

# COVID-19 EVENTS AS *FORCE MAJEURE* IN THE POSTPONEMENT OR DECLARATION OF FAILURE OF PHILIPPINE ELECTIONS\*

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## ABSTRACT

This Article assesses how an event attributable to the COVID-19 pandemic may be classified by the Commission on Elections (COMELEC) as *force majeure* for purposes of postponing or declaring a failure of elections in the Philippines. The prospect of deferring the elections has become more relevant in the country as the 2022 national and local elections (“2022 NLE”) drew near amid the COVID-19 pandemic. While the 2022 NLE concluded without delay or postponement, the COVID-19 pandemic persisted. This Article would be relevant in future instances where another pandemic or a similar event may threaten the conduct of forthcoming elections. The Omnibus Election Code (“OEC”) authorizes the COMELEC to postpone or declare a failure of election on account of *force majeure*, among other causes, when such cause complies with the qualifying circumstances provided therein. Philippine election law adopted the concept of *force majeure* in civil law, where it is invoked for exemption from civil liabilities, a purpose that is completely different from suspending elections. This Article thus examines the principles of *force majeure* in civil law to determine which principles may be applied in resolving to postpone or declare a failure of election. In doing so, this Article proposes a framework which the COMELEC may use in deciding whether to postpone or declare a failure of election due to a specific event related to COVID-19 considered as *force majeure*. The framework involves the identification of the specific event related to COVID-19, classifying it as either *force majeure* or not, and if so, the determination of whether the event is qualified by any of the circumstances mentioned in the relevant provisions of the OEC.

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## INTRODUCTION

Law has many fields that, although distinct from one another, are not entirely separate. At times, they coexist, with one field sometimes adopting concepts and principles found in another field.<sup>1</sup> This Article illustrates such overlap, specifically between civil law and election law, by relating the COVID-19 pandemic to the principle of *force majeure* in the context of postponing and declaring failure of elections in the Philippines.

While scholars in civil law associate COVID-19 with *force majeure* to determine whether the pandemic may excuse civil liability,<sup>2</sup> authors in election law focus on how COVID-19 is becoming a new threat to the regular conduct of elections.<sup>3</sup> Maintaining the regularity of elections has transformed into a worldwide concern, as the pandemic forced many democracies across the globe to suspend their elections.<sup>4</sup> In the Philippines, such a concern had become more and more relevant<sup>5</sup> as the 2022 National and Local Elections (“2022 NLE”) was fast approaching.<sup>6</sup>

Through the Omnibus Election Code (“OEC”), the Philippine Congress has delegated to the Commission on Elections (COMELEC)—the government institution primarily tasked to conduct and regulate national and local elections<sup>7</sup>—the authority to postpone or declare a failure of election under

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<sup>1</sup> See, e.g., Calvin Liang, *The Application of Administrative Law Principles in Private Law: The Case for Convergence*, 2020 SING. J. LEGAL STUD. 427 (2020).

<sup>2</sup> E.g., Stacy W. Harrison & Ryan D. Booms, *Drafting Force Majeure Clauses amid COVID-19*, 43 L.A. LAW. 10 (2020); Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020); Robert L. Gegios & Lance Duroni, *The Legal Domino Effect: COVID-19 & Contracts*, 93 WIS. LAW. 12 (2020); Muhammad Yar Lak, *The Impact of Covid-19 on Contractual Rights and Obligations in Pakistan*, 7 LUMS L.J. 1 (2020); Petruta-Elena Ispas, *Exonerat on from Civil Liability. Force Majeure and the Fortuitous Event*, 2020 CONF. INT’L DR. 549 (2020); Czar Matthew Gerard Dayday & Amer Madcasim Jr., *(Un)Fortuitous Event: The COVID-19 Pandemic as a Fortuitous Event*, 93 (Special Online Feature) PHIL. L.J. 71 (2020).

<sup>3</sup> See, generally, Richard Briffault, *COVID-19 and the Law: Elections*, in LAW IN THE TIME OF COVID-19 (Katharina Pistor ed., 2020); Douglas Mains & Kevin Blair, *Political Processes during a Pandemic: How COVID-19 Has Changed and Will Change Michigan’s Elections*, 99 MICH. B.J. 28 (2020); Richard Briffault, *Election Law Localism in the Time of COVID-19*, 2020 U. CHI. L. REV. ONLINE 11 (2020).

<sup>4</sup> See International Institute for Democracy and Electoral Assistance [hereinafter “IIDEA”], *Global Overview Of COVID-19 Impact On Elections*, at <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (last visited July 2, 2022).

<sup>5</sup> See, generally, *2022 poll postponement over pandemic threat up to Duterte, Congress – Comelec*, CNN PHIL., Sept. 24, 2020, at <https://cnnphilippines.com/news/2020/9/24/postponement-of-2022-elections-up-to-duterte-congress.html>.

<sup>6</sup> Election day was scheduled for Monday, May 9, 2022, per COMELEC Res. No. 10695 (2021).

<sup>7</sup> See, generally, CONST. art. IX(C).

specific circumstances.<sup>8</sup> Pursuant to the OEC, the COMELEC shall postpone an election if, among other reasons, there is an event considered as *force majeure* of such a nature that the holding of a free, orderly, and honest election should become impossible in any political subdivision.<sup>9</sup> On the other hand, the COMELEC shall declare the failure or suspension of an election if, on account of *force majeure*, among other causes, the election in any polling place has not been held on the date fixed, or has been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election.<sup>10</sup>

There is no definition of *force majeure* exclusive to Philippine election law, which merely borrowed the concept in civil law. The Civil Code defines *force majeure* as (1) any unforeseen event, or (2) one that could be foreseen but was inevitable.<sup>11</sup> Adopting this definition, one author claims that the pandemic should not be deemed *force majeure*.<sup>12</sup> Supposedly, with more than two years of lead time to address the public health crisis, the COVID-19 pandemic can no longer be considered unforeseen.<sup>13</sup>

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<sup>8</sup> ELECT. CODE, §§ 5, 6 & 45; Rep. Act No. 6679 (1988), § 2. An Act to Amend Republic Act No. 6653 to Postpone the Barangay Elections to March 28, 1989, Prescribing Additional Rules Governing the Conduct of Barangay Elections and for Other Purposes.

<sup>9</sup> ELECT. CODE, § 5. “Sec. 5. Postponement of election. – When for any serious cause such as violence, terrorism, loss or destruction of election paraphernalia or records, *force majeure*, and other analogous causes of such a nature that the holding of a free, orderly and honest election should become impossible in any political subdivision, the Commission, motu proprio or upon a verified petition by any interested party, and after due notice and hearing, whereby all interested parties are afforded equal opportunity to be heard, shall postpone the election therein to a date which should be reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause for such postponement or suspension of the election or failure to elect.”

<sup>10</sup> § 6. “Sec. 6. Failure of election. – If, on account of *force majeure*, violence, terrorism, fraud, or other analogous causes the election in any polling place has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of a verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect.”

<sup>11</sup> CIVIL CODE, art. 1174.

<sup>12</sup> *E.g.*, Emil Marañon III, [EXPLAINER] *Can we postpone the 2022 elections?*, RAPPLER, Sept. 25, 2020, at <https://www.rappler.com/voices/thought-leaders/explainer-can-philippines-postpone-2022-elections>.

<sup>13</sup> *Id.*

However, this argument may have (1) overlooked the second definition of *force majeure* and (2) oversimplified the pandemic as a single event.

First, an event, even if foreseeable, may still be considered *force majeure* if it is proven to be unavoidable.<sup>14</sup> Suppose the COMELEC had foreseen the chance that a deadlier and more contagious variant of SARS-CoV-2 might occur and spread in the future. Unfortunately, despite COMELEC's best efforts to prepare for contingencies, a deadlier variant still did spread nationwide on or around election day, threatening the health and safety of many voters. The COMELEC may have foreseen the occurrence of the deadlier variant, but since it could not avoid the occurrence despite its best efforts, it may still consider the event as *force majeure*.<sup>15</sup>

Second, the COVID-19 pandemic is not simply one, indivisible occurrence.<sup>16</sup> Besides the outbreak and spread of the virus, the pandemic involves other specific events that are the factual or legal effects of the public health crisis.<sup>17</sup> Factual effects may involve illness or quarantine, death of key personnel, production facility closures, or interruption of supply chains.<sup>18</sup> Legal effects may relate to lockdowns, curfews, travel restrictions, and other measures by governments and public authorities issued in reaction to the crisis.<sup>19</sup>

Instead of focusing on the COVID-19 pandemic as a whole, one should analyze the specific events accompanying it in determining *force majeure* since each one may merit a different treatment. Consider this illustration: The COMELEC could already foresee the further spread of existing variants of COVID-19, and it could avoid such spread on election day through careful planning and proper execution of health protocols on every precinct. Hence, the COMELEC may not consider the spread as *force majeure*. On the other hand, suppose the national government imposes a total nationwide lockdown on election day considering the spread of a deadlier, or more contagious, or vaccine-resistant variant. The COMELEC could not foresee the spread of the deadlier variant, nor could it avoid the lockdown. While being part of the government, it has no mandate or

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<sup>14</sup> Phil. Comm. Satellite Corp. v. Globe Telecom, Inc., G.R. No. 147324, 429 SCRA 153, 163, May 25, 2004; *See also* ROMMEL CASIS, ANALYSIS OF PHILIPPINE LAW AND JURISPRUDENCE ON TORTS AND QUASI-DELICTS 263, (2012).

<sup>15</sup> This hypothetical example, as well as the subsequent ones, is used only to prove a point. In the real world, other factors may affect the scenarios given, which may merit a different interpretation.

<sup>16</sup> Compare Klaus Peter Berger & Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, 6 MCGILL J. DISP. RESOL. 76, 91 (2019-2020).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

control over such order. Hence, the COMELEC may consider the spread and the lockdown as *force majeure*. As can be surmised, all those occurrences are attributable to the COVID-19 pandemic, but not all of them are *force majeure*.

Considering the foregoing discussion, the issue must be reframed: How may the COMELEC consider *force majeure* an event attributable to the COVID-19 pandemic, then use it to justify the postponement or the declaration of a failure of election?

Answering this question requires an examination of relevant principles in both civil and election laws. Part I traces the conceptual origins of *force majeure* and fortuitous event, as well as their adoption and evolution in the Philippine legal system. This includes an examination of the requisites for the application of fortuitous event in liability cases. It ends with a discussion on the relationship between *force majeure* and fortuitous event, and on how Philippine jurisprudence has come to regard them as conceptually identical terms.

Part II presents the apparent threat of the COVID-19 pandemic to the conduct of the 2022 NLE. It examines the relevant rules that empower the COMELEC to postpone and declare a failure of election on account of various causes, including *force majeure*.

Part III seeks to combine the relevant principles of *force majeure* and the appropriate provisions of the OEC toward a framework that may guide the COMELEC in deciding whether to postpone or declare a failure of election due to an event attributable to COVID-19.

This Article concludes with a summary of the framework and a discussion of its scope and limitations, as well as a stance in promoting the regularity of elections.

## I. CONVERGENCE OF TWO CONCEPTS

Providing a sensible assessment on the suspension of elections due to *force majeure* requires a thorough understanding of this concept, the principles tied to it, and its place in the Philippine legal system in comparison with other analogous concepts. This Part revisits the historical and comparative development of *force majeure* and fortuitous event—two related principles frequently discussed, compared, and applied in Philippine jurisprudence.

### A. Origins of *Force Majeure* and Fortuitous Event

The general rule is that contracts should be complied with in good faith.<sup>20</sup> An exception to this rule is rooted in the Latin maxim “*actus dei nemini nocet*” (the act of God does injury to no one).<sup>21</sup> From such an assertion, the conceptions of fortuitous event and *force majeure* (as well as *actus dei, vis major, caso fortuito*, and *fuerza mayor*) have come to light in the transactions of private persons.<sup>22</sup>

Literally translating to “superior force,”<sup>23</sup> the term “*force majeure*” originated in French Law, which, in turn, derived the concept from the Roman Law term “*vis major*.”<sup>24</sup> In Roman Law, the *vis major* principle served as a limit to the liability imposed on bailees of lands, ship captains for goods entrusted to them, and innkeepers and stable owners for premises in their custody.<sup>25</sup>

*Force majeure* eventually appeared as a legal term in the French Civil Code (*Code Napoléon* or *Code Civil*) of 1804, which included *force majeure* as an excuse to contractual performance:<sup>26</sup>

There is no occasion for damages and interest when, in consequence of a *force majeure* or an accident (‘cas fortuit’), the debtor has been prevented from conveying or doing that to which he was obliged or has done what he was debarred from doing.<sup>27</sup>

Meanwhile, the concept of fortuitous event arose from the Latin maxim “*lex non cogit impossibilia*” (the law does not require the impossible).<sup>28</sup> Furthermore, the concept has been associated with the terms “*cas fortuit*,”<sup>29</sup> “*caso fortuito*,”<sup>30</sup> “*casus fortuitus*,”<sup>31</sup> and “act of God.”<sup>32</sup> *Cas fortuit* also appears in Article 1148 of the French Civil Code, but the expression “*force majeure*” has, in contractual

<sup>20</sup> CIVIL CODE, art. 1159.

<sup>21</sup> Rogelio Subong, *Fortuitous Event: An Act of God or A Curse of Heaven?*, 222 SCRA 428, 433 (1993).

<sup>22</sup> *Id.* at 432.

<sup>23</sup> Klaus, *supra* note 17, at 90.

<sup>24</sup> Robert Lombardi, *Force Majeure in European Union Law*, 3 INT’L. TRADE & BUS. L. ANN. 81, 82 (1997).

<sup>25</sup> *Id.*

<sup>26</sup> Klaus, *supra* note 17, at 93.

<sup>27</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1148 (Fr.); cited in Lombardi, *supra* note 24, at 83.

<sup>28</sup> RUBEN BALANE, JOTTINGS AND JURISPRUDENCE ON CIVIL LAW (OBLIGATIONS AND CONTRACTS) 101 (2020 ed.).

<sup>29</sup> J. Denson Smith, *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, 45 YALE L. J. 452, 452 (1936).

<sup>30</sup> Subong, *supra* note 21, at 429.

<sup>31</sup> CYCLOPEDIA OF LAW AND PROCEDURE [hereinafter “Cyclopedia”], 701 (William Mack & Howard P. Nash eds., 1901–1912).

<sup>32</sup> Subong, *supra* note 21, at 430.

matters, “virtually supplanted the former in French jurisprudence.”<sup>33</sup> *Caso fortuito* is a Spanish term, which Article 1105 of Law 11, Title 33, Partida 7 defines as “[a]n event that takes place by accident and could not have been foreseen. Examples of this are destruction of houses, unexpected fire, shipwreck, [and] violence of robbers.”<sup>34</sup>

*Casus fortuitus*, on the other hand, refers to “[a] fortuitous or accidental event; an inevitable accident; an event occurring without the intervention of human agency, and producing a loss in spite of all human effort or sagacity.”<sup>35</sup> Lastly, the *Corpus Juris Secundum* defines an *act of God* as “any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains or care, reasonably to have been expected, could have been prevented.”<sup>36</sup>

## B. Arrival and Evolution in the Philippine Legal System

### 1. *Force Majeure*

*Force majeure* was already present in the Philippine legal system even before the American colonization of the country.<sup>37</sup> The Spanish Civil Code of 1889, which had been enforced in the country during the Spanish colonization and until the present Civil Code took effect,<sup>38</sup> contained several provisions qualifying civil liability with *fuereza major*.<sup>39</sup>

Nevertheless, *force majeure* first appeared in Philippine case law<sup>40</sup> at almost the same time as the arrival of constitutionalism and common law in the

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<sup>33</sup> Smith, *supra* note 29, at 452.

<sup>34</sup> *Lasam v. Smith* [hereinafter “*Lasam*”], 45 Phil. 657, 661, Feb. 2, 1924.

<sup>35</sup> CYCLOPEDIA, *supra* note 31.

<sup>36</sup> *Nakpil & Sons v. Ct. of Appeals* [hereinafter “*Nakpil*”], G.R. No. 47851, 144 SCRA 596, 606, Oct. 3, 1986;  *citing* 1 CJS 1423.

<sup>37</sup> On December 10, 1898, Spain ceded the Philippine Islands to the United States through the Treaty of Paris, paving the way for the US to colonize the country.

<sup>38</sup> The Civil Code took effect on Aug. 30, 1950. *See Garingan v. Garingan* [hereinafter “*Garingan*”], G.R. No. 144095, 455 SCRA 480, 486, Apr. 12, 2005.

<sup>39</sup> *See* CIVIL CODE (1889) art. 1602, 1625, 1784, 1905 & 1908; *See also* art. 457 & 1777, which also mention *fuereza major* but does not qualify liability.

<sup>40</sup> In this Article, I refer to “Philippine case law” as the collection of binding decisions promulgated by the Supreme Court of the Philippines since its establishment on June 11, 1901 through Act No. 136.

Philippines.<sup>41</sup> The case alluded to is *Brillantes v. Brillantes*,<sup>42</sup> promulgated in 1902, just a few years following American colonization over the country. In this case, the appeal of Manuel Brillantes was declared abandoned due to the expiration of his right to prosecute his appeal for more than two years. Brillantes then asked the Supreme Court to restore his appeal, alleging that *force majeure*, specifically war, prevented him from prosecuting his appeal. The Court denied his request and held:

[Brillantes] has not proven, nor has he even offered to prove, that he was prevented from prosecuting his appeal before the expiration of the term of two years by *force majeure*, or by any cause independent of his own will.<sup>43</sup>

The Court made no extensive discussion or citations, on the concept of *force majeure* in its decision. Yet this case is still significant for three reasons. First, as already mentioned, *force majeure* first appeared in Philippine jurisprudence through this case. Second, it was invoked not to escape a civil liability under civil law (which is the usual purpose of the concept in Philippine jurisprudence<sup>44</sup>), but rather to restore a dismissed appeal under remedial law. Third, through this case, Philippine jurisprudence first recognized the principle that it is not enough to simply attribute an event as *force majeure* to call for its application. As the Court ruled, parties raising *force majeure* must still prove that it *prevented* them from prosecuting their appeal.

In *Pons y Compañia v. La Compañia Maritima*,<sup>45</sup> the Court first extensively discussed the principle of *force majeure*. In this case, a portion of goods, wares, and merchandise were submerged in water in the hold of a commercial ship and were practically destroyed. *La Compañia Maritima*, the owner of the ship, tried to escape liability over the destroyed goods by arguing that the damages were

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<sup>41</sup> See, generally, PACIFICO AGABIN, *MESTIZO: THE STORY OF THE PHILIPPINE LEGAL SYSTEM* 174 (2011). Agabin traces the “coming” of “Constitutionalism and Common Law” in the Philippines to the year 1900 when President William McKinley instructed then District Judge William Howard Taft, as head of the Philippine Commission, to “impose” upon the Philippine government “the inviolable rule that no person shall be deprived of life, liberty or property without due process of law.” While Agabin did not expressly mention whether the Instructions definitively marked the formalization of Constitutionalism and Common Law in Philippine legal system, he said, “There is no doubt that the [due process] rule carried with it all the case law laid down by the US. Even the manner of its interpretation in the Philippines was laid out along a narrow, undeviating path of the common law.” *Id.* at 174–75.

<sup>42</sup> [Hereinafter “*Brillantes*”], 1 Phil. 533 (1902).

<sup>43</sup> *Id.* at 534.

<sup>44</sup> See Subong, *supra* note 21.

<sup>45</sup> 9 Phil. 125 (1907).



not caused by its negligence, but by circumstances over which it had no control, i.e., “*fuera mayor*.”<sup>46</sup> The Court, however, held La Compañía liable and ruled:

We are satisfied from an examination of the record brought to this court that the damages occasioned were not of such a character as to be characterized as *force majeure*. Where the officers of a vessel fail to make such frequent inspection of their ship as to discover the existence of rusted parts, from which injuries to cargo result, we are of the opinion that such injuries can not [*sic*] be attributed to *force majeure*, but rather to the negligence of the officials of such ship.<sup>47</sup>

The Court examined Spanish and American authorities defining *force majeure*<sup>48</sup> and concluded that the jurisprudences of these two countries “practically agree”<sup>49</sup> upon the meaning of this phrase. From these definitions, the Court concluded that *force majeure* “generally applies, broadly speaking, to natural accidents, such as those caused by lightning, earthquake, tempests, [and] public enemy, etc.”<sup>50</sup>

The Civil Code, which took effect on August 30, 1950,<sup>51</sup> repealed the Civil Code of 1889.<sup>52</sup> The present Civil Code also mentions the term *force majeure* in several provisions that qualify civil liability.<sup>53</sup>

## 2. *Fortuitous Event*

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<sup>46</sup> *Id.* at 128.

<sup>47</sup> *Id.* at 129.

<sup>48</sup> *Id.* at 129–130. “Blackstone, in his Commentaries on English Law, defines it as—¶ ‘Inevitable accident or casualty; an accident produced by any physical cause which is irresistible; such as’ lightning, tempest, perils of the sea, inundation, or earthquake; the sudden illness or death of a person.’ (2 Blackstone’s Commentaries, 122; Story on Bailments, sec. 25.) ¶ Escriche, in his *Diccionario de Legislation y Jurisprudential* defines *fuera mayor* as follows: ¶ ‘The event which we could neither foresee nor resist; as, for example, the lightning stroke, hail, inundation, hurricane, public enemy, attack by robbers; *Vis major est*, says Cayo, *ea quæ consilio humano neque provideri neque vitari potest*. Accident and mitigating circumstances.’ ¶ Bouvier defines the same as—¶ ‘Any accident due to natural causes, directly, exclusively without human intervention, such as could not have been prevented by any kind of oversight, pains, and care reasonably to have been expected.’ (Law Reports, 1 Common Pleas Division, 423; Law Reports, 10 Exchequer, 255.) ¶ Cockburn, chief justice, in a well-considered English case (1 Common Pleas Division, 34, 432), said that where a captain—¶ ‘Uses all the known means to which prudent and experienced captains ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major*.’”

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Garingan*, 455 SCRA 480, 486.

<sup>52</sup> CIVIL CODE, art. 2270(1).

<sup>53</sup> See arts. 1990, 2000, 2001, 2183, 2191.

Fortuitous event (*caso fortuito*) has a definition laid down in the Civil Code of 1889:

ARTICLE 1105. No one shall be liable for *events which could not be foreseen or which, even if foreseen, were inevitable*, with the exception of the cases in which the law expressly provides otherwise and those in which the obligation itself imposes such liability.<sup>54</sup>

Accordingly, a fortuitous event is one that could not be foreseen or was inevitable. The clause, “with the exception of the cases in which the law expressly provides otherwise and those in which the obligation itself imposes such liability,” does not form part of the definition of fortuitous event, but only limits the applicability of the principle as a defense for exoneration.<sup>55</sup> Hence, the obligor is still liable if the law or the obligation imposes a liability despite the presence of a fortuitous event.<sup>56</sup>

The Court first discussed the Article 1105 definition in *Lasam v. Smith*.<sup>57</sup> By looking at Spanish authorities,<sup>58</sup> the Court concluded that “some extraordinary circumstance independent of the will of the obligor, or of his

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<sup>54</sup> CIVIL CODE (1889), art. 1105; translated in *Balane*, *supra* note 28, at 102. (Emphasis supplied.)

<sup>55</sup> See Subong, *supra* note 21, at 433.

<sup>56</sup> *Id.*

<sup>57</sup> *Lasam*, 45 Phil. 657. Prior to the promulgation of this case, however, fortuitous event was already the subject matter of decisions in jurisprudence. See *Baer Senior & Co. v. Compañía Marítima*, 6 Phil. 215 (1906); *Yap Kim Chuan v. Tiaoqui.*, 31 Phil. 433 (1915); *Ong Jang Chuan v. Wise & Co.*, 33 Phil. 339 (1916); *De la Cruz v. Fabie.*, 35 Phil. 144 (1916); and *University of Santo Tomas v. Descals.*, 38 Phil. 267 (1918).

<sup>58</sup> *Id.* at 660–61. “The Spanish authorities regard the language employed as an effort to define the term *caso fortuito* and hold that the two expressions are synonymous. (Manresa, *Comentarios al Código Civil Español*, vol. 8, pp. 88 *et seq.*; Scævola, *Código Civil*, vol. 19, pp. 526 *et seq.*) ¶ The antecedent to Article 1105 is found in Law 11, Title 33, Partida 7, which defines *caso fortuito* as ‘ocasión que acaese por aventura de que non se puede ante ver. E son estos, derrivamientos de casas e fuego que se enciende a so ora, e quebrantamiento de navio, fuerca de ladrones\*\*\* (An event that takes place by accident and could not have been foreseen. Examples of this are destruction of houses, unexpected fire, shipwreck, violence of robbers. \* \* \*)’ ¶ Escriche defines *caso fortuito* as ‘an unexpected event or act of God which could neither be foreseen nor resisted, such as floods, torrents, shipwrecks, conflagrations, lightning, compulsion, insurrections, destruction of buildings by unforeseen accidents and other occurrences of a similar nature.’ ¶ In discussing and analyzing the term *caso fortuito* the *Enciclopedia Jurídico, Española* says: ‘In a legal sense and, consequently, also in relation to contracts, a *caso fortuito* presents the following essential characteristics: (1) The cause of the unforeseen and unexpected occurrence, or of the failure of the debtor to comply with his obligation, must be independent of the human will. (2) It must be impossible to foresee the event which constitutes the *caso fortuito*, or if it can be foreseen, it must be impossible to avoid. (3) The occurrence must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner. And (4) the obligor (debtor) must be free from any participation in the aggravation of the injury resulting to the creditor.’ (5 *Enciclopedia Jurídica Española*, 309.)”

employees, is an essential element of a *caso fortuito*.<sup>59</sup> Applying the definition to the case in question, the Court ruled that an accident caused either by defects in the automobile or through the negligence of its driver is not a *caso fortuito*.

When the present Civil Code took effect, its Article 1174 superseded Article 1105 of the Spanish Civil Code and has since become the basis for the definition of fortuitous event, thus:

ARTICLE 1174. Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable.

The new Article 1174 adds another limitation to the application of fortuitous event, which is when the nature of the obligation requires the assumption of risk. Even so, the definition of fortuitous event remains the same—it refers to events that could not be foreseen or were inevitable. Interpreting this definition, the Court in *Republic v. Luzon Stevedoring Corp.*<sup>60</sup> rationalized that the event must be impossible, not merely difficult, to foresee or avoid.<sup>61</sup>

### 3. Elements of Fortuitous Event as a Defense

We proceed to trace and review the development of the elements for raising the defense of fortuitous event under Article 1174. This review emphasizes the distinction between determining the nature of fortuitous event, on the one hand, and ascertaining whether to invoke it as a defense, on the other. This distinction becomes important in the discussion of the framework proposed in Part III.

In *Austria v. Court of Appeals*,<sup>62</sup> the Court enumerated the following elements:

It is recognized in this jurisdiction that to constitute a *caso fortuito* that would exempt a person from responsibility, it is necessary that (1) the event must be independent of the human will (or rather, of the debtor's or obligor's); (2) the occurrence must render it impossible for the debtor to fulfill the obligation in a normal manner; and that (3) the

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<sup>59</sup> *Id.* at 661–62.

<sup>60</sup> [Hereinafter “*Luzon Stevedoring*”], G.R. No. 21749, 21 SCRA 279, Sept. 29, 1967.

<sup>61</sup> *Id.* at 283.

<sup>62</sup> [Hereinafter “*Austria*”], G.R. No. 29640, 39 SCRA 527, June 10, 1971.

obligor must be free of participation in, or aggravation of, the injury to the creditor.<sup>63</sup>

In presenting the above elements, the Court cited the *Lasam* case, which, in turn, cited the essential characteristics of *caso fortuito* in the *Enciclopedia Jurídica Española*.<sup>64</sup> While the Court merely cited such characteristics in *Lasam* as *obiter*, it adopted the elements into a doctrine in *Austria*. In doing so, the Court made two conspicuous changes.

First, the Court included a qualifier in its statement of the elements. Specifically, while the *Enciclopedia* only mentioned, “a *caso fortuito* presents the following essential characteristics,” the Court in *Austria* stated, “to constitute a *caso fortuito* that would exempt a person from responsibility.”

Second, the Court in *Austria* excluded in its elements one essential characteristic of *caso fortuito* in *Enciclopedia*, i.e., “(2) [i]t must be impossible to foresee the event [that] constitutes the *caso fortuito*, or if it can be foreseen, it must be impossible to avoid.”<sup>65</sup> Notably, this essential characteristic is the very definition of fortuitous event under Article 1174.

This begs the question: Why has the Court in *Austria* made such inclusion and exclusion at the same time? It seems that this is intentional, as the Court deemed that the elements as enumerated in *Austria* are for the purpose of availing the defense of fortuitous event, not for defining fortuitous event *per se*. Determining whether an occurrence is considered a fortuitous event on the one hand, and invoking the latter as a defense to escape liability on the other, are two different endeavors.<sup>66</sup> Should one desire to know if an occurrence is a fortuitous event, they need to look at the definition under Article 1174, and ask whether the occurrence is impossible to foresee or avoid. On the other hand, if one needs to know whether one may avail of the principle of fortuitous event as a defense to escape liability, they must also look at other principles of fortuitous event as established in jurisprudence. As *Casis* explains:

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<sup>63</sup> *Id.* at 530.

<sup>64</sup> *Lasam*, 45 Phil. 657, 661. “In discussing and analyzing the term *caso fortuito* the *Enciclopedia Jurídica Española* says: ‘In a legal sense and, consequently, also in relation to contracts, a *caso fortuito* presents the following essential characteristics: (1) The cause of the unforeseen and unexpected occurrence, or of the failure of the debtor to comply with his obligation, must be independent of the human will. (2) It must be impossible to foresee the event which constitutes the *caso fortuito*, or if it can be foreseen, it must be impossible to avoid. (3) The occurrence must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner. And (4) the obligor (debtor) must be free from any participation in the aggravation of the injury resulting to the creditor.’ (5 *Enciclopedia Jurídica Española*, 309.)”

<sup>65</sup> *Id.*

<sup>66</sup> *Casis*, *supra* note 14, at 264–65.

To illustrate, if an injury is caused by an earthquake, the defendant may still be held liable if the injury was caused by his negligence, which coincided with the earthquake. But the fact that the defendant cannot raise the fortuitous event defense does not make an earthquake any less of a fortuitous event. An earthquake will always be a fortuitous event not unless it is caused by human acts. But whether that fortuitous event can be available as a defense for an actor sought to be held liable for an injury is another matter altogether.<sup>67</sup>

To bolster this interpretation of the Court's intention, I refer to its own explanation and examples of what exactly is the nature of a fortuitous event:

A fortuitous event, therefore, can be produced by nature, e.g., earthquakes, storms, floods, etc., or by the act of man, such as war, attack by bandits, robbery, etc., provided that the event has all the characteristics enumerated above.<sup>68</sup>

At first blush, this seems to rebut the interpretation given the phrase "provided that the event has all the characteristics enumerated above," which is clearly referring to the cited elements. Taken literally, it would seem then that the Court intended the elements to only define the nature of fortuitous event. Nevertheless, a review of *Austria* in its entirety would clearly show how the Court used the elements it enumerated.

In this case, Guillermo Austria commissioned Maria Abad to sell a pendant containing diamonds or return it on demand. One night in 1961 in the City of Manila, while walking to her residence, Abad was said to have been accosted by two men, one of whom hit her on the face, while the other snatched her purse containing the pendant and ran away. Austria later sued Abad for failing to return the pendant or pay for its value. The trial court found Abad liable for being negligent by walking outside and carrying a valuable thing when it was already getting dark and without a companion. The Court of Appeals, however, relieved her from liability, declaring her "not responsible for the loss of the jewelry on account of a fortuitous event."<sup>69</sup> The Court upheld the decision of the Court of Appeals and absolved Abad.

In applying the elements, the Court held:

*The point at issue in this proceeding is how the fact of robbery is to be established in order that a person may avail of the exempting provision of Article 1174 of the new Civil Code[.]*

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<sup>67</sup> *Id.*

<sup>68</sup> *Austria*, 39 SCRA 527, 530.

<sup>69</sup> *Id.* at 529.

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*To avail of the exemption granted in law, it is not necessary that the persons responsible for the occurrence should be found or punished; it would only be sufficient to establish that the unforeseeable event, the robbery in this case, did take place without any concurrent fault on the debtor's part[.]*

It is undeniable that in order to completely exonerate the debtor for reason of a fortuitous event, such debtor must, *in addition to the casus itself, be free of any concurrent or contributory fault or negligence.*<sup>70</sup>

The Court ruled that Abad was not negligent as criminality in Manila in 1961 was not yet so high as to render “travel after nightfall a matter to be sedulously avoided without suitable precaution and protection.”<sup>71</sup> The Court thus applied the fortuitous-event defense in her case and exempted her from liability.

Clearly, the Court used the elements to determine whether Abad may invoke Article 1174 to escape liability, and not to define a fortuitous event. The emphasized phrases also indicate that the Court acknowledged the distinction between defining a fortuitous event and invoking it as a defense for exoneration.

In *Nakpil & Sons v. Court of Appeals*,<sup>72</sup> the Court also recognized the distinction between determining the existence of fortuitous event and raising it as a defense for exemption:

To exempt the obligor from liability under Article 1174 of the Civil Code, for a breach of an obligation due to an “act of God,” the following must concur: (a) the cause of the breach of the obligation must be independent of the will of the debtor; (b) the event must be either unforeseeable [*sic*] or unavoidable; (c) the event must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and (d) the debtor must be free from any participation in, or aggravation of the injury to the creditor.<sup>73</sup>

The Court reworded the elements for raising the fortuitous-event defense to cater specifically to breaches of obligation due to acts of God. More interestingly, the Court included the statutory definition of fortuitous event in

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<sup>70</sup> *Id.* at 530–32. (Emphasis supplied.)

<sup>71</sup> *Id.* at 532.

<sup>72</sup> *Nakpil*, 144 SCRA 596.

<sup>73</sup> *Id.* at 606.

the elements, clearly deviating from what it did in *Austria*.<sup>74</sup> Furthermore, this definition is enumerated before elements (c) and (d). This seems to indicate an intent of the Court to stress that before a party could raise the fortuitous event defense, they must first ascertain whether the subject occurrence is a fortuitous event. In other words, the determination of the existence of a fortuitous event is necessary and must precede the determination of its defense applicability.<sup>75</sup>

In *Metal Forming Corporation v. Office of the President*,<sup>76</sup> the Court changed again the phrasing in *Austria* and *Nakpil*, thus:

Article 1174 provides that subject to certain exceptions, no person shall be responsible for those events which could not be foreseen, or which though foreseen were inevitable. A fortuitous event presents the following characteristics: (a) the cause of the unforeseen and unexpected occurrence, or the failure of the debtor to comply with his obligations, must be independent of the human will; (b) it must be impossible to foresee the event which constitutes the *caso fortuito*, or if it can be foreseen, it must be impossible to avoid; (c) the occurrence must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and, (d) the obligor must be free from any participation in the aggravation of the injury resulting to the creditor.<sup>77</sup>

Notably, the Court did not omit the Article 1174 definition in the elements. What the Court omitted, however, was the qualifier “that would exempt a person from responsibility.” It is not clear how the Court in this case came to exclude the qualifier, as the above-quoted paragraph gave no citations in the *ponencia*. At first blush, it would seem that the Court had changed the purpose of the elements, from raising the defense of fortuitous event to simply defining the nature of a fortuitous event. Yet a reading of the entire decision would show that the Court still intended to use them to determine the existence of liability, and not to simply determine the existence of a fortuitous event.

It should be noted that the *Metal Forming* case is not a civil case, but is administrative in nature. Here, the Department of Trade and Industry (DTI) fined Metal Forming Corp. for misrepresenting the durability of its product, the *Banawe* metal tile.<sup>78</sup> The order came after Metal Forming had advertised that its

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<sup>74</sup> *Austria*, 39 SCRA 527, 530.

<sup>75</sup> See Casis, *supra* note 14, at 264–65.

<sup>76</sup> [Hereinafter “*Metal Forming*”], G.R. No. 111386, 247 SCRA 731, Aug. 28, 1995.

<sup>77</sup> *Id.* at 738.

<sup>78</sup> DTI based its order on Act No. 3740 (1930), § 3: “It shall be unlawful for any person, firm or corporation, either as principal or agent, in any handbill, billboard, sign, pamphlet, circular, projected lantern slides, or any other form of advertising whatsoever printed, displayed, or

product is “structurally safe and strong”<sup>79</sup> and “acts as a single unit against wind and storm pressure due to the strong hook action on its overlaps.”<sup>80</sup> Despite such representation, the complainants, who bought the tiles and got Metal Forming to install them on their roof, found that a typhoon blew away the tiles barely two months after installation. The Office of the President affirmed the decision of the DTI *in toto*. The lower court nevertheless averred that “under Art. 1174 of the Civil Code, [Metal Forming] should not be made responsible for the adverse consequences of a fortuitous event such as the typhoon which caused the section or portion of [complainants’] roof to be blown away.”<sup>81</sup>

The Court upheld the decisions of the Office of the President and the DTI, and denied the application of the fortuitous-event defense, as Metal Forming was found guilty of contributory negligence. Applying the above-quoted elements, the Court held:

Based on the foregoing, *in order that a fortuitous event may exempt a person from liability*, it is necessary that he be free from negligence. An act of God cannot be urged for the protection of a person who has been guilty of gross negligence in not trying to avert its results. When the negligence of a person concurs with an act of God in producing a loss, such person is not exempt from liability by showing that the immediate cause of the damage was the act of God.

*As correctly viewed by the Office of the President, although the occurrence of a typhoon is a fortuitous event which by itself might have exempted [Metal Forming] from liability to [complainants]—*

...it cannot efface the fundamental fact that [Metal Forming] acted in bad faith and/or with gross negligence in failing to deliver the necessary accessories for the proper installation of the structure x x x and actually installed inferior roofing materials at [complainants’] residence, in violation of the proper installation procedure expressly specified in the former’s brochures and advertisements for installation, i.e., the metal tile attached to the roof panels should be by two (2) self-drilling screws for one (1) metal cleat. However, instead of conforming with this procedure, [Metal Forming] attached some of the metal cleats with only one (1)-inch ordinary nail each and others were fastened with only one (1) wood screw each.

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circulated in the Philippines to misrepresent the character, value, properties or condition of any article offered or exposed for sale, barter, or exchange or of the materials of which said article is composed.”

<sup>79</sup> *Metal Forming*, 247 SCRA 731, 734.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 737.



As it turned out, the tiles were improperly installed thus contributing to the damage to private respondents' roof.<sup>82</sup>

Notably, the qualifier is still present in a different part of the decision, appearing as the first emphasized phrase in the above quotation. Moreover, the Court still recognized that determining a fortuitous event *per se*, and invoking it as a defense, are two different principles. This can be concluded from the second emphasized phrase, where the Court agreed with the Office of the President that the typhoon itself was a fortuitous event.

Subsequent cases that cited the elements in the *Metal Forming* case have also used them to determine the existence of liability rather than to simply define the nature of a fortuitous event.<sup>83</sup> The distinction thus stands to this day, and it gives both wisdom and caveat to anyone who encounters or intends to use the term “fortuitous event”: They must ascertain whether the term is used to refer only to the nature of a fortuitous event, or to the other principles regarding its applicability as a defense, as well.

### C. Convergence of the Two Concepts

A school of thought among civil law scholars holds that the differences between fortuitous event and *force majeure* are no longer relevant.<sup>84</sup> Accordingly, there should be no distinction between the two concepts, as the result of their application will be the same.<sup>85</sup>

Nevertheless, there have been various views on the distinctions between the two concepts across many jurisdictions.<sup>86</sup> A prevailing opinion among Roman law scholars is that circumstances of *force majeure* are not only unforeseeable, but also inevitable or irresistible (*vis cui resistit non potest*).<sup>87</sup> Among

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<sup>82</sup> *Id.* at 738–39. (Emphasis supplied.)

<sup>83</sup> *See, e.g.*, *Mindex Resources Dev. Corp. v. Morillo*, G.R. No. 138123, 379 SCRA 144, March 12, 2002; *Lea Mer Industries, Inc. v. Malayan Ins. Co., Inc.*, G.R. No. 161745, 471 SCRA 698, Sept. 30, 2005; *Sicam v. Jorge* [hereinafter “*Sicam*”], G.R. No. 159617, 529 SCRA 443, Aug. 08, 2007; and *Asset Privatization Trust v. T.J. Enterprises*, G.R. No. 167195, 587 SCRA 481, May 8, 2009.

<sup>84</sup> International Law Commission, “Force majeure” and “Fortuitous event” as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine - study prepared by the Secretariat, at 70, U.N. Doc. A/CN.4/315 (1978).

<sup>85</sup> Ispas Petruta-Elena, *Exoneration from Civil Liability. Force Majeure and the Fortuitous Event*, 2020 CONF. INT’L DR. 549, 556 (2020); *citing* IV D. ALEXANDRESCO, *PRINCIPILLE DREPTULUI CIVIL ROMAN* (1926).

<sup>86</sup> International Law Commission, *supra* note 84.

<sup>87</sup> *Id.* at 70.

civil law scholars, there are two theories maintaining the differences of the two concepts.<sup>88</sup>

The first theory differentiates the concepts based on foreseeability and inevitability.<sup>89</sup> Accordingly, fortuitous event refers to an event that could not be foreseen yet could still be avoided, while *force majeure* refers to one that could not be avoided, whether or not it could be foreseen.<sup>90</sup>

The second theory claims that while a fortuitous event occurs on the “internal” side of the circle of those affected by the obligation, *force majeure* takes place outside such circle and involves such “overwhelming violence” that cannot be expected in the normal course of everyday life.<sup>91</sup> In other words, “a fortuitous event may imply a cause of damage arising within the debtor's sphere of control (e.g. fire) that is relatively insurmountable. On the other hand, a *force majeure* event suggests an event outside that sphere (e.g. flood) that is ‘absolutely’ insurmountable.”<sup>92</sup>

The civilist Manresa, in his comments on the Civil Code of 1889, wrote:

The difference between the two concepts [i.e., *caso fortuito* and *fuereza mayor*] is simple: *caso fortuito*, as such, is independent not only of the debtor's will but of any human will; *fuereza mayor* proceeds from an inevitable occurrence or from an act, whether legal or illegal, of a person other than the debtor, which makes it impossible for the debtor to comply with his obligation.<sup>93</sup>

Be that as it may, there appears no debate on the relationship between *force majeure* and fortuitous event in Philippine jurisprudence. The *Luzon Stevedoring* case is clear on their relationship:

For *caso fortuito* or *force majeure* (which in law are identical in so far as they exempt an obligor from liability) by definition, are extraordinary events not foreseeable or avoidable, “events that could not be foreseen, or which, though foreseen, were inevitable” (Art. 1174, Civ. Code of the Philippines).<sup>94</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses*, 12 UNIF. L. REV. n.s. 101, 103 (2007).

<sup>93</sup> *Cited in Balane, supra note 28, at 102.*

<sup>94</sup> *Luzon Stevedoring*, 21 SCRA 279, 282–83.

This gives rise to two significant principles. First, insofar as they exempt liability, *force majeure* and fortuitous event are identical concepts within the Philippine jurisdiction. Hence, coming from the Spanish legal system that regarded them as distinct from each other (at least according to Manresa), *force majeure* and fortuitous event have evolved in Philippine jurisprudence to mean the same thing. Second, *force majeure* shares with fortuitous event the definition under Article 1174. It is no longer necessary for the Civil Code to provide a specific definition of *force majeure*, since jurisprudence has already ruled that it is likewise defined by Article 1174. All the elements and principles associated with fortuitous event shall also be attributable to *force majeure*, and *vice versa*.

## II. THE THREAT TO DEMOCRACY

After examining the concepts of *force majeure* and fortuitous event in civil law, we now shift our focus to election law. The task now is to discuss whether COVID-19 presents a threat to elections at a level that might lead to postponement or suspension, highlighting the relevant rules of Philippine election law.

### A. Is There a Threat?

The conduct of regular, periodic elections is viewed as one of the essential features of democracy.<sup>95</sup> Holding regular elections ensures that government authority continues to reflect the will of the people.<sup>96</sup> This view is recognized under Article 21(3) of the Universal Declaration of Human Rights<sup>97</sup> and Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR).<sup>98</sup>

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<sup>95</sup> Toby S. James & Sead Alihodzic, *When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations*, 19 ELECT. L. J. 344, 344 (2020); citing ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971); ADAM PRZEWORSKI, *Minimalist Conception of Democracy: A Defence*, in DEMOCRACY'S VALUE (Ian Shapiro & Casiano Hacker-Cordon eds. 1999).

<sup>96</sup> UNITED NATIONS CENTER FOR HUMAN RIGHTS, HUMAN RIGHTS AND ELECTIONS: A HANDBOOK ON THE LEGAL, TECHNICAL AND HUMAN RIGHTS ASPECTS OF ELECTIONS 11 (1994).

<sup>97</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21(3) (Dec. 10, 1948). "The will of the people shall be the basis of the authority of government; this will shall be expressed in *periodic* and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." (Emphasis supplied.)

<sup>98</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 25(b), (Dec. 16, 1966). "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions [. . .] (b) To vote and to be elected at genuine *periodic elections* which shall be by universal and equal suffrage and shall be

Nevertheless, Article 4(1) of the ICCPR likewise states that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation[.]”<sup>99</sup> This reflects the humanitarian case for delaying the conduct of elections when there is an immediate threat to life and security.<sup>100</sup> As James and Alihodzic point out, “[h]olding elections when they might jeopardize lives would [...] be a counterintuitive use of institutions designed to facilitate individual and collective preservation.”<sup>101</sup>

The COVID-19 pandemic had been making it difficult to maintain the regularity of elections across the globe.<sup>102</sup> Between February 21, 2020 and February 21, 2022, the pandemic had caused the suspension of national and subnational elections in at least 80 countries and territories, of which 42 have decided to postpone national elections and referenda.<sup>103</sup> Nevertheless, in the same period, at least 160 countries and territories pushed through with their elections, of which at least 130 held national elections or referenda.<sup>104</sup> At least 65 countries and territories held elections initially postponed, of which at least 33 have held national elections or referenda.<sup>105</sup> Furthermore, among 108 countries that held their national elections and referenda in 2020 to 2021, 71 reflected a decline in voter turnout (10.01% mean decline), while 37 showed an increased turnout (8.35% mean increase).<sup>106</sup>

In the Philippines, the 2022 NLE took place on May 9, 2022 as scheduled.<sup>107</sup> At stake were almost all the elective positions in the executive and legislative branches of the national government and the local government

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held by secret ballot, guaranteeing the free expression of the will of the electors.” (Emphasis supplied.)

<sup>99</sup> Art. 4(1).

<sup>100</sup> James & Alihodzic, *supra* note 95, at 348.

<sup>101</sup> *Id.*

<sup>102</sup> See IDEEA, *supra* note 4.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Change in voter turnout in each country was computed by comparing the turnout in the elections held between 2020 and 2021 to the average turnout in the elections held between 2008 and 2019.

<sup>107</sup> COMELEC Res. No. 10695 (2021).

units.<sup>108</sup> Only the elections for positions in the barangay<sup>109</sup> and the *sangguniang kabataan* (SK)<sup>110</sup> will take place later, on December 5, 2022.<sup>111</sup>

As the 2022 NLE approached, and considering the continuing threat of the COVID-19 pandemic, ideas had been floated on whether the elections should push through.<sup>112</sup> On September 24, 2020, during the deliberations in the House of Representatives on the proposed 2021 budget of the COMELEC, Representative Mikey Arroyo asked COMELEC officials if they have ever considered postponing the elections.<sup>113</sup> COMELEC Chairperson Sheriff Abas answered: “No, we have not considered it. Because we know this is a constitutional mandate and it is fixed.”<sup>114</sup> The COMELEC also assured the public of its readiness for the elections despite the threat of COVID-19.<sup>115</sup>

On May 9, 2022, amidst the pandemic, more than 55.5 million Filipinos cast their votes for the 2022 NLE, constituting 82.6% of the 65.7 million registered voters—the highest voter turnout in Philippine history.<sup>116</sup> There were no reports of widespread postponement or failure of elections, although the COMELEC declared failure of elections in 14 barangays within the province of

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<sup>108</sup> Local government units include the provinces, cities, municipalities, barangays and the Bangsamoro government. *See, generally*, LOCAL GOV'T CODE, Bk. III; Rep. Act No. 11054 (2018).

<sup>109</sup> The barangay is the basic political unit of government in the Philippines. *See* LOCAL GOV'T CODE, § 384. “As the basic political unit, the barangay serves as the primary planning and implementing unit of government policies, plans, programs, projects, and activities in the community, and as a forum wherein the collective views of the people may be expressed, crystallized and considered, and where disputes may be amicably settled.”

<sup>110</sup> In every barangay, there is a *Sangguniang Kabataan* composed of a chairperson and seven (7) members who are elected by the registered voters of the Katipunan ng Kabataan, which, in turn, is composed of all citizens of the Philippines residing in the barangay for at least six (6) months, who are at least fifteen (15) but not more than thirty (30) years of age, and who are duly registered in the list of the Commission on Elections (COMELEC) and/or the records of the Sangguniang Kabataan secretary. *See, generally*, Rep. Act No. 10742 (2016). *Sangguniang Kabataan Reform Act of 2015*.

<sup>111</sup> Rep. Act No. 11462 (2019), § 1.

<sup>112</sup> Daphne Galvez, *Mikey Arroyo raises idea of postponing 2022 polls due to pandemic*, INQUIRER.NET, Sept. 24, 2020, at <https://newsinfo.inquirer.net/1339789/mikey-arroyo-raises-idea-of-postponing-2022-polls-due-to-pandemic>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Dwight De Leon, *Comelec 'ready' for campaign season, even as pandemic risks loom*, RAPPLER, Feb. 8, 2022, at <https://www.rappler.com/nation/elections/comelec-ready-2022-campaign-season-covid-19-pandemic-risks-loom/>.

<sup>116</sup> Hana Bordey, *Eleksyon 2022 voter turnout at 83%, highest in PH history*, GMA NEWS ONLINE, May 18, 2022, at <https://www.gmanetwork.com/news/topstories/nation/832115/eleksyon-2022-voter-turnout-at-83-highest-in-ph-history/story/>.

Lanao del Sur.<sup>117</sup> The failure of elections, however, was not due to COVID-19, and on May 24, 2022, special elections were held for those barangays.<sup>118</sup>

While the 2022 NLE has concluded, the pandemic nevertheless persisted.<sup>119</sup> As of July 1, 2022, there have been 545 million confirmed cases of COVID-19 worldwide with 829,623 new cases in the last 24 hours.<sup>120</sup> On January 26, 2022, worldwide daily cases peaked at about 4 million confirmed cases on that day, although the numbers have declined since.<sup>121</sup>

As of July 1, 2022, the Philippines has reported over 3.7 million total COVID-19 cases, which included 8,706 active cases.<sup>122</sup> The United States Centers for Disease Control and Prevention has tagged the Philippines with “Level 1: Low Level of COVID-19.”<sup>123</sup> The Department of Health (DOH) reported a 53% increase of cases recorded from June 20 to 26, 2022 compared with the cases reported from a week before.<sup>124</sup> The DOH also warned that national daily cases may reach 17,000 by end-July if Filipinos continued their current level of compliance with minimum public health standards.<sup>125</sup> The National Capital Region (NCR) and other areas have been under community quarantine of varying degrees for more than two years since the pandemic began,<sup>126</sup> and as of July 2, 2022, NCR was under Alert Level 1.<sup>127</sup>

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<sup>117</sup> Neil Arwin Mercado, *Failure of elections declared in 14 barangays in Lanao del Sur*, INQUIRER.NET, May 11, 2022, at <https://newsinfo.inquirer.net/1596394/failure-of-elections-declared-in-14-barangays-in-lanao-del-sur>.

<sup>118</sup> Dwight De Leon, *Lanao del Sur town holds special elections*, RAPPLER, May 24, 2022, at <https://www.rappler.com/nation/elections/tubaran-lanao-del-sur-holds-special-polls-may-24-2022/>.

<sup>119</sup> See World Health Organization, *WHO Coronavirus (COVID-19) Dashboard*, available at <https://covid19.who.int/> (last visited Jul. 2, 2022).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *COVID-19 Case Tracker*, DEP’T OF HEALTH WEBSITE, at <https://doh.gov.ph/covid-19/case-tracker> (last visited Jul. 2, 2022).

<sup>123</sup> *COVID-19 in the Philippines*, U.S. CTR. FOR DISEASE CONTROL AND PREVENTION WEBSITE, at <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-philippines> (last visited Feb. 8, 2022).

<sup>124</sup> Gaea Katreena Cabico, *Philippines logs 4,634 new COVID-19 cases in past week; tally up by 53%*, PHILSTAR.COM, June 27, 2022, at <https://www.philstar.com/headlines/2022/06/27/2191281/philippines-logs-4634-new-covid-19-cases-past-week-tally-53>.

<sup>125</sup> *Daily COVID-19 cases may reach 17,000 if health measures ignored – DOH*, RAPPLER, Jun. 28, 2022, at <https://www.rappler.com/nation/doh-warning-daily-covid-19-cases-increase-if-health-measures-ignored/>.

<sup>126</sup> Aie Balagtas See, *Rodrigo Duterte Is Using One of the World’s Longest COVID-19 Lockdowns to Strengthen His Grip on the Philippines*, TIME, Mar. 15, 2021, at <https://time.com/5945616/covid-philippines-pandemic-lockdown/>.

<sup>127</sup> Inter-Agency Task Force (IATF) for the Management of Emerging Infectious Diseases Res. No. 169-A (2022).

As of writing, the COMELEC was preparing to conduct the Barangay and SK Elections on December 5, 2022.<sup>128</sup> Before the election date arrives, one could only speculate whether any instance of *force majeure* might arise and threaten the conduct of voting. Besides that, one ought to prepare (especially the COMELEC) for the proper course of action for all risks foreseeable and avoidable, and for those neither.

## B. Relevant Election Laws

The power to fix the date of elections in the Philippines resides with the legislature,<sup>129</sup> as entrenched in certain provisions of the 1987 Constitution.<sup>130</sup> Through the OEC, Congress has delegated a portion of such power to the COMELEC, specifically the authority to either (1) postpone an election to another date or (2) declare a failure of election and call for its holding on another date.<sup>131</sup> Such delegated authority applies to all elections of public officers, as well as all referenda and plebiscites.<sup>132</sup>

Still, Congress retains the power to set the original date of all elections, and that the COMELEC may exercise such delegated authority only within specific terms and circumstances under the relevant provisions of the OEC.<sup>133</sup> These provisions even limit the periods within which the COMELEC may reschedule the election postponed or declare a failure.<sup>134</sup> These OEC provisions are the focus of this Article, as they require the application of appropriate *force majeure* principles as limitations to the said delegated powers.

In *Kida v. Senate*,<sup>135</sup> the Court explained that the provisions in the OEC on postponement and declaration of failure of elections “address instances where elections have already been scheduled to take place but do not occur or had to be suspended because of *unexpected and unforeseen circumstances*, such as

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<sup>128</sup> CNN Philippines Staff, *Comelec prepares for Barangay, SK Elections in December*, CNN PHIL., June 14, 2022, at <https://www.cnnphilippines.com/news/2022/6/14/Comelec-preparations-barangay-sk-elections.html>.

<sup>129</sup> *Kida v. Senate* [hereinafter “2011 *Kida*”], G.R. No. 196271, 659 SCRA 270, Oct. 18, 2011.

<sup>130</sup> See CONST. art. VI, § 8; art. VII, § 4(3); art. X, § 3.

<sup>131</sup> 2011 *Kida*, 659 SCRA 270, 314; *Kida v. Senate* [hereinafter “2012 *Kida*”], 667 SCRA 200, 232, G.R. No. 196271, Feb. 28, 2012.

<sup>132</sup> ELECT. CODE, § 2.

<sup>133</sup> 2011 *Kida*, 659 SCRA 270, 314.

<sup>134</sup> The new date must be “reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause for such postponement or suspension of the election or failure to elect.” See ELECT. CODE, §§ 5 & 6. See also ELECT. CODE, § 45 & Rep. Act No. 6679 (1988), § 2.

<sup>135</sup> 2012 *Kida*, 667 SCRA 200.

violence, fraud, terrorism, and other analogous circumstances.<sup>136</sup> As can be observed, the Court described such events as “unexpected and unforeseen circumstances,” similar to the first definition of *force majeure* under Article 1174 of the Civil Code.

The COMELEC *en banc* has the exclusive power to postpone or declare a failure of election.<sup>137</sup> Furthermore, the COMELEC’s power to declare a failure of elections falls under its administrative function,<sup>138</sup> which pertains to the enforcement of laws.<sup>139</sup> Therefore, as distinguished from pre-proclamation cases where the COMELEC is restricted to an examination of the election returns on their face, the COMELEC is authorized in the declaration of failure of elections to investigate allegations of fraud, terrorism, violence, and other analogous causes.<sup>140</sup>

The administrative function specified in the cases cited, namely, *Sambarani* and *Loong*, is the declaration of failure of elections. Nevertheless, it also extends to postponement of elections, as can be surmised in *Cagas v. COMELEC*.<sup>141</sup>

The Constitution, however, grants the COMELEC the power to “[e]nforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall.” The COMELEC has “exclusive charge of the enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections.” The text and intent of Section 2(1) of Article IX(C) is to give COMELEC “all the necessary and incidental powers for it to achieve the objective of holding free, orderly, honest, peaceful and credible elections.”

Sections 5 [i.e., Postponement of election] and 6 [i.e., Failure of election] of Batas Pambansa Blg. 881 (B.P. Blg. 881) [or] the Omnibus Election Code, provide the COMELEC the power to set elections to another date.<sup>142</sup>

<sup>136</sup> *Id.* at 233. (Emphasis supplied.)

<sup>137</sup> Rep. Act No. 7166 (1991), § 4; *Benito v. Commission on Elections* [hereinafter “*Benito*”], G.R. No. 134913, 349 SCRA 705, 712, Jan. 19, 2001; *Legaspi v. Commission on Elections*, G.R. No. 216572, 790 SCRA 443, 462, Apr. 19, 2016.

<sup>138</sup> *Sambarani v. Commission on Elections* [hereinafter “*Sambarani*”], G.R. No. 160427, 438 SCRA 319, 326, Sept. 15, 2004.

<sup>139</sup> *Bedol v. Commission on Elections* [hereinafter “*Bedol*”], G.R. No. 179830, 606 SCRA 554, 569–70, Dec. 3, 2009.

<sup>140</sup> *Loong v. Commission on Elections* [hereinafter “*Loong*”], G.R. Nos. 107814, 257 SCRA 1, 23, May 16, 1996.

<sup>141</sup> *Cagas v. COMELEC* [hereinafter “*Cagas*”], G.R. No. 209185, 708 SCRA 672, Oct. 25, 2013.

<sup>142</sup> *Id.* at 686–87.



Therefore, the COMELEC exercises its administrative function when it determines the existence of *force majeure* or analogous causes for both postponing elections and declaring a failure thereof.

We now tackle the aforementioned provisions separately.

### 1. *Postponement of Election*

Section 5<sup>143</sup> of the OEC applies when the COMELEC needs to postpone elections because of (a) violence, (b) terrorism, (c) loss or destruction of election paraphernalia or records, (d) *force majeure*, and (e) other analogous causes of such a nature that the holding of a free, orderly, and honest election should become impossible in any political subdivision.<sup>144</sup> The Court in *Kida* explained that the term “analogous causes” is restricted to those unforeseen or unexpected events that prevent the holding of the scheduled elections.<sup>145</sup> These “analogous causes” are further qualified by the phrase “of such nature that the holding of a free, orderly[,] and honest election should become impossible.”<sup>146</sup>

The Court in *Kida* did not expressly state whether the subject phrase applies not only to “analogous causes” but to all circumstances enumerated in the section as well. In the humble opinion of the author, it should. In other words, an occurrence of violence, terrorism, loss or destruction of election paraphernalia or records, and *force majeure* must also be of such nature that the holding of a free, orderly, and honest election should become impossible. Otherwise, any instance of *force majeure* that happens far away from a given precinct that has no effect whatsoever on the conduct of voting therein would still constitute a ground for postponement of elections in that precinct. Such is an absurd situation that Congress could not have intended the provision to cover.<sup>147</sup>

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<sup>143</sup> ELECT. CODE, § 5. “Sec. 5. *Postponement of election*. – When for any serious cause such as violence, terrorism, loss or destruction of election paraphernalia or records, *force majeure*, and other analogous causes of such a nature that the holding of a free, orderly and honest election should become impossible in any political subdivision, the Commission, *motu proprio* or upon a verified petition by any interested party, and after due notice and hearing, whereby all interested parties are afforded equal opportunity to be heard, shall postpone the election therein to a date which should be reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause for such postponement or suspension of the election or failure to elect.”

<sup>144</sup> 2011 *Kida*, 659 SCRA 270, 315.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> This argument reflects a principle in statutory construction explained in *Brent School, Inc. v. Zamora*, G.R. No. 48494, 181 SCRA 702, 715, Feb. 5, 1990; *citing* *People v.*

Jurisprudence has previously applied *force majeure* under Section 5 to justify the postponement of a plebiscite to another date, although the discussion on the concept is not exhaustive.

In *Cagas v. COMELEC*,<sup>148</sup> the COMELEC postponed the holding of the plebiscite for the creation of the province of Davao Occidental originally scheduled on or before April 6, 2013.<sup>149</sup> It decided instead to synchronize the plebiscite with the barangay elections on October 28, 2013 to save on expenses. Agreeing with the COMELEC, the Court ruled that “[t]he logistic and financial impossibility of holding a plebiscite so close to the National and Local Elections is unforeseen and unexpected, a cause analogous to *force majeure*.”<sup>150</sup>

## 2. *Failure of Election*

Several Supreme Court decisions<sup>151</sup> interpreted Section 6<sup>152</sup> of the OEC in such a way that it allows only three instances to justify the declaration of a failure of election, namely: (a) the election in any polling place has not been held on the date fixed on account of enumerated causes; (b) the election in any polling place had been suspended before the hour fixed by law for the closing of the voting on account of the enumerated causes; or (c) after the voting and during the preparation and transmission of the election returns or in the custody or

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Purisima, G.R. No. 42050, 86 SCRA 542, 561, Nov. 20, 1978. “It is a salutary principle in statutory construction that there exists a valid presumption that undesirable consequences were never intended by a legislative measure, and that a construction of which the statute is fairly susceptible is favored, which will avoid all objectionable, mischievous, undefensible [sic], wrongful, evil, and injurious consequences.”

<sup>148</sup> *Cagas*, 708 SCRA 672.

<sup>149</sup> The original schedule is pursuant to Rep. Act No. 10360, which was the law that created the province of Davao Occidental.

<sup>150</sup> *Cagas*, 708 SCRA 672, 688.

<sup>151</sup> See, e.g., *Canicosa v. COMELEC*, G.R. No. 120318, 282 SCRA 512, 515, Dec. 5, 1997; *Typoco, Jr. v. COMELEC*, G.R. No. 136191, 319 SCRA 498, 505–06, Nov. 29, 1999; *Banaga v. COMELEC*, G.R. No. 134696, 336 SCRA 701, 710–11, July 31, 2000; *Pasandalan v. COMELEC* [hereinafter “*Pasandalan*”], G.R. No. 150312, 384 SCRA 695, 701–02, July 18, 2002; *Mutlan v. COMELEC*, G.R. No. 171248, 520 SCRA 152, 161, Apr. 2, 2007.

<sup>152</sup> ELECT. CODE, § 6. “Sec. 6. *Failure of election*. - If, on account of *force majeure*, violence, terrorism, fraud, or other analogous causes the election in any polling place has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of a verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect.”

canvass thereof, such election results in a failure to elect on account of the enumerated causes. The common denominator in these three instances is the resulting failure to elect, which means no candidate emerged as a winner.<sup>153</sup>

Other decisions interpreted Section 6 with two preconditions for declaring a failure to elect: (1) no voting has been held in any precinct or precincts due to *force majeure*, violence, or terrorism; and (2) the votes not cast therein are sufficient to affect the results of the election.<sup>154</sup> The cause of such a failure may arise before or after the casting of votes or on the day of the election.<sup>155</sup>

Nevertheless, these two prevailing interpretations in jurisprudence are not contradictory. Rather, they can be easily harmonized such that the previously enumerated instances in the first interpretation are subsumed under the first precondition in the second interpretation.

### *3. Postponement and Failure of Election of Barangay Officials*

Section 45<sup>156</sup> is generally similar to Sections 5 and 6 since the former also mentions almost the same requisites to postpone and declare failure of elections. One difference—besides Section 45 being specifically applicable to elections of barangay officials—is that, unlike Section 6, Section 45 does not state that special

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<sup>153</sup> *Pasandalan*, 384 SCRA 695, 701.

<sup>154</sup> *Sardea v. COMELEC*, G.R. No. 106164, 225 SCRA 374, 383, Aug. 17, 1993; *Lucero v. COMELEC*, G.R. No. 113107, 234 SCRA 280, 295, July 20, 1994; *Loong*, 257 SCRA 1, 17; *Hassan v. COMELEC*, G.R. No. 124089, 264 SCRA 125, 131, Nov. 13, 1996; *Benito*, 349 SCRA 705, 713.

<sup>155</sup> *Benito*, 349 SCRA at 713.

<sup>156</sup> ELECT. CODE, § 45. “Section 45. *Postponement or failure of election*. - When for any serious cause such as violence, terrorism, loss or destruction of election paraphernalia or records, *force majeure*, and other analogous causes of such nature that the holding of a free, orderly and honest election should become impossible in any barangay, the Commission, upon a verified petition of an interested party and after due notice and hearing at which the interested parties are given equal opportunity to be heard, shall postpone the election therein for such time as it may deem necessary. ¶ If, on account of *force majeure*, violence, terrorism, fraud or other analogous causes, the election in any barangay has not been held on the date herein fixed or has been suspended before the hour fixed by law for the closing of the voting therein and such failure or suspension of election would affect the result of the election, the Commission, on the basis of a verified petition of an interested party, and after due notice and hearing, at which the interested parties are given equal opportunity to be heard shall call for the holding or continuation of the election within thirty days after it shall have verified and found that the cause or causes for which the election has been postponed or suspended have ceased to exist or upon petition of at least thirty percent of the registered voters in the barangay concerned. ¶ When the conditions in these areas warrant, upon verification by the Commission, or upon petition of at least thirty percent of the registered voters in the barangay concerned, it shall order the holding of the barangay election which was postponed or suspended.”

elections should be held on a date reasonably close to the original date of the election.<sup>157</sup> Instead, under Section 45, special elections should be scheduled within 30 days from the cessation of the causes for postponement.<sup>158</sup> Another distinction is that the qualifying circumstance “after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect” found under Section 6 is not included under Section 45.

Section 2 of Republic Act No. 6679<sup>159</sup> (R.A. 6679) modified the first paragraph of Section 45 in that it did not include the term “*force majeure*” as one of the causes. This may not mean, however, that *force majeure* is no longer a cause for postponement of elections of barangay officials for two reasons. First, *force majeure* may still apply, and be subsumed, under “analogous causes” as long as it is “of such nature that the holding of a free, orderly and honest election should become impossible in any barangay.” Second, there is no reasonable justification to interpret that *force majeure* is a cause for postponement of elections of all public officials (pursuant to Section 5 of the OEC) except barangay officials (pursuant to Section 2 of R.A. 6679). Surely, such absurd interpretation could not be the intent of Congress when it enacted R.A. 6679.<sup>160</sup>

#### 4. *Elements of Force Majeure Application*

Considering the foregoing discussion, the elements for invoking *force majeure* as a ground under Sections 5, 6, and 45<sup>161</sup> are as follows:

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<sup>157</sup> *Sambarani*, 438 SCRA 319, 329.

<sup>158</sup> *Id.* at 329–30.

<sup>159</sup> Rep. Act No. 6679 (1988), § 2. “When for any serious cause such as rebellion, insurrection, violence, terrorism, loss or destruction of election paraphernalia, and any analogous causes of such nature that the holding of a free, orderly and honest election should become impossible in any barangay, the Commission on Elections motu proprio or upon sworn petition of ten (10) registered voters of a barangay, after summary proceedings of the existence of such grounds, shall suspend or postpone the election therein to a date reasonably close to the date of the election that is not held or is suspended or postponed, or which resulted in a failure to elect, but not later than thirty (30) days after the cessation of the cause for such suspension or postponement of the election or failure to elect, and in all cases not later than ninety (90) days from the date of the original election.”

<sup>160</sup> *Supra*, note 147.

<sup>161</sup> As modified by Rep. Act No. 6679 (1988), § 2.

<b>Elements for Invoking <i>Force Majeure</i> as a Cause</b>	
<b>Postponement of Elections<sup>162</sup></b>	<b>Declaring a Failure of Election<sup>163</sup></b>
<ol style="list-style-type: none"> <li>1. Existence of <i>force majeure</i>, and</li> <li>2. The <i>force majeure</i> is of such a nature that the holding of a free, orderly, and honest election should become impossible in any political subdivision (or barangay as regards barangay elections).</li> </ol>	<ol style="list-style-type: none"> <li>1. Existence of <i>force majeure</i>, and</li> <li>2. On account of the <i>force majeure</i>, the election in any polling place (or barangay as regards barangay elections)—               <ol style="list-style-type: none"> <li>a. has not been held on the date fixed; or</li> <li>b. had been suspended before the hour fixed by law for the closing of the voting; or</li> <li>c. after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect; and</li> </ol> </li> <li>3. The failure or suspension of election would affect the result of the election.</li> </ol>

### III. CONVERGENCE OF TWO FIELDS

After a separate discussion on the concept of *force majeure* in civil law and the relevant statutory provisions in election law, we now harmonize the rules in these two fields to determine which principles of *force majeure* may be applied in resolving to postpone or declare a failure of election.

Adopting *force majeure* in another field of law is not of first impression in the Philippine legal system, as observed in the early *Brillantes* case. Neither is *force majeure* a newly adopted concept in election law, since it has been for a long time present in the OEC and has been already applied in the *Cagas* case. The novel undertaking here is to thoroughly analyze the application of *force majeure* in

<sup>162</sup> Essentially the same rules for ELECT. CODE, §§ 5 & 45.

<sup>163</sup> Essentially the same rules for ELECT. CODE, §§ 6 & 45, except that para. 2(c) is not present under § 45.

Philippine election law, as necessitated by assessing the probable legal effects of the COVID-19 pandemic on Philippine elections.

This author proposes the framework below to determine how the COMELEC may classify a specific COVID-19-related event<sup>164</sup> as *force majeure*, and then use it as a cause for postponing or declaring a failure of elections. It must be noted that this framework is limited to explaining how *force majeure* can be considered a justified cause for postponement and declaration of failure of elections. The subject OEC provisions, as well as the COMELEC Rules of Procedure,<sup>165</sup> also describe the procedures for the postponement and declaration of a failure of election. Such procedures do not directly concern *force majeure*, hence are no longer the author's focus.

Be that as it may, the following table presents the proposed framework:

Steps	Postponement of Elections	Failure of Election
1	Identify the specific COVID-19-related event.	
2	Decide whether such event is classified as <i>force majeure</i> pursuant to Article 1174 of the Civil Code.	
3	Resolve whether the <i>force majeure</i> is of such a nature that the holding of a free, orderly, and honest election should become impossible in any political subdivision (or barangay as regards barangay elections).	a. Resolve whether on account of the <i>force majeure</i> , the election in any polling place (or barangay as regards barangay elections)— <ol style="list-style-type: none"> <li>i. has not been held on the date fixed; or</li> <li>ii. had been suspended before the hour fixed by law for the closing of the voting; or</li> <li>iii. after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect<sup>166</sup>; and</li> </ol>

<sup>164</sup> In this Article, a “COVID-19-related event” refers to any event caused by, arising out of, or attributable to the COVID-19 pandemic.

<sup>165</sup> See COMELEC RULES OF PROC. (1993), Rule 26.

<sup>166</sup> This specific instance is not expressly included under Section 45 of the OEC in declaring a failure of election in barangay elections.

		b. Ascertain whether the failure or suspension of election would affect the result of the election.
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### A. Determining *Force Majeure* from the Point of View of COMELEC

Before we proceed to the discussion of the steps in the proposed framework, it is necessary to answer first the question: For election purposes, whose point of view should the COMELEC consider in assessing whether an event is foreseeable or avoidable? This question is appropriate for inclusion on the discussion of Step 2 (i.e., whether a specific COVID-19-related event is *force majeure*), but we shall deal with the question independently, as this is relevant not only in the consideration of an event as *force majeure*, but also in Step 1 on the identification of the specific event.

In civil cases, the rule is that “the burden of proving that the loss was due to a fortuitous event rests on [the party] who invokes it.”<sup>167</sup> Furthermore, one of the elements for invoking the fortuitous-event defense as enumerated in *Austria* is that “the event must be independent of the human will (or rather, of the debtor’s or obligor’s).”<sup>168</sup> These principles reflect the prevailing situation in civil cases where the parties who invoke *force majeure* must prove that they themselves, or their agents, are the ones who could not foresee or avoid the event.

As regards postponement and failure of election, whose responsibility is it to foresee and avoid an event invoked as *force majeure*? Based on the discussed rules and jurisprudence, it is the COMELEC itself.

Under Section 52 of the OEC, the COMELEC is vested with the “exclusive charge of the enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly[,] and honest elections, except as otherwise provided [in the OEC].”<sup>169</sup> Furthermore, under Republic Act No. 7166, it is the COMELEC sitting *en banc* that has the authority to postpone or declare a failure of election.<sup>170</sup> Therefore, as regards elections,

<sup>167</sup> *Sicam*, 529 SCRA 443, 459.

<sup>168</sup> *Austria*, 39 SCRA 527, 530.

<sup>169</sup> ELECT. CODE, § 52.

<sup>170</sup> Rep. Act No. 7166 (1991), § 4. An Act Providing for Synchronized National and Local Elections and for Electoral Reforms, Authorizing Appropriations Therefor, and for Other Purposes. “Section 4. *Postponement, Failure of Election and Special Elections*. - The postponement, declaration of failure of election and the calling of special elections as provided in Sections 5, 6

classifying an event as *force majeure* should be based on the perspective of the COMELEC itself and its capacity to foresee and avoid such event.

The COMELEC's capacity to foresee and avoid an adverse COVID-19-related event is different from such a capacity of the whole government or other government institutions. The mandate of the COMELEC, along with its resources, is concerned only with the conduct and regulation of elections, and not the whole management of public services.<sup>171</sup> The COMELEC cannot possibly foresee or avoid all government actions over which it has no prior knowledge or control. Neither can other government institutions possibly foresee or avoid all orders over which the COMELEC has exclusive authority. Thus, in Step 1 of the framework, the COMELEC may still identify government actions outside its mandate (e.g., imposition of lockdowns) as events possible to be classified as *force majeure*.

While such capacities of the COMELEC and of other government institutions are distinct, they are nevertheless related. After all, while being an independent constitutional commission,<sup>172</sup> the COMELEC still forms part of the government, and it may even seek the assistance of officials and employees outside its organization in the conduct of elections.<sup>173</sup> Hence, it should be recognized that the capacity of the COMELEC to foresee or avoid adverse events may be aided by other government institutions.

The COMELEC's capacity is also different from that of a natural person or any other private party, given that the COMELEC is composed of numerous officials and employees working together pursuant to its distinct mandate.<sup>174</sup> Hence, the capacity of the COMELEC should not be equated to that of an individual or any other entity.

The postponement and declaration of failure of elections may be initiated by a verified petition of an interested party.<sup>175</sup> Nevertheless, the COMELEC will decide such petition in the exercise of its administrative, not quasi-judicial, function.<sup>176</sup> As earlier discussed, the authority to postpone and

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and 7 of the Omnibus Election Code shall be decided by the Commission sitting *en banc* by a majority vote of its members. The causes for the declaration of a failure of election may occur before or after the casting of votes or on the day of the election.”

<sup>171</sup> See CONST. art. IX(C), § 2.

<sup>172</sup> CONST. art. IX, § 1.

<sup>173</sup> See CONST. art. IX(C), § 2(4); ELECT. CODE, § 52(a).

<sup>174</sup> See ELECT. CODE, art. VII; *Organizational Chart*, COMELEC WEBSITE, at <https://comelec.gov.ph/index.html?r=AboutCOMELEC/OrganizationalInfo/OrganizationalChart> (last visited Jul. 3, 2022).

<sup>175</sup> See COMELEC RULES OF PROC. (1993), Rule 26.

<sup>176</sup> *Bedol*, 606 SCRA 554.



declare a failure of election falls under the administrative function of the COMELEC.<sup>177</sup> In such situations, the COMELEC is not acting as a quasi court resolving controversies among parties, but as an administrative agency, enforcing relevant laws under its mandate.<sup>178</sup> This administrative function comes with the discretion to conduct a technical examination to determine the existence of *force majeure*,<sup>179</sup> which entails more than mere evaluation of the petition and evidence presented by the petitioner. Notwithstanding such petition, therefore, the COMELEC's capacity to foresee or avoid events for postponement or failure of elections prevails over that of the petitioner.<sup>180</sup> Hence, the COMELEC should still be the one to characterize the event as one unforeseeable or unavoidable, to the exclusion of the petitioner or any other person.

## B. Discussion of Steps

### 1. Identifying the Specific Event

The first step in the framework is to identify the specific COVID-19-related event, which is the same step for both postponement and failure of election. As already mentioned, COVID-19, when referring to the whole pandemic and not just the disease, is not simply a single event. It also pertains to the series of interconnected factual and legal events caused by or related to the outbreak and spread of the virus.

As Klaus and Behn argues:

Typically, the *force majeure* event is not the pandemic as such, but the factual or legal effects of the public health crisis. Factual effects may involve illness or quarantine or even death of key personnel, production facility closures, or interruption of supply chains. Legal effects relate to lockdowns, curfews, travel restrictions and other

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<sup>177</sup> *Id.*, at 569–70. “The powers and functions of the COMELEC, conferred upon It by the 1987 Constitution and the Omnibus Election Code, may be classified into administrative, quasi-legislative, and quasi-judicial. The quasi-judicial power of the COMELEC embraces the power to resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies; and of all contests relating to the elections, returns, and qualifications. Its quasi-legislative power refers to the issuance of rules and regulations to implement the election laws and to exercise such legislative functions as may expressly be delegated to it by Congress. Its administrative function refers to the enforcement and administration of election laws. In the exercise of such power, the Constitution (Section 6, Article IX-A) and the Omnibus Election Code (Section 52 [c]) authorize the COMELEC to issue rules and regulations to implement the provisions of the 1987 Constitution and the Omnibus Election Code.”

<sup>178</sup> *Id.*

<sup>179</sup> *Compare Loong*, 257 SCRA 1, 23.

<sup>180</sup> RULES OF COURT, Rule 115, § 2; COMELEC RULES OF PROC. (1993), Rule 37, § 1.

measures by governments and public authorities which are issued *in reaction* to the crisis.

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Both the strict distinction between the outbreak of the COVID-19 pandemic on the one hand and its factual or legal consequences on the other as well as the limited effect of declarations, certificates or similar statements by governments or public authorities are important to prevent misuse of the *force majeure* defense.<sup>181</sup>

Broadly speaking, the whole pandemic may not be considered *force majeure*. Rather, the COMELEC should identify the specific COVID-19-related event. This may include either natural occurrences, such as the spread of the COVID-19 virus; human-induced events such as government imposition of community quarantines; or a series of specific and interconnected events.<sup>182</sup>

As mentioned above, the COMELEC may consider orders and actions by other government agencies as *force majeure*. Although the COMELEC forms part of the government, it has no control over orders and actions by other government institutions not directly related to the conduct of elections.<sup>183</sup> Furthermore, as already discussed, the foreseeability or inevitability of an event being considered as *force majeure* for postponement and failure of elections should be from the lens of the COMELEC.<sup>184</sup> Hence, while the whole government may not consider *force majeure* an order imposed by itself (e.g., community quarantine), the COMELEC may still treat such an order as *force majeure*.

## 2. *Classifying the Event as Force Majeure*

The second step is to classify the specified COVID-19-related event as *force majeure*, pursuant to Article 1174 of the Civil Code. As already discussed, *force majeure* and fortuitous event are conceptually the same insofar as they exempt an obligor from liability. Both concepts should likewise be interchangeable in election law since this field has no exclusive definition for both terms. Election law has only borrowed these concepts from civil law, which deems them identical. As such, *force majeure* in the context of election law may also be defined

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<sup>181</sup> Klaus, *supra* note 17, at 91, 93.

<sup>182</sup> *Id.*

<sup>183</sup> *See* ELECT. CODE, art. VII.

<sup>184</sup> *Id.*

by Article 1174 of the Civil Code, i.e., it refers to events that are unforeseeable, or which though foreseen, are unavoidable.<sup>185</sup>

With this definition comes the principle on interpreting the nature of *force majeure* as ruled in the *Luzon Stevedoring* case: The event must not merely be difficult, but impossible to foresee or to avoid.<sup>186</sup> Accordingly, in cases of postponement and declaration of failure of elections, the specific COVID-19-related event must be impossible to be foreseen or avoided by the COMELEC.

Again, the elements of *force majeure*, as enumerated in *Austria, Nakpil*, and *Metal Forming*, refer to the nature of *force majeure* itself, namely: (a) the cause of the unforeseen and unexpected occurrence, or the failure of the debtor to comply with their obligations, must be independent of the human will; and (b) it must be impossible to foresee the event that constitutes the *caso fortuito*, or if it can be foreseen, it must be impossible to avoid.<sup>187</sup>

In ascertaining whether an event is *force majeure*, the COMELEC may adopt element (a) with a few modifications, as follows: The cause of the unforeseen and unexpected occurrence must be independent of the will of the COMELEC. The phrase “or the failure of the debtor to comply with [their] obligations” is deleted as it relates to a civil obligation, which is not the subject

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<sup>185</sup> With this definition, *force majeure* may become a broadening (rather than a limiting) cause among other enumerated causes in Sections 5, and 6 of the OEC. As already previously quoted, “both Section 5 and Section 6 of BP 881 address instances where elections have already been scheduled to take place but do not occur or had to be suspended because of *unexpected and unforeseen circumstances*, such as violence, fraud, terrorism, and other analogous circumstances.” (2012 *Kida*, 667 SCRA 200, at 233.) The Court in ruling as such did not expressly state that the mentioned causes should be characterized as only unexpected and unforeseen without regard to inevitability. If the Court meant so, however, then *force majeure* would have a broader definition compared with that of the other causes. In other words, while other enumerated occurrences would be considered a cause for special elections only if they are unforeseen and expected, *force majeure* would still be deemed a cause even if foreseen and expected as long as it is inevitable. Such interpretation would nevertheless yield no pernicious results. On the contrary, a broadened definition of *force majeure* gives more discretion for the COMELEC to protect the integrity of suffrage, as well as the safety of the electorate, than would a limited definition. To illustrate, suppose the COMELEC had foreseen the occurrence of an alarming spike of COVID-19 cases, which occurrence did happen on election day and proved to be unavoidable. If the COMELEC interprets *force majeure* as only unavoidable, it could not consider the occurrence as *force majeure*, which would mean the elections could not be postponed to the detriment of voters’ health and safety. If the COMELEC, however, interprets *force majeure* as also inevitable, then it could consider the occurrence as *force majeure* and would have more leeway to declare the postponement of elections. Furthermore, a broadened definition of *force majeure* in election law would not mean that an election would automatically be postponed or declared a failure because there are still further steps in the proposed framework that limit the applicability of *force majeure*.

<sup>186</sup> *Luzon Stevedoring*, 21 SCRA 279, 282–83.

<sup>187</sup> *Metal Forming*, 247 SCRA 731, 738.

matter of postponing and declaring elections. The phrase “the human will” is modified as “the will of the COMELEC,” consistent with the principle that the foreseeability and inevitability of an event should be on the part of the COMELEC. On the other hand, the COMELEC may adopt element (b) in its entirety, as this is precisely the definition of *force majeure* under Article 1174 of the Civil Code.

It has been argued that a COVID-19-related event may be considered *force majeure* depending on the time of its occurrence.<sup>188</sup> Timing and the application of fortuitous event defense have been discussed in Philippine jurisprudence as early as in the *Austria* case, where the Court ruled that the difference in the prevalence of robbery cases in 1961 and 10 years later may affect the application of the fortuitous event defense.<sup>189</sup> As a caveat, the discussion of timing in *Austria* was not for the purpose of determining whether the robbery was a fortuitous event, but for determining whether there is contributory negligence to prevent the application of the principle. Thus, the COMELEC may deem the case instructive on the effect of an event’s time of occurrence on its treatment as *force majeure*.

To illustrate the effect of time, the spread of and eventual global disruption by COVID-19 may not yet have been foreseeable by the COMELEC in December 2019, when the virus was yet to be identified as a contagious and harmful coronavirus.<sup>190</sup> On the other hand, the spread of present strains of COVID-19 may already be foreseeable at present by anyone, including the COMELEC, considering the length of time that has passed since the outbreak. The only question is whether such spread of the virus would be avoidable by the COMELEC in future elections, which remains to be seen.

### 3. *Applying the Qualifying Circumstances*

The third step is to determine whether an event already deemed as *force majeure* may be considered a cause to postpone or declare a failure of election. It

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<sup>188</sup> Dayday & Madcasim, *supra* note 2, at 94.

<sup>189</sup> *Austria*, 39 SCRA 527, 530–32. “It is clear that under the circumstances prevailing at present in the City of Manila and its suburbs, with their high incidence of crimes against persons and property, that renders travel after nightfall a matter to be sedulously avoided without suitable precaution and protection, the conduct of respondent Maria G. Abad, in returning alone to her house in the evening, carrying jewelry of considerable value, would be negligent *per se*, and would not exempt her from responsibility in the case of a robbery. We are not persuaded, however, that the same rule should obtain ten years previously, in 1961, when the robbery in question did take place, for at that time criminality had not by far reached the levels attained in the present day.”

<sup>190</sup> World Health Organization, *Archived: WHO Timeline - COVID-19*, available at <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19> (last accessed Apr. 20, 2021).

is in this step that one may clearly comprehend the completely different application of *force majeure* in election law as compared with its common usage in civil law. For while *force majeure* is often invoked in civil law by a private party as a defense in court litigation to escape liability, *force majeure* is used in election law by the State, through the COMELEC, in the performance of its administrative function to determine whether the exercise of suffrage should be suspended and rescheduled.

It is therefore inappropriate and untenable to adopt, for election purposes, all the elements of *force majeure* defense as cited in *Austria*, *Nakpil*, and *Metal Forming*. As earlier noted, some of these elements refer to the nature of *force majeure* itself and can hence be adopted by the COMELEC with few adjustments. On the other hand, the COMELEC should not adopt element (c), i.e., “the occurrence must be such as to render it impossible for the debtor to fulfill [their] obligation in a normal manner.”<sup>191</sup> Rather, this element should be substituted by the qualifying circumstances in the relevant OEC provisions.

Thus, for postponement of elections, it is necessary that the *force majeure* is of such a nature that the holding of a free, orderly, and honest election should become impossible in any political subdivision (or barangay as regards barangay elections). For declaring a failure of election, the requirement is that the election in any polling place (or barangay, for barangay elections) has not been held on the date fixed, had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect.<sup>192</sup> Also, the failure to elect in those instances must be on account of *force majeure* and would affect the result of the election.

Neither should the COMELEC adopt element (d), i.e., “the obligor must be free from any participation in the aggravation of the injury resulting to the creditor.”<sup>193</sup> As with element (c), (d) presupposes a civil obligation not covered by the intent of the provisions on postponement and failure of elections. One might argue that excluding this element could allow fraud and negligence as grounds for postponement and failure of elections. This argument practically overlooks the fact that Sections 5, 6, and 45 do indeed permit fraud and negligence as causes. Section 6 itself even mentions “fraud” as one of its enumerated causes. Alternatively, fraud and negligence may be absorbed under “analogous causes” as long as the fraud or negligence is “unexpected and unforeseen” by the COMELEC and qualified by the circumstances stated in these provisions.

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<sup>191</sup> *Metal Forming*, 247 SCRA 731, 738.

<sup>192</sup> ELECT. CODE, §§ 6, 45.

<sup>193</sup> *Id.*

Why do Sections 5, 6, and 45 allow fraud and negligence to be considered as causes for postponement and declaration of failure of elections? These provisions and all other laws and regulations relative to the conduct of an election (as well as a plebiscite, initiative, referendum, and recall) that the COMELEC is constitutionally mandated to enforce<sup>194</sup> were crafted with the intent to give the COMELEC all the necessary and incidental powers to achieve the objective of holding free, orderly, honest, peaceful, and credible elections.<sup>195</sup> Accordingly, in enforcing Sections 5, 6, and 45, the COMELEC is empowered to protect such conduct of elections from any cause characterized by said provisions, including fraud and negligence.

As to contributory fault or negligence,<sup>196</sup> Sections 5, 6, and 45 neither mention nor imply the absence thereof as part of the qualifying circumstances to postpone or declare failure of elections. What is important is that the *force majeure* or other causes engendered the failure to elect or the impossibility to hold free, orderly, and honest elections.

In civil obligations, the existence of contributory fault or negligence by the obligor will not exempt them from liability despite the existence of *force majeure*.<sup>197</sup> Hence, they would still suffer the consequences of their liability due to their contributory acts or omissions. This is not the same effect if elections are not postponed or declared a failure merely because of a contributory fault by the COMELEC, its officials, or employees, or any other person. It would not be the COMELEC nor the erring individual that would suffer, but the integrity of elections and, ultimately, the suffrage of voters.

Thus, element (d) is unnecessary in this case and should not be adopted. Should any instance of fraud or negligence be committed by any individual, including a COMELEC official and an employee, that would call for the application of Sections 5, 6, or 45, the COMELEC could simply enforce the proper provision to protect the integrity of the elections, order the holding of the elections on another date, and then charge the erring individual with the appropriate election offense<sup>198</sup> and/or other criminal, administrative, and civil liabilities.

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<sup>194</sup> See CONST. art. IX (C), § 2 (1).

<sup>195</sup> Pangandaman v. COMELEC, G.R. No. 134340, 319 SCRA 283, 299, Nov. 25, 1999.

<sup>196</sup> Phil. Nat'l Construction Corp. v. Ct. of Appeals, G.R. No. 159270, 467 SCRA 569, 584, Aug. 22, 2005. "Contributory negligence is conduct on the part of the injured party, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection."

<sup>197</sup> *Austria*, 39 SCRA 527, 531.

<sup>198</sup> See ELECT. CODE, §§ 264, 265.

In sum, the COMELEC, in deciding to postpone or declare a failure of election on account of *force majeure*, should adopt only the principles in civil law that deal with the nature of *force majeure*, and exclude those principles that pertain to exonerating an obligor from liability.

### CONCLUSION

We finally go back to this Article's primary question: How may the COMELEC consider as *force majeure* a COVID-19-related event and then use it to justify the postponement of an election or the declaration of a failure thereof? The foregoing framework proposes a guide that the COMELEC may use should it face the same question in future elections.

To resolve the question, the COMELEC should first identify the specific COVID-19-related event and then determine if the event may be classified as *force majeure* under Article 1174 of the Civil Code. After which, the COMELEC should resolve whether such *force majeure* may be characterized by the qualifying circumstances under Section 5, 6, or 45 of the OEC. All such steps properly followed will render sound justification for the COMELEC to decide whether to postpone an election or declare a failure thereof on account of the COVID-19-related event.

While this Article focuses on the COVID-19 pandemic, it should be noted that the proposed framework and accompanying discussion may also assist the COMELEC in classifying as *force majeure* other events unrelated to the pandemic. This Article aims to contribute not only to the growing literature on the legal effects of COVID-19, but also to the relatively scarce scholarship on the application of civil law concepts such as *force majeure* in election law.

While this Article undertakes to present a comprehensive assessment of suspending elections due to COVID-19, it recognizes its limitations in the broader inquiry on whether the government should legally prevent the conduct of upcoming elections. As discussed, the power to postpone and declare failure of elections is merely a delegated authority by Congress, which has the ultimate power to decide whether future elections should continue as scheduled. Assessing this power requires an examination of constitutional tenets that lie beyond the purview of *force majeure* principles in civil law and needs further discussion.

In proposing a framework for postponing and declaring a failure of elections due to events caused by the pandemic, this Article does not intend to promote the disruption of democratic elections. On the contrary, it

acknowledges, and even alludes to on several occasions, the fundamental importance of the regular conduct of elections in the legitimacy, stability, and continuity of any democracy. The cited provisions of the OEC are themselves crafted with the thought of maintaining the regularity of elections, while at the same time ensuring to protect the voters' right to suffrage from threats to undermine its exercise.

Indeed, during unforeseen or inevitable times, the State should be able to make a careful and well-founded decision to briefly suspend the exercise of the right of suffrage, if only to guard its integrity, so that this constitutionally cherished right may be exercised again the soonest possible time.

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