

FOREWORD: THE POST-COVID WORLD—WHERE LAW AND ECONOMICS MEET*

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Before the COVID-19 pandemic, I thought that the nexus of law and economics was best exemplified by the enforcement of anti-trust law, under which the legal standard for a violation requires an economic determination. For example, the question of whether a dominant firm is abusive requires an economic analysis of what constitutes a market, whether a firm dominates such market in terms of sales, whether its conduct prevents competitors from participating in the market on equal footing, and whether such exclusionary behavior results in loss of consumer welfare by way of price increases, quality deterioration, narrowing of choices, or loss of innovation. All of these require economic analysis. Clearly, anti-trust law is a complex space where law and economics are intricately intertwined.

Fast forward to today. It turns out that the post-COVID world is the better shared working space for law and economics, for at least two economic problems that we have faced during this pandemic—uncertainty and the free-rider problem—require solutions that are provided by the law. Hence, now more than ever, these times call for relevant and responsive regulation.

Economic theory suggests that if markets are “perfect”—buyers and sellers are small in size, infinite in number, and thus unable to influence the price—then such markets maximize consumer welfare. “Perfect” markets are also frictionless, in that transaction costs are zero and most importantly, uncertainty is absent.

It is this last assumption that fails miserably in the post-COVID world.

The end of the pandemic remains unknown. While we certainly anticipate that we will revert to some form of normality with the advent of a

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vaccine, we do not know when that time will be. No one can predict with certainty when the epidemic curve will peak, nor how many of such curves we will have.

Similarly, there is still much yet to be known about the virus itself. No one absolutely knows who has COVID-19, and its transmission is likewise not fully understood. Is it airborne? Can asymptomatic individuals infect others? Will having COVID-19 and surviving it result in immunity from the virus? Still, no one knows, much more with complete certainty.

Uncertainty is the biggest enemy in the post-COVID world. With uncertainty, people hoard essential goods, causing unnecessary price increases. Faced with uncertain demand for their goods and services, firms begin to retrench employees and, with the rising cost of capital, postpone their investment decisions. Despite requiring hospital care, the sick opt instead for self-medication in fear of hospital-acquired COVID-19—all with grave consequences. Similarly, markets cease to function as a mechanism for price determination and resource allocation.

Thus, the required response is Keynesian: the government must spend to boost the animal spirits. Legislation is needed for this purpose.

As our economy transitions into the new normal, there is now a need to enact a recovery plan. Last June 4, 2020, the lower house passed the Accelerated Recovery and Investments Stimulus for the Economy of the Philippines Bill¹ (“ARISE Philippines Bill,” in short) on its third and final reading. The bill proposes a 1.3 trillion-peso, multi-year economic stimulus plan that includes spending programs to promote business continuity. Ultimately, the goal is to protect workers from massive layoffs.² The proposals include mass testing,³ especially for workers returning to their workplaces, wage subsidies⁴ and interest-free loans with labor retention conditionalities,⁵ unemployment assistance,⁶ regulatory relief,⁷ credit guarantees,⁸ subsidies for the most critically impacted sectors (including tourism, export and import industries, transportation, agriculture, and

¹ H. No. 6815, 18th Cong., 1st Sess. (2020). Accelerated Recovery and Investments Stimulus for the Economy of the Philippines.

² § 2.

³ § 6.

⁴ § 7.

⁵ § 17.

⁶ § 8.

⁷ § 12.

⁸ § 15.

education),⁹ and infrastructure for the new normal,¹⁰ especially those needed to improve internet connectivity.¹¹

With increased government spending, the hope is to reduce uncertainty and boost confidence among businesses, workers, and consumers, so that we can safely re-start the economy.

The other noteworthy economic concern in the time of COVID-19 is the free-rider problem. This occurs when people benefit from an activity without having to shoulder the cost for it. In the end, the activity becomes under-provided. Take the case of wearing masks. One might decide not to wear a mask, thinking he is still safe since others will do so. If everyone thinks this way, many will not wear masks! In effect, no one is protected.

Again, the solution requires regulation. As a first step, the lockdown was imposed. This was a good call at the beginning of the outbreak when the free-rider problem was at its peak, given minimal information on the nature of disease transmission. The government should have used this time to get ahead of the problem. Policymakers should have set the policy direction based on the data being collected. Citizens should have been clearly informed to encourage them into a routine of mask-wearing, social distancing, hand washing, and other preventive measures. By now, the to-do's at the onset of any sign of COVID-19 should be top of mind. But today, the question remains: did we optimize the use of the lockdown?

Nonetheless, the classic solution to any free-rider problem is coordination, which in turn requires information. In the context of COVID-19, the platform for that coordination is regulation, including imposing minimum health standards, mandatory disease surveillance, targeted quarantines, border control, penalties, and other enforcement tools.

From the lens of an economist and lawmaker, this Special Online Feature on COVID-19 and the Law, a collection of 13 5,000-word essays on various aspects of the law in a time of pandemic, is both timely and relevant.

Amidst the pandemic, law and economics continue to intersect in competition law. In *Competition and Government Response to the COVID-19 Pandemic*, the UP Law Center's Competition Law and Policy Program ("CLPP") examines the measures under the ARISE Philippines Bill. Here, the

⁹ Ch. V.

¹⁰ § 26.

¹¹ § 26(b).

CLPP reminds us of the relevance of competition law in promoting consumer welfare, as well as public interest, in times of emergency. The CLPP warns against provisions that may erode the enforcement of competition policy, which is key to ensuring economic recovery.

In her essay *A Pandemic of Misinformation: Legal Issues Concerning Intermediary Liability in the COVID-19 Era*, Shiela Marie L. Rabaya talks precisely about the biggest source of uncertainty in a time of pandemic: misinformation. She highlights an important concern in light of the increasing reliance on social media for information, which is the appropriate liability of “middlemen,” such as internet service providers (“ISPs”) in the spread of fake news. Rabaya reviews the safe-harbor provisions under the Cybercrime Prevention Act and the approaches to content moderation taken by various platforms. She concludes that, although ISPs can afford to employ a hands-free approach, the conditions of the pandemic call on them to take on a more proactive role in regulating fake news.

The issue of fake news is also the topic of Paulo Romeo J. Yusi’s work entitled *Fake News in the Time of the Pandemic*. Yusi discussed the constitutionality of the State’s efforts to punish fake news during a pandemic, given the penalties for fake news provided under the Bayanihan to Heal as One Act. He points to the consequences of the proliferation of fake news and argues that it is not included in the constitutional protection of freedom of speech, particularly in the context of a pandemic.

Businesses, which thrive on predictability and thus prefer to avoid uncertainty, must now weather through the unprecedented uncertainty of this pandemic. Many of them are in “non-essential” sectors and were unable to operate at full capacity for months, yet continued to pay for overhead expenses, including payroll. Now, employees and employers alike must adapt how they conduct their work, as workplace and transportation conditions continue to change amid the government’s imposition of various lockdown measures. In *Labor Issues in the Time of COVID-19: From ECQ, MECQ, to GCQ, and Back Again*, Anna Maria D. Abad surveys existing and newly enacted labor guidelines. She explains that the pandemic has resulted in a “paradigm shift” in workplace management—from employees, to their respective working arrangements, to the physical workspace itself. She also explores the remedial and cost-cutting measures that companies may impose in light of their reduced profit and productivity, as well as the conditions in which they may be invoked.

The education sector is one of those most critically impacted by COVID-19, and therefore, it is in dire need of government assistance. Schools

were among those not allowed to operate during the lockdown, leaving many educators at risk of job loss. If internet connectivity worked effectively, then shifting to online learning would have been the best approach to education in the post-COVID world. But the reality is that the country's education system is not ready for a permanent transition to online learning, as argued by Justin D.J. Sugang in *Tipping Point: Will This Pandemic Mainstream Online Learning in Philippine Legal Education?* Instead, given various hindrances—such as our limited connectivity capabilities, the current design of our legal education, and various administrative barriers—Sugang provides his own pragmatic assessment of the state of legal education post-COVID.

While the classic economic response to uncertainty by the State is increased government spending, such pump-priming can be supplemented by legal remedies made available to affected businesses. In *(Un)Fortuitous Event: The COVID-19 Pandemic as a Fortuitous Event*, Czar Matthew Gerard T. Dayday and Amer M. Madcasim, Jr. explore a possible remedy for such affected businesses—the invocation of *force majeure* or fortuitous event clauses. Here, they argue that the COVID-19 pandemic should not be treated as a singular event that automatically entitles contracting parties to avail of the fortuitous event defense. There is a need to assess a range of factors, including community quarantine policies, social distancing measures, locations of the parties, and business operations, among others, in order to determine the applicability of such a defense to each case.

One can think of many forms of free-rider problems arising from the pandemic. In the context of the Philippines, important government functions are relegated to the local government units (“LGU”) based on the Local Government Code, including those pertaining to health care. Yet, the government's COVID-19 response has largely been centralized through the Inter-Agency Task Force (IATF) of the national government. The potential free-rider problem in this situation is as follows: why would an LGU take action and decide on COVID-related matters, such as the repatriation of OFWs, when any failure will result in blame? Why act—possibly fail and take the blame—when the national government is expected to act anyway and thus, will have to own up on the failure? Once again, economic theory provides a solution: coordination. In *The Executive & Local Governments versus COVID-19: A Cycle of Blame and Burden*, Kent Almadro Alonzo examines the legal framework for the COVID-19 response of national and local governments, mainly provided in the Local Government Code and the Bayanihan to Heal as One Act. He analyzes why the division of powers between the levels of government has resulted in disjointed response efforts. He concludes by encouraging multi-level government coordination in order to lessen costs to the Filipino people and avoid exacerbating systemic issues.

The advent of a COVID-19 vaccine hinges heavily on research and development (“R&D”), which is fraught with the free-rider problem. R&D entails huge upfront investments, and its outcome is uncertain. No right-minded private entity will engage in R&D for the vaccine unless successful developers have sufficient protection in the form of intellectual property rights. Without such protection, other firms can take a free ride on whoever invests in the R&D, and the original developer will not make up its investments. However, the ongoing pandemic also asks us to consider legal solutions, which will facilitate timely access to COVID-19 medicine. In her essay, *The Demand and Supply of Humanity: On the Legality and Justification of Adopting Compulsory Licensing Measures for COVID-19 Medicines*, Julia Therese D. Pineda addresses the balance between the intellectual property concerns of pharmaceutical companies and the global call to altruism amid a pandemic. Here, she argues for the possible adoption of compulsory licensing measures, while considering existing international and domestic laws.

Perhaps the most powerful approach to curbing the free-riding tendencies of free-thinking individuals is to impose penalties. Without penalties, behavior, such as mask-wearing and staying at home, will likely be under-provided. Hence, the Bayanihan to Heal as One Act imposed certain penalties relating to the control of the spread of COVID-19. In *A Framework for Analyzing the Legality of COVID-19 Emergency Measures*, Paolo S. Tamase analyzes the emergency measures provided under the Bayanihan to Heal as One Act and highlights the legal defects of certain regulations that compromised public compliance. He also proposes a framework for scrutinizing the legality of emergency regulations and their incidents, with the objective of balancing the need for swift action in times of emergency with the perpetual need to preserve the constitutional system.

Similarly, in *Of Baseless Arrests and COVID-19: A Tale of Two Pandemics*, Juli Ann Rosette M. Sibi scrutinizes the penalty framework provided for by the Bayanihan to Heal as One Act, in light of the arrest of more than 57,177 supposed community quarantine violators as of June. Sibi highlights weaknesses in the framework and argues, based on the principle of *nullum crimen, nulla poena sine lege*, that these supposed violations are outside the scope of the criminal law regime and therefore cannot be grounds for an individual’s arrest.

Finally, with the ongoing lockdown, millions of Filipinos have lost their jobs, countless small businesses have closed shop, and almost all families worry not only about protecting themselves from the virus, but also about putting food on the table every day. As we focus on economic and health

needs, we are also reminded that now more than ever is a time to preserve our dignity as human beings. In *Protecting Rights while Protecting Lives: Permissible Derogations of Human Rights in the COVID-19 Pandemic Philippine State of Emergency*, Anton Miguel A. Sison examines the derogation clause provided in Article 4 of the International Covenant on Civil and Political Rights and its potential application in how our government handles the COVID-19 pandemic. He asserts that a declaration of a state of emergency is in no way a justification to suspend all human rights.

With the recent controversy on the increasing number of deaths among high-profile prisoners and the possible breaches by government officials in charge of the penal facilities, as well as the generally poor condition of prison facilities, the time of COVID-19 is also a time to reflect on the protection of the human rights of prisoners. Nicole Beatriz Y. Veloso's *Life and Death Sentence: A Case for the Accelerated Decongestion of Prisons and Jails in the Philippines in Light of Covid-19* sheds light on the conditions of overcrowded prisons and jails in the context of the ongoing pandemic. She discusses the lawfulness of accelerated decongestion in light of Philippine and international laws, and recommends steps to implement these in the face of the new normal.

Is the Commission on Human Rights (CHR) fully equipped to protect our human rights in the post-COVID world? In *Philippine Human Rights in the Time of Pandemic*, Mario C. Cerilles, Jr. analyzes the institutional capacity of the CHR to meet the complications the pandemic has injected into the country's human rights situation, which was already previously deteriorating. Cerilles points to severe limitations in the CHR's legal structure which hinder enforcement, while also reflecting on the adequacy of the prevailing international framework in the context of the Philippine experience.

Dear reader, these are 13 excellent essays, well-written and highly relevant to today's ongoing challenges. I congratulate the writers and enjoin the public to read and reflect on these works. While the framework and analysis are legal, the soul is economic. I believe these thoughtful and nuanced policy recommendations are necessary, particularly at a time where markets, if left to their own devices, may be doomed to fail.

