

FOREWORD:
TOWARD MAKING THE ECONOMY A CAUSE CÉLÈBRE
IN PHILIPPINE LEGAL SCHOLARSHIP?*

*Raphael Perpetuo M. Lotilla***

Writing a foreword for this special issue of the PHILIPPINE LAW JOURNAL on Law and the Economy presents a distinct dilemma. A celebratory comment on its thematic significance carries at once an indictment for grave neglect of the theme by generations of legal scholars in the Philippines.

Yet, throughout the history of the JOURNAL, there certainly have been articles touching on the law and the economy, particularly where commercial and business matters bridge an ostensible divide; the JOURNAL also has had thematic issues on law and the economy in their broadest sense.

But even these have been too few and too far between. Their relative rarity enables the present thematic issue to stand out as an entirety.

By a propitious turn of events, the count of articles on various aspects of competition eventually climbed to five of the nine contained in this special issue, lending even more coherence to its economic content. Novelty alone falls far short of explaining the intensified interest in competition matters. Recall that the substance of the Sherman Act¹ was legislated in the Philippines in 1925 under US colonial rule; that of the Clayton Act² as well, although much later in time. Competition law had long typified legislation happily nurtured in the breach, inviting neither enforcement nor scholarly legal disquisition. It has taken new skin, in the form of the Philippine Competition Act (“PCA”) of 2015,³ to infuse intensity into old wine. The story behind legal hibernation in this instance

* *Cite as* Raphael Perpetuo M. Lotilla, *Foreword: Toward Making the Economy a Cause Célèbre in the Philippine Legal Scholarship?*, 91 PHIL. L.J. v, (page cited) (2018).

** LL.M., University of Michigan Law School (1988); LL.B., University of the Philippines (UP) College of Law (1984); B.A. History (1980), B.S. Psychology (1979), UP College of Arts and Sciences; Editor, Student Editorial Board, PHILIPPINE LAW JOURNAL Vol. 58.

¹ 26 Stat. 209 (1890). An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies.

² 38 Stat. 730 (1914). An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes.

³ Rep. Act No. 10667 (2015).

awaits to be written out. But all are reminded that vigilance is required to avert the Act's falling once more at some point into the shadow of the curse of extended slumber.

Competition issues aside, the rest of the articles address diverse topics running through the law and the economy continuum: piercing the corporate veil, corporate control by creditors, contemporary relevance of negotiable instruments, and e-commerce intermediary liability. Despite their rich diversity, it cannot be said that the featured works are solely sewn by a sheer economic thread into a single legal quilt—or, the other way around, by a plain legal yarn.

Opening this issue is a transcribed speech delivered by El Cid R. Butuyan, former Commissioner of the Philippine Competition Commission (“PCC”). *Taming Oligopolies Through Competition Law* was initially prepared for the agency's public information campaign but has been reproduced in this issue as it breaks down fundamental concepts in competition law—in a way, serving as a neat “easing in” to this Issue's other, more technical, competition-related works. Butuyan also articulates the advocacy underlying the provisions of the PCA.

In *Commercializing Justice: The Legality of Lawyers' Professional Fee Schedules Under the Philippine Competition Act*, Avril R. Bries and Pamela Marie T. Marcelo examine the applicability of the PCA to the fixing of rates in the legal profession. Recipient of the 2017 Roberto Sabido Prize for Best Legal Paper, the article inquires into the schedule of fees provided by the Integrated Bar of the Philippines (“IBP”) vis-à-vis the Code of Professional Conduct, a code that all members of the bar are mandated to observe. The authors examine whether such recommended fees fall within the ambit of “price fixing,” a practice that has otherwise been primarily considered relative to business enterprises rather than the practice of professions. The implications of the PCA on professionals and their practices, and the recommendations for its application, are nuanced in the context of the Philippine legal profession, specifically, the legal basis for the IBP's creation and the concept of the separation of the powers among the different branches of government.

The article on *Anti-Competitive Behaviors Through Consumer Switching Constraints Imposed by Mobile Telecommunications Firms in the Philippines* scrutinizes, through the lens of the PCA, certain business practices in the telecommunications industry. Gian Angelo E. Chua, Salutatorian of U.P. Law Class of 2018, argues that contractual lock-in periods and mobile number (un)portability constitute anti-competitive switching costs that

further cement the collective market dominance enjoyed by Globe and Smart, the country's biggest telecommunication service providers—much to the prejudice of the consuming public.

A joint article entitled *The Philippine Competition Act and the Small Business Sector Framework for Development*, authored by Professors Gwen Grecia-De Vera and Rachel Burgess of the University of Southern Queensland, follows. The two identify legal and regulatory gaps that impede the growth of micro, small, and medium-sized enterprises (“MSME”). They proceed to determine the extent to which competition policy might address such growth impediments, ultimately providing some high-level recommendations on how competition would figure into MSME’s regulatory ensemble in the Philippines.

Last among the competition-related subgroup of works is *Administrative Will to Power: Articulating the Goals of Antitrust & Proposing Therefor a Regulatory Framework*, where Jose Maria L. Marella argues that there is more to the purpose of the PCA other than traditional notions of economic efficiency and consumer welfare. Competition law, Marella contends, can also serve as a tool to promote the interests of micro, small, and medium enterprises; as a means to address income inequality; and as an instrument to advance a wide array of social and political goals. But more than articulating such non-traditional purposes, Marella goes on to propose an analytical framework through which the PCC—the government agency tasked to implement the PCA—can infuse such considerations in the discharge of its mandate.

Well beyond the field of competition law, and consistent with the JOURNAL’s tradition of critiquing jurisprudence, this themed Issue features a work entitled *Procedural Considerations in Piercing the Corporate Veil: A Survey of Jurisprudence*. Alayza C. Azis, Kent A. Alonzo, and Jose Maria L. Marella review recent Supreme Court decisions where the plaintiffs sought to pierce the corporate veil but the appropriate defendants were not impleaded at the first instance. The authors probe the interplay among established principles of separate juridical personality, due process, and equitable justice, in an attempt to harmonize the seemingly inconsistent ways the Court has taken in applying such principles.

In the Court’s view in *Gamboa v. Teves*,⁴ effective control of the national economy and patrimony is exercised through ownership of capital. But, in *Creditors in Control: The Exercise by Creditors of Corporate Control Through*

⁴ G.R. No. 176579, 682 SCRA 397, Oct. 9, 2012.

Loan Agreements, Theodore Joseph M. Jumamil challenges the foregoing premise, arguing instead that financial and contractual innovations have allowed creditors to exercise *de facto* control over corporations. Jumamil then goes on to proffer an expanded regulatory regime that attempts to strike a balance between the competing policy of effective control by Filipinos, and the interest of securing crucial corporate funding. This work won the 2018 Jose C. Campos, Jr. Prize for Best Paper in Corporate Governance.

Meanwhile, Nicholas Felix L. Ty's *A Non-Negotiable Confession: Coming to Terms with the Negotiable Instruments Law's Mandatory Instruction Amidst its Practical Irrelevance* tackles the law on negotiable instruments and, as the author himself phrases it, its "fall from grace." The contentious course and its continued presence in the law curriculum is critiqued by Ty from the viewpoint of how, on the one hand, its subject matter may no longer be of any practical value considering how it had been crafted for conditions no longer present in today's age, and on the other hand, how its academic value is sustained perhaps merely by its inclusion in the Philippine Bar Examinations.

Finally, in *Decoding the Role of the 'Gatekeepers of Cyberspace' in the Internet Economy: Analyzing the Legal Foundation of Intermediary Liability of Online Providers*, Arvin Kristopher A. Razon addresses the pressing need for increased regulation of Internet usage. He cites the contradicting sides of how the Internet has indeed contributed significantly to national growth and economy, but has likewise presented new and prevalent risks for Filipino users. Razon analyzes this issue from the lens of e-commerce, specifically, how Filipinos, from the beneficial standpoint, are provided with information services such as online marketplaces and communication networks, yet from the prejudicial standpoint, are exposed to risks that still lack sufficient legislation for purposes of protection and regulation.

These articles together constitute a concrete push back against the historical benign neglect that has made the thematic Issue on the law and the economy stand out in the first place. This ought to be in a country whose current Constitution devotes among its lengthiest Articles to the National Economy and Patrimony, where strong economic growth reduced poverty by 5 percentage points from 2006 to 2015, but with 22 million more people seeking uplift from poverty.

The articles provide an inspiring sneak peek into the future of Philippine legal scholarship. Their diversity indicates the limitless opportunities for discourse and scholarship ahead—from the law and the economy to justice and development.