Throwing Philippine Democracy and Public Procurement Open

Enrico C. Caldona[*]

I. INTRODUCTION

The Philippine government is in a crisis of relevance, and the Sandiganbayan bears witness.

The Author takes cognizance of the recent trend where cases filed by the Office of the Ombudsman (OMB) are more often than not dismissed, citing the statistics it published in 2022 indicating a conviction rate of 27%.[1] Republic Act (R.A.) No. 9184[2] or the Government Procurement Reform

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[*] '21 J.D., Ateneo de Manila University School of Law. He previously co-wrote *Beyond the Record: The Admissibility of Dying Declarations and the First Kind of Res Gestae Made Through Electronic Means*, 96 PHIL. L.J. 475 (2023) and *Competing and Non-Competing: The Overlapping Jurisdiction of the Philippine Competition Commission and of Philippine Transportation Agencies Over Sector-Specific Regulatory Matters*, 94 PHIL. L.J. 613 (2021) with Maria Patricia Santos.

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1. Office of the Ombudsman, Government Agencies with the Most Number of Cases Filed (Statistics), *available at* https://www.ombudsman.gov.ph/references/statistics (last accessed Apr. 30, 2023).
2. An Act Providing for the Modernization, Standardization, and Regulation of the Procurement Activities of the Government and for Other Purposes [Government Procurement Reform Act], Republic Act No. 9184 (2019).

Act is a reminder that public procurement covers everything governing the disbursement of public funds.[3] Reactions and comments on social media platforms indicate loss of public trust in the justice system because those perceived as guilty by the public in corruption cases are absolved from criminal liability.[4] The Sandiganbayan, however, cannot really be blamed for their acquittals because the law dictates that the quantum of proof for criminal cases is proof beyond reasonable doubt, the highest quantum of proof.[5] Conviction entails the ruin of a life, if not, of lives spanning generations. As such, "it is better that ten guilty persons escape than that one innocent suffer."[6] The Sandiganbayan merely applies the law when meritorious, including the defenses available to the accused.[7]

Nonetheless, the effect of the dismissal of cases against these politicians is deepened polarization between the government and the general public.[8] The government is viewed as a corruption machinery, frustrating the general public because their qualms are not being heard,[9] making them lose faith in

3. *Id.* § 5 (n).

4. *See, e.g.*, Philippine Star, Facebook Post, *Just In: Sandiganbayan First Division Acquits Former Senator Ramon "Bong" Revilla Jr. of Plunder, Convicts His Co-accused Richard Cambe and Janet Lim-Napoles*, Facebook, Dec. 7, 2018, *available at* www.facebook.com/PhilippineSTAR/photos/a.134754620011561/1217196195100726/?type=3 (last accessed Apr. 30, 2023) [https://perma.cc/LZ6E-EFCG].

5. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 133, § 2.

6. SIR WILLIAM BLACKSTONE & THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 358 (3d ed., 1884).

7. *See* 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 115, §§ 1 (a)-(i) (superseded in 2019).

8. *See, e.g.*, Thomas Carothers & Andre O'Donohue, *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers*, CARNEGIE, Aug. 18, 2020, *available at* https://carnegieendowment.org/research/2020/08/political-polarization-in-south-and-southeast-asia-old-divisions-new-dangers?lang=en (last accessed Apr. 30, 2023) [https://perma.cc/F5BY-QC4Z].

9. *See, e.g.*, Bonz Magsambol, *Frustrated Doctors Call for Swift Probe in PH Pandemic Corruption Mess*, RAPPLER, Oct. 8, 2021, *available at* https://www.rappler.com/philippines/frustrated-doctors-call-swift-probe-philippines-pandemic-corruption-mess (last accessed Apr. 30, 2023)

the government.[10] Polarization is dangerous because it makes one forget the fundamental point that people are all just people. Yes, one can and should get frustrated, but one should not forget their humanity along the way. And in this view, prosecution of cases leads to the symbolization of public officials, which is the greatest dehumanization of all, thus fostering the dehumanization of all.

Accordingly, the Author asks, "how does one avoid polarization in public procurement law?" Chapter II reviews constitutional theory on Philippine democracy to understand the principles underpinning Philippine government. The Author also inquires into Philippine democracy because of a similar trend of polarization within the Philippine political system as that of in public procurement. The Author learned that to emerge from polarization is to return to the elementary principles of democracy. The Author then refreshes on public procurement jurisprudence in Chapter III. Chapter IV applies the Author's insights on democracy to public procurement law. Finally, the Author draws recommendations from the analysis in Chapter V.

The central thesis of the Article is that, as in all things, human subjectivity should be the paramount consideration in public procurement, and as such, public procurement law should be grounded on inclusivity and open communication. Thus, aside from amending procurement law to reflect these considerations, this Article recommends the implementation of open democracy and open contracting in public procurement through the utilization of technological advancements in the digital age.

II. PHILIPPINE DEMOCRACY AND CONSTITUTIONAL THEORY

The Philippines follows the American form of government, evidenced by its adoption of American constitutional theory.[11] The United States Constitution guarantees a republican form of government, which is one constructed on the

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[https://perma.cc/V8YY-SG8D] & Rodolfo Severino, *Filipinos March Against Corruption*, East Asia Forum, Sept. 12, 2013, *available at* https://eastasiaforum.org/2013/09/12/filipinos-march-against-corruption [https://perma.cc/3259-8DUA].

10. *Id.*

11. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 56 (2009).

principle that "the supreme power resides in the body of the people,"[12] protecting against monarchy and oligarchy on one hand and against pure, direct, or participatory democracy on the other.[13] The Tydings-McDuffie Law,[14] in authorizing the Filipino people to draft its own constitution in 1934, required that the same "shall be republican in form."[15] As understood by the constitutional framers at the time —

> We may define a republic to be a government which derives all its power directly or indirectly from the great body of people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favorable class of it. It is sufficient for such a government that the person administering it be appointed either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.[16]

In other words, "a government republican in form is one where sovereignty resides in the people and where all government authority emanates from the people."[17] Article II, Section 1 of the 1987 Philippine Constitution codifies this in declaring that "[t]he Philippines is a democratic and republican state, sovereignty resides in the people and all government authority emanates from them."[18]

The aforesaid provision, however, includes the word "democratic,"[19] which means that "the Philippines under the new Constitution is not just a representative government but also shares some aspects of direct

12. Chisholm v. Georgia, 2 U.S. 419, 457 (1793).

13. BERNAS, *supra* note 11.

14. *See generally* An Act to Provide for the Complete Independent of the Philippine Islands, to Provide for the Adoption of a Constitution and a Form of Government for the Philippine Constitution and a Form of Government for the Philippine Islands, and for Other Purposes, 48 Stat. 456 (1934).

15. BERNAS, *supra* note 11, at 56-57.

16. *Id.* at 57.

17. *Id.* (citing PHIL. CONST. art. II, § 1).

18. PHIL. CONST. art. II, § 1.

19. *See* PHIL. CONST. art. II, § 1.

democracy."[20] As "a monument to 'people power[,]' which re-won democracy in EDSA (Epifanio de los Santos Avenue), the added word is a 'justifiable redundancy.'"[21]

The Author reviews this constitutional backdrop vis-à-vis current trends worldwide, where democracy has been reduced to liberal capitalism that pushes for multiculturalism and anti-colonialism, focusing on a politics of identity and authenticity.[22] This political correctness is precisely just that — thinking that there are objective, fixed, correct norms that can be universally imposed. These are readily observable in neoliberal capitalist political figures who are treated as "subjects supposed to know."[23] People treat their political figures as all-knowing heroes with the monopoly of goodness and correctness who can deliver them from all their problems, when doing so would be a denial of one's own symptom (as will be further elucidated on). Ironically, cultures are idealized and objectified, erasing the particularity of people as such. In Europe, for instance, in relation to the refugee crisis, this democracy "cover[s] up the antagonisms within ... particular ways of life[,] [for example,] by justifying acts of brutality, sexism[,] and racism as expressions of a particular way of life that [they] ... have no right to measure with foreign ... values."[24]

This ideology is silent "on questions of culture," which "ends up conceding ... [this terrain] to" authoritarians and populists.[25] The result is increased polarization in societies. The import of these observations, especially from the US, is that republicanism and democratism have been reduced to an ideological stalemate or impasse, where each side claims to have the monopoly of reason, thereby making them right and dismissing the other as wrong. In other words, each side claims to have the complete picture.

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20. BERNAS, *supra* note 11, at 59.

21. *Id.*

22. Ilan Kapoor, *Žižek, Antagonism and Politics Now: Three Recent Controversies*, 12 INT'L J. OF ŽIŽEK STUD. 1, 2, 6, & 12 (2018).

23. Xuelian He, *Flux Qua Gap: The Hegelian Deleuze*, 14 INT'L J. OF ŽIŽEK STUD. 1, 9 & 11 (2020).

24. Kapoor, *supra* note 22, at 12.

25. *Id.*

The consequences of this polarization are alarming, mainly because they foster "othering"[26] people. Polarization mobilizes people against each other, labelling the other as irredeemable. This is where the narratives of good versus evil and right versus wrong spring from, when none of these labels exist. People consequently ideate each other instead of recognizing each other as people.

Modern democracy can be analyzed deeper through Hegelian dialectical materialism[27] and the Lacanian logic of "not-all."[28] Emerging from Kantian transcendental idealism,[29] which stresses that one cannot access objective truth because of one's subjective reason,[30] the two ideas posit that truth for people is subjectivity because humans are incomplete, indeterminate, and lacking beings. Hegelian cunning of reason[31] and the Lacanian logic of the unconscious[32] further expose that since truth is subjectivity, the big Other or whatever is passed as objective is actually subjective, tainted by imperfect human reason.[33] In other words, there is no big Other, yet it is precisely the emptiness of the big Other that allows one to fill it in, making it all the more real.[34]

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26. "The act of treating someone as though they are not part of a group and are different in some way." Cambridge Dictionary, Definition of Plagiarism, *available at* https://dictionary.cambridge.org/us/dictionary/english/othering (last accessed Apr. 30, 2023) [https://perma.cc/E8TM-WKY6].

27. Christopher Martien Boerdam, *Debating the Subject of Substance: Adrian Johnston and Slavoj Žižek on Dialectical Materialism*, 17 INT'L J. OF ŽIŽEK STUDIES 1, 3 (2023).

28. He, *supra* note 23, at 2–5.

29. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON 501 (1787).

30. *Id.*

31. *See generally* G.H.R. Parkinson, *Hegel, Marx and the Cunning of Reason*, 64 PHILOSOPHY, 287 (1989).

32. *See* Gregory A. Trotter, *Unconscious Structure in Sartre and Lacan*, 36 PSYCHOANALYTISCHE PERSPECTIEVEN (2018).

33. *See* Parkinson, *supra* note 31, at 287 & Trotter *supra* note 32.

34. Rebecca L. Thacker, *Kafka's* The Trial, *Psychoanalysis, and the Administered Society*, 14 INT'L J. OF ŽIŽEK STUDIES 1, 8 (2020).

Yet, in relation to modern democracy, the current political ideas of left-wing liberals and right-wing populists completely define people and cultures. Each side's supposedly correct ideas are actually subjective positions being asserted as objective fact, thereby denying one's subjectivity or one's very being.

Further, these supposedly objective political ideas are asserted in a system where "the European symbolic order is the de facto global symbolic order,"[35] meaning "capitalism is now the big Other for the global system"[36] and "the postcolonial subject ... has no choice but to work with it."[37] Thus, while "capitalism does not exist,"[38] it "is real in the Lacanian sense of the term."[39] Capitalism "is the background for how [one] relate[s] to objects today, populism and democracy included. Capital largely determines what options are available to us, not some sort of objective standard of personal choice. Today, it is capitalism that provides the objective standard itself."[40]

Thus, the Marxist "critique of capitalism emerges from the inside of capitalist dynamics[;] it is real in the precise sense of determining the structure of the very material social processes."[41]

> The fate of whole strata of population and sometimes of whole countries can be decided by the solipsistic speculative dance of capital, which pursues its goal of profitability in a blessed indifference with regard to how its movement will affect social reality. Therein resides the fundamental systemic violence of capitalism, much more uncanny than direct precapitalist socio-ideological violence. This violence is no longer attributable to concrete

35. Kapoor, *supra* note 22, at 7.

36. Geoff Boucher, *An Inversion of Radical Democracy: The Republic of Virtue in Žižek's Revolutionary Politics*, 4 INT'L J. OF ŽIŽEK STUDIES 1, 18 (2010).

37. Kapoor, *supra* note 22, at 7.

38. Boucher, *supra* note 36, at 15.

39. Barret Weber, *Laclau and Žižek on Democracy and Populist Reason*, 5 INT'L J. OF ŽIŽEK STUDIES, Vol. 1, 14 (2011).

40. *Id.* at 15.

41. *Id.*

> individuals and their 'evil' intentions but is purely objective, systemic, anonymous.[42]

Our polarized political system, therefore, avoids and supports the issue of capitalism as a "big Other," "formal universal," a "sublime object," an "object elevated to the level of the Thing," or simply, the subjective construct forced as objective civilization, limiting individual subjectivity and making people suffer.[43] As previously well-put, ours is "a system of exploitation, which operates in the opposites. The confrontation of the two opposite bands, far from bringing to a third way, legitimates the same cultural values."[44]

The liberal democrats, specifically, do not seem to "try hard enough to break out of the patriarchal, racist, capitalist system, and so on, that it continually critiques and loathes but it secretly and unconsciously supports."[45] Their particularism

> despite outward protestations against imperial power, ... aids and abets that most dominant form of imperial power — global capitalism. Particularism suits imperial economic interests well — you do your own thing, celebrate your language, identity and festivals, as long as you don't interfere with the free mobility of capital. Such postmodern multicultural politics is the politico-cultural arrangement of global capitalism ... . Particular identities and minority demands (e.g., gender, LGBT, ethnic, indigenous rights) are unthreatening to the smooth functioning of the system and can be (and are) quite readily accommodated (i.e., assigned a 'proper' place) and commodified (e.g., the corporate niche-marketing of products to women, minorities, environmentalists, etc.) ... .[46]

42. *Id.* (citing SLAVOJ ŽIŽEK, IN DEFENSE OF LOST CAUSES 195 (3d ed. 2018)).

43. Thacker, *supra* note 34; Daniel Tutt, *Radical Love and Žižek's Ethics of Singularity*, 6 INT'L J. OF ŽIŽEK STUDIES 1, 3-4 (2012).

44. Maximiliano E. Korstanje, *Dialogues with Slavoj Žižek: Placing the Role of Torture in Context*, 12 INT'L J. OF ŽIŽEK STUDIES 1, 4 (2018).

45. Weber, *supra* note 39, at 6.

46. Kapoor, *supra* note 22, at 7.

In other words, "emancipatory projects always remain within the narrow bounds of an ameliorated version of capitalism."[47] This signal "the complicity of the Left in covering up the Real [or the big Other] of our age,"[48] enabling "right-wing reaction as a way of deflecting attention from the fundamental contradictions of capitalism."[49] Ultimately, democracy as presently constituted is too restricted to get at the fundamental problems.

> We do not get to vote on who owns what, or on relations in a factory and so on, for all this is deemed beyond the sphere of the political, and it is illusory to expect that one can actually change things by 'extending' democracy to this sphere, by, say, organizing 'democratic' banks under the people's control. Radical changes in this domain should be made outside the sphere of legal 'rights', etcetera ... It is the 'democratic illusion', the acceptance of democratic procedures as the sole framework for any possible change, that blocks any radical transformation of capitalist relations ... .[50]

In this sense that governments sell to their constituents the notion that liberal capitalism is all there is, that it is the only way to live life, modern democracy is totalitarian. This totalitarianism "serve[s] to rule out any emancipatory alternatives to neo-liberalis[t] [capitalism]."[51] Ironically, while subjectivity is essential, it is disregarded by the system.

What revolution could surmount this totalitarian regime? In philosophical terms

> the moment of the psychoanalytic cure arrives when the subject acknowledges the 'nonexistence of the Other.' ... [T]he revolutionary Act involves a break with today's perverse elevation of transgression to a norm that is ultimately based in the supposition of the existence of the Other, and that *the revolutionary government would therefore institutionalize the non-existence*

47. Joshua Rayman, *The Specter of Liberation: Emancipatory Possibilities in the Political Theory of Marcuse and Žižek*, 12 INT'L J. OF ŽIŽEK STUDIES 1, 14 (2018).

48. Kapoor, *supra* note 22, at 12.

49. *Id.*

50. Rayman, *supra* note 47, at 16 (citing SLAVOJ ŽIŽEK, THE YEAR OF DREAMING DANGEROUSLY 87 (2012)).

51. *Id.* at 13.

> *of the big Other*. As a result of the revolution, capitalism, in short, 'does not exist.'[52]

> The egalitarian republic of virtue will break entirely with the dead weight of human history — with 'bourgeois' civility, humanitarian ethics, principles of human rights, liberal democracy, and, especially, habits of all varieties and kind ... — in short, with modern ethical life ... . This is the substance of individual freedom, in other words, the stuff that forms particular interests; authentic revolutionaries are 'figures without habits' operating according to universal principles without consideration of the 'complex circumstances' and the 'particular conditions' ... .[53]

In other words, one should not put neoliberal capitalist democracy and political figures on a pedestal by making them the big Other. One should not "pretend ... to transcend the particular nor impose ... a positive universalized norm."[54] Rather, [one] should face "antagonism of the fall head-on."[55] One should "openly acknowledge and identify with the symptoms of democracy as an impure, all-too-human object."[56]

> [T]he thing to do is not to 'overcome', to 'abolish' it, but to come to terms with it. That is to say, democracy ... as a form of Power has very precise limitations and its implication with questions of violence and particularity is far from easy for us to accept.[57]

As previously noted, "[w]hile there are no transcendent principles that every society shares, ... there is a constitutive failure that marks every society."[58] The Universal is about

> an antagonistic struggle which does not take place between particular communities, but splits from within each community, so that the 'trans-cultural' link between communities is that of a shared struggle. ... The universal is thus not about finding a common positive element but a shared excluded element so that, under our current global capitalist system,

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52. Boucher, *supra* note 36, at 18 (emphasis supplied).

53. *Id*. at 21.

54. Kapoor, *supra* note 22, at 5.

55. *Id*. at 7.

56. Weber, *supra* note 39, at 10.

57. *Id*.

58. Kapoor, *supra* note 22, at 6.

> solidarity around the world is to be forged on the basis of shared experiences of exploitation and marginalization.[59]

Simply put, "[i]deologies propagated by the state or market (e.g., multiculturalism, neoliberalism) aim at covering up this fundamental deadlock (e.g., social contradictions such as inequality or class struggle) ... to present reality as unified, complete or pristine."[60] Thus, "what is to be overthrown consists not in political actors and institutions per se, but in ideas, for they form the real terms of the state."[61]

Given that humans are incomplete, indeterminate, and lacking beings, human subjectivity entails that people cannot completely define ourselves and each other, even for the noblest ideals, such as (nonexistent) universal peace and harmony. There will always be conflict in and between people; "antagonism ... [is] ontological. There is no escape from it[.]"[62] The only Universal is the negative idea that because of subjectivity, there will always be conflict, and the system will always fall short. As such, the system must always strive to reach it through novel, creative, and surprising ways. To inscribe this insight within itself, the fundamental norm then is a reminder to the system of its propensity to fall short of subjectivity. This is pure ideology.

Thus, Žižekian ideology is "highly critical of European empire, while nonetheless being able to retrieve from it a Left antagonistic universal dimension (emancipation, justice, equality) that speaks to struggles against empire, marginalization[,] and exploitation in other parts of the world."[63] It "highlight[s] a fundamental conflict or deadlock"[64] and "uncover[s] these contradictions ... for [people] to better face both [ ] social traumas and [ ] unconscious investments in obscuring and perpetuating social antagonisms."[65] If Žižekian ideology is criticized for providing

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59. *Id.* at 5.

60. *Id.*

61. Rayman, *supra* note 47, at 16.

62. Kapoor, *supra* note 22, at 2.

63. *Id.* at 6.

64. *Id.* at 11.

65. *Id.* at 2.

> no 'coherent political or ethical program,' 'the reason is that ... rather than 'unthinking' action, our first task is thinking [i.e., thinking of better ways to address our conflicts;] [w]e must be engaged in a process of bringing the future to presence, rather than asserting that it can never arrive without *eo ipso* becoming totalitarian.'[66]

Thus,

> the challenge for the Left, [then,] ... is ... to envision 'radical economic change which would abolish the [very] conditions that create [issues such as] the refugee ... [crisis] ... . [And] [I]t is because the Left has given up on the possibility of such change — the prospect of a post-capitalist world — that it ends up [making strategic] compromis[es] on right-wing demands ... .
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> [T]he real task is to build bridges between 'our' and 'their' working classes. Without this unity (which includes the critique and self-critique of both sides)[,] class critique proper regresses into a clash of civilizations.[67]

Accordingly, it is necessary to revisit the overarching principles of democracy as pure ideology. The starting point is the insight that "[democracy] ... is ... always accompanied with a 'nugget' of enjoyment that ties it to fundamentalist fantasies of a completely sutured totality and pure democratic society."[68] As such, "democracy and deficiency are not somehow essentially different or radically separate from the other. On the contrary, democracy and nuggets of deficiency ... are each two sides of the very same coin."[69] This is why Žižekian ideology never "mentions the republican tradition [as an implementation of The Social Contract, and] it rejects [direct, pure,] participatory democracy for representative government."[70] Instead of viewing republicanism and democratism as monopolies of objective truths with complete pictures, one should acknowledge that they are subjective positions. In so doing, democracy becomes a moment of truth — that the people actually do not know what they want, that government will never be the full embodiment of the people's will, that there will always be discord and struggle, and that there are no perfect solutions. Thus, the use democracy as

66. Rayman, *supra* note 47, at 15.

67. Kapoor, *supra* note 22, at 13.

68. Weber, *supra* note 39, at 9.

69. *Id.* at 8.

70. Boucher, *supra* note 36, at 14.

an avenue to communicate, hash out conflicts, and make compromises to best reflect individual subjectivity and freedom.

This open democracy more accurately captures the intention of the 1987 Constitutional framers in conceiving the Philippines as a republican and democratic state. Republicanism, instead of being an avenue for right-wing authoritarianism and populism, acknowledges that there is no pure, distilled will of the people, and such a will never be fully embodied by the government. So, people elect representatives who can mediate social struggles. On the other hand, instead of its left-wing totalitarian forms, which republicanism stands to protect against, democratism serves to remind the government that it cannot rule absolutely over the people and that it should take the interests of individual freedom seriously.[71] In this wise, both republicanism and democratism cannot function without each other — they serve to remind everyone that there is no monolithic law because law represents the compromises made as a society in consideration of individual freedom. The law is living and breathing; it is subject to change. People can and should demand better rules.

These insights are the import of a comprehensive reading of Jean Jacques Rousseau's "The Social Contract."[72] Previous commentators have focused only on Book I, Chapter 6 of Rousseau's *magnum opus*[73] discussing the contract itself, leading to the idea of the good society characterized by popular sovereignty and individual autonomy. Thus, The Social Contract is interpreted merely as the republican social contract tradition, an original agreement in which people who imagine obstacles come together to form a community wherein everyone will be both protected and liberated by government and law.

71. T.R.S. ALLAN, THE SOVEREIGNTY OF LAW: FREEDOM, CONSTITUTION, AND COMMON LAW 108 (2013).

72. JEAN-JACQUES ROUSSEAU, OEUVRES COMPLÈTES DE JEAN-JACQUES ROUSSEAU (1964).

73. *Id.* at 359-60.

Commentators, however, leave out Book II, Chapter 7 on the lawmaker, treating it merely as an anomaly. The lawmaker is either deemphasized,[74] discussed in isolation to the rest of the text,[75] dismissed as merely preceding the original agreement to the contract,[76] or substituted by Rousseau's other works, specifically *Second Discourse* (leading to the interpretation that there is an inevitable movement from one's toxic self-love to virtuous citizenry by considering the people's general will).[77] These commentators forget that the idea of the contract does not exist outside of history or contexts. Consequently, the lawmaker gets to make and impose their own contract, legitimacy, power, and terms of freedom; and the people are not even aware of it. What is then supposedly a rational consensus between free individuals is actually a suppression, a denial, a lie. In Žižekian terms, all ideas come from imperfect ideology (or the symbolic order), as objects are still founded in subjectivity.

The same insight applies even when The Social Contract is read together with John Stuart Mill's proposition that "the ideally best form of government is representative government,"[78] which is applicable in the Philippine context because "[s]overeignty resides in the people and all government authority emanates from them."[79] Government overreach is the major reason for the good society's decay because the government is influenced not only by the will of the people, but also by the interests of the institution itself and of the

74. *See, e.g.*, JUDITH N. SHKLAR, MEN AND CITIZENS: A STUDY OF ROUSSEAU'S SOCIAL THEORY 221 (1969); NICHOLAS DENT, ROUSSEAU 140–142 (2005); & JOSHUA COHEN, ROUSSEAU: A FREE COMMUNITY OF EQUALS 153 (2010).

75. *See, e.g.*, ROGER D. MASTERS, THE POLITICAL PHILOSOPHY OF ROUSSEAU (1976).

76. *See, e.g.*, CÉLINE SPECTOR, ROUSSEAU (2019).

77. *See, e.g.*, ERNST CASSIRER, ÜBER ROUSSEAU (2012) & Daniel Cullen, *From Nature to Society*, *in* THE ROUSSEAUIAN MIND (Eve Grace and Christopher Kelly, eds., 2019).

78. John Stuart Mill, *Representative Government*, *in* 43 GREAT BOOKS OF THE WESTERN WORLD 369 (Hutchins ed., 1984).

79. PHIL. CONST. art. II, § 1.

individual interests of those who comprise the institution.[80] Simply put, the government is marred by individual positions. In the modern context, the patriarchal-capitalist system is the lawmaker, assumed as permanently fixed coherent ideas in societies that get to dictate how one should live life, thereby limiting freedom and making people suffer. Ironically, "with the human mask of capitalism well and truly ripped off ... the Left has got nothing to say to the 'wretched of the earth[.]'"[81]

To address this, the fundamental principle of interpretation should be applied to The Social Contract, meaning it should be interpreted in its entirety and in relation to the whole context, especially since it affects the text's general line of argument. Specifically, the import of Book II, Chapter 7 of the The Social Contract is that whoever occupies the position of the lawmaker (as there will always be a lawmaker) must "institutionalize the nonexistence of the Other".[82] If "the [S]tate is regarded as a repressive apparatus that includes the army, the judiciary and the police," [...] then the lawmaker must be ready to defend "the operation of a revolutionary government seeking to implement radically egalitarian social measures through the administration of justice."[83] As to who may be the lawmaker,

> [o]nly those who are, formally speaking, representatives of the 'substanceless subjectivity' of a proletarian subject-position, [especially "the inhabitants of the slums in the new megalopolises"] because they lack a social identity, and materially excluded from the world system through structural marginalization, are going to be ready for such a step into the void.[84]

In relation to the polarization in modern democracy, antagonism of positions should not be suppressed because it is inherent even to the social contract comprising the lawmaker, society, and individual. Antagonism should be acknowledged as the consequence of accepting that individuals each have subjective positions, and there is no reconciling these positions. Ironically, suppressed antagonisms result in polarization due to everyone's insistence that their positions are the fixed objective position, resulting to deadlock and

80. ROUSSEAU, *supra* note 72, at 400 & 421-23 (1964).

81. BOUCHER, *supra* note 36, at 5.

82. *Id.* at 18.

83. *Id.* at 7.

84. *Id.* at 4.

sustaining the Big Other in every way. On the other hand, when people accept the irreconcilability of their positions, they can see all the more the importance of communication and empathy for being caught in an imperfect symbolic order, making them come together to resolve their conflicts and strike out compromises, leading to a truly novel third way that considers all circumstances.

III. PHILIPPINE PUBLIC PROCUREMENT LAW

The Author thus reviews the inconsistencies in the rules governing Philippine public procurement as tackled by the Supreme Court.

The Author starts with *Del Rosario vs. Bengzon*,[85] which states that the primary consideration in considering procurement items should be the primary characteristic and qualifications, not the brands of items.[86] The question one should ask, then, should be "what do people want to get out of this?"

Also, in *National Power Corporation v. Pinatubo Commercial*,[87] the Court held that a bid partakes of the nature of an offer to contract with the government, meaning the government may refuse bids, and the bidding process may state other conditions.[88] Thus, bidding is not a free-for-all. Procurement officers have the discretion to accept or reject bids.[89]

In *Belgica v. Executive Secretary*,[90] Government Procurement Policy Board (GPPB) Resolution No. 12-2007, dated 29 June 2007,[91] as a form of negotiated procurement procedure, whereby a procuring entity may enter into a memorandum of agreement with a non-governmental organization

85. Del Rosario v. Bengzon, G.R. No. 88265, 180 SCRA 521 (1989).

86. *Id.*

87. National Power Corporation v. Pinatubo Commercial, 630 Phil. 599 (2010).

88. *Id.* at 608.

89. Osmeña v. DOTC Secretary Abaya, et al., 778 Phil. 395, 437 (2016).

90. Belgica, et al. v. Hon. Exec. Sec. Ochoa, Jr., et al., 721 Phil. 416 (2013).

91. Government Procurement Policy Board, Amendment of Section 53 of the Implementing Rules and Regulations Part A Of Republic Act 9184 and Prescribing Guidelines on Participation of Non-Governmental Organizations in Public Procurement, Resolution No. 12-2007 (2007).

(NGO), provided that an appropriation law or ordinance earmarks the amount to be specifically contracted out to NGOs.[92] While Section 48 does, in fact, allow the GPPB to determine instances other than those provided under Section 53 of the law, where the procuring entity may resort to negotiated procurement, this power is not unbridled.[93] Section 48 (e) provides that this negotiated procurement must be with a supplier, contractor, or consultant who has the technical, legal, and financial capabilities to the end of ensuring that the most advantageous price for the government is secured.[94] Interestingly, the Court declared, as unconstitutional, the Priority Development Assistance Fund (PDAF) Article,[95] which was made as the basis for the amendment of the Implementing Rules and Regulations (IRR) of Republic Act No. 9184, including all provisions authorizing legislators to intervene, assume, or participate in any of the various post-enactment stages of the budget execution, or which confer personal, lump-sum allocations to legislators from which they are able to fund specific projects which they themselves determine all informal practices of similar import and effect.[96] This ruling was also in view the Commission on Audit's (COA's) report which highlighted, among others: (1) "[s]ignificant amounts were released to implementing agencies without the latter's endorsement and without considering their mandated functions, administrative and technical capabilities to implement projects;"[97] (2) "[t]he funds were transferred to the [NGOs] [...] in spite of the absence of any appropriation law or ordinance;"[98] (3) "[s]election of the NGOs were not compliant with law and regulations;"[99] (4) "[82] [...] NGOs entrusted with implementation of [772] [...] projects amount to ₱6.156 [b]illion were either found questionable, or submitted

92. *Belgica*, 721 Phil. at 501 (citing Government Procurement Policy Board, Resolution No. 12-2007 (2007)).

93. *See generally* Government Procurement Reform Act, art. XVI, §§ 48 & 53.

94. *Id.* § 48 (e).

95. *Belgica*, 721 Phil. at 582.

96. *Id.*

97. *Id.* at 512.

98. *Id.* at 513.

99. *Id.*

questionable/spurious documents, or failed to liquidate in whole or in part their utilization of the funds;"[100] and (5) "[p]rocurement by the NGOs, as well as some implementing agencies, of goods and services reportedly used in the projects were not compliant with law."[101]

In *Philippine Pharmawealth, Inc. v. Philippine Children's Medical Center Bids and Awards Committee*,[102] the Court ruled that a bidding participant ineligible by the Bids and Awards Committee (BAC) must exhaust the administrative remedies available to it before it may resort to judicial remedies.[103] The Court, in deciding the case, relied on the Implementing Rules and Regulations of Republic Act No. 9184, which has been revised at least eight times.[104] Specifically, the Court cited Sections 55.1 and 58.1 of Rule XVII, in relation to Section 23.3, Rule VII on non-exhaustion of administrative remedies.[105] Sections 55 and 58, Article XVII of Republic Act No. 9184 providing for the protest mechanism, however, does not provide for this procedure.[106] In fact, Republic Act No. 9184 was explicit in stating that decisions of the BAC in all stages of procurement may be protested in writing to the head of the procuring entity and only the amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the implementing rules and regulations.[107]

There is also inconsistency during the period of evaluation of bids. A plain reading of Section 30 of Republic Act No. 9184 provides that evaluation should be based on non-discretionary criteria.[108] However, there are instances in practice when the bidder barely complies with a criterion such that the

100. *Id.*

101. *Belgica*, 721 Phil. at 513.

102. Phil. Pharmawealth, Inc. v. Phil. Children's Medical Center Bids and Awards Committee, 525 Phil. 811 (2006).

103. *Id.* at 814.

104. *Id.* at 814-16.

105. *Id.*

106. *Id.* at 815-16.

107. Government Procurement Reform Act, art. XVII, § 55.

108. *Id.* § 30.

BAC will then be called to rule on the submission, which requires exercise of its discretion. Such an issue was discussed in *Commission on Audit v. Link Worth International, Inc.*,[109] where the procuring entity disregarded the eligibility requirement laid down by Republic Act No. 9184, contending that the difference on the technical specifications of the goods being procured was insignificant or inconsequential.[110] The Court, however, ruled against the procuring entity, stating that the purpose of post-qualification evaluation is to verify, inspect, and test whether the technical specifications of the goods offered comply with the requirements of the contract and the bidding documents.[111] It does not give occasion for the procuring entity to arbitrarily exercise its discretion and brush aside the very requirements it specified as vital components of the goods it bids out.[112] Aside from *Link Worth*, another instance allowing for exercise of discretion could be the submission of the latest business permit for procurement conducted at the beginning of the year, where there may be possible delay in the issuance of the Local Government Units (LGU) of the required permit, which would then render bidders disqualified.[113]

In *Jacomille v. Abaya*,[114] the Court ruled that the periods fixed by Sections 37 and 38 of Republic Act No. 9184 are mandatory periods and not merely directory.[115] The use of the word "shall" necessitated the mandatory character of the periods imposed by law and non-compliance therewith will certainly affect the validity of the bidding process.[116] The Court ruled that the three-month period under Section 38 was complied with since the period is reckoned from the opening of the bids up to the award of the contract and

109. Commission on Audit v. Link Worth International, Inc., 600 Phil 547 (2009) [hereinafter Link Worth].

110. *Id.* at 554.

111. *Id.* at 561.

112. *Id.*

113. Government Procurement Policy Board, Revised Implementing Rules And Regulations of Republic Act No. 9184, art. II, § 8.5.2 (July 3, 2023) (as amended).

114. Jacomille v. Sec. Abaya, et al., 759 Phil. 248 (2015).

115. *Id.* at 271.

116. *Id.*

not, as therein petitioner claims, up to the posting of the notice of award in the Philippine Government Electronic Procurement System (PhilGEPS) website.[117] However, the Court ruled that the specific periods on entering of contracts and notices to proceed provided in Section 37 were not observed.[118] In addition, the project did not have the adequate appropriation when its procurement was commenced on 20 February 2013, contrary to the provisions of Republic Act No. 9184.[119] No multi-year obligational authority was also secured during the start of the procurement process.[120] These irregularities tainted the procurement process and rendered it null and void.[121] In spite of these, the Court did not invalidate the contract involved because the issue was rendered moot and academic by the subsequent General Appropriations Act.[122] The Court also did not rule on the liability of the accused public officials because the Court is not a trier and facts and thus may not receive new evidence on the matter at hand.[123] However, in practice, compliance with these mandatory periods are next to impossible.

In *De Guzman v. OMB*,[124] a member of the BAC concerned argued that they complied with the provisions of the IRR of Republic Act No. 9184 when it resorted to alternative modes of procurement in the questioned procurements because the subsequent biddings were merely re-bids.[125] Thus, they argued that a pre-bid conference was no longer necessary since all information about the projects had already been discussed with and made known to interested accredited bidders.[126] The Court held, however, that the provisions on Limited Source Bidding under the IRR of Republic Act No.

117. *Id.* at 271-72.

118. *Id.* at 272.

119. *Id.* at 260.

120. *Jacomille*, 759 Phil. at 261.

121. *Id.* at 285.

122. *Id.*

123. *Id.*

124. De Guzman v. Office of the Ombudsman, et al., 821 Phil. 681 (2017).

125. *Id.* at 689.

126. *Id.*

9184 should be read in consonance with the provisions of its implementing law, and the language of the law and the IRR is clear — "such requirements must be followed in any and all types of procurement[,]"[127] and not all procedures followed in competitive biddings are dispensed with when an agency or office resorts to any of the alternative modes of procurement.[128] Thus, the required pre-bid conference, written invitation to observers, and posting of IAEB, which, in alternative modes of procurement, must be followed in any and all types of procurement, and not all procedures followed in competitive biddings are dispensed with when an agency or office resorts to any of the alternative modes of procurement.[129] The law requires that the procedure be followed in all types of procurement and does not admit of any exceptions.[130] This requirement appears to prolong the award of the contract and ultimately result in the delay in the delivery of government service.[131]

Bishop Pabillo, DD, et al. v. COMELEC, et al.[132] pertains to the repair and maintenance of the automated election system (AES) furnished by Smartmatic-TIM to the COMELEC.[133] In the said case, the COMELEC did not conduct a public bidding for the repair and maintenance of the AES used in the national elections; instead, COMELEC resorted to direct contracting when it procured from Smartmatic-TIM the services for the repair and refurbishment of the existing PCOS machines through an Extended Warranty Contract.[134] COMELEC maintained that the goods sought to be procured are of a proprietary nature, which may only be obtained from the proprietary source, in this case Smartmatic-TIM, which owns the intellectual property rights over such goods.[135] Also, the COMELEC invoked Section 52 (h) of Batas Pambansa. No. 881 or the Omnibus Election Code, which, in its view,

127. *Id.* at 696.

128. *Id.*

129. *Id.*

130. Government Procurement Reform Act, art. VII, §§ 20 & 22.

131. *See Id.*

132. Bishop Pabillo, DD, et al. v. COMELEC, et al., 758 Phil. 806 (2015).

133. *Id.* at 824.

134. *Id.* at 823.

135. *Id.* at 846.

has not been repealed by Republic Act No. 9184.[136] The same provision states that the COMELEC shall "[p]rocure any supplies, equipment, materials or services needed for the holding of the election by public bidding[,] [p]rovided that, if it finds the requirements of public bidding impractical to observe, then by negotiations or sealed bids, and in both cases, the accredited parties shall be duly notified."[137] The Court, however, did not give value to said provision's broad gauge of impracticality.[138] It countered that practicality is a relative term which, to stand the mettle of law, must be supported by independently verified and competent data.[139] A claim of practicality should only be based on substantiated projections, else it would be easy to contrive, and the rule on public bidding easily circumvented.[140] The Court thus ultimately resolved that the COMELEC failed to comply with the conditions by which its selected mode of procurement, direct contracting, would have been allowed.[141]

Balbedrin v. Sandiganbayan[142] is a case on splitting of contracts,[143] which has been limited in the IRR of Republic Act No. 9184 to, "those which exceed procedural purchase limits to avoid competitive bidding or to circumvent the limits of approving or procurement authority."[144] The intent in the ban on splitting of contract be reviewed because of ambiguity in application, such as the definition of "contract," as well as whether a procurement officer must wait for a purchase acquisition that comes in late before consolidation of contracts. The rubric for illegal splitting of contracts should be avoiding public bidding and having different approving authorities. The point of the ban should be efficiency and economy.

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136. *Id.* at 835.

137. *Id.* at 869-70 (citing Omnibus Election Code of the Philippines, Batas Pambansa Blg. 881, art. VII, § 52 (h)).

138. *Bishop Pabillo, DD, et al.*, 758 Phil. at 871.

139. *Id.* at 875.

140. *Id.*

141. *Id.* at 874.

142. Baldebrin v. Sandiganbayan (Third Div.), 547 Phil. 522 (2007).

143. *Id.* at 527.

144. Revised Implementing Rules and Regulations of Republic Act No. 9184, rule XXI, § 65.1 (d).

The contention in *People v. Arandia*,[145] a case decided by the First Division of the Sandiganbayan, lies in the nature of the procurement project since the MRI project cannot be categorized simply as procurement of goods, but rather involves an infrastructure component, which involves a different set of guidelines and procedures in the conduct of its procurement.[146] Accused claimed that, at the time of the procurement of the subject MRI machine, there were difficult or at least unsettled questions of law relating to the correct and proper procedure and documentation governing mixed procurements.[147] Among such questions were whether or not the then existing bidding documents of the procuring entities complied with the requirements of the Government Procurement Reform Act (GPRA),[148] and whether or not there are specific steps or procedures in the GPRA to be observed in the case of mixed procurements.[149] Citing *Posadas v. Sandiganbayan*,[150] the Court gave credence to accused's claim, stating that good faith is a valid defense in anti-graft-cases involving the present scenario.[151] Inadvertence or mistake committed, when unattended with malice or willful intent to commit a crime, is a badge of good faith.[152] A doubtful or difficult question of law may become the basis of good faith and, in this regard, law always accords to public officials the presumption of good faith and regularity in the performance of official duties.[153] Simply put, Republic Act No. 9184 is *malum prohibitum*, while Republic Act No. 3019[154] is *malum in se*.

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145. People v. Arandia, SB-14-CRM-0431, Jan. 25, 2019, *available at* https://sb.judiciary.gov.ph/wp-content/uploads/2024/06/A_Crim_SB-14-CRM-0431_People-vs-Arandia-et-al_01_25_2019.pdf.

146. *Arandia*, SB-14-CRM-0431 (2019).

147. *See generally id.*

148. *Id.* at 14.

149. *Id.*

150. Dr. Posadas, et al. v. Sandiganbayan, et al., 722 Phil. 118 (2013).

151. *Arandia*, SB-14-CRM-0431 at 23 (citing *Dr. Posadas, et al.*, 722 Phil. at 123-24).

152. *Id.* at 24 (citing Drilon v. Court of Appeals, G.R. No. 107019, 270 SCRA 211 (1997)).

153. *Id.*

154. Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960).

Arias v. Sandiganbayan[155] is another Republic Act No. 3019 case arising from procurement law. The Court held that all heads of offices have to rely to a reasonable extent on their subordinates and on the good faith of those who prepare bids, purchase supplies, or enter into negotiations.[156] The Court opined that while it may be argued that accused should have diligently inspected the documents presented to him for signing, it is doubtful if any auditor for a fairly sized office could personally do all these things in all vouchers presented for his signature.[157] In addition, there should be other grounds to sustain a conspiracy charge or a conviction of accused other than the presence of their mere signature or approval appearing on a voucher.[158] Conviction of accused would set a bad precedent if a head of office plagued by too common problems — dishonest or negligent subordinates, overwork, multiple assignments or positions, or plain incompetence is suddenly swept into a conspiracy conviction simply because they did not personally examine every single detail painstakingly every step from inception, and investigate the motives of every person involved in a transaction before affixing their signature as the final approving authority.[159] *Joson III v. COA*[160] is another Supreme Court case that applied the *Arias* doctrine, holding that since the accused had no hand in the preparation of the relevant documents, they cannot be held liable for its absence.[161] The *Arias* doctrine, however, was not applied in *OMB v. Espina*[162] because there were already red flags throughout the procurement process.[163] Thus, Espina could not just blindly rely on his subordinates; it was incumbent upon him to check on the status of the procurement.[164]

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155. Arias v. Sandiganbayan, G.R. No. 81563, 180 SCRA 309 (1989).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Joson v. Commission on Audit, 820 Phil. 485 (2017).

161. *Id.* at 499.

162. Office of the Ombudsman, et al. v. PS/Supt. Espina, 807 Phil. 529 (2017).

163. *Id.* at 267.

164. *Id.*

Forgery is also a potent defense in procurement cases. The case of *Gatan v. Vinarao*[165] states that "[a]s a rule, forgery cannot be presumed and must be proved by clear, positive and convincing evidence, the burden of proof lies on the party alleging forgery."[166] Further, "[o]ne who alleges forgery has the burden to establish his case by a preponderance of evidence, or evidence which is of greater weight or more convincing than that which is offered in opposition to it."[167] Thus, "[t]he fact of forgery can only be established by a comparison between the alleged forged signature and the authentic and genuine signature of the person whose signature is theorized to have been forged."[168] Defendants in cases involving the priority development assistance fund have evaded criminal liability using this defense.[169]

On the liability of government officials for acts inimical to public interest in the conduct of the procurement process, the Court elucidated in *Vicencio v. Villar*[170] that the public official's personal liability arises only if the expenditure of government funds was made in violation of law.[171] The Court also stated that while heads of procuring entities may have relied on the opinion of other public officials, this reliance only serves to support the defense of good faith.[172] It does not, however, exculpate accused from personal liability under the law.[173] Thus, in signing a contract contrary to an ordinance, which only authorized the then city vice mayor to enter into consultancy contracts, and contrary to appropriations for this particular item — which were limited to the savings for a different period, or in other words without verifying

165. Gatan, et al. v. Vinarao, et al., 820 Phil. 257 (2017).

166. *Id.* at 267 (citing Gepulle-Garbo v. Sps. Garabato, 750 Phil. 846, 855-56 (2015)).

167. *Id.*

168. *Id.*

169. *See, e.g.*, People v. Revilla, Crim. Case No. SB-14-CRM-0240, Dec. 7, 2018, *available at* https://sb.judiciary.gov.ph/wp-content/uploads/2024/06/L_Crim_SB-14-CRM-0240_People-vs-RevillaJr-et-al_12_07_2018.pdf.

170. Vicencio v. Hon. Villar, et al., 690 Phil. 59 (2012).

171. *Id.* at 71.

172. *Id.*

173. *Id.*

compliance of existing laws — respondent falls short of the required competence expected of them in the performance of their functions.[174] In signing the contract without verifying compliance of existing laws, respondent falls short of the required competence of him in the performance of his official functions.[175]

In *Cagang v. Sandiganbayan*,[176] the Court re-examined the doctrine laid down in *People v. Sandiganbayan, Fifth Division*,[177] which provided for the streamlined and new criteria in determining inordinate delay by holding that preliminary investigation should be counted for purposes of determining inordinate delay.[178] In this case, the criminal complaint against Cagang was filed on 10 February 2003[179] but the fact-finding investigation was wrapped up by the OMB on 12 April 2005.[180] However, it was only on 17 November 2011, or six years after the recommendation to file information against Cagang was approved, that the said information was filed.[181] While it held that the burden of proving the justification of the delay is on the prosecution,[182] the Court cited *Jacob v. Sandiganbayan*,[183] which pronounced that institutional delay, in the proper context, should not be taken against the State.[184] Courts should appraise a reasonable period from the point of view of how much time a competent and independent public officer would need in relation to the

174. *Id.*

175. *Id.*

176. Cagang v. Sandiganbayan, Fifth Division, Quezon City, et al., 837 Phil. 815 (2018).

177. People v. Sandiganbayan, Fifth Division, 791 Phil. 37 (2016).

178. *See generally Cagang*, 837 Phil.

179. *Id.* at 831-32.

180. *Id.* at 836.

181. *Id.* at 837.

182. *Id.* at 877.

183. *Cagang*, 837 Phil. at 879 (citing Jacob v. Sandiganbayan, 649 Phil. 374, 392 (2010)).

184. *Id.*

complexity of a given case.[185] The Court thus averred that inordinate delay, for purposes of determining a violation of the accused's right to speedy disposition of cases, must be determined not only through mere mathematical reckoning but through the examination of the facts and circumstances surrounding each case.[186] The Court recognized that the OMB is encumbered by heavy case load, which is the typical reason for the delay in the conduct of the proceedings.[187] The Court also faulted Cagang who has only invoked their right when the information against them was filed with the Sandiganbayan.[188]

Another case relevant to the OMB is the case of *Crespo v. Mogul*,[189] where the trial court refused to grant a motion to dismiss a criminal case filed by a Provincial Fiscal upon instructions of the Secretary of Justice to whom the case was elevated for review.[190] The Sandiganbayan may encounter overlapping proceedings with the OMB.[191] One such instance would be where a complaint is already filed with the Sandiganbayan despite there being a pending motion for reconsideration with the OMB, which, under its current rules, only has five days to resolve said motion.[192]

IV. ANALYSIS OF PHILIPPINE PUBLIC PROCUREMENT LAW

From this layout of jurisprudence, inconsistencies in procurement law can be summed up in two categories: (1) instances where the implementing law and/or rules make procurement virtually impossible to enforce,[193] and (2)

185. *Id.* at 877.

186. *Id.*

187. *Id.* at 879.

188. *Id.* at 878.

189. Crespo v. Mogul, G.R. No. L-53373, 151 SCRA 462 (1987).

190. *Id.*

191. *See id.*

192. Office of the Ombudsman, Rules of Procedure of the Office of the Ombudsman, rule II, § 7.

193. *See generally Del Rosario*, 180 SCRA 521; *National Power Corporation*, 630 Phil. 599; *Belgica, et al.*, 721 Phil. 416; *Phil. Pharmawealth, Inc.*, 525 Phil. 811; *Link Worth International, Inc.*, 600 Phil 547; *Jacomille*, 759 Phil. 248; *De Guzman*, 821 Phil.

opportunities afforded to procurement officials to circumvent and transgress procurement law.[194] These contradictions represent "today's perverse elevation of transgression to a norm that is ultimately based in the supposition of the existence of the Other".[195]

The IRR of Republic Act No. 9184 has been revised at least eight times, the latest in 2016, bringing substantial changes to the rules that are more stringent than the provisions of the implementing law, as observed in the protest mechanism justified along the lines of the doctrine of exhaustion of administrative remedies in *Philippine Pharmawealth*.[196] These revisions are especially concerning because aside from incongruencies with the implementing law, which constitutes a violation of the doctrine of non-delegation of legislative power.[197] The supplemental rules provide more stringent hurdles to public procurement.[198]

Nonetheless, both the implementing law and the implementing rules provide for regulations that make it virtually impossible for public procurement to prosper. This is evident, for example, in the time limits set in *Jacomille* within which certain acts should be done or requirements complied with.[199] The 10-day requirement for contracts of execution is difficult to comply with because in said contracts, while there may be a notice of award already, there are still conditions to be complied with before execution, especially obtaining a performance security, a security bond, and other

681; *Bishop Pabillo*, *DD*, *et al.*, 758 Phil. 806; *Baldebrin*, 547 Phil. 522; & *Arandia*, SB-14-CRM-0431.

194. *See generally Arias*, 180 SCRA 309; *Joson*, 820 Phil. 485; *Office of the Ombudsman*, *et al.*, 807 Phil. 529; *Gatan*, *et al.*, 820 Phil. 257; *Vicencio*, 690 Phil. 59; *Cagang*, 837 Phil. 815; & *Crespo*, 151 SCRA 462.

195. Boucher, *supra* note 36, at 18 & 21.

196. *See* generally *Phil. Pharmawealth*, *Inc.*, 525 Phil.

197. Metropolitan Bank and Trust Co., Inc. v. National Wages and Productivity Commission, 543 Phil. 318, 330 (2007).

198. *Phil. Pharmawealth*, *Inc.*, 525 Phil. at 811.

199. *See Jacomille*, 759 Phil. at 721.

conditions from the Insurance Commission.[200] Sometimes, when the name indicated in the security bonds are wrong, the same bonds will even have to be returned. The same difficulty is experienced with the three-month rule.[201]

Yet, while some provisions are too stringent as to be impractical, the law also provides for loopholes and technicalities that may be prone to exploitation and abuse. For one, while the language of the law makes a rule clearly mandatory, the Court has exercised leniency in interpreting the law for various reasons, such as in *Philippine Pharmawealth* and *Linkworth*, where the Court gave some allowance to complete certain acts and requirements beyond the time limits provided.[202] These allowances go against the use of the word "shall" in the law, indicative of the periods' compulsoriness. Jurisprudence dictates that the word "shall" is a word of command.[203]

Another point is that not only has the Court exercised leniency, but also even go against the purpose of the law in its interpretations. This is evident in the cases of *Belgica* and *Linkworth*.[204] Case law on statutory construction provides that

> where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application. Where the language of a statute is clear and unambiguous, the law is applied according to its express terms, and interpretation should be resorted to only where a literal interpretation would be either impossible or absurd or would lead to an injustice.[205]

Even further, cases usually get dismissed when a case is filed under Republic Act No. 3019 or the Graft and Corrupt Practices Act, especially

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200. Government Procurement Policy Board, Approving the Guidelines on the Renewal of Regular and Recurring Services, Resolution No. 06-2022 (2022).

201. *See* Government Procurement Reform Act, § 30.

202. *See generally Phil. Pharmawealth, Inc.*, 525 Phil. 811 & *Link Worth International, Inc.*, 600 Phil. at 547.

203. Enriquez v. Enriquez, 505 Phil. 193, 199 (2005).

204. *See generally Belgica, et al.*, 721 Phil. at 416 (2013) & *Link Worth International, Inc.*, 600 Phil. at 547.

205. Barcellano v. Bañas, 673 Phil. 177, 187 (2011) (citing Cebu Portland Cement Co. v. Municipality of Naga, 133 Phil. 695, 699 (1968)).

under Section 3 (e)[206] thereof, arising from violations covered by Republic Act No. 9184. Defendants may bring up the defense of good faith under Section 3 (e) of Republic Act No. 3019. Because special penal laws are generally considered to be *mala prohibita*, Republic Act No. 9184 is *malum prohibitum*, absence any indication of the contrary. On the other hand, because of the availability of the defense of good faith, Republic Act No. 3019, Section 3 (e) is considered *malum in se*.

> Criminal law has long divided crimes into acts wrong in themselves called acts *mala in se*; and acts which would not be wrong but for the fact that positive law forbids them, called acts *mala prohibita*. This distinction is important with reference to the intent with which a wrongful act is done. The rule on the subject is that in acts *mala in se*, the intent governs; but in acts *mala prohibita*, the only inquiry is, "has the law been violated?" When an act is illegal, the intent of the offender is immaterial. When the doing of an act is prohibited by law, it is considered injurious to public welfare, and the doing of the prohibited act is the crime itself.[207]

Applied to Republic Act No. 9184 and Republic Act No. 3019, Section 3 (e), the defense of good faith may ultimately lead to acquittals,[208] thus leaving violations of public procurement law unaccounted for.

Despite the ruling in *Espina,* heads of procuring entities (HoPE) may also routinely evade liability under the *Arias* doctrine, as illustrated in the case of *Joson*.[209] As for the defense of forgery, procurement officials may easily ask another person to affix their purported signature so that they may conveniently disown the signature later.

Finally, while *Cagang* departs from a loose interpretation of and set the standards in the availment of the right of the accused to speedy disposition of cases,[210] this can still be invoked as an avenue to dodge criminal liability,

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206. Anti-Graft And Corrupt Practices Act, § 3 (e).

207. Dungo, et al. v. People, 762 Phil. 630, 658 (2015).

208. *See* Anti-Graft And Corrupt Practices Act, § (3) e.

209. *See generally PS/Supt. Espina*, 807 Phil. 529; *Arias*, 180 SCRA 309; & *Joson*, 820 Phil. 485.

210. *See generally Cagang*, 837 Phil. at 815.

especially because it is a constitutional right.[211] More so, because the OMB is plagued by heavy case load, and its rules may provide for periods that are virtually impossible to comply with, such as the three-day period to resolve motions for reconsideration.[212] Another explanation for the OMB's heavy case load is the use of audit reports with notices of disallowance as usual evidentiary bases for findings of probable cause.[213] The administrative cases with COA arising from these notices are appealable to the COA *en banc* and may therefore be reversed.[214] As a result, the OMB's cases founded on probable cause would be dismissed pursuant to the doctrine of conclusiveness of administrative findings of fact, where courts are normally persuaded by the decisions of administrative agencies whose factual findings are generally accorded with weight and respect, if not finality by courts, by reason of their special knowledge and expertise over matters falling under their jurisdiction.[215]

Through the inconsistencies in public procurement rules, as shown by a review of relevant jurisprudence, uncovers a polarization akin to that of modern democracy. The law treats all parties involved in public procurement as objects with no room for subjectivity. The law imposes very stringent, close to impossible ideals upon public procurement officers, then naively assumes that public officers are competent and knowledgeable enough to enforce these ideals. The law leaves them grasping in the dark, fending for themselves, then prosecuting them for any violation of procurement laws. This leaves public officers daunted by having to go through a system that ultimately fosters their own prosecution, having a stifling effect on procurement. The law may even be weaponized by the political opponents of procurement officers. Considering that the procurement process deals with cumbersome and even conflicting provisions,[216] it is no wonder that government officials may be apprehensive in performing their function since there will be personal liability

211. PHIL. CONST., art III, § 16.

212. Rules of Procedure of the Office of the Ombudsman, rule II, § 7.

213. *See*, *e.g.*, Pasok v. Office of the Ombudsman-Mindanao, et al., 832 Phil. 719, 725 (2018).

214. *See generally* Dela Cruz, et al. v. Sandiganbayan, et al., 622 Phil. 908 (2009).

215. Miro v. Vda. de Erederos, et al., 721 Phil. 722, 784 (2013).

216. *See generally* Government Procurement Act & Revised Implementing Rules And Regulations of Republic Act No. 9184.

attached to a public official for approving what could be potentially an illegal disbursement.

Also, by focusing on prosecution, the system supports enjoyment through transgression, where trials become games of technicalities and loopholes. Officers may simply go through the procurement process while leaving trails of irregularities along the way, only to conveniently invoke them as valid defenses in court. Knowledgeable but malicious offenders get away scot-free, wasting the efforts of all parties involved. Meanwhile, those less knowledgeable, yet daring enough to go through the process to be able to deliver to their constituents, are immediately prosecuted for the slightest mistake they make. There is no room for error, but there is wiggle room for the corrupt.

The result is an infuriated public, who is left with neither procurement results nor accountability. Because they are left with nothing, they dismiss the government as a rigged machinery of corruption. The public makes sense of their frustrations by othering the government, just as the government has othered them.

Further, all parties involved — not only between procurement officers and the general public, but also government watchdogs COA and the OMB — do not communicate with each other. Each actor seems to be performing alone at their own "phase" in a timeline of prosecution: procurement officers go through the condemning procurement process, then COA usually only conducts post-audits when entire procurement process is already over, then the OMB prosecutes without regard to the COA proceedings (i.e., checking whether the proceedings are already over). Also, end-user participation is also inconsequential throughout the entire process.

Yet, as previously discussed, the problem is not in institutions or personalities *per se*, but in ideas. The government machinery is only enforcing the very ideas underlying the system. Again, these ideas paralyze procurement actors, encourage plunderers to pillage government coffers, and provides no avenues for communication.

Thus, it is no surprise that the public is infuriated with the government, not so much because of government incompetence, but especially because of the culture that pushes them to be infuriated in the first place. This culture lays the foundation for societal polarization. The Author reiterates that the confrontation of the polarized opposites, instead of paving the way for a resolution, serves to reinforce the very same oppressive culture that brought it about.

Ultimately, then, the greatest fault of Philippine culture is erasing subjectivity. All actors are ideated, treating them as though they were objectively complete individuals. The current procurement rules,[217] instead of providing for a creative space to express subjectivity, stifles creation. It erases humanity; people are all cogs in one big corruption-prosecution machine. Everything is kept fixed, stagnant, immovable, as though *it* is all there is, totally missing the point of procurement.

V. RECOMMENDATIONS AND CONCLUSION

People can and should demand better rules — this cannot be stressed enough. Top of mind, the Government Procurement Act should be amended to include the following recommendations:

First, procurement officers forming the BAC are in need of support through strong policy guidance. The GPPB recognizes as much.[218] A reading of controlling case law enlightens why procurement officers are scared to make decisions, paralyzed in their analysis, because they are afraid of possible cases against them possibly initiated by disgruntled bidders or from the findings of COA's post-audit. This lack of support could also be a reason why courts afford leniency to procurement officers in procurement cases. Defendants may invoke the defense of good faith,[219] making this circumstance a pivotal defense against prosecution of procurement cases. To address this gap, procurement law should be amended to provide for a framework that will support the functions of procurement officers, such as strategic procurement mechanisms. Also, the amendments should focus on adding professionals in the composition of the BAC. For example, the HoPE may be the *ex-officio* chairman, while lawyers and accountants, or in the alternative, city municipal legal officers and accountants, may be required in the composition of the BAC. In so doing, procurement officers will be more confident in discharging their duties, while also minimizing dismissal of cases based on questions of competency.

Second, one might talk highly of Philippine procurement law, claiming that it is among the best in the world. Supposedly, the procurement process can be finished by 26 days for goods and infrastructure projects and 36 days

217. *See generally* Government Procurement Act & Revised Implementing Rules And Regulations of Republic Act No. 9184.

218. Government Procurement Policy Board, NPM 087-2013, Nov. 25, 2013.

219. *See* Anti-Graft And Corrupt Practices Act, § (3) e.

for consulting services. To roughly outline the periods comprising the whole procurement process, the Pre-Bid Conference should be finished at least 12 or at least 30 calendar days for exceptional circumstances before the deadline for the Submission of Bids.[220] Bids may be submitted until the 45th calendar day from the last day of advertisement.[221] Bid evaluation may be continued for a period of seven calendar days.[222] Post-qualification process should be concluded within 12 calendar days or 45 calendar days in exceptional cases.[223] The hope must have already acted on a contract within seven days (or 15 days for government-owned and controlled corporations and government financial institutions) of its receipt, and in case it approves, a notice of award must be issued promptly.

Based on this walkthrough of the procurement process, the Author readily sees that the entire process will take more than five months. Sure, this may still seem fast compared to other countries whose duration of the entire procurement process average one year. Still, the supposed timeframe of less than a year is an ideal duration, discounting exigent circumstances, such as the system's aiding of analysis paralysis. The result is a slow procurement process spanning years. To remedy this situation, the Author points out that alternative modes of procurement may be availed of without repeating the early stages of procurement (i.e., posting of notices and invitation to bid). Also, alternative methods may be resorted upon failure at the second attempt of bidding.

Third, presumed violations of Republic Act No. 9184 become the bases for findings of probable cause and thus initiate criminal proceedings under Republic Act No. 3019, Section 3 (e). However, criminal proceedings filed by the OMB with the Sandiganbayan are tiresome, requiring the highest quantum of proof,[224] likely leading to the dismissal of the cases. Accordingly, the OMB should be more meticulous and apprehensive in its findings of probable cause. Finality of judgement in COA administrative proceedings

220. Revised Implementing Rules And Regulations of Republic Act No. 9184, rule VII, § 22.2 (d).

221. *Id.* rule VIII, § 25.4.

222. *Id.* rule IX, § 32.4.

223. *Id.* rule X, § 34.8.

224. Proof beyond reasonable doubt.

involving notices of disallowance should be treated as a condition precedent before the OMB can file cases with the Sandiganbayan stemming from the same notices. The OMB proceedings may be dismissed, or even just deferred, by the Sandiganbayan,[225] to give COA time to decide its cases given that it will affect the outcome of criminal cases and may lead to dismissal of said cases based on technicalities. In fact, the OMB may already impose administrative penalties at its level,[226] for example the accessory penalties of suspension or disqualification from public office, as well as fines and damages.[227] This approach finds legal basis in the Constitution itself, which empowers the OMB to "stop, prevent, and correct any abuse or impropriety in the performance of duties by public officials."[228] Corollarily, it is recommend that the OMB focus not on indictments of public officials but on resolution of cases. Lastly, the OMB could also amend its rules to extend unobservable periods, such as the period to resolve motions for reconsideration.[229]

Fourth, the public should certainly laud the procurement laws for promoting public accountability. However, the law can be too stringent to the point of sacrificing room for other public considerations. A salient example is the focus on the lowest priced goods in public bidding,[230] coupled with the yardstick of primary characteristics and qualifications instead of brand names.[231] The point is, cheaper products are not necessarily always in line with the public interest; there are definitely other factors that should be considered. As such, the government should widen the public procurement standards, by including value-for-money procurement and including economic considerations. Specifically, desired outcomes of the procurement may not necessarily be covered by just looking into primary characteristics and qualifications, and so a broader measure would be necessary, such as the looking into the advantages and drawbacks of each submission; looking into

225. *See Cagang*, 837 Phil. at 890.

226. *See Id.* at 889.

227. *See* Anti-Graft And Corrupt Practices Act, § 13.

228. PHIL. CONST. art. XI, § 13 (2).

229. *See* Rules of Procedure of the Office of the Ombudsman, rule II, § 7.

230. *See* Government Procurement Reform Act, art. IX, § 32.

231. *See generally*, Updated 2016 Revised Implementing Rules and Regulations, rule X.

inclusive factors such as the quality of products and/or services; appropriateness and propriety for the project; and prior transactions, performance, and adaptability. Simply put, the Author recommends widening of considerations that are still justifiable using tangible considerations and also within the standards set by the GPPB such as for determining overpricing.

Fifth, however, if there is one insight to be derived from this paper, it is that no matter how many amendments are made to the law, it will never be perfect — it will always fall short of subjectivity, so it always has to strive to reach it through new, innovative, and unexpected ways. Thus, upon further deliberation, the essential amendment to the procurement law would be the acknowledgement of the nonexistence of the big Other, or that there is no objective procurement law. In translation, procurement law must provide for open contracting mechanisms that employ inclusive and conversational approaches.

Hence, *last* but definitely not the least, just as there is a need open democracy, the government needs open contracting in public procurement. "There is no common definition of the concept of open contracting and of the nature and extent of disclosure requirements this may entail."[232] However, "[o]pen contracting broadly refers to the publication of government contracts from the awarding process to the monitoring and evaluation of contract implementation."[233] "[O]pen contracting ... [may also refer] to pro-active disclosure of contract information with open access to the public free-of-charge."[234]

Previous literature has also enumerated open contracting global principles, which may be summarized as follows:

(1) right of the public to access information;

(2) [conducting] public contracting ... in a transparent and equitable manner;

(3) timely, current, and routine publi[shing] of enough information;

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232. U4 Anti-Corruption Resource Centre, The Benefits of Open Contracting, at 2, *available at* https://www.u4.no/publications/the-benefits-of-open-contracting.pdf (last accessed Apr. 30, 2023).

233. *Id.*

234. *Id.*

(4) develop[ing] systems to collect, manage, simplify and publish contracting data ... in an open and structured format;

(5) complete information;

(6) [c]ontracting parties['] ... support[ing] disclosure in future contracting;

(7) right of the public to participate;

(8) [fostering] an enabling environment ... for public consultation and monitoring of public contracting;

(9) build[ing] capacities of all relevant stakeholders;

(10) ensur[ing] oversight authorities;

(11) citizen consultation and engagement in the management of the contract.[235]

In the Philippines, open contracting is considered "an extension of the Open Government movement aimed at increasing public participation and holding governments accountable for public resources through increased disclosure of government procurement information."[236] "South Cotabato is the first LGU to have a permanent BAC secretariat under the Office of the Governor."[237] The local government identified that there is "a lack of publicly accessible information on the real-time status of projects hindered

235. Justus Gätjen, *Open Contracting — What is it and How Good Is It?*, at 16-17 (July 3, 2014) (unpublished IBA thesis, University of Twente) (on file with the University of Twente Library).

236. Open Data Labs Jakarta, Can the Philippines Implement the Open Contracting Data Standard?, at 9, *available at* https://web.archive.org/web/20210516151856/http://labs.webfoundation.org/wp-content/uploads/2015/09/OCDS-Philippines-Research-Note.pdf. *See also* Open Contracting Partnership, Why Open Contracting Is Essential to Open Government, *available at* https://web.archive.org/web/20230224143737/https://www.open-contracting.org/wp-content/uploads/2016/01/OCP2015_Brief-OpenContracting-OGP.pdf.

237. Adelle Chua, Open Contracting in the Province of South Cotabato, *available at* https://hivos.org/story/theres-always-room-for-improvement (last accessed Apr. 30, 2023) [https://perma.cc/JQ8W-T87J].

accountability on the issue."[238] Thus, "South Cotabato aims to proactively disclose the status of infrastructure projects on a near real-time basis through the provincial government website and social media channels."[239] Also, in March 2019, "the province was ... able to establish its own online portal[240] where procurement data in machine-readable formats could be easily accessed by the public."[241] In establishing these mechanisms, the local government also hopes to keep "the private sector ... abreast of business opportunities."[242] In fact, resultantly:

(1) [f]ailed bids decreased from 32 in 2018, to just 3 in 2019;

(2) [c]ompleted infrastructure projects increased from 120 in 2018, to 128 in 2019;

(3) [n]ew bidders rose from 173 in 2018, to 202 in 2019;

(4) [i]nformation on 19 projects has been published since the portal's launch."[243]

In sum, "[t]he general public — civil society, media, students/researchers[,] and other stakeholders — now enjoy access to information at all stages of the procurement process, from planning to implementation, and now participate much more in it."[244]

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238. Open Government Partnership, South Cotabato, Philippines – Citizen Monitoring of Public Infrastructure Projects, *available at* https://www.opengovpartnership.org/stories/south-cotabato-philippines-citizen-monitoring-of-public-infrastructure-projects (last accessed Apr. 30, 2023) [https://perma.cc/KEN3-UA6Q].

239. *Id.*

240. Province of South Cotabato, Bringing Services Close to South Cotabateños by Opening Contracting and Procurement Data, *available at* https://web.archive.org/web/20230604150839/https://southcotabato.gov.ph/open-contracting/index.html.

241. Chua, *supra* note 237.

242. *Id.*

243. *Id.*

244. *Id.*

Also, in 2015, Bantay Kita, a national coalition of civil society organizations, "implemented Project OMG (Open Mining Governance) which aims to increase the use of mining contract data."[245] This opportunity resulted from "the large amount of data on the mining sector that government had published after the country institutionalized a global standard for the governance of extractive resources."[246]

In relation to this Article, the Author posits that as currently conceptualized — "making the data and documents of public procurement processes accessible"[247] — open contracting is not "open" enough. The definition of open contracting should move beyond access to information by instead focusing on the conversation between all parties involved: the procurement officers; other government agencies concerned such as the COA and the OMB; intermediaries such as NGOs; end-users and beneficiaries; and even the general public.

Prosecution of public officials should definitely be the last resort and should be left for cases of corruption. The focus should be in salvaging procurement initiatives as much as possible. This means assisting procurement officials through the procurement process by the COA as adviser, giving them the opportunity to rectify any mistakes in real-time. There is even jurisprudence supporting this proposal, stating that COA's presence during bidding as observers is necessary in guaranteeing documentary integrity and transparency.[248] In effect, prosecution will really be kept within instances of corruption, and the bases for filing these cases will be clearer because the entire procurement process can easily be tracked. In other words, there will be lesser room for loopholes. In this wise, procurement officers will no longer be scared of the process, while also avoiding the filing of procurement cases as much as possible.

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245. Public Procurement and Social Inclusion in the Network Society, *available at* https://dl.acm.org/doi/fullHtml/10.1145/3494193.3494299 (last accessed Apr. 30, 2023) [https://perma.cc/AHP7-3Z35].

246. *Id.*

247. Chua, *supra* note 237.

248. Director Villanueva v. Commission on Audit, 493 Phil. 887, 902 (2005) (citing Government Procurement Reform Act, art. V, § 13).

Currently, there are efforts to further educate procurement officers regarding the procurement law. The GPPB website readily provides information on education services that cater all the way to the barangay levels.[249] These efforts are certainly laudable especially for taking the unique circumstances at the barangay level into consideration. However, there is a clear need to make the information more digestible; the rules should be broken down in simpler terms that are easier to recall. Learning materials should be readily accessible and engaging; handbooks will definitely not suffice. More importantly, education efforts should be regular, scheduled, systematized, and sustainable. In fact, there should be helplines where procurement officers may reach out in real-time to the COA to ask about the procurement law and ask advice in relation to their procurement goals. Simply put, education on procurement law should be continuing, not just in the periodic sense, but in real-time.

The COA, the OMB, and the Sandiganbayan should also be communicating with each other in relation to the prosecution of offenses. These institutions should provide a platform in which cases and stages of proceedings and outcomes are readily available. Communicating within such a platform will avoid overlapping proceedings between the COA and the OMB, as exemplified in *Cagang*, as well as between the OMB and the Sandiganbayan, which is possible as seen in *Crespo*. The intention would be to avoid dismissal of cases due to technicalities, and to foster communication between these agencies to better resolve cases.

Finally, the end-users, beneficiaries, and general public should also be allowed to participate in the procurement proceedings. They should be able to track the procurement process and give their comments to assist the COA in advising procurement officers. They should be able to monitor when the items under procurement will be delivered to them. Intermediaries are also important, especially in assisting all parties in the procurement process, and can also serve as watchdogs not only of procurement officers but of government watchdogs such as COA. Further, the general public should be able to voice out what they prefer to be added in items for procurement. Lastly, they should also be able to access the platforms between government agencies to be informed not only about procurement processes but also

249. *See generally* Government Procurement Policy Board Technical Support Office, How to Request for Training?, *available at* https://www.gppb.gov.ph/how-to-request-for-training (last accessed Apr. 30, 2023).

corruption cases. This way, not only government transparency is ensured, but also avenues for their participation. Conversation with the government will be sustained.

These initiatives can be distilled in government websites and/or applications for procurement processes and corruption cases. These platforms are within the government's horizons thanks to advances in technological infrastructures in the digital age. The PhilGEPS website[250] is wholly insufficient, because it is a centralized website that primarily serves as a registration portal for suppliers who wish to participate in public bidding for procurement entities' business needs and thus does not account for the unique circumstances of different procuring contexts. Also, it does not provide avenues for communication between all parties involved. To roughly illustrate, the Author envisions government websites and/or applications to function like social media and e-commerce platforms where all parties may communicate and easily track procurement initiatives in real-time.

As a final matter, a salient limitation of this Article is perhaps the retention of capitalism as the big Other. However, in this Article's defense, the Author has not really agreed on a viable replacement to capitalism in this regard. More importantly, the government's open contracting proposal stands against capitalism as a reminder that there is no big Other; there is only us. Capitalism may readily be replaced by any alternative as appropriate. In fact, the big Other may readily be abandoned for localized efforts that focus on the demands of particular circumstances. In the end, open contracting fully supports human subjectivity.

250. *See generally* Philippine Government Electronic Procurement System *available at* https://notices.philgeps.gov.ph (last accessed Apr. 30, 2023).