THE REMEDY OF FURLOUGH: REMOVING ARBITRARINESS IN A CONTROVERSIAL PROCEDURAL RECOURSE*

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ABSTRACT

Nowhere is the disparity between the social elite and the poor of Philippine society more apparent and more perverted than in the practical application of the law. The long history of revering or giving special treatment to those who have wealth and high political status has made varied manifestations in the legal process. This circumstance is readily apparent in some detainees' ostensible enjoyment of "prison furloughs," a remedy absent in the current rules of criminal procedure. Readily a subject of news headlines and popular controversies, prison furloughs have become indications of the legal process' arbitrariness, unfairness, and partiality. Despite the outrage that follows announcements of furloughs for powerful individuals, there exists no critique, more so an analysis, of the remedy of furlough—its source, bases, effects, and implications—in contemporary legal literature. This Article is the first to dissect this legal concept. The authors argue that the highly discretionary and arbitrary nature of furloughs opens it to an equal protection challenge because it permits discrimination. An analysis of the cases where furlough has been denied and granted will show that persons similarly situated were clearly not treated alike. Despite this, the authors are of the opinion that "furloughs," in theory, may be an additional remedy for the accused. This is anchored on the rights of the accused and the purpose of preventive imprisonment. Thus, the remedy is not for the abolition of "furloughs," but for the

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Supreme Court to provide rules and guidelines for its application. Finally, taking from a review of domestic and international jurisprudence, this Article sets out standards on when furlough may be considered fair and reasonable in order for it to become available to all defendants, regardless of power, wealth, popularity, social standing, or counsel.

INTRODUCTION

On November 5, 2019, Reina Mae "Ina" Nasino, a pregnant urban poor organizer in Smokey Mountain, was arrested at her apartment[1] in Tondo, Manila by policemen armed with a search warrant that allegedly indicated a different address.[2] The arrest was made in connection with what appeared to be a "crackdown" on activists. The police arrested without warrants as many as 62 activists in a span of days using the classic caught-in-the-act arrests for illegal possession of firearms and explosives[3] method—notably an "old trick" employed by the Armed Forces of the Philippines and the Philippine National Police.[4]

Nasino, who was already pregnant when she was arrested, "asked the Supreme Court to temporarily release her on humanitarian grounds" as she was considered as someone at a "high risk" of contracting COVID-19.[5] While waiting for the decision of the Court, she gave birth to Baby River who, at the time of birth, already showed poor health.[6] In light of Baby River's condition, Nasino asked the Regional Trial Court (RTC) of Manila to temporarily allow

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[1] Reina Mae "Ina" Nasino's apartment also served as the Manila office of Bagong Alyansang Makabayan. *See* Lian Buan, *Arrested in 2019 crackdown, jailed activist gives birth in a pandemic*, RAPPLER, July 2, 2020, *at* https://www.rappler.com/nation/jailed-activist-gives-birth-coronavirus-pandemic-july-2020.

[2] *Id.*

[3] Buan, *supra* note 1; Third Anne Peralta-Malonzo, *3 more activists arrested as 'crackdown' continues*, SUNSTAR MANILA, Nov. 5, 2019, *at* https://www.sunstar.com.ph/article/1830555/Manila/Local-News/3-more-activists-arrested-as-crackdown-continues.

[4] Satur Ocampo, *At Ground Level: Planting guns as 'evidence' an old AFP-PNP trick*, PHIL. STAR, Nov. 9, 2019, *available at* https://www.philstar.com/opinion/2019/11/09/1967201/planting-guns-evidencean-old-afp-pnp-trick.

[5] Jeline Malasig, *Furlough ruling juxtaposed: The case of Baby River activist mom vs Bong Revilla and father*, INTERAKSYON, Oct. 12, 2020, *at* https://interaksyon.philstar.com/politics-issues/2020/10/12/178522/furlough-ruling-juxtaposed-the-case-of-baby-river-activist-mom-vs-bong-revilla-and-father.

[6] Lian Buan, *As SC justices debated prisoner release, a baby was born, then died*, RAPPLER, Oct. 12, 2020, *at* https://www.rappler.com/nation/sc-justices-debated-prisoner-release-baby-river.

her to stay in a hospital or prison nursery to be able to nurse her child.[7] However, her petition was denied.[8]

Later, Baby River, who was then three months old, suffered from acute respiratory distress syndrome, and was brought to a hospital where she was later diagnosed with pneumonia.[9] On October 9, 2020, Nasino, through the National Union of Peoples' Lawyers (NUPL), filed a "Very Urgent Motion for Furlough" before the RTC of Manila so that Nasino may be with her baby in the latter's final moments.[10] Unfortunately, Baby River passed away on the same day.[11] On October 12, 2020, NUPL filed another motion for furlough before the RTC of Manila, asking it to grant Nasino temporary liberty to "properly grieve" over the untimely passing of Baby River.[12]

On October 13, 2020, the RTC of Manila granted Nasino's request for three days of continuous furlough to visit Baby River's wake and attend her burial.[13] However, this was shortened to two days after Manila City Jail Warden Ignacia Monteron pleaded to reduce the period due to "lack of personnel," among other reasons.[14] Ironically, Nasino was guarded by at least 37 officers during the wake[15] and around 43 officers during the funeral.[16]

Aside from being heavily guarded and remaining in handcuffs during the entire furlough, several commotions that happened thereon prompted the public to denounce the handling by the police as an injustice. For instance,

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[7] Buan, *supra* note 1.

[8] Buan, *supra* note 6.

[9] *Id.*

[10] Lian Buan, *Jailed activist pleads furlough to visit baby in ICU*, RAPPLER, Oct. 9, 2020, *at* https://www.rappler.com/nation/reina-mae-nasino-motion-furlough-visit-baby-hospital.

[11] Lian Buan, *3-month-old baby, separated from jailed activist mother at birth, dies*, RAPPLER, Oct. 9, 2020, *at* https://www.rappler.com/nation/baby-separated-from-jailed-activist-mother-reina-mae-nasino-dies.

[12] CNN Phil. Staff, *Lawyers' group files motion to allow political prisoner to attend three-month-old baby's wake*, CNN PHIL., Oct. 12, 2020, *at* https://cnnphilippines.com/news/2020/10/12/Reina-Mae-Nasino-Baby-River-wake.html.

[13] Mike Navallo, *Court allows political detainee to attend baby's wake, burial*, ABS-CBN NEWS, Oct. 13, 2020, *at* https://news.abs-cbn.com/news/10/13/20/court-allows-political-detainee-to-attend-babys-wake-burial.

[14] Mike Navallo, *Court reduces furlough granted to activist visiting baby's wake*, ABS-CBN NEWS, Oct. 14, 2020, *at* https://news.abs-cbn.com/news/10/14/20/court-reduces-furlough-granted-to-activist-visiting-babys-wake.

[15] Coconuts Manila, *Police wanted to bring back activist Nasino to jail before end of furlough, says lawyer*, YAHOO! NEWS, Oct. 15, 2020, *at* https://ph.news.yahoo.com/police-wanted-bring-back-activist-013329252.html.

[16] Lian Buan, *Baby River, who died in 'cracks' of justice system, laid to rest under tight police watch,* RAPPLER, Oct. 16, 2020, *at* https://www.rappler.com/nation/reina-mae-nasino-baby-river-dies-cracks-justice-system-buried-tight-watch-police-october-16-2020.

the policemen prevented Nasino from speaking to the media by whisking her away as she was being interviewed, and then attempting to bring her back to jail an hour earlier than what was provided for in the court order.[17] Another instance was when the hearse carrying Baby River sped towards the cemetery upon orders of the deployed police to speed up the procession, leaving the attendees who were trailing behind the vehicle.[18]

The events surrounding the death of Baby River made it difficult for the public not to draw a comparison between the treatment of Nasino, an activist and urban poor organizer detained under questionable charges, and that of several high-profile inmates who were charged with graver crimes of graft, corruption, plunder, and even massacre.[19] When asked to comment regarding the inconsistency, Department of Justice Secretary Menardo Guevara said: "Our justice system, like all systems created by human beings, is not a perfect system."[20]

The public backlash over the double standards on the imposition of furlough is indicative of the legal process' arbitrariness, unfairness, and partiality amid the courts' constant justification that furloughs are granted for humanitarian reasons.[21] Despite the recurrence of this controversial and legally suspect remedy, Philippine legal literature offers no guidance on how to approach furlough as a matter of criminal procedure. Its source, bases, effects, and implications are largely unexamined.

Addressing this paucity, this Article is the first to dissect this legal concept. It aims to be the voice for detainees who are yet to be convicted under the judicial authority of the courts and who are not able to enjoy the

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[17] Tetch Torres-Tupas, *Nasino visits Baby River's wake wrapped in PPE suit, shackled in handcuffs*, INQUIRER.NET, Oct. 14, 2020, *at* https://newsinfo.inquirer.net/ 1347937/nasino-visits-baby-rivers-wake-wrapped-in-ppe-suit-shackled-in-handcuffs.

[18] CNN Phil. Staff, *Baby River Nasino laid to rest, but road to burial filled with tension*, CNN PHIL., Oct. 16, 2020, *at* https://www.cnnphilippines.com/news/2020/10/16/Baby-River-burial-Reina-Mae-Nasino.html.

[19] Raisa Serafica, *For netizens, jailed activist's furlough shows how courts can treat people and the powerful differently*, RAPPLER, Oct. 15, 2020, *at* https://www.rappler.com/moveph/jailed-activist-furlough-shows-how-courts-treat-people-power-differently.

[20] Jeffrey Damicog, *Justice chief symphatizes with Nasino over death of child,* MANILA BULL., Oct. 16, 2020, *at* https://mb.com.ph/2020/10/16/justice-chief-symphatizes-with-nacino-over-death-of-child.

[21] Lian Buan, *PH courts inconsistent in letting detainees attend family events*, RAPPLER, Aug. 22, 2018, *at* https://www.rappler.com/newsbreak/iq/philippine-courts-inconsistent-allowing-detainees-attend-family-events. "There are no specific, detailed rules for temporary release of detention prisoners, those not yet convicted but denied bail. Judges have control over them and have full discretion subject to reasonable grounds and of course security procedures."

"humanitarian considerations" granted to their fellow detainees who happen to be politically influential individuals. It seeks to democratize the privilege of furlough for it to be available to all detainees, regardless of social status outside detention.

I. UNDERSTANDING "FURLOUGH"

"Furlough" is an elusive word that even graduates from Philippine law schools may have never encountered. The reason for this is simple: despite its importance, no explicit law or rule governs its application. In this part of the Article, the authors will attempt to define "furlough" as understood and as applied in the Philippines based on the country's experience.

A. Defining "Furlough"

BLACK'S LAW DICTIONARY defines furlough as "[a] brief release from prison."[22] On the other hand, the U.S. Code of Federal Regulations defines furlough as "an authorized absence from an institution by an inmate who is not under escort of a staff member, U.S. Marshal, or state or federal agents."[23]

In the Philippines, there is no codified set of rules defining the term "furlough." Despite this, the term can be found in motions[24] filed by detainees or prisoners, through counsel, seeking temporary liberty to attend important family matters or medical emergencies. These motions are acted upon by the courts, which makes it reasonable to assume that despite the lack of printed laws or rules, there is a common judicial understanding of its meaning.

To better understand the concept of furlough, it would be more prudent to look at its development from its country of origin—the United States.

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[22] BLACK'S LAW DICTIONARY 698 (8th ed. 2004).

[23] U.S. CODE OF FEDERAL REGULATIONS, tit. 28, § 570.32.

[24] *See e.g.,* People v. Reyes, Crim. Case No. 26352, (Sandiganbayan Apr. 12, 2019); Lian Buan, *De Lima asks court for urgent furlough as mom fights for life,* RAPPLER, Aug. 9, 2019, *at* https://www.rappler.com/nation/de-lima-asks-court-urgent-furlough-mother-fights-for-life-hospital; *NUPL thanks Chief Justice Peralta for swift action*, SUPREME COURT WEBSITE, Oct. 14, 2020, *at* https://sc.judiciary.gov.ph/14173; Tetch Torres-Tupas, *Parojinog siblings ask court's nod to attend parents' wake, burial*, INQUIRER.NET, Aug. 10, 2017, *at* https://newsinfo.inquirer.net/921774/parojinog-nova-princess-parojinog-wake-burial-furlough-court-reynaldo-parojinog.

B. Furlough Programs in the United States

1. History

Before any legislation was passed in the United States, the authority for temporary release without escort was found in the general authority of wardens to define the place of confinement of imprisoned felons, and the authority of governors or boards of parole to grant reprieves, suspensions of execution of sentences, and paroles.[25] Thus, even before the enactment of the Prisoner Rehabilitation Act in 1965, wherein the U.S. Congress gave the Attorney General the power to grant furloughs for federal prisoners,[26] there were already four states with existing furlough programs.[27] These were: (1) Mississippi (1918); (2) Arkansas (1922); (3) Louisiana (1964); and (4) Delaware (1964).[28] However, information about furloughs under general authority is generally anecdotal because of infrequent use and lack of records.[29]

The Prisoner Rehabilitation Act specifically authorized the Attorney General to grant work furloughs as well as emergency furloughs to attend a funeral, to visit a dying relative, or to receive medical services, among other "compelling reason[s] consistent with the public interest."[30] After the enactment of the federal law, state legislations followed suit, starting from the States of Utah, California, and North Carolina.[31] Notably, only a few of these states allowed holiday furloughs, while the majority allowed medical

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[25] U.S. Department of Justice ["U.S. DOJ"], National Evaluation Program Phase I Report: Summary Furlough Programs for Inmates 17 (1976), *available at* https://www.ojp.gov/pdffiles1/Digitization/45054NCJRS.pdf.

[26] 18 U.S.C. (1965), § 4082. "The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to—"(1) visit a specifically designated place or places for a period not to exceed thirty days and return to the same or another institution or facility. An extension of limits may be granted only to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers, or for any other compelling reason consistent with the public interest; or (2) work at paid employment or participate in a training program in the community on a voluntary basis while continuing as a prisoner of the institution or facility to which he is committed x x x."

[27] U.S. DOJ, *supra* note 25 at 17.

[28] *Id.* at 17; *But see* Carson Markley, *Furlough Programs and Conjugal Visiting in Adult Correctional Institutions*, 37 FED. PROBATION 19, 21 (1973).

[29] U.S. DOJ, *supra* note 25, at 17.

[30] 18 U.S.C. (1965), § 4082; *See also* Robert Smith & Michael Milan, *A Survey of the Home Furlough Policies of American Correctional Agencies*, 11 CRIMINOLOGY 95, 97–98 (1973).

[31] U.S. DOJ, *supra* note 25, at 17.

furloughs.[32] There is a debate, however, on whether medical furloughs could be considered as "furloughs," since a staff member or a correctional officer is required to stay at the hospital with the inmate;[33] thus, it becomes inconsistent with the definition of furlough.

The Comprehensive Crime Control Act of 1984 introduced 18 U.S.C. § 3622,[34] which partially repealed 18 U.S.C. § 4082, and became the controlling law for offenses that occurred after November 1, 1987.[35] 18 U.S.C. § 3622 enumerated the purposes for which furlough may be applied for, and at the same time, transferred to the Director of the Bureau of Prisons the authority to grant furlough to inmates. Title 28 of the Code of Federal Regulations (CFR) currently prescribes the procedures governing the furlough program under 18 U.S.C. 3622.[36]

2. Rationale for Furlough

There are generally four basic rationales for granting furlough, which may differ among the states offering the program.[37] These are: (1) the

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[32] Smith & Milan, *supra* note 30, at 99. Out of the 52 correctional agencies surveyed, 45 indicated that emergency leaves are included in its program.

[33] *Id.*; U.S. DOJ, *supra* note 25, at 25.

[34] The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—(a) visit a designated place for a period not to exceed 30 days, and then return to the same or another facility, for the purpose of—(1) visiting a relative who is dying, (2) attending a funeral of a relative, (3) obtaining medical treatment not otherwise available, (4) contacting a prospective employer, (5) establishing or reestablishing family or community ties, or (6) engaging in any other significant activity consistent with the public interest; (b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or (c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community, and (2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

[35] U.S. DOJ, Program Statement, at 2. (Feb. 4, 1998), *available at* https://www.bop.gov/policy/progstat/5280_008.pdf.

[36] U.S. CODE OF FEDERAL REGULATIONS, tit. 28, § 570.3–38.

[37] U.S. DOJ, *supra* note 25, at 37.

humanitarian philosophy; (2) the reduction of tension philosophy; (3) the inmate management philosophy; and (4) the reintegration philosophy.[38]

The *humanitarian philosophy* sees the offender as having basic needs, both physical and psychological, which must be met. Its goal is to reduce or mitigate the stress created by institutionalization within a particular individual.[39] The *reduction of tension philosophy* aims to reduce tension generated by long-term captivity, notably including "sexual frustration," to lessen conflict.[40] The *inmate management philosophy* aims to reduce negative activity in the institutional setting by integrating furlough as a reward for positive behavior.[41] Lastly, the *reintegration philosophy* recognizes that institutional life is atypical and that the offender must be given the opportunity to ease his transition back to the community and preserve community ties.[42]

It must be noted that these philosophies find semblance in the justifications for furlough currently listed under 28 CFR § 570.33, which provides:

> The Warden or designee may authorize a furlough, for 30 calendar days or less, for an inmate to:
>
> a) Transfer directly to another Bureau institution, a non-federal facility, or community confinement;
> b) Be present during a crisis in the immediate family, or in other urgent situations;
> c) Participate in the development of release plans;
> d) Establish or reestablish family and community ties;
> e) Participate in selected educational, social, civic, and religious activities which will facilitate release transition;
> f) Appear in court in connection with a civil action;
> g) Comply with an official request to appear before a grand jury, or to comply with a request from a legislative body, or regulatory or licensing agency;
> h) Appear in or prepare for a criminal court proceeding, but only when the use of a furlough is requested or recommended by the applicable court or prosecuting attorney;

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[38] U.S. DOJ, *supra* note 25, at 37–38.

[39] U.S. DOJ, *supra* note 25, at 38; For instance, The Pennsylvania furlough program employed the humanitarian philosophy, with the rationale being to "humanize the care of inmates and create meaningful treatment, education[,] and training programs based upon the needs of the individual." Kean McDonald, An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, 47 Temp. L. Q. 288, 289 (1974).

[40] U.S. DOJ, *supra* note 25, at 38.

[41] *Id.*

[42] *Id.*

> i) Participate in special training courses or in institution work assignments, including Federal Prison Industries (FPI) work assignments, when daily commuting from the institution is not feasible; or
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> j) Receive necessary medical, surgical, psychiatric, or dental treatment not otherwise available.[43]

3. Contemporary Application

In the United States, there are two types of furlough. The first type is the *transfer furlough*, which is used for transferring an inmate from one bureau facility to another, to a non-federal facility, to a community confinement facility, or to home confinement.[44] The second type is the *non-transfer furlough*, which encompasses any other furlough that is not considered a transfer furlough.[45] This includes the emergency furlough, which allows an inmate to address a family crisis or other urgent situation; and the routine furlough, which covers the rest of the justifications mentioned in the preceding sub-section, including medical furlough.[46]

The furlough program prescribes eligibility requirements, but generally covers both pretrial and sentenced inmates.[47] Furthermore, under the present furlough program, inmates themselves may submit a furlough application, which will then be subject to the approval of the warden—the decision of whom is appealable.[48]

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[43] U.S. CODE OF FEDERAL REGULATIONS, tit. 28, § 570.33.

[44] § 570.33.

[45] § 570.33.

[46] § 570.32; A furlough is an authorized absence from an institution by an inmate who is not under escort of a staff member, U.S. Marshal, or state or federal agents. The two types of furloughs are: (a) Transfer furlough – a furlough for the purpose of transferring an inmate from one bureau facility to another, a non-federal facility, or community confinement (including home confinement) as noted below at § 570.33(a); (b) Non-transfer furlough – a furlough for any purpose other than a transfer furlough, and which may be defined based on its nature, as either emergency or routine, as follows: (1) Emergency furlough – a furlough allowing an inmate to address a family crisis or other urgent situation as noted below at § 570.33(b); (2) Routine furlough – a furlough for any of the reasons noted below at § 570.33 (a) and (c) through (j); (c) Duration and distance of non-transfer furlough – (1) Day furlough – a furlough within the geographic limits of the commuting area of the institution, which lasts 16 hours or less and ends before midnight; (2) Overnight furlough – a furlough which falls outside the criteria of a day furlough.

[47] § 570.31.

[48] § 570.37.

C. Basis of Furlough in the Philippines

1. Jurisprudence

While there is no law or rule that governs the concept of furlough, the Court, in several instances, has recognized the discretion of "authorities" or courts to grant "emergency or compelling temporary leaves from imprisonment." The first of this kind was the case of *People v. Jalosjos*,[49] where the Court, through Justice Consuelo Ynares-Santiago, held that "[e]mergency or compelling temporary leaves from imprisonment are allowed to all prisoners, at the discretion of the authorities or upon court orders."[50] Notwithstanding the fact that the case did not cite any authority as its basis for the quoted pronouncement, it ultimately became the seminal case for justifying the grant of furlough. The *Jalosjos* case was subsequently cited in the case of *Trillanes v. Pimentel*,[51] and more recently, in the separate opinion of Justice Marvic Leonen in the case of *Almonte v. People*.[52] Notably, the *Jalosjos* case was also used in the Senate Resolution filed by members of the Liberal Party supporting the motion for furlough filed by Senator Leila de Lima.[53]

2. Other Administrative Basis

The Bureau of Jail Management and Penology (BJMP) Comprehensive Operations Manual provides for "meritorious" instances when a detainee can be allowed to temporarily leave jail, to *wit*:

> Section 65. LEAVE FROM JAIL - Leave from jail shall be allowed in very meritorious cases, like the following:
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> 1. Death or serious illness of spouse, father, mother, brother, sister, or children.
> 2. Inmates who are seriously ill or injured may, under proper escort, be allowed hospitalization leave or medical attendance. However, such leave shall require prior approval of the Courts having jurisdiction over them;
>
> Provided, however, that in life and death cases where immediate medical attention is imperative, the warden, at his/her own discretion, may allow an inmate to be hospitalized or moved out of jail for medical treatment; Provided further, that when the

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[49] [Hereinafter "*Jalosjos*"], G.R. No. 132875, 324 SCRA 689, Feb. 3, 2000.
[50] *Id.* at 698.
[51] [Hereinafter "*Trillanes*"], G.R. No. 179817, 556 SCRA 471, June 27, 2008.
[52] [Hereinafter "*Almonte*"], G.R. No. 252117, July 28, 2020.
[53] S. Res. 391, 17th Cong., 1st Sess. (2017).

> emergency has ceased as certified by the attending physician, the warden shall cause the inmate's immediate transfer back to the jail, except when there is a court order directing him to continue the inmate's confinement in a hospital until his/her recovery or upon order of the Court for his/her immediate return to the jail.[54]

It must be noted that unlike in the United States where procedures on furlough have a statutory basis, the BJMP Comprehensive Manual cannot claim to have one. Furthermore, while the BJMP only covers detainees or those who are not yet convicted and prisoners who have not been sentenced to serve a term of imprisonment for more than three years, a survey of court orders would show that the trial courts, at times, grant furloughs even to those already sentenced to imprisonment of *reclusion perpetua*.[55]

D. Illustrations of Applications of Furlough in the Philippines

Consistent with Section 65 of the BJMP Operations Manual, several high-profile detainees over the years have been granted furlough to visit a dying or already-dead close family relative, or to attend to medical emergencies.

For instance, in 2007, former President Joseph "Erap" Estrada, who was under detention for plunder charges, sought furlough in light of the deteriorating health condition of his mother.[56] This was granted by the Sandiganbayan. In 2017, Senator Ramon "Bong" Revilla, who was detained for allegedly plundering around 224.5 million pesos through kickbacks, was granted furlough several times to visit his ailing father.[57] However, in August 2017, when Former Ozamiz Vice-Mayor Nova Princess Parojinog and her brother, Reynaldo Parojinog Jr., who were detained for illegal possession of firearms and drugs,[58] asked for a furlough to attend the wake and burial of

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[54] BJMP Comprehensive Operations Manual (2015), § 65.

[55] *See, e.g.,* Maria Althea Teves, *Erap used his mom, too*, ABS-CBN NEWS, Apr. 27, 2010, *at* https://news.abs-cbn.com/-depth/04/27/10/erap-used-his-mom-too. "In late September 2007, Estrada was also allowed a 10-hour visit at the San Juan Medical Center. Doña Mary had been confined there since August 2007. This was the first time, after being convicted of plunder, Estrada was allowed to visit his mother."

[56] *Erap leaves Tanay, begins 34-hour furlough*, GMA NEWS, Oct. 18, 2007, *at* https://www.gmanetwork.com/news/news/nation/64903/erap-leaves-tanay-begins-34-hour-furlough/story.

[57] Lian Buan, *Bong Revilla again allowed to visit ailing father*, RAPPLER, Mar. 17, 2017, *at* https://www.rappler.com/nation/bong-revilla-hospital-furlough-sandiganbayan.

[58] Rappler, *Parojinogs charged with illegal possession of firearms, drugs,* RAPPLER, Aug. 3, 2017, *at* https://www.rappler.com/nation/nova-reynaldo-parojinog-indictment-illegal-possession-firearms-drugs.

their parents and relatives, who were killed by law enforcement agents in a bloody raid that also resulted in their capture,[59] the Executive Judge of Ozamiz City denied the motion on the ground that the detainees are "high-security risk detainees [...] considering [...] their power and political influence."[60]

Trial courts have also granted furlough for detainees to attend to medical emergencies. For instance, in December 2003, former President Estrada was allowed to go on a three-month leave to the United States to undergo knee surgery. In January 2017, the Sandiganbayan granted former Senator Jinggoy Estrada's motion to undergo X-ray and MRI examinations on his left knee at the Cardinal Santos Medical Center in San Juan City.[61] In 2018, the trial court granted detained Senator Leila de Lima a one-day medical furlough for a CT scan at the Philippine Heart Center to examine "an impression of a liver mass."[62] Senator Revilla was also granted furlough on March 23, 2017 to undergo implant surgery for his teeth. He then asked for another furlough to have his teeth checked on August 25, 2017.[63]

It is notable, however, that, notwithstanding the provision of the BJMP Operations Manual, trial courts have also granted furlough for reasons other than visiting ailing relatives, funerals, or medical emergencies.

Former President Estrada was allowed by the Sandiganbayan to spend the Christmas holiday in his home for the years 2005[64] and 2006,[65] citing, in 2005, humanitarian reasons and consideration for the Filipino tradition. In

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[59] Torres-Tupas, *supra* note 24.

[60] ABS-CBN News, *Court denies Parojinog siblings' plead to attend parents' wake, burial,* ABS-CBN NEWS, Aug. 11, 2017, *at* https://news.abs-cbn.com/news/08/11/17/court-denies-parojinog-sibilings-plea-to-attend-parents-wake-burial.

[61] Lian Buan, *Sandiganbayan allows Jinggoy Estrada to get medical test*, RAPPLER, Jan. 9, 2017, *at* https://www.rappler.com/nation/157779-sandiganbayan-allows-jinggoy-estrada-medical-tests.

[62] Lian Buan, *Muntinlupa court grants De Lima 1-day medical furlough,* RAPPLER, Mar. 10, 2018, *at* https://www.rappler.com/nation/197860-de-lima-medical-furlough-muntinlupa.

[63] ABS-CBN News, *Bong Revilla asks for furlough for dental check-up,* ABS-CBN NEWS, Aug. 18, 2017, *at* https://news.abs-cbn.com/news/08/18/17/bong-revilla-asks-for-furlough-for-dental-check-up.

[64] Mike Frialde, *Sandigan grants Erap extended furlough,* PHIL. STAR, Dec. 30, 2005, *available at* https://www.philstar.com/headlines/2005/12/30/314306/sandigan-grants-erap-extended-furlough.

[65] GMANews.TV, *Sandigan OKs Estrada Xmas furlough,* GMA NEWS, Dec. 22, 2006, *at* https://www.gmanetwork.com/news/news/nation/24400/sandigan-oks-estrada-xmas-furlough/story.

2014[66] and 2015,[67] the motion for furlough of former President Gloria Macapagal-Arroyo, requesting to celebrate Christmas with her family in their residence, was granted. The decision of the Sandiganbayan in 2014 cited "mercy and compassion" as well as the "forthcoming visit of His Holiness Pope Francis" in granting the furlough.[68] On the other hand, former Senator Estrada was allowed by the Sandiganbayan to attend the graduation of his son in March 2015, saying that "[i]f Estrada will not be around, that will be traumatic for the child. We are not doing this for Senator Estrada. We're doing this for the child."[69] In 2017, Senator Revilla was allowed to attend his family's Christmas eve celebration from 11:00 o'clock in the morning up to 9:00 o'clock in the evening of December 24.[70] In the same year, the Sandiganbayan allowed Senator Estrada to attend the 80th birthday celebration of former President Estrada, citing "recognition of deeply embedded Filipino customs and traditions."[71] In 2018, a trial court in Quezon City granted furlough for former Autonomous Region for Muslim Mindanao (ARMM) Governor—and one of the principal suspects in the 2009 Maguindanao massacre where 58 persons were ambushed in an election-related violence—Zaldy Ampatuan, who requested to attend his daughter's wedding.[72] In its decision, the court said that a daughter's wedding is a "significant milestone" and "momentous family occasion" in the culture of Filipinos.[73]

To be fair, high-profile individuals do not always receive this privilege—a fact that further adds to the unpredictable application of this controversial remedy. In 2017 and 2018, detainees Senator Revilla and Senator

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[66] Marc Jayson Cayabyab, *Arroyo given 4-day Christmas furlough*, INQUIRER.NET, Dec. 22, 2014, *at* https://newsinfo.inquirer.net/658582/arroyo-given-4-day-christmas-furlough.

[67] Rey Requejo & Sandy Araneta, *Christmas, New Year furloughs given Arroyo*, MANILA STANDARD, Dec. 9, 2015, *available at* https://manilastandard.net/news/top-stories/193933/christmas-new-year-furloughs-given-arroyo.html.

[68] Cayabyab, *supra* note 66.

[69] Marc Jayson Cayabyab, *Sandigan allows Jinggoy Estrada to attend son's graduation*, INQUIRER.NET, Mar. 16, 2015, *at* https://newsinfo.inquirer.net/679121/sandigan-allows-jinggoy-estrada-to-attend-sons-graduation.

[70] CNN Phil. Staff, *Sandiganbayan allows ex-senator Bong Revilla to go home for Christmas Eve*, CNN PHIL., Dec. 21, 2017, *at* https://cnnphilippines.com/news/2017/12/21/Sandiganbayan-Bong-Revilla-Christmas-Eve.html.

[71] Erwin Colcol, *Ex-Sen. Jinggoy Estrada may attend Erap's 80th Birthday – Sandiganbayan*, GMA NEWS, Apr. 17, 2017, *at* https://www.gmanetwork.com/news/news/nation/607232/ex-sen-jinggoy-estrada-may-attend-erap-s-80th-birthday-sandiganbayan/story.

[72] Tetch Torres-Tupas, *Look: Court order allowing Zaldy Ampatuan to attend daughter's wedding*, INQUIRER.NET, Aug. 22, 2018, *at* https://newsinfo.inquirer.net/1023948/look-court-order-allowing-zaldy-ampatuan-to-attend-daughters-wedding.

[73] *Id.*

De Lima each filed a motion for furlough, requesting to attend the graduation ceremony of their respective children. The Sandiganbayan's First Division and the Muntinlupa City RTC denied the motion of Senators Revilla[74] and De Lima,[75] respectively. Senator Revilla's other request to attend the 18th birthday of his daughter was also denied on the ground that social events are not "exceptional circumstances" that would warrant deviations from the general limitation on the rights of a detainee.[76]

Ultimately, these cases only illustrate the inconsistency in the application of furloughs. Such inconsistency is expected in the absence of a uniform standard. But more than these inconsistencies, the biggest concern is that the grant of furlough becomes a privilege as it becomes practically available only to those people who can afford to employ a good enough lawyer. Thus, for the tens of thousands—if not hundreds of thousands—of other pretrial detainees, the privilege of furlough has never really been an option. An ordinary detainee—someone without any social, political, or economic clout and status—must content himself with missed family holidays, birthdays, weddings, and funerals.

With such an ostensibly biased remedy, what then becomes of the great constitutional right that "[n]o person shall [...] be denied the equal protection of the laws"?[77]

E. Conclusion

From the above discussion, several things are made clear regarding the difference between the furlough programs of the United States and "furlough" as it exists in the Philippines. *First*, furlough in the United States generally requires no escort. In the Philippines, as seen in the case of Nasino, police and jail officers are required to accompany the detainee during the entirety of the furlough.[78] *Second*, furlough in the United States derives its

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[74] Rappler, *Bong Revilla can't go to daughter's graduation – court*, RAPPLER, Mar. 27, 2015, *at* https://www.rappler.com/nation/sandiganbayan-bong-revilla-daughter-graduation.

[75] Kristine Joy Patag, *Court denies De Lima plea to attend son's graduation*, PHIL. STAR, May 28, 2018, *at* https://www.philstar.com/headlines/2018/05/28/1819461/court-denies-de-lima-plea-attend-sons-graduation.

[76] Marc Jayson Cayabyab, *Bong Revilla plea to attend daughter's debut denied*, INQUIRER.NET, Oct. 23, 2015, *at* https://newsinfo.inquirer.net/733940/bong-revilla-plea-to-attend-daughters-debut-denied.

[77] CONST. art. III, § 1.

[78] *See* CNN Phil. Staff, *Nasino files complaints vs cops, jail guards for security 'overkill' during Baby River's burial*, CNN PHIL., Dec. 2, 2020, *at* https://www.cnnphilippines.com/news/2020/12/2/Reina-Mae-Nasino-complaints-PNP-BJMP-officials.html; Joseph Tristan Roxas, *Sandiganbayan OKs Bong Revilla furlough for dental*

authority from both federal and state laws. On the other hand, furlough in the Philippines finds basis only in the BJMP Operations Manual and the *Jalosjos* decision. *Third*, there are several rationales for the U.S. furlough program, which include rehabilitation and humanitarian grounds. On the other hand, in the Philippines, based on the BJMP Operations Manual, the rationale is humanitarian grounds, as in the case of a personal medical emergency, or the death or serious illness of an immediate family member. However, it would seem that the need to preserve "family" ties has also become a justification in practice following the trend of trial courts in allowing high-profile detainees to spend Christmas with their families or attend important family occasions. *Fourth*, furlough in the United States can also be applied to convicted prisoners, albeit requiring prior legislative authority. In the Philippines, except for a few instances, such as when former President Estrada was allowed to visit his ailing mother despite already being convicted, the applicants are mostly detainees whose cases are pending before trial courts. *Fifth*, aside from having the complete discretion to deny or grant the application of furlough, the courts also exercise complete discretion over the other details of a grant of furlough, such as its duration, as these are not covered by either the BJMP Operations Manual or jurisprudence. Therefore, furlough in the Philippines must be understood as a concept that is distinct from that of the United States. Philippine furlough pertains to the grant of temporary liberty, upon motion, to detainees based on humanitarian grounds, particularly to visit a seriously ill relative, to attend a funeral of a relative, or to attend to personal medical emergencies. This definition could be expanded to include holiday furloughs, if the practice of trial courts in extending the standard set by the BJMP Operations Manual were to be accepted.

In any case, the grant of a prison furlough, in the absence of rules providing for strict guidelines on its issuance, is highly discretionary in nature—dependent on the better wisdom and judgment of the courts. However, the judges cannot be blamed entirely in the absence of strict rules and guidelines on granting prison furlough.

II. IS A STANDARD RULE FOR FURLOUGH NEEDED?

A. Legal Considerations

In this section, the courts' basis to grant furlough will be traced and further explored. The current application of furlough will also be examined to

check-up, GMA NEWS, June 14, 2018 *at* https://www.gmanetwork.com/news/news/nation/656882/sandiganbayan-oks-bong-revilla-furlough-for-dental-check-up/story.

determine if it is consistent with jurisprudential standards. Lastly, furlough, as currently understood and applied, will be reviewed in light of the constitutional guarantee of equal protection.

1. Basis of Furlough

As discussed, there is currently no rule or law regarding the grant of furlough in the Philippines. Furlough is, at best, enshrined in a short pronouncement of the Supreme Court in the case of *Jalosjos*.[79] In that case, the accused, Representative Romeo Jalosjos, sought permission to attend Congressional Sessions while the appeal to overturn his conviction was still pending before the Supreme Court.[80] The Supreme Court denied his motion and explained that "emergency or compelling temporary leaves from imprisonment are allowed to all prisoners, at the discretion of the authorities or upon court orders."[81] The Supreme Court merely reiterated this single statement when it denied a request for furlough in *Trillanes v. Pimentel*.[82]

This pronouncement was likewise cited by Justice Leonen's separate opinion in the latest case of *Almonte v. People*, which stated that "the Court acknowledged that prisoners might be granted temporary leaves from imprisonment upon a court order. However, a prisoner must first establish an emergency or compelling reason."[83]

While it was not applied in *Jalosjos*, *Trillanes*, and *Almonte*, it is that exact phrase from which courts trace their power to grant furloughs. Nonetheless, a closer analysis of this phrase will show that the courts have exceeded the power that allowed them to grant furloughs in the first place.

There appear to be two principles that should guide the courts in their exercise of the power of furlough: *first*, that the furlough should be characterized as an "emergency" or "compelling," and *second*, that it is discretionary on the part of the court. In other words, the power of the courts to grant furlough is limited by these two conditions—and these two conditions *only*. Unfortunately, a perusal of the instances enumerated in this Article will outright reveal that the courts have utterly failed to apply the *first* aspect, i.e., that the furlough must be for an "emergency" or a "compelling" reason.

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[79] *Jalosjos*, 324 SCRA 689, 698.

[80] *Id.* at 693–94.

[81] *Id.* at 698.

[82] *Trillanes*, 556 SCRA 471, 489.

[83] *Almonte*, at 14 (Leonen, *J.*, *separate*). This pinpoint citation refers to the copy of the decision uploaded on the Supreme Court website.

2. Analysis of the Grants of Furlough

Having sufficiently threshed out the basis of furlough, the current application of furlough will be examined if it complies with the two guiding principles.

While there are compelling instances wherein the grant of furlough was in accordance with the power of the courts, such as Nasino's request to visit Baby River's wake and attend her burial, or detained Senator de Lima's request for a one-day furlough for a CT scan, the rest of the cases are *highly* doubtful. In fact, in no stretch of legal argumentation can attending a daughter's wedding or spending Christmas for "humanitarian reasons" be considered as an "emergency" or "compelling." While two courts did try to provide a legal basis, such as "family culture,"[84] this justification is not supported by the principles in *Jalosjos*. It is clear that the only justification for furlough is that the "leave" should only be for an "emergency" or for a "compelling" reason—reasons manifestly absent in most of the examples enumerated in this Article. These grants of furlough cannot even fall under any of the instances enumerated under Section 65 of the BJMP Manual.

It is conceded that what may be considered an "emergency" and "compelling" depends on the circumstances of each case. However, this is the reason why trial courts have been granted discretion—so that they may flexibly determine what is "compelling" in each instance. Unfortunately, it is this absence of standards that shows that the enjoyment of the said privilege remains to be a gray area of law where the power and discretion of the judge are absolute.

3. The Equal Protection Violation

From the foregoing, this arbitrary and highly discretionary implementation of furlough may be challenged on constitutional grounds. Specifically, this broad power to grant furlough is violative of the equal protection clause.

The Supreme Court has succinctly explained the constitutional right of equal protection in the case of *Ichong v. Hernandez*,[85] to *wit*:

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[84] Referring to the cases of Senator Estrada and Zaldy Ampatuan who were granted furlough to attend his father's 80th birthday party and his daughter's wedding, respectively. *See* Colcol, *supra* note 71; Torres-Tupas, *supra* note 72.

[85] 101 Phil. 1155 (1957).

> The equal protection of the law clause is against undue favor and individual or class privilege, as well as hostile discrimination or the oppression of inequality. It is not intended to prohibit legislation, which is limited either [by] the object to which it is directed or by [the] territory within which it is to operate. *It does not demand absolute equality among residents; it merely requires that all persons shall be treated alike, under like circumstances and conditions both as to privileges conferred and liabilities enforced.* The equal protection clause is not infringed by legislation which applies only to those persons falling within a specified class, if it applies alike to all persons within such class, and reasonable grounds exist for making a distinction between those who fall within such class and those who do not.[86]

A simple evaluation of the narratives earlier presented clearly shows that *persons under like circumstances and conditions were not treated alike.* While some were allowed to attend their children's weddings, some were not allowed to go to their children's graduation. Worse, the treatment, despite the grant of furlough, is also vastly different—a grieving mother was allowed to stay with her deceased daughter for only a few hours in two days, while others were even allowed to attend Christmas holiday celebrations which lasted the whole day.

In fact, the same issue was raised by the Supreme Court itself in the case of *Jalosjos,* when Jalosjos filed a "Motion To Be Allowed To Discharge Mandate As Member of House of Representatives"[87] and argued that by virtue of "having been re-elected by his constituents, he has the duty to perform the functions of a Congressman,"[88] and that such duty "cannot be defeated by insuperable procedural restraints arising from pending criminal cases."[89] In denying his claim, the Supreme Court ruled, *viz.*:

> In the ultimate analysis, *the issue before us boils down to a question of constitutional equal protection.*
>
> The Constitution guarantees: "[N]or shall any person be denied the equal protection of laws." This simply means that all persons similarly situated shall be treated alike both in rights enjoyed and responsibilities imposed. The organs of government may not show any undue favoritism or hostility to any person. Neither partiality nor prejudice shall be displayed.

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[86] *Id.* at 1157. (Emphasis supplied.)
[87] *Jalosjos*, 324 SCRA 689, 693.
[88] *Id.* at 694.
[89] *Id.*

> Does being an elective official result in a substantial distinction that allows different treatment? Is being a Congressman a substantial differentiation which removes the accused-appellant as a prisoner from the same class as all persons validly confined under law?
>
> The performance of legitimate and even essential duties by public officers has never been an excuse to free a person validly in prison. The duties imposed by the "mandate of the people" are multifarious. The accused-appellant asserts that the duty to legislate ranks highest in the hierarchy of government. The accused-appellant is only one of 250 members of the House of Representatives, not to mention the 24 members of the Senate, charged with the duties of legislation. Congress continues to function well in the physical absence of one or a few of its members. Depending on the exigency of Government that has to be addressed, the President or the Supreme Court can also be deemed the highest for that particular duty. The importance of a function depends on the need for its exercise. The duty of a mother to nurse her infant is most compelling under the law of nature. A doctor with unique skills has the duty to save the lives of those with a particular affliction. An elective governor has to serve provincial constituents. A police officer must maintain peace and order. Never has the call of a particular duty lifted a prisoner into a different classification from those others who are validly restrained by law.
>
> A strict scrutiny of classifications is essential lest wittingly or otherwise, insidious discriminations are made in favor of or against groups or types of individuals.
>
> *The Court cannot validate badges of inequality. The necessities imposed by public welfare may justify exercise of government authority to regulate even if thereby certain groups may plausibly assert that their interests are disregarded.*
>
> *We, therefore, find that election to the position of Congressman is not a reasonable classification in criminal law enforcement. The functions and duties of the office are not substantial distinctions which lift him from the class of prisoners interrupted in their freedom and restricted in liberty of movement. Lawful arrest and confinement are germane to the purposes of the law and apply to all those belonging to the same class.*[90]

The case of *People v. Vera*[91] is instructive. In that case, the constitutionality of Section 11 of the Act No. 4221 was questioned on the

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[90] *Id.* at 700–02. (Emphasis supplied.)

[91] 65 Phil. 56 (1937).

grounds of equal protection.[92] The questioned provision grants to the provincial boards the power to provide a system of probation to convicted persons.[93] It was argued that Section 11 violates the equal protection clause for being an invalid classification because its applicability is not uniform throughout the country.[94] Under Section 11, each provincial board may exercise its *own discretion* as to whether or not to provide a probation system, allocate funds for the probation officers, among others.[95] The Supreme Court agreed with the petitioners and struck down the provision.[96]

In doing so, the Supreme Court gave two scenarios. *First*, the Court explained that one province might appropriate the necessary funds to defray the salary of a probation officer, while another might not.[97] This will then result in the insidious situation wherein two probation officers, similar in all respects, shall be treated differently because of the choice of their provincial boards.[98] *Second*, the Court did acknowledge that it is also possible that all provincial boards will appropriate the necessary funds for the salaries of the probation officers in their respective provinces, in which case there is no inequality.[99] Despite the possibility that there may be no discrimination, the Supreme Court held that the law violates the equal protection clause because it "creates a situation in which discrimination is permitted," to wit:

> These different situations suggested show, indeed, that while inequality may result in the application of the law and in the conferment of the benefits therein provided, inequality is not in all cases the necessary result. *But whatever may be the case, it is clear that [S]ection 11 of the Probation Act creates a situation in which discrimination and inequality are permitted or allowed.* There are, to be sure, abundant authorities requiring actual denial of the equal protection of the law before courts should assume the task of setting aside a law vulnerable on that score, but premises and circumstances considered, we are of the opinion that [S]ection 11 of Act No. 4221[ ] permits of the denial of the equal protection of the law and is on that account[,] bad. *We see no difference between a law which denies equal protection and a law which permits of such denial. A law may appear to be fair*

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[92] *Id.* at 73.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 129.
[97] *Id.* at 126.
[98] *Id.*
[99] *Id.* at 126–27.

> *on its face and impartial in appearance, yet, if it permits of unjust and illegal discrimination, it is within the constitutional prohibition.*[100]

The same can be said about the current application of furlough in our legal system. While the basis of furlough itself—the ruling in *Jalosjos*—does not provide a "classification,"[101] the various examples provided herein sufficiently show that the grant of furlough, through the unfettered discretion of the trial courts, *permits* a situation of discrimination. Thus, the lack of clear rules or guidelines on the grant of furlough renders its current application constitutionally infirm.

B. The Available Remedy

While the current application for furlough may not pass constitutional muster, furlough, as a concept, still has a place in the Philippine legal system. Under criminal law, there are two available remedies for detainees: bail and recognizance.

Article III, Section 13 of the Constitution provides:

> All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.[102]

Bail is the security given for the temporary release of a person who has been arrested and detained but whose guilt has *not* yet been proven in court beyond a reasonable doubt.[103] Bail may be a matter of right or judicial discretion.[104] The accused has the right to bail before or after conviction by the first-level courts, or before conviction by the Regional Trial Court if the offense charged is not punishable by death, *reclusion perpetua*, or life imprisonment.[105] However, if the accused is charged with an offense, the penalty of which is death, *reclusion perpetua*, or life imprisonment, and when

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[100] *Id.* at 127. (Emphasis supplied.)

[101] *See* Ang Ladlad LGBT Party v. COMELEC, G.R. No. 190582, 618 SCRA 32, 63, Apr. 8, 2010.

[102] CONST. art. III, § 13.

[103] People v. Escobar, G.R. No. 214300, 833 SCRA 180, 195, July 26, 2017.

[104] *Id.* at 196.

[105] RULES OF COURT, Rule 114, § 4.

evidence of one's guilt is not strong, then the accused's prayer for bail is subject to discretion of the trial court.[106]

Moreover, there are instances where bail will no longer be granted despite the pendency of appeal:

> If the penalty imposed by the trial court is imprisonment exceeding six (6) years, the accused shall be denied bail, or his bail shall be cancelled upon a showing by the prosecution, with notice to the accused, of the following or other similar circumstances:
>
> a) That he is a recidivist, quasi-recidivist, or habitual delinquent, or has committed the crime aggravated by the circumstance of reiteration;
> b) That he has previously escaped from legal confinement, evaded sentence, or violated the conditions of his bail without valid justification;
> c) That he committed the offense while under probation, parole, or conditional pardon;
> d) That the circumstances of his case indicate the probability of flight if released on bail; or
> e) That there is undue risk that he may commit another crime during the pendency of the appeal.[107]

Under the Revised Rules of Criminal Procedure, bail also covers recognizance where the person has been in custody for a period equal to or more than the minimum of the principal penalty prescribed for the offense charged.[108] He or she may be released on reduced bail or on his own recognizance, at the discretion of the court.[109]

The Supreme Court held that the right to bail is premised on the presumption of innocence, *viz*:

> The right to bail, which may be waived considering its personal nature and which, to repeat, arises from the time one is placed in the custody of the law, springs from the presumption of innocence accorded every accused upon whom should not be inflicted incarceration at the outset since after trial he would be entitled to acquittal, unless his guilt be established beyond reasonable doubt.[110]

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[106] Rule 114, § 7.
[107] Rule 114, § 5.
[108] Rule 114, §§ 15–16.
[109] Rule 114, § 16.
[110] Paderanga v. Ct. of Appeals, G.R. 115407, 247 SCRA 741, 753, Aug. 28, 1995.

On the other hand, under Republic Act No. 10389, or the Recognizance Act of 2012, release on recognizance is allowed if any person in custody or detention "is unable to post bail due to abject poverty." It is a matter of right in the following instances:

> Section 5. Release on Recognizance as a Matter of Right Guaranteed by the Constitution. — The release on recognizance of any person in custody or detention for the commission of an offense is a matter of right when the offense is not punishable by death, *reclusion perpetua*, or life imprisonment: Provided, That the accused or any person on behalf of the accused files the application for such:
>
> a) Before or after conviction by the Metropolitan Trial Court, Municipal Trial Court, Municipal Trial Court in Cities and Municipal Circuit Trial Court; and
>
> b) Before conviction by the Regional Trial Court: Provided, further, That a person in custody for a period equal to or more than the minimum of the principal penalty prescribed for the offense charged, without application of the Indeterminate Sentence Law, or any modifying circumstance, shall be released on the person's recognizance.[111]

Similar to bail, it is discretionary for those charged with offenses punishable by death, *reclusion perpetua*, or life imprisonment when evidence of guilt is strong, those charged with offenses as a result of a military proceeding, and those charged in an extradition or deportation proceeding, unless otherwise allowed by law.[112] Furthermore, the basis of the recognizance is also the presumption of innocence.[113]

It is thus apparent that the remedy of bail cannot apply to all detainees. For example, those who may have already been convicted by the Court of Appeals and whose case is pending appeal with the Supreme Court, or those charged with a capital offense and whose evidence of guilt is strong, can no longer apply for bail or recognizance. This is so *despite the fact* that these

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[111] Rep. Act. No. 10389 (2013), §5. Recognizance Act of 2012.

[112] PPA–DOJ Internal Guidelines for the Implementation of Rep. Act No. 10389, Rule I, § 2.

[113] Rep. Act No. 10389 (2013), § 2. "In consonance with the principle of presumption of innocence, the 1987 Philippine Constitution recognizes and guarantees the right to bail or to be released on recognizance as may be provided by law."

detainees also enjoy the presumption of innocence until their conviction attains finality:

> Petitioner is similarly situated with Jalosjos with respect to the application of the presumption of innocence during the period material to the resolution of their respective motions. The Court in Jalosjos did not mention that the presumption of innocence no longer operates in favor of the accused pending the review on appeal of the judgment of conviction. *The rule stands that until a promulgation of final conviction is made, the constitutional mandate of presumption of innocence prevails.*[114]

At this juncture, it must be emphasized that *preventive imprisonment* before the finality of conviction is not a form of punishment; otherwise, that would be contrary to the constitutional right to presumption of innocence. Furthermore, in the case of *United States v. Salerno*,[115] the U.S. Supreme Court held that pretrial detention does not serve as a punishment.[116] Rather, its purpose is to protect the community from the potential convicts and their propensity to commit further crimes, and to ensure that the courts will acquire jurisdiction over the persons of the accused pending trial.[117]

Thus, given the presumption of innocence of the accused, combined with the fact that pretrial imprisonment does not serve as punishment, the grant of furlough has a *space* in our criminal system. The accused should be allowed, as a matter of right, to have temporary leaves should there be any compelling reason—medical, familial, or the like—to grant the same given that he is, in the eyes of the law, *innocent*. He should not be allowed to further suffer under preventive imprisonment if he has a valid reason to seek temporary leaves. In fact, furlough would be an *additional* remedy should the accused not qualify for any form of bail.

III. RECOMMENDATION

While furlough itself may be justified, it is imperative that the jurisprudence on furlough be revisited and that the Supreme Court craft adequate rules for its application. While a certain level of discretion is required for the courts to properly examine each and every possible scenario for the grant of furlough, it is clear that unbounded discretion has been abused in

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[114] *Trillanes*, 556 SCRA 471, 484. (Emphasis supplied.)
[115] 481 U.S. 739 (1987).
[116] *Id.* at 748.
[117] *Id.* at 755.

clear violation of the equal protection clause. As discussed, the current state of furlough "permits discrimination." In providing clearer rules and guidance, the discretion of the courts will be limited, which, in turn, may eradicate, or at least lessen, any form of discrimination in the grant of the same. Such would also guide members of the bench and the bar as to how to properly avail of the remedy.

A. Promulgation of Rules by the Supreme Court

The issuance of a standard in granting prison furlough to detainees will promote correctional goals and contribute to a fair, effective, and efficient Philippine penal system in four ways. First, the promulgation of such rules will be based less on personality, political, or social influences, but more on need and strict compliance with the guidelines. Second, detainees who do not wield political influence or cannot employ the services of a lawyer will be given an opportunity to enjoy the privilege of furlough. Third, the decision of judges in granting furlough will be free from arbitrariness and partiality. Lastly, it will promote transparency, such that it will become accessible to every detainee.

In the Philippines, the social, political, and legal consequences arising from the absence of the said rules are observed on detainees and not on those already convicted. Section 25, Rule 114 of the Rules of Criminal Procedure provides:

> The *court shall exercise supervision over all persons in custody* for the purpose of eliminating unnecessary detention. The executive judges of the Regional Trial Courts shall conduct monthly personal inspections of provincial, city, and municipal jails and the prisoners within their respective jurisdictions. They shall ascertain the number of detainees, inquire on their proper accommodation and health[,] and examine the condition of the jail facilities. They shall order the segregation of sexes and of minors from adults, ensure the observance of the right of detainees to confer privately with counsel, and strive to eliminate conditions inimical to the *detainees*.[118]

Accordingly, the Supreme Court, based on its exclusive power to promulgate rules of procedure,[119] has the authority to enact rules on granting furlough to detainees.

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[118] RULES OF COURT, Rule 114, § 25. (Emphasis supplied.)

[119] CONST. art. VIII, § 5.

B. Legislation

The authors also emphasize that while furlough may be extended by the Supreme Court to detainees by virtue of their rule-making power, the same cannot be said for those whose convictions have attained finality. In that case, the grant of furlough should be granted by the legislature. The authors acknowledge that in *Jalosjos*, Justice Ynares-Santiago used the phrase "all prisoners," which may cover also those whose conviction already attained finality. However, the otherwise is submitted, as will be discussed below.

The Supreme Court explained the limits of its rule-making power:

> [N]o definitive line can be drawn between those rules or statutes which are procedural, hence within the scope of this Court's rule-making power, and those which are substantive. In fact, a particular rule may be procedural in one context and substantive in another. It is admitted that what is procedural and what is substantive is frequently a question of great difficulty. It is not, however, an insurmountable problem if a rational and pragmatic approach is taken within the context of our own procedural and jurisdictional system.
>
> In determining whether a rule prescribed by the Supreme Court, for the practice and procedure of the lower courts, abridges, enlarges, or modifies any substantive right, the test is whether the rule really regulates procedure, that is, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for a disregard or infraction of them. *If the rule takes away a vested right, it is not procedural. If the rule creates a right such as the right to appeal, it may be classified as a substantive matter; but if it operates as a means of implementing an existing right then the rule deals merely with procedure.*[120]

Upon finality of conviction, the courts have no other choice but to impose the penalty provided under the law. The presumption of innocence is already overturned. The accused's imprisonment is no longer merely *preventive* but serves as a punishment pursuant to the State's police power and its duty "to look after, guard[,] and defend the interests of the community, the individual[,] [. . .] [the] social rights and [. . .] liberties of every citizen[,] and the

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[120] Estipona v. Lobrigo [hereinafter "*Estipona*"], G.R. No. 226679, 837 SCRA 160, 184–85, Aug. 15, 2017, *citing* Fabian v. Desierto, G.R. No. 129742, 295 SCRA 470, Sept. 16, 1998. (Emphasis supplied, citations omitted.)

guaranty of the exercise of his rights."[121] Thus, the grant of furlough to a convicted person is no longer a matter of procedure, but a substantive matter because it creates a new right.

In *Jaylo v. Sandiganbayan*,[122] the Supreme Court held that Section 6, Rule 120 of the Rules of Criminal Procedure, which provides that an accused who failed to appear at the promulgation of the judgment of conviction shall lose the right to avail of post-judgment remedies, is well within its power to promulgate rules.[123] It does not take away substantive rights but merely provides a manner through which an existing right may be implemented, viz:

> Section 6, Rule 120, of the Rules of Court, does not take away per se the right of the convicted accused to avail of the remedies under the Rules. It is the failure of the accused to appear without justifiable cause on the scheduled date of promulgation of the judgment of conviction that forfeits their right to avail themselves of the remedies against the judgment.
>
> It is not correct to say that Section 6, Rule 120, of the Rules of Court diminishes or modifies the substantive rights of petitioners. It only works in pursuance of the power of the Supreme Court to "provide a simplified and inexpensive procedure for the speedy disposition of cases." This provision protects the courts from delay in the speedy disposition of criminal cases—delay arising from the simple expediency of nonappearance of the accused on the scheduled promulgation of the judgment of conviction.[124]

In the same vein, the Supreme Court also held that plea bargaining is a procedural matter and not a matter of substantive rights, as its purpose is to create a "simplified and inexpensive procedure for the speedy disposition of cases,"[125] to wit:

> In this jurisdiction, plea bargaining has been defined as "a process whereby the accused and the prosecution work out a mutually satisfactory disposition of the case subject to court approval." There is give-and-take negotiation common in plea bargaining. The essence of the agreement is that both the prosecution and the defense make concessions to avoid potential losses. Properly administered, plea bargaining is to be encouraged

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[121] Ha Datu Tawahig v. Lapinid, G.R. No. 221139, 897 SCRA 602, 630, Mar. 20, 2019. (Citations omitted.)

[122] G.R. No. 183152, 746 SCRA 452, Jan. 21, 2015.

[123] *Id.* at 472.

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

[125] *Estipona*, 837 SCRA at 188.

> because the chief virtues of the system—speed, economy, and finality—can benefit the accused, the offended party, the prosecution, and the court.
>
> Considering the presence of mutuality of advantage, the rules on plea bargaining neither create a right nor take away a vested right. Instead, it operates as a means to implement an existing right by regulating the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for a disregard or infraction of them.[126]

It is clear that the rule-making power of the Supreme Court is limited to instances relating to trial or the implementation of rights. This is in line with granting furlough to an accused, who will still have to go through the rigors of trial. The same, however, cannot be said of a person who has already been convicted. In that situation, the trial has ended, and there is nothing left but the imposition and service of the penalty. The grant of furlough after conviction, therefore, is a matter of substantive right because it grants another form of right or remedy.

C. Summary

In sum, it is clear that while the application of furlough by the courts renders it susceptible to constitutional challenge, the concept of furlough in itself has a place in Philippine criminal law when anchored to the presumption of innocence and the purpose of preventive imprisonment. Thus, in order for furlough to be an adequate remedy in addition to bail, the Supreme Court should promulgate rules to limit the unfettered discretion of the trial courts. However, it has been clarified that the Supreme Court's rules on furlough will only be applied to those who are yet to be convicted. Post-conviction furloughs can only be granted by the legislature since it involves substantive rights.

CONCLUSION

The absence of rules to guide the courts on granting furloughs to detainees has resulted in several political and social issues, including the unequal treatment of detainees, mostly favoring influential individuals, and the seemingly partial and arbitrary decision of judges in granting prison furlough, among others.

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[126] *Id.* at 189–90. (Citations omitted.)

With the approval or rejection of an application for furlough falling under the absolute discretion of judges, the constitutional right to equal protection has become susceptible to abuse. A glaring example of such abuse is the well-publicized furlough granted to former congressmen, senators, and presidents who were or are pretrial detainees facing charges which are, in the first place, non-bailable.[127] "Ordinary" detainees can only dream of enjoying the privilege of spending holidays with their loved ones. Regrettably more so, not all politically influential detainees are treated alike and have the luxury to enjoy holiday furloughs.

As this Article has shown, injustice and inequality among equally placed detainees can be addressed through the promulgation of rules or guidelines upon which judges shall be forced to base their decisions on, thereby reining in the possibility arbitrariness. The Supreme Court, under its awesome power under the Constitution may validly promulgate such rules or guidelines. The Supreme Court and all inferior courts, after all, have the sacred duty "to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers."[128]

Based on the issues discussed above, it is high time that a set of rules or guidelines on the grant of furlough be promulgated to address questions of equal protection and to help the State implement a more effective and efficient penal system that is impartial and is equally applied to all persons deprived of liberty, directed towards practical and achievable correctional goals.

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[127] *See supra* Part I.D.

[128] *In re* Ilagan, G.R. No. 70748, 139 SCRA 349, 405, Oct. 21, 1985.