of the Civil Code.[302]

Article 32 is commonly misconceived as a means to enforce Constitutional protections against private impairments. The records of the Code Commission (hereinafter, "Records") confirms however that Article 32 was not created to serve the same functions of the Bill of Rights, but to remedy the long-drawn inefficiencies of criminal proceedings.[303]

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[300] Pangalangan, *supra* note 4, at 144.

[301] *See* ICCPR, art. 26; ICESCR, art. 2.

[302] CASIS, *supra* note 287, *citing* Manila Electric Co. v. Spouses Chua, G.R. No. 160422, 623 SCRA 81, July 5, 2010.

[303] REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 30-31 (1949).

Furthermore, Article 32 does not in itself prohibit private impairments in the same categorical language as the Constitution does. It merely provides for redress by way of damages after the fact of impairment—a paradoxical situation where private individuals may be liable for violating constitutional rights, but in the same breath, are incapable of doing so under the *state action doctrine*.

Though it may be argued that Article 32 *per se* created a set of rights separate from those enumerated in the Bill of Rights, the former would nevertheless fail to embody the categorical and prohibitive nature of the latter. On its face, Article 32 does not proscribe particular acts, but merely warns as to possible pecuniary consequences for he who "defeats, violates or in any manner impedes or impairs any of the [enumerated] rights and liberties of another person."[304]

In any case, assuming arguendo that the 19 rights listed under Article 32's *chapeau* impose the same obligations as the Constitution itself, such would only buttress the obsolescence of the *state action doctrine*. Article 32, together with the progressive rulings of the Court discussed in this paper, evidence both legislative and judicial recognition that contrary to the old paradigm, private individuals are capable of impairing fundamental rights. Like in *Agabon*, where the Court distinguished constitutional and statutory due process, jurisprudence too has recognized the need for due process, regardless of its provenance, against private abuse.

3. Onus Probandi *in Judicial Review*

Article 32 rights may also be distinguished from Constitutional protections with regard to the burden of proof in judicial review. As evinced by the Records, the creation of an independent cause of action for violations of fundamental rights lowered the quantum of evidence needed for the collection of damages.[305] Unlike criminal proceedings which require proof beyond reasonable doubt,[306] the threshold under Article 32 liability is a mere preponderance of evidence.[307]

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[304] CIVIL CODE, art. 32.

[305] REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 30-31 (1949).

[306] RULES OF COURT, Rule 133, § 2.

[307] § 1.

Though the Court similarly abides by the equiponderance doctrine of evidence when it comes to Constitutional issues,[308] this would not entail that the *onus probandi* for Article 32 liability and Constitutional liability are one and the same. Unlike civil liability, questions involving fundamental rights under the Constitution would precipitate the application of the tests of judicial review: *Strict Scrutiny*, *Intermediate Scrutiny*, and *Rational Basis*.[309] Under the first two tests, the burden of proof is on the Government. Furthermore, violations of the Bill of Rights would involve further inquiry into the classification of the right as life, liberty, or property,[310] as well as to the "least restrictive nature" of the contested means, and the presence of a legitimate government objective.[311] On the other hand, Article 32 liability hinges on a mere preponderance of evidence alone. He who alleges must only prove a legal injury proximately caused by a factually established culpable act or omission.[312]

4. Closing

Constitutional torts may give redress for violations made by private individuals, but it does not enforce protections in the same manner as the Bill of Rights. The nuances between the Bill of Rights and constitutional torts have been addressed above as to their scope of application, provided remedy, and the *onus probandi*. Though Article 32 may have a wider ambit of regulation, encompassing both acts and omissions, it does not reflect the same proscriptive language of the Constitution.[313] The Constitution itself remains the principal source of law in protecting fundamental rights, Article 32 merely

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[308] WILLARD RIANO, EVIDENCE: THE BAR LECTURE SERIES 103 (2013). *See* Rivera v. Ct. of Appeals, G.R. No. 115625, 284 SCRA 673, Jan. 23, 1998; Marubeni Corp. v. Lirag, G.R. No. 130998, 362 SCRA 620, Aug. 10, 2001; People v. Saturno, G.R. No. 160858, 355 SCRA 578, Mar. 28, 2001; Malana v. People, G.R. No. 173612, 549 SCRA 451, Mar. 26, 2008; People v. Erguiza, G.R. 171348, 571 SCRA 634, Nov. 26, 2008; Malillin v. People, G.R. No. 172953, 553 SCRA 619, Apr. 30, 2008; Mayon Hotel & Restaurant v. Adana, G.R. No. 157634, 458 SCRA 609, May 16, 2005.

[309] Fernando v. St. Scholastica's College, G.R. No. 161107, 693 SCRA 141, 157-58, Mar. 12, 2013, *citing* White Light Corp. v. City of Manila, G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

[310] United States v. Carolene Products. Co., 304 U.S. 144, 155 (1938).

[311] *White Light Corp.*, 576 SCRA 416; Imbong v. Ochoa, G.R. No. 204819, 721 SCRA 146, Apr. 8, 2014. *But see* City of Manila v. Laguio, G.R. No. 118127, 455 SCRA 308, Apr. 12, 2005.

[312] CASIS, *supra* note 287, at 161, *citing* Manila Electric Co. v. Spouses Chua, G.R. No. 160422, 623 SCRA 81, July 5, 2010.

[313] *See e.g.* Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573, 612, Nov. 17, 2004. *See also* Cuaycong v. Sengbengco, 110 Phil. 113, 118 (1960); CIVIL CODE, art. 32.

providing a recourse for damages. Lastly, the quantum of evidence necessary under these respective sources substantially differ; the different levels of scrutiny in judicial review are not applied by the Court in constitutional torts.[314]

In any case, even if constitutional torts were assumed to serve the same functions as the Bill of Rights, this would only buttress the obsolescence of the *state action doctrine*. Article 32 and pertinent case law[315] evidence legislative and judicial recognition that, contrary to the presumption of the old paradigm, even private actors may be the sources of abuse of deeply cherished rights and freedoms enshrined in the Constitution.

V. THE NEW PARADIGM

A. Due Process Begins with Us

Presumptions of the old paradigm are far removed from reality. Traditional doctrine holds that only the State is in a position to violate fundamental rights, yet case law paints a different picture.[316] *Duncan* deals with the clash of a private employer's management prerogative versus an employee's right to marry and fall in love.[317] *Victoriano v. Elizalde Rope Worker's Union* is about a labor union's threats against its members' religious liberty.[318] *Zulueta* concerns a spouse's conduct of a warrantless search and seizure under the veneer of marital privacy.[319] And *Alcuaz*, among others, involves a school's violation of students' rights to due process and free expression.[320]

Clearly, the private sphere is no longer the benign domain it was purported to be. Deregulation, globalization, and privatization have brought with it substantial changes in the socio-political landscape of the Philippine legal system. Contrary to the presumptions of the past, the economic powers

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[314] *See* CASIS, *supra* note 287, at 161. *See also* White Light Corp. v. City of Manila, 596 Phil. 444 (2009).

[315] *See* Silahis International Hotel v. Soluta, G.R. No. 163087, 482 SCRA 66, Feb. 20, 2006.

[316] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

[317] *Duncan*, 438 SCRA 343.

[318] Victoriano v. Elizalde Rope Worker's Union, G.R. No. L-25246, 59 SCRA 54, Sept. 12, 1974.

[319] *Zulueta*, 253 SCRA 699.

[320] *Alcuaz*, 161 SCRA 7.

of private individuals may at times prevail over the sovereignty of State[321]—what more the autonomy of the lone individual.[322]

While the traditional approach that limits Constitutional protections to government acts alone may have been acceptable in old paradigms, the premises on which they were hinged no longer hold true. In this day and age, "most of the law takes the form of private arrangements among private entities" rather than government legislation.[323] *Tañada v. Angara* further testifies to the shifting of political and economic powers from the public sphere to the private.[324] In a new paradigm of free enterprise and capitalism, where private interests are both the fire that keeps the engine running and the flame that burns it out, the revitalized private sphere has evolved to become a real threat to constitutional rights[325] just as much as any government act would be.[326]

These unforeseen, albeit, contextual changes necessitate a concomitant modification in approach, lest we settle with a stalemate because of the Constitutional framers' failure to provide for a specific solution for every novel issue that has arisen, and will inevitably arise.[327] Ultimately, the traditional notions of state action and the *public/private distinction* have regressed into obsolete tools in contemporary realities that demand for a modernized interpretation of the Constitution.

This is not to say that the Bill of Rights should be categorically applied in all cases. Admittedly, to perpetually enforce the Bill of Rights against all private acts would result in an absurd and paradoxical interpretation of the Constitution[328] where the very freedoms afforded are the very limits to their

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[321] AGABIN, *supra* note 13, at 289.

[322] *See e.g. Duncan*, 438 SCRA 343.

[323] AGABIN, *supra* note 13, at 282, *citing* ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 219 (1982).

[324] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997. *See* AGABIN, *supra* note 13, at 282.

[325] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*); Hila Shamir, *Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 5 THEORETICAL INQ. L. 1 (2014).

[326] AGABIN, *supra* note 13, at 296, *citing* Peter F. Drucker, *The Global Economy and the Nation State*, 76 FOREIGN AFFAIRS No. 5, 167 (1997). *See also* Bazelon, *supra* note 20, at 512-13.

[327] RALPH K. WINTER, CONSTITUTIONAL ADJUDICATION: THE INTERPRETATIVE VIEW ON THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 25 (Eugene W. Hichkok, Jr. ed., 1991).

[328] *Marti*, 193 SCRA 57, 68.

exercise.[329] Rather, what is proposed is for the Constitution to be attuned to context. As the Courts have done in the past, each case should be dealt with according to the circumstances of the situation, whether public or private. If the interplay of these elements merit the application of the Constitution, then the judiciary should not fret from applying its protections.

In the exercise of its judicial discretion, the Court may find guidance from case law that have dealt with the turning of the tide from the old paradigm to new. These considerations may include the *public interest* standard replete in Philippine case law,[330] or the "justness" threshold exhibited in *Zulueta*.[331]

On a practical note, the exercise of judicial discretion of such an extent is no different from the *status quo*. The Court has often ruled on the ground of equity, but only if not contrary to law.[332] The Constitution not having proscribed expanding its protections within the private sphere, the Courts may do so as an exercise of their equity jurisdiction.[333] Further, by unshackling the antiquated notions of state action, the Courts will be forced to, at the least, tackle the substantive issues of each particular case, i.e. the violation of a right, and steer away from summarily dismissing substantive issues based simply on matters of form, i.e. the absence of state action.[334]

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[329] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991). *See also* Pangalangan, *supra* note 4, *citing* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AN AMERICAN CULTURE (1986).

[330] *See Alcuaz*, 161 SCRA 78. *See also* Ateneo de Manila Univ. v. Ct. of Appeals, G.R. No. L-56180, 145 SCRA 100, Oct. 16, 1986; Arreza v. Gregorio Araneta Univ. Foundation, G.R. No. L-62297, 137 SCRA 94, June. 19, 1985; De La Salle Univ., Inc. v. Ct. of Appeals, G.R. No. 127980, 541 SCRA 22, Dec. 19, 2007; Guzman v. National Univ., G.R. No. L-68288, 142 SCRA 699, July 11, 1986; Malabanan v. Ramento, G.R. No. L-62270, 129 SCRA 359, May 21, 1984; Non v. Danes II, G.R. No. 89317, 185 SCRA 523, May 20, 1990; Villar v. Technological Institute of the Philippines, G.R. No. 69198, 135 SCRA 706, Apr. 17, 1985.

[331] *Zulueta*, 253 SCRA 699.

[332] Toyota Motor Philippines v. Ct. of Appeals, G.R. No. 102881, 216 SCRA 236, Dec. 7, 1992; Zabat v. Ct. of Appeals, G.R. No. L-36958, 142 SCRA 587, July 10, 1986.

[333] *See* Arsenal v. Intermediate Appellate Court, G.R. No. L1-66696, 143 SCRA 40, 53, July 14, 1986, *citing* McCurdy v. County of Shiawassee, 118 N.W. 625 (1915).

[334] Kay, *supra* note 130, at 510.

The Philippine regime of inequality[335] has borne novel and unprecedented forms of abuse.[336] The underlying purpose of the the Bill of Rights being to ensure fair play,[337] the Constitution "should be construed so it may bend with the refreshing winds of change necessitated by unfolding events."[338] Not only has the Constitution acquiesced to such a progressive interpretation,[339] but verily mandates the same through its social justice provisions.[340]

The Philippine legal system has reached a crossroads. The Courts must now determine which path to pursue: that with antiquated, yet long-established views of state action, or the path less traveled, unchartered, but full of auspicious promise.

B. Recommendations

The Constitution is not merely a legal document of black letter law, but a living document fine-tuned to the vicissitudes of the times.[341] With the aim of interpreting the Constitution "by the spirit that giveth life,"[342] the following modifications should be made to acclimatize Bill of Rights protections to new paradigms.

1. The Living Constitution

The new paradigm necessitates a concomitant change in approach by the judiciary.[343] With the aim of evolving a "perfect constitution,"[344] the Court

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[335] Pacifico A. Agabin, *What exactly is Teaching Law in the Grand Manner*, in IN THE GRAND MANNER: LOOKING BACK, THINKING FORWARD 34 (Danilo L. Concepcion et al. eds., 2012). *See also* BERNAS, *supra* note 54, at 3.

[336] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

[337] WILLIAM O. DOUGLAS, A LIVING BILL OF RIGHTS 61-62, 64 (1961); *See Philippine Blooming Mills*, 51 SCRA 189.

[338] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 64, May 2, 1997.

[339] *Serrano*, 323 SCRA 445, 545 (Panganiban, *J.*, *separate opinion*).

[340] BERNAS, *supra* note 232, at 46.

[341] *See* Panganiban, *supra* note 12, *citing* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 56 (1992), *quoting from* THE NEW YORK TIMES MAGAZINE, Nov. 28, 1954, at 14.

[342] Civil Service Commission v. Cortes, G.R. No. 200103, 723 SCRA 609, 614, Apr. 23, 2014.

[343] *See* Panganiban, *supra* note 12, *citing* Pacifico A. Agabin, Globalization and the Judicial Function, Lecture Delivered During the Chief Justice Andres R. Narvasa Centennial Lecture Series (October 29, 1998), *in* ODYSSEY AND LEGACY: THE CHIEF JUSTICE ANDRES R. NARVASA CENTENNIAL LECTURE SERIES (Antonio M. Elicano ed., 1998).

[344] JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: CONSTITUTIONAL ISSUES ARISING DURING THE TROUBLED GLORIA ARROYO PRESIDENCY 42 (2010). "But before that

should abandon the *originalist* approach which interminably adheres to the intent of the Constitution's drafters.[345] Lest we settle with the impossibility to foresee every novel issue that may inevitably come about, it is proposed that the *interpretavist* view be adopted. Pursuant to this latter view, rather than kowtowing to legal precedence, the Constitution will be construed as a "living constitution" attuned to pulsating social realities and the specificities of context.[346]

This approach is in accordance with the dynamic role of law "as a brick in the ultimate development of the social edifice."[347] It would also enable the judiciary to look past the traditional notions of state action, and instead extend Constitutional protections to ostensibly private matters. In doing so, the Supreme Court would no longer be beholden to case law such as *Marti*, and may instead adopt *au courant* doctrines such as *Zulueta*.

Lastly, the Courts should adopt the *Purposive Approach*[348] of interpretation. The judiciary will then weave into the circumstances of each case[349] not only the letter that kills but the spirit that breathes life into law.[350]

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let me just say that I have never claimed that the 1987 Constitution is perfect. It is the Constitution, warts and all, which the Filipino people overwhelmingly ratified after we emerged from the dark era of martial rule. But no matter what the circumstances of its birth are, no constitution is ever perfect. A constitution, although more enduring than statutes, is always a work in progress. Ours is, and one of these days, it will have to yield to change." Kay, *supra* note 130, at 510, *citing* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 (1981).

[345] BOUVIER LAW DICTIONARY 557 (2011).

[346] Obosa v. Ct. of Appeals, G.R. No. 114350, 266 SCRA 281, 304, Jan. 16, 1997, *citing* Frivaldo v. Commission on Elections, G.R. No 120295, 257 SCRA 727, June 28, 1996; BLACK'S LAW DICTIONARY 838 (8th ed. 2004).

[347] *Obosa*, 266 SCRA 281, 304, *citing* Frivaldo v. Commission on Elections, G.R. No 120295, 257 SCRA 727, June 28, 1996.

[348] Baviera, *supra* note 63, at 63. "This approach takes into consideration the historical, social and economic aspects, the moral and legal history of the enactment. The role of the judge is to resort to the whole range of resources within the legal culture, such as social policy, economic and other administrative and political considerations to realize the purpose and objective of the act."

[349] AGABIN, *supra* note 13, at 282, *citing* Henry Manne, *The Judiciary and Free Markets*, 21 HARV. J.L. & PUB. POL'Y 11, 33 (1997).

[350] Civil Service Commission v. Cortes, G.R. No. 200103, Apr. 23, 2014; Obosa v. Ct. of Appeals, G.R. No. 114350, 266 SCRA 281, Jan. 16, 1997; Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210, Sept. 3, 1991; Ysip v. Municipal Council of Cabiao, 42 Phil. 352 (1922).

2. Judicial Contextualization

The Constitution is not a *table d'hôte* list, set and inflexible, but rather a catalog *à la carte* from which the judiciary determines the appropriate order. In making this determination, the Court should re-evaluate the context in which it sits,[351] for though the menu has not changed, the ingredients have.[352]

Through the process of contextualization, the judiciary will define the "the all-important terrain in which [our] rights are situated and practiced,"[353] and from there, identify the applicable doctrine. For example, while under the old paradigm, it was presumed that only the state was in the position to violate fundamental rights, the same may no longer be said. Hence, in a case where the admissibility of evidence is at issue, the *Zulueta* ruling rather than the *Marti* doctrine would serve as precedent.

By acknowledging the shift in paradigms from old to new, traditional doctrines such as *Marti*, *Villanueva*, *Waterous*, and *Mendoza* would be abandoned. These would then be succeeded by more abreast and time-appropriate doctrine that would allow the application of the Constitution within the private sphere.

3. Old Doctrines in a New Paradigm

At the nub, the *state action doctrine* should be abandoned as the threshold question of constitutional protections. The over-simplistic division made through the *public/private distinction* fails to justify itself amidst the complex relationships of the quasi-public and quasi-private spheres. The same may be said for the *distinction* vis-à-vis the *state action doctrine*, it having encompassed public evils while unduly excluding private wrongs from its regulatory ambit.

The line separating the public and private spheres have inevitably blurred. Traditional notions of the *public/private distinction* and *state action doctrine* fail to keep apace the complexities of new paradigms and the threats that come with them.

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[351] Obosa v. Ct. of Appeals, G.R. No. 114350, 266 SCRA 281, Jan. 16, 1997.

[352] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[353] HILBAY, *supra* note 270, at 223-24.

4. Restraining the Constitution's Expansion

It is not the purpose of this article to justify a wholesale application of the Constitution. Doing so would only impede the object and purpose of these freedoms to foster a democracy that would structure itself as it so chooses.[354] Rather, it is proposed that the Courts should determine in each case whether the purported wrongdoer acted within his own freedoms in committing the questioned act.[355]

Such a standard is reflected in the *Marti-Zulueta* contrast. On one hand *Marti* dealt with a situation where a private individual "following standard operating procedure, opened [consigned] boxes for final inspection."[356] On the other hand, *Zulueta* was concerned with a wife "breaking the drawers and cabinets of the other and in ransacking them for any telltale evidence of marital infidelity."[357] Apparently, the Court applies the full force of the law, whether statutory or constitutional, when private actors overstep the boundaries of liberty through fraud or abuse. In the face of "intentional, forcible [acts] by a private person, it would be abhorrent for the same court to nevertheless allow [the Constitution's] use in a judicial proceeding."[358]

In its determination on the merits, the Court should abandon the equipoise test of "balancing of interests,"[359] and instead adopt a triage approach. Here, the adjudication of the parties' respective rights "will be rendered based on what values must be prioritized in terms of protections and what values can be forgone for their relative dispensability."[360] Ultimately, a determination on the issue will depend on the degree of urgency of each particular right to be recognized by the Court.[361]

Furthermore, the underlying rationale behind the Bill of Rights to balance the scales of justice between the all-powerful state and the lone individual should be extended to the inequalities within the private sphere. The Constitution's leveling function, as a code of fair play, should not be

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[354] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991), *citing* Lugar v. Edmondson Oil Co., 457 U. S. 922, 936-37 (1982).

[355] Kay, *supra* note 130, at 510, *citing* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 510 (1985).

[356] *Marti*, 193 SCRA 57, 61.

[357] *Zulueta*, 253 SCRA 699, 704.

[358] Tan, *supra* note 45, at 138.

[359] RIANO, *supra* note 308, at 103.

[360] Balisacan, *supra* note 27, at 87.

[361] *Id.*, *citing* L. Sager, *Constitutional Triage*, 81 COLLUM. L. REV. 707-19 (1981).

thwarted due to a lack of state action alone.[362] A progressive application of the Constitution would empower the Court's equity jurisdiction in balancing the "stringent application of technical rules vis-à-vis strong policy considerations of substantial significance."[363]

Though "equity follows the law,"[364] it is worth repeating that the Constitution does not expressly limit its application to the public sphere alone.[365] The Constitution's silence on the matter may be taken as the imprimatur for the judiciary to abandon traditional notions of the *public/private distinction* and *state action doctrine*, and open the floodgates to more equitable interpretations of the Constitution.[366]

VI. CONCLUSION

An analysis of the *state action doctrine* forces one to re-examine fundamental assumptions that underlie traditional notions of the Constitution.[367] Having taken the *Path of Law*, the following are concluded.

A. The Old Paradigm

The *state action* doctrine was a product of the old paradigm where only the government was in a position to violate fundamental rights.[368] Heavily reliant on the *public/private distinction*, the blurring of these domains through the emergence of the quasi-private and quasi-public spheres, as well as the reinvigoration of the private sphere, bring into question the propriety of the doctrine's application in contemporary times.[369]

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[362] *Duncan*, 438 SCRA 343.

[363] Trans International v. Ct. of Appeals, G.R. No. 128421, 285 SCRA 49, 55, Jan. 26, 1998, *citing* Toledo v. Intermediate Appellate Court, G.R. No. L-65211, 152 SCRA 579, July 31, 1987.

[364] Arsenal v. Intermediate Appellate Court, G.R. No. L-66696, 143 SCRA 40, 53, July 14, 1986, *citing* McCurdy v. County of Shiawassee, 118 N.W. 625 (1915); *See also* Toyota Motor Philippines v. Ct. of Appeals, G.R. No. 102881, 216 SCRA 236, Dec. 7, 1992; Zabat v. Ct. of Appeals, G.R. No. L-36958, 142 SCRA 587, July 10, 1986.

[365] *Serrano*, 323 SCRA 445, 545 (Panganiban, *J.*, *separate opinion*).

[366] Ysip v. Municipal Council of Cabiao, 42 Phil. 352 (1922).

[367] Lessard, *supra* note 97.

[368] Bernas, *supra* note 5, at 674; *Marti*, 193 SCRA 57; *Barron*, 32 U.S. 243.

[369] Holmes, Jr., *supra* note 28.

B. Paradigm Shift: Expanding the Constitution to the Private Sphere

Unlike the presumptions of the old paradigm, the private sphere is no longer the disempowered domain it was purported to be. As exhibited through Philippine case law such as *Alcuaz, Non, Duncan, Victoriano*, and *Zulueta,* fundamental rights of due process,[370] free expression,[371] decisional privacy,[372] informational privacy,[373] and religious freedoms,[374] have been the subject of abuse by private actors.

This notwithstanding, the *state action doctrine* remains the general rule, though it is no way absolute. U.S. jurisprudence has recognized exceptions that apply the Constitution to ostensibly private actors, such as *Public Function* [375] *State Compulsion*, [376] *Nexus Test*, [377] *State Agency*, [378] *Entwinement*,[379] *Symbiotic Relationship*,[380] *Joint Participation*,[381] and *State Inaction Liability*.[382] The Philippine Supreme Court in *Duncan,* expressly restricted these exceptions to government entwinement or involvement alone.[383]

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[370] *Alcuaz*, 161 SCRA 7.

[371] *Non*, 185 SCRA 523.

[372] *Duncan*, 438 SCRA 343.

[373] *Zulueta*, 253 SCRA 699.

[374] Victoriano v. Elizalde Rope Worker's Union, G.R. No. L-25246, 59 SCRA 54, Sept. 12, 1974.

[375] *Marsh*, 326 U.S. 501, 502, 505; *See also* Brown, *supra* note 36, at 86, *citing* Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992). S.F. Arts & Athletics v. U.S. Olympic Commission, 483 U.S. 522, 544 (1987), *citing* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984). Nixon v. Condon, 286 U.S. 73 (1932).

[376] Brown, *supra* note 36, *citing* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), *citing* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1965).

[377] *Id.* at 86, *citing* Wolotsky v. Huhn, *citing* 960 F.2d 1331, 1335 (6th Cir. 1992); Manufacturs Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[378] *Id.* at 86, *citing* Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

[379] *Id.* at 86, *citing* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

[380] *Id.* at 86, *citing* Gregory D. Malaska, American Manufacturers Mutual Insurance Company v. Sullivan: *"Meta-Analysis" as a Tool to Navigate through the Supreme Court's "State Action" Maze*, 17 J. CONTEMP. HEALTH L. & POL'Y 619, 651 (2001).

[381] *Id.* at 86, *citing* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

[382] Lenahan, Report No. 80/11.

[383] *Duncan*, 438 SCRA 343, 354.

C. Public Interest as the Catch-All Exception to State Action

Traditional doctrine notwithstanding, the Supreme Court has applied constitutional limitations within the private sphere under *public interest*[384] and "justness"[385] exceptions.[386] In doing so, the Court continues to circumvent traditional practice of identifying government action as *sine qua non* to apply constitutional protections.

Further, Philippine jurisprudence has conflated public interest and public function. While the former triggers state regulation by appropriate legislation,[387] the latter elicits the application of Constitutional protections *per se*.[388] Similar to the *public function test* established in *Marsh*,[389] the Philippine Supreme Court is persuaded by the mere presence of *public interest* to trigger the application of the Constitution.[390]

D. Legislative and Judicial Recognition of the Paradigm Shift

Article 32 of the Civil Code, though generally contemplating the same rights as those in the Bill of Rights, does not provide the same degree of protection. The former does not in itself prohibit violations of one's rights in

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[384] *Alcuaz*, 161 SCRA 7. *See* Ateneo de Manila Univ. v. Ct. of Appeals, G.R. No. L-56180, 145 SCRA 100, Oct. 16, 1986; Arreza v. Gregorio Araneta Univ. Foundation, G.R. No. L-62297, 137 SCRA 94, June. 19, 1985; De La Salle Univ., Inc. v. Ct. of Appeals, G.R. No. 127980, 541 SCRA 22, Dec. 19, 2007; Guzman v. National Univ., G.R. No. L-68288, 142 SCRA 699, July 11, 1986; Malabanan v. Ramento, G.R. No. L-62270, 129 SCRA 359, May 21, 1984; Non v. Danes II, G.R. No. 89317, 185 SCRA 523, May 20, 1990; Villar v. Technological Institute of the Philippines, G.R. No. 69198, 135 SCRA 706, Apr. 17, 1985.

[385] *Zulueta*, 253 SCRA 699.

[386] Then again, there is a public interest in justice, as reflected in Yuchengco v. The Manila Chronicle Publishing Corp., G.R. No. 184315, 661 SCRA 392, 402-403, Nov. 28, 2011, *citing* REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 39 (1949). *See also* CIVIL CODE, art. 19.

[387] Civil Rights Cases, 109 U.S. 3, 42 (1883) (Harlan, *J.*, *dissenting*). *See also* Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240, 307-308 (1935).

[388] *Marsh*, 326 U.S. 501-502, 505 (1946).

[389] *Id.*

[390] *See Alcuaz*, 161 SCRA 7; Ateneo de Manila Univ. v. Ct. of Appeals, G.R. No. L-56180, 145 SCRA 100, Oct. 16, 1986; Arreza v. Gregorio Araneta Univ. Foundation, G.R. No. L-62297, 137 SCRA 94, June. 19, 1985; De La Salle Univ., Inc. v. Ct. of Appeals, G.R. No. 127980, 541 SCRA 22, Dec. 19, 2007; Guzman v. National Univ., G.R. No. L-68288, 142 SCRA 699, July 11, 1986; Malabanan v. Ramento, G.R. No. L-62270, 129 SCRA 359, May 21, 1984; Non v. Danes II, G.R. No. 89317, 185 SCRA 523, May 20, 1990; Villar v. Technological Institute of the Philippines, G.R. No. 69198, 135 SCRA 706, Apr. 17, 1985.

the same categorical language of the Constitution, but merely provides for redress by way of damages after the fact of impairment.[391] Verily, the records of the Civil Code Commission confirms that Article 32 was not made to replace or supplement the Constitutional law *per se*, but to remedy the inefficiencies of criminal proceedings.[392]

Case law and statutory law serve as judicial and legislative recognition of the paradigm shift. Article 32 as well as jurisprudence like *Zulueta* diverge from traditional presumptions and recognize that fundamental freedoms may be impaired by, and should be protected from, private wrongs.

E. The New Paradigm

In the main, both the *public/private distinction* and the *state action doctrine* of the old paradigm have been overtaken by history. As seen through case law, the private sphere today is no longer the disempowered domain it was purported to be. Hence, the judiciary has many times modified traditional doctrine to enable it to cope with new forms of abuse within the private sphere.[393]

Constant flux necessitates expanding the Constitution's scope of application beyond the once reasonable and now obsolete standard of state action. Not only does the silence of the Constitution's text imply assent to such expansion,[394] the spirit of the Constitution as a code of fair play,[395] as well as the mandates of social justice, welcomes it.[396] But while unshackling the chains of old paradigms may be fueled by noble conviction, the same must be tempered[397] to avoid a perplexing situation where the freedoms afforded by the Constitution are the very limits to their exercise.[398]

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[391] CIVIL CODE, art. 32.

[392] REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 30-31 (1949).

[393] *Serrano*, 323 SCRA 445 (Panganiban, *J.*, *separate opinion*).

[394] *Id.*

[395] *See Philippine Blooming Mills*, 51 SCRA 189, 220.

[396] CONST. art. XIII, § 3.

[397] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, *J.*, *dissenting*).

[398] *See* Pangalangan, *supra* note 4, at 146, *citing* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AN AMERICAN CULTURE (1986). *See also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

The Court may temper liberal interpretations of the Constitution by limiting its application in the private sphere only to level the terrain.[399] Traditional notions of state action having been premised on the supremacy of the State over the plebeian individual,[400] the Constitution's protections should be extended to similar situations of inequality, without regard to the absence or presence of government action. Such a situation may be determined by the relationship of the parties, such as that between labor and management,[401] or by the parties' acts. As may be gleaned from jurisprudence, the Court has extended the protections of the Bill of Rights to situations of abuse, fraud, and force.[402] Parenthetically, the sovereign government, having retained its status as a dominant force, remains bound to its provisions.[403]

The presumptions of old paradigms are no longer the realities we face today. Hence, the traditional doctrines of *state action* and *distinction* should be abandoned to allow the judiciary to continue with its plight against new forms of abuse within and without the private sphere.[404] In a new paradigm, the Court must continue utilizing the Constitution as the ultimate equalizer, tilting the scales of justice in favor of the penury.[405]

The Constitution is but a work in progress, and has left much for interpretation. Ours is, and one of these days, it will yield to change.[406] While the meaning of constitutional guaranties never varies, the scope of its application must nevertheless expand and contract with the vicissitudes of time. In a changing world, it is impossible that it should be otherwise.[407]

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[399] *Philippine Blooming Mills*, 51 SCRA 189, 220.

[400] *Serrano*, 323 SCRA 445.

[401] *See* Ledesma v. Nat'l Lab. Rel. Comm'n, G.R. No. 174585, 537 SCRA 358, Oct. 19, 2007, *citing* JPL Marketing Promotions v. Ct. of Appeals, G.R. No. 151966, 463 SCRA 136, 149-150, July 8, 2005; Pure Foods Corp. v. Nat'l Lab. Rel. Comm'n, 347 Phil. 434, 444 (1997); GMA Network, Inc. v. Pabriga, G.R. No. 176419, 710 SCRA 690, Nov. 27, 2013; Panuncillo v. CAP Philippines, Inc., G.R. No. 161305, 515 SCRA 323, Feb. 9, 2007; Philippine Geothermal, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 106370, 236 SCRA 371, 378-79, Sept. 8, 1994; Homeowners Savings and Loan Ass'n v. Nat'l Lab. Rel. Comm'n, 330 Phil. 979, 985 (1996). *See also* Lochner v. New York, 198 U.S. 45, 69 (1905) (Harlan, *J., dissenting*).

[402] *See* Tan, *supra* note 45; *See also Zulueta*, 253 SCRA 699.

[403] *Serrano*, 323 SCRA 445, 468.

[404] *Serrano*, 323 SCRA 445, 542 (Panganiban, *J.*, *separate opinion*), *citing* ARTEMIO V. PANGANIBAN, LEADERSHIP BY EXAMPLE: THE DAVIDE STANDARD 60-61 (1999).

[405] Mayon Hotel & Restaurant v. Adana, G.R. No. 157634, 458 SCRA 609, 640, May 16, 2005.

[406] BERNAS, *supra* note 54, at 42.

[407] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).