

# Balancing Modernization and Heritage: Insufficiency of Cultural Heritage Laws vis-à-vis the Torre de Manila Issue

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## I. INTRODUCTION

For a country that is rich in cultural heritage, the Republic of the Philippines (the Philippines), ironically, has always treated arts and culture as its least priority.<sup>1</sup> This is evidenced by the apathetic attitude of Filipinos and its

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1. Florangel Rosario Braid, *Arts and culture in political platform*, MANILA BULL., Apr. 22, 2016, available at <http://www.mb.com.ph/arts-and-culture-in-political-platform> (last accessed Aug. 31, 2016); Nathalie Tomada, *Ma'Rosa director hopes Duterte will also pay attention to the arts*, PHIL. STAR, May 28, 2016, available at <http://www.philstar.com/entertainment/2016/05/28/1587590/marosa-director-hopes-duterte-will-also-pay-attention-arts> (last accessed Aug. 31, 2016); Butch Dalisay, *Why the arts should matter*, PHIL. STAR, Apr. 25, 2016, available at <http://www.philstar.com/arts-and-culture/2016/04/25/1576353/why-arts-should-matter> (last accessed Aug. 31, 2016); & H.B. No. 5878, 16th Cong., 2d Reg. Sess. (2015).

government towards the preservation and restoration of cultural heritage sites.<sup>2</sup> Issues on cultural heritage have often been treated only as a side note and are rarely the determining factor in resolving cases in court. In this regard, the Torre de Manila decision will be a landmark case, because it will be the first of its kind — one which deals with cultural heritage and aesthetics as a main issue.

In 2012, D.M. Consunji Inc. (DMCI) Homes started the construction of Torre de Manila, a 49-story condominium, just meters away from Rizal Park.<sup>3</sup> It has been the subject of criticisms and oppositions from various cultural heritage groups and advocates,<sup>4</sup> and has even been labeled as the “national photobomber” because it obstructs the view of the clear skyline backdrop of the Rizal Monument.<sup>5</sup> After almost two years of out-of-court debates regarding the legality of the project, and countless suspensions and re-issuances of Torre de Manila’s building permit, the issue was brought before the Supreme Court through a petition filed by Knights of Rizal (KOR) in 2014.<sup>6</sup>

Year 2016 marks the fourth year since the construction of the building began, yet still, the Supreme Court has released no decision on the merits of the case. An unfinished Torre de Manila looms unremittingly behind the Rizal Monument. This Essay does not intend to pre-empt the decision of the Supreme Court; instead, it aims to study the problem areas in the case that have led to the difficulty in coming up with a solution to the issue. This Essay’s main argument is that the lack or insufficiency of laws, or their non-binding character with regard to the protection and conservation of cultural heritage sites, is the main hindrance to resolving the Torre de Manila case.

On one hand, the Supreme Court cannot rule in favor of DMCI without considering the State’s obligation enshrined in the 1987 Philippine Constitution to protect and conserve the nation’s cultural treasures and heritage.<sup>7</sup> On the other hand, the decision cannot deny DMCI due process and completely disregard the damage that DMCI might suffer if the project is ordered demolished. Hence, the creation of a Writ of *Pamana* or *Kasaysayan* as a remedy for future cases involving the nation’s historical and

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2. Jose C. Sison, *Preserving our cultural heritage*, PHIL. STAR, Nov. 22, 2002, available at <http://www.philstar.com/opinion/184958/preserving-our-cultural-heritage> (last accessed Aug. 31, 2016).

3. Katerina Francisco, *TIMELINE: The Torre de Manila case*, available at <http://www.rappler.com/nation/104667-torre-de-manila-dmci-supreme-court-timeline> (last accessed Aug. 31, 2016) [hereinafter Francisco, *TIMELINE*].

4. *Id.*

5. *Id.*

6. *Id.*

7. See PHIL. CONST. art. XIV, §§ 15 & 16.

cultural wealth<sup>8</sup> shall be evaluated vis-à-vis the State's constitutional obligation in the protection and conservation of historical and cultural heritage.

To facilitate a clear and structured discussion of the abovementioned argument, this Essay is divided into four main parts. First, it will present the factual backdrop of the Torre de Manila case, its current status, and the different arguments forwarded by DMCI, KOR, and other intervenors. Second, it will discuss the various laws and treaties, in both the domestic and international level, safeguarding national historical and cultural properties. Third, it will discuss the problem of lack or insufficiency in the law, specifically laws protecting sightlines and jurisdiction over disputes involving cultural sites, as the impediment in resolving the Torre de Manila case and even other similarly situated cases. It will also explore possible solutions to the case and use analogous situations in foreign jurisdictions as bases. Fourth, this Essay will discuss the necessity and relevance of a Writ of *Pamana* or *Kasaysayan* as a remedy for future cases involving cultural heritage.

## II. BACKGROUND OF THE CASE

### A. Luneta Park and the Rizal Monument

Luneta Park, also known as the Rizal Park,<sup>9</sup> is a 58-hectare,<sup>10</sup> lunette-shaped park<sup>11</sup> located at the center of the City of Manila. It has been a witness to numerous historical events that have shaped the nation.<sup>12</sup> It was where the Filipino patriots who opposed the 333-year Spanish regime were executed;<sup>13</sup> among them were Fathers Mariano Gomes, Jose Burgos, and Jacinto Zamora, or collectively known as “Gomburza.”<sup>14</sup> Throughout the years, it has been the venue for a number of historic ceremonies and major political activities in the country, from the United States of America's (U.S.) grant of

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8. See Knights of Rizal (KOR) Petition for Injunction at 2, *Knights of Rizal v. DMCI Homes, Inc.*, G.R. No. 213948 (Sep. 12, 2014).

9. Gwen de la Cruz, FAST FACTS: Rizal Park, available at <http://www.rappler.com/specials/pope-francis-ph/stories/80688-fast-facts-rizal-park> (last accessed Aug. 31, 2016).

10. KOR Petition for Injunction at 9, *Knights of Rizal*, G.R. 213948.

11. Jerome Aning, *Vatican City can fit in Rizal Park*, PHIL. DAILY INQ., Jan. 1, 2012, available at <http://newsinfo.inquirer.net/120581/vatican-city-can-fit-in-rizal-park-2> (last accessed Aug. 31, 2016).

12. *Id.* at 8 & National Historical Commission of the Philippines (NHCP) Consolidated Comment at 2, *Knights of Rizal v. DMCI Homes, Inc. et al.*, G.R. No. 213948 (Jan. 12, 2015).

13. NHCP Consolidated Comment at 2, *Knights of Rizal*, G.R. No. 213948.

14. Petition for Injunction at 8, *Knights of Rizal*, G.R. No. 213948.

independence to the Filipinos on 4 July 1946,<sup>15</sup> to the Million People March protest against the pork barrel system on 26 August 2013.<sup>16</sup> It was declared as a national park by then President Ramon D. Magsaysay, Sr. on 19 December 1955<sup>17</sup> and as a national historical site by the National Historical Institute on 5 July 1995.<sup>18</sup>

The Rizal Monument, or *Motto Stella*, which means “guiding star,”<sup>19</sup> is the most prominent structure in Luneta Park.<sup>20</sup> It pays tribute to national hero Dr. Jose Rizal, whose execution in Luneta led the Philippine Revolution against Spanish rule.<sup>21</sup> The standing bronze sculpture of Dr. Rizal holding books together with other surrounding figures signifies the importance of education,<sup>22</sup> while the three stars arranged in a triangle at the top of the obelisk symbolize Luzon, Visayas, and Mindanao.<sup>23</sup> In its granite base, the remains of Dr. Rizal were reinterred.<sup>24</sup> The monument was made by Swiss sculptor Richard Kissling, and was unveiled on 30 December 1913, to mark the 17th death anniversary of Dr. Rizal.<sup>25</sup> It was declared a national

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15. *Id.*

16. See Gang Badoy, ‘Million people march’ set at Luneta against pork barrel scam, PHIL. DAILY INQ., Aug. 19, 2013, available at <http://newsinfo.inquirer.net/469217/million-people-march-set-at-luneta-against-pork-barrel-scam> (last accessed Aug. 31, 2016).

17. Office of the President, Reserving for National Park Purposes to be known as the “Luneta National Park” a Certain Parcel of the Private Domain of the Government Situated in the District of Ermita, City of Manila, Proclamation No. 234 (Dec. 19, 1995).

18. National Registry of Historic Sites and Structures in the Philippines, available at <http://nhcphistoricsites.blogspot.com/search/label/Rizal%20Park%20%28Bagumbayan%29%20Historical%20Site%20> (last accessed Aug. 31, 2016).

19. Pablo S. Trillana III, *Were Rizal’s burial wishes honored?*, PHIL. DAILY INQ., Dec. 3, 2013, available at <http://newsinfo.inquirer.net/554367/were-rizals-burial-wishes-honored> (last accessed Aug. 31, 2016).

20. Petition for Injunction at 8-9, *Knights of Rizal*, G.R. No. 213948.

21. NHCP Consolidated Comment at 2, *Knights of Rizal*, G.R. No. 213948.

22. Petition for Injunction at 10, *Knights of Rizal*, G.R. No. 213948.

23. *Id.*

24. National Museum, Declaration of the Monument to Dr. Jose Rizal in Rizal Park, City of Manila as a National Cultural Treasure, Museum Declaration No. 9-2013, whereas cl. para. 6 (Nov. 14, 2013).

25. NHCP Consolidated Comment at 3, *Knights of Rizal*, G.R. No. 213948.

monument on 15 April 2013<sup>26</sup> and a national cultural treasure on 14 November 2013.<sup>27</sup>

*B. The Torre de Manila Project*

DMCI Project Developers, Inc. (DMCI-PDI) acquired from a corporation owned by the Madrigal family a property consisting of three lots with a total area of 7,556 square meters, for a ₱29,000.00 per square meter purchase price, on 1 September 2011.<sup>28</sup> It is located in the middle of the former Manila Jai-Alai Building on Taft Avenue, Sta. Isabel College, Adamson University, Masagana Mall, Instituto Cervantes, and Casino Español.<sup>29</sup>

Prior to the construction of the Torre de Manila project, DMCI-PDI started securing numerous permits from various agencies, namely: two Height Clearance Permits from the Civil Aviation Authority,<sup>30</sup> a Building Permit and a Sanitary/Plumbing Permit from the Manila Office of the Building Official,<sup>31</sup> and a Barangay Clearance.<sup>32</sup> The Housing and Land Use Regulatory Board (HLURB) issued DMCI-PDI a Zoning Certification classifying the project as an “Institutional Zone,”<sup>33</sup> which was later reclassified by the Manila City Planning and Development Office (CPDO) upon the issuance of a Zoning Permit designating the project as a “University Cluster Zone.”<sup>34</sup> Despite exceeding the required Floor Area Ratio (FAR) under the Manila Zoning Ordinance,<sup>35</sup> and without even formally applying for a variance or an exemption from zoning height limits,<sup>36</sup> DMCI-PDI’s project was still granted a zoning permit by the

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26. National Museum (NM) and National Commission for Culture and the Arts (NCAA) Memorandum at 6, ¶ 18, *Knights of Rizal v. DMCI Homes, Inc. et al.*, G.R. No. 213948 (Sep. 21, 2015).

27. National Museum, Museum Declaration No. 9-2013.

28. Petition for Injunction at 22, *Knights of Rizal*, G.R. No. 213948.

29. DMCI Project Developers, Inc. (DMCI-PDI) Comment Ad Cautelam at 3, ¶ 2, *Knights of Rizal v. DMCI Homes, Inc.*, G.R. No. 213948 (Nov. 11, 2014).

30. *Id.* at 3, ¶ 5, *Knights of Rizal*, G.R. No. 213948.

31. *Id.* at 4, ¶ 9.

32. *Id.* at 4, ¶ 7.

33. *Id.* at 4, ¶ 6.

34. *Id.* at 4, ¶ 8.

35. DMCI-PDI Comment Ad Cautelam at 5, ¶ 12, *Knights of Rizal*, G.R. No. 213948.

36. Vince Alvic Alexis F. Nonato, ‘Friends of the court’ differ on Torre de Manila legal controversy, available at <http://www.bworldonline.com/content.php?section=Nation&title=&145friends-of-the-court&8217-differ-on-torre-de-manila-legal-controversy&id=117897> (last accessed Aug. 31, 2016). A variance is an exemption from zoning height limits. *Id.*

Manila CPDO.<sup>37</sup> The restriction “was suspended by the executive branch, for the City Planning Office opted to follow the National Building Code.”<sup>38</sup> DMCI-PDI had also secured a Development Permit<sup>39</sup> and a License to Sell<sup>40</sup> from HLURB, and an Environmental Compliance Commitment from the Environmental Management Bureau.<sup>41</sup>

Nineteen days after the grant of the building permit, Resolution No. 121, which was drafted by city councilor Don Juan “DJ” Bagatsing, was adopted by the Manila City Council and enjoined the suspension of DMCI-PDI’s building permit.<sup>42</sup> Together with the Resolution, Ordinance No. 8310, series of 2013 entitled the “Historical and Cultural Monuments Preservation and Protection Ordinance of the City of Manila” was filed by Bagatsing and approved by the Council.<sup>43</sup> However, then-Manila mayor Alfredo S. Lim vetoed the ordinance for being *ultra vires*.<sup>44</sup>

During the administration of Mayor Joseph “Erap” Ejercito Estrada, Resolution No. 146, series of 2013 was passed, temporarily suspending the building permit of Torre de Manila,<sup>45</sup> while a roundtable discussion between DMCI and those opposing the project was conducted.<sup>46</sup> In 2014, DMCI-PDI applied for an exemption from the FAR restriction, which the Manila Zoning Board of Adjustments and Appeals (MZBAA) approved.<sup>47</sup>

### *C. Petition, Oral Arguments, and Injunction*

On 12 September 2014, KOR filed a Petition for Injunction against DMCI-PDI to discontinue the construction of Torre de Manila.<sup>48</sup> It grounded its capacity to sue on its obligation and interest in protecting the country’s historical and cultural heritage.<sup>49</sup>

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37. DMCI-PDI Comment Ad Cautelam at 4, ¶ 8, *Knights of Rizal*, G.R. No. 213948.

38. *Id.* at 5, ¶ 12.

39. *Id.* at 5, ¶ 13.

40. *Id.* at 6, ¶ 14.

41. *Id.* at 6, ¶ 15.

42. Petition for Injunction at 24, *Knights of Rizal*, G.R. No. 213948.

43. NM and NCAA Memorandum at 5, ¶ 16, *Knights of Rizal*, G.R. No. 213948.

44. Francisco, TIMELINE, *supra* note 3.

45. NM and NCAA Memorandum at 6, ¶ 18, *Knights of Rizal*, G.R. No. 213948.

46. Francisco, TIMELINE, *supra* note 3.

47. NM and NCAA Memorandum at 7 ¶ 23, *Knights of Rizal*, G.R. No. 213948.

48. Petition for Injunction, *Knights of Rizal*, G.R. No. 213948.

49. *Id.* at 5. See also An Act Creating the National Commission for Cultural and the Arts Establishing National Endowment Fund for Culture and the Arts, and for

KOR argued that Torre de Manila visually dominates the surroundings of Luneta Park and the Rizal Monument, hence violating the Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos and Other Personages (Guidelines).<sup>50</sup> It also argued that the project violates the Venice Charter,<sup>51</sup> and can be classified as a nuisance under the Civil Code of the Philippines.<sup>52</sup>

Various government agencies and units interested in the case, namely the Office of the Solicitor General (OSG), the National Museum, the National Historical Commission of the Philippines (NHCP), the National Commission for Culture and the Arts (NCCA), and the City of Manila were asked for comments.<sup>53</sup> In January 2015, the NCCA issued a Cease and Desist Order (CDO) against Torre de Manila for violating the National Cultural Heritage Act of 2009.<sup>54</sup> This was followed by a Temporary Restraining Order (TRO) issued by the Supreme Court in June of the same year.<sup>55</sup>

By July 2015, oral arguments regarding the petition of the KOR had begun.<sup>56</sup> One of the issues discussed was the interpretation of constitutional and statutory provisions regarding heritage protection and conservation.<sup>57</sup> The case had its sixth and last hearing on 1 September 2015.<sup>58</sup> Almost a year later, and DMCI, KOR, and all the other groups and agencies against the project still await the decision of the Supreme Court on whether the construction of Torre de Manila will be allowed to continue.

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Other Purposes [Law Creating the National Commission for Culture and the Arts], Republic Act No. 7356, § 7 (1992).

50. National Historical Commission of the Philippines (NHCP), Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos and Other Personages, *available at* <http://nhcp.gov.ph/resource/guidelines/nhcp-guidelines> (follow the link to the “Guidelines on Monuments Honoring National Heroes, Illustrious Filipinos and Other Personages”) (last accessed Aug. 31, 2016).

51. International Charter for the Conservation and Restoration of Monuments and Sites, May 25-31, 1964 [hereinafter Venice Charter].

52. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, arts. 694-707 (1950).

53. Francisco, TIMELINE, *supra* note 3.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

### III. SAFEGUARDS OF CULTURAL AND HISTORICAL PROPERTIES

There are laws in both the domestic and international level that provide for the protection of cultural heritage and historical sites within a nation's territory. The common problems with these laws are their applicability and the extent of their enforceability within the Philippines.

#### A. Domestic Law

##### 1. Philippine Constitution

It is one of the State Policies, as provided in the Constitution, that "education, science and technology, *arts, culture*, and sports"<sup>59</sup> shall be given priority "to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development."<sup>60</sup> This provision serves as the principal foundation of Article XIV of the Constitution.<sup>61</sup> Sections 14 to 18 of Article XIV pertain to the obligations of the State with regard to arts and culture.<sup>62</sup> However, only Sections 15 and 16 are the provisions relevant to the Torre de Manila case. Section 15 reads, "[a]rts and letters shall enjoy the patronage of the State. The State shall *conserve, promote, and popularize the nation's historical and cultural heritage and resources*, as well as artistic creations,"<sup>63</sup> while Section 16 provides that "[a]ll the country's artistic and historic wealth constitutes the cultural treasure of the nation and shall be under the protection of the State which may regulate its disposition."<sup>64</sup> The Rizal monument is considered a national treasure, as it pays tribute to Dr. Rizal who was instrumental in freeing the Philippines from the shackles of the colonial powers and whose life significantly contributes to the nation's history.<sup>65</sup>

However, these provisions on arts and culture are mere expressions of national policy rather than binding law.<sup>66</sup> Article II, Section 17 and Article IX, Sections 15 and 16 of the Constitution are not self-executing provisions.<sup>67</sup> They only serve as a guide for the Legislature in enacting laws

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59. PHIL. CONST. art. II, § 17 (emphasis supplied).

60. PHIL. CONST. art. II, § 17 (emphasis supplied).

61. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 91 (2009 ed.).

62. *See* PHIL. CONST. art. XIV, §§ 14-18.

63. PHIL. CONST. art. XIV, § 15 (emphasis supplied).

64. PHIL. CONST. art. XIV, § 16 (emphasis supplied).

65. National Museum Declaration No. 9-2013.

66. BERNAS, *supra* note 61, at 1311.

67. *See generally* Manila Prince Hotel v. Government Service Insurance System, 267 SCRA 408, 431 & 434-36 (1997).



that bring policy into effect.<sup>68</sup> Hence, a law is necessary for these Constitutional provisions on arts and culture to be effectively implemented.

## 2. National Cultural Heritage Act of 2009

One of the laws enacted in line with the arts and culture provisions of the Constitution is the National Cultural Heritage Act of 2009.<sup>69</sup> One of the Act's objectives is to “[p]rotect, preserve, conserve[,] and promote the nation's cultural heritage, its property and histories[.]”<sup>70</sup> It further states that “[t]he State shall likewise endeavor *to create a balanced atmosphere where the historic past coexists in harmony with modern society.*”<sup>71</sup> Hence, preserving cultural heritage does not mean living in a backward society, but being able to adapt to urbanization and modernization without compromising historic and cultural heritage.

“Cultural property” is defined as “all products of human creativity by which a people and a nation reveal their identity ... whether public or privately-owned, movable or immovable, and tangible or intangible.”<sup>72</sup> It can be categorized into any of the following:

- (1) National cultural treasures;
- (2) Important cultural property;
- (3) World heritage sites;
- (4) National historical shrines;
- (5) National historical monuments; or
- (6) National historical landmarks.<sup>73</sup>

The Rizal monument is classified as both a national cultural treasure<sup>74</sup> and a national historical monument.<sup>75</sup> A “national cultural treasure” is defined as “a unique cultural property found locally, possessing outstanding historical, cultural, artistic and/or scientific value which is highly significant

68. *Id.* at 474 (J. Puno, dissenting opinion).

69. An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for Culture and the Arts (NCCA) and its Affiliated Cultural Agencies, and For Other Purposes [National Cultural Heritage Act of 2009], Republic Act No. 10066, art. I, § 2 (2010).

70. *Id.*

71. *Id.* (emphasis supplied).

72. *Id.* art. II, § 3 (o).

73. *Id.* art. III, § 4.

74. National Museum, Museum Declaration No. 9-2013.

75. National Registry of Historic Sites and Structures in the Philippines, *supra* note 18.

and important to the country and nation, and officially declared as such by pertinent cultural agency”<sup>76</sup> whereas “historical monuments” refer to “structures that honor illustrious persons or commemorate events of historical value as declared by the National Historical Institute.”<sup>77</sup> The Act provides privileges for cultural properties; however, none of them refer to a particular means of protecting or conserving said property.<sup>78</sup> Nor is there any provision in the act referring to the conservation of the surrounding area of the cultural property.

The area where Torre de Manila is being constructed has also been called a “virtual heritage zone,” as the area is surrounded by eight historical sites, namely: St. Vincent de Paul Church, Colegio de Santa Isabel, Philippine Normal University (PNU), Central United Methodist Church, Casino Español de Manila, Technological University of the Philippines (TUP), Adamson University, and the Old Legislative Building, which is now the National Art Gallery of the National Museum.<sup>79</sup> “Heritage zones” are “historical, anthropological, archaeological, artistic geographical areas and settings that are culturally significant to the country, as declared by the National Museum and/or the National Historical Institute.”<sup>80</sup> Local government units are tasked to maintain the heritage zones as close to their original appearance as possible, when such are considered areas of most importance to Philippine history, as determined by the National Historical Institute.<sup>81</sup> But there is no reference in the Act’s policy for balancing preservation and modernization.

### 3. Law Creating the National Commission for Culture and the Arts

The creation of the National Commission for Culture and the Arts (NCCA) allows the enforcement of the State policy of conserving and promoting national cultural heritage.<sup>82</sup> One of the mandates of the Commission is to conserve and promote the nation’s historical and cultural heritage through supporting and promoting the establishment and preservation of cultural and historical monuments, markers, names, and sites.<sup>83</sup> The Commission is given the power to promulgate rules, regulations, and other measures necessary to

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76. National Cultural Heritage Act of 2009, art. II, § 3 (bb).

77. *Id.* art. II, § 3 (t).

78. *See* National Cultural Heritage Act of 2009, art. III, § 7.

79. Edgar Allan M. Sembrano, *Torre de Manila vicinity, a virtual ‘heritage zone,’* PHIL. DAILY INQ., Aug. 17, 2015, available at <http://lifestyle.inquirer.net/203700/torre-de-manila-viceinity-a-virtual-heritage-zone> (last accessed Aug. 31, 2016).

80. National Cultural Heritage Act of 2009, art. II, § 3 (q).

81. *Id.* art. IV, § 13.

82. *See* PHIL. CONST. art. XIV, § 15.

83. Law Creating the National Commission for Culture and the Arts, § 12 (b) (3).

implement and fulfill its mandate,<sup>84</sup> and to regulate activities that are inimical to the preservation and conservation of national cultural heritage and properties.<sup>85</sup> This statute creating the NCCA recognizes culture as a human right<sup>86</sup> and, thus, the need to preserve and protect it.

#### 4. Cultural Properties Preservation and Protection Act

This law expounds the State policy of preserving and protecting important cultural properties and national cultural treasures and their intrinsic value.<sup>87</sup> “Important cultural properties” refer to those “cultural properties which have been singled out from among the innumerable cultural properties as having exceptional historical and cultural significance to the Philippines, but are not sufficiently outstanding to merit the classification of ‘national cultural treasures.’”<sup>88</sup> The definition of a “national cultural treasure” is the same as its definition in the National Cultural Heritage Act of 2009.<sup>89</sup>

The Rizal monument, as a “national cultural treasure,” is protected by this Act from unlawful exportation or importation,<sup>90</sup> unauthorized alteration,<sup>91</sup> and unregistered sales.<sup>92</sup> There is nothing in the entire statute protecting, or even discussing, the background or sightline of an important cultural property or national cultural treasure.

### *B. International Law*

#### 1. World Heritage Convention

Acknowledging the threats brought by the constantly changing social and economic conditions in society to natural and cultural heritage,<sup>93</sup> the World Heritage Convention urges State-Parties to ensure the “identification,

84. *Id.* § 13 (k).

85. *Id.* § 13 (l).

86. *Id.* § 1.

87. An Act to Repeal Act Numbered Thirty Eight Hundred Seventy Four, and to Provide for the Protection and Preservation of Philippine Cultural Properties [Cultural Properties Preservation and Protection Act], Republic Act No. 4846, § 2 (1966).

88. *Id.* § 3 (b).

89. *See* Cultural Properties Preservation and Protection Act, § 3 (c) & National Cultural Heritage Act of 2009, art. II, § 3 (bb).

90. Cultural Properties Preservation and Protection Act, §§ 9-11.

91. *See* Cultural Properties Preservation and Protection Act, § 13.

92. Cultural Properties Preservation and Protection Act, § 15.

93. Convention Concerning the Protection of the World Cultural and Natural Heritage pmb., Nov. 16, 1972 [hereinafter World Heritage Convention].

protection, conservation, presentation[,] and transmission to future generations of the cultural and natural heritage.”<sup>94</sup> The term “cultural heritage” includes monuments of outstanding universal value in history, art, or science.<sup>95</sup> Cultural heritage has a function in the life of the community, and its protection must be taken into consideration when the State is crafting comprehensive planning programmes.<sup>96</sup>

Each State-Party must submit an inventory of cultural and natural heritage properties found within its territory.<sup>97</sup> The World Heritage Committee (Committee) shall prepare a “World Heritage List,” which shall contain a list of cultural and natural heritage properties considered to have outstanding universal value in accordance with their prescribed criteria.<sup>98</sup> The inventories submitted by the State-Parties shall serve as the basis of the list.<sup>99</sup> The Committee shall update the list every two years.<sup>100</sup>

## 2. Venice Charter

The Venice Charter was adopted to recognize, at an international level, the responsibility of each State to preserve and restore historical monuments and buildings, as these monuments serve as a common heritage of the nation’s different generations.<sup>101</sup> In this Charter, historic monuments do not only pertain to a single architectural work but also to the urban or rural setting of the monument.<sup>102</sup> A monument is deemed inseparable from the setting where it occurs.<sup>103</sup> Hence, the conservation of a monument includes the preservation of the traditional setting.<sup>104</sup> Any new construction, demolition, or modification altering the relations of mass and color in the setting is not allowed.<sup>105</sup>

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94. *Id.* art. 4.

95. *Id.* art. 1.

96. *Id.* art. 5 (a).

97. *Id.* art. 11, ¶ 1.

98. *Id.* ¶ 2.

99. World Heritage Convention, *supra* note 93, art. 11, ¶ 2.

100. *Id.*

101. Venice Charter, *supra* note 51, pmb1.

102. *Id.* art. 1.

103. *Id.* art. 7.

104. *Id.* art. 6.

105. *Id.*

### 3. Burra Charter

The The Australia ICOMOS Charter for Places of Cultural Significance or the Burra Charter was adopted by the Australian International Council on Monuments and Sites<sup>106</sup> and has introduced two major changes in the Venice Charter, namely: (1) the concept of “place” and (2) the more complex definition of “cultural significance.”<sup>107</sup> “Place” is a “geographically defined area”<sup>108</sup> and includes “elements, objects, spaces[,] and views.”<sup>109</sup> While “cultural significance” refers not only to historic value but also to aesthetic, scientific, social, or spiritual value for all generations — past, present, and future.<sup>110</sup>

Conservation of a historical place extends to its setting, which contributes to its cultural significance.<sup>111</sup> Setting is “the immediate and extended environment of a place”<sup>112</sup> and includes, among other things, the visual setting such as the “views to and from the place, and along the cultural route.”<sup>113</sup> Changes that would adversely affect the setting are deemed inappropriate.<sup>114</sup> However, changes are allowed provided that it is done to suit the present function of a historical place and that its impact on the place’s cultural significance is minimal.<sup>115</sup>

## IV. IDENTIFYING THE PROBLEMS; SEARCHING FOR A BALANCED SOLUTION

### A. *The Problems*

#### 1. No Sightline Law

The Torre de Manila case highlights the lack or insufficiency of Philippine laws in protecting cultural and historical properties. As pointed out by Justice Antonio T. Carpio during the oral arguments, there is no law prohibiting

106. The Australia ICOMOS Charter for Places of Cultural Significance, pmbl, Oct. 31, 2013 [hereinafter Burra Charter].

107. KEITH EMERICK, *CONSERVING AND MANAGING ANCIENT MONUMENTS: HERITAGE, DEMOCRACY, AND INCLUSION* 176 (2014).

108. Burra Charter, *supra* note 106, art. 1.1.

109. *Id.*

110. *Id.* art. 1.2.

111. *Id.* art. 6.

112. *Id.* art. 1.12.

113. *Id.* explan. n.

114. Burra Charter, *supra* note 106, art. 8.

115. *Id.* art. 21.1.

the construction of Torre de Manila or making it illegal.<sup>116</sup> When the City of Manila approved the project, what it only considered was DMCI-PDI's compliance with the zoning ordinances in the area. Although these ordinances are said to be greatly influenced by the presence of cultural and historical sites within the area, the ordinances merely focused on the dimension and safety of the building rather than complementarity of the building with its surroundings.

The CDO against the construction of Torre de Manila is grounded on the NCCA's power to issue a CDO when the physical integrity of national cultural treasures or important cultural properties is endangered.<sup>117</sup> But "physical integrity" refers to the structure itself and does not cover the visual background of the structure.<sup>118</sup> The problem with relying on this provision is that its coverage is very narrow, since it specifically mentioned that the danger should be on the "physical integrity" of the cultural treasure or property. NCCA Chairman Felipe M. De Leon, Jr. also characterized the

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116. Tarra Quismundo, *SC Justice Carpio: No law vs Torre de Manila construction*, PHIL. DAILY INQ., Aug. 12, 2015, available at <http://newsinfo.inquirer.net/712179/sc-justice-carpio-no-law-vs-torre-de-manila-construction> (last accessed Aug. 31, 2016).

117. Camille Diola, *NCCA orders halt in construction of Torre de Manila*, PHIL. STAR, Jan. 14, 2015, available at <http://www.philstar.com/nation/2015/01/14/1412861/ncca-orders-halt-construction-torre-de-manila> (last accessed Aug. 31, 2016). See also National Cultural Heritage Act of 2009, art. VII, § 25. The provision states —

When the physical integrity of the national cultural treasures or important cultural properties are found to be in danger of destruction or significant alteration from its original state, the appropriate cultural agency shall immediately issue a Cease and Desist Order ex parte suspending all activities that will affect the cultural property. The local government unit which has the jurisdiction over the site where the immovable cultural property is located shall report the same to the appropriate cultural agency immediately upon discovery and shall promptly adopt measures to secure the integrity of such immovable cultural property. Thereafter, the appropriate cultural agency shall give notice to the owner or occupant of the cultural property and conduct a hearing on the propriety of the issuance of the Cease and Desist Order. The suspension of the activities shall be lifted only upon the written authority of the appropriate cultural agency after due notice and hearing involving the interested parties and stakeholders.

*Id.*

118. Oscar Franklin Tan, *Legal lies about Torre de Manila case*, PHIL. DAILY INQ., Oct. 12, 2015, available at <http://opinion.inquirer.net/89317/legal-lies-about-torre-de-manila-case> (last accessed Aug. 31, 2016).

Rizal Park and Monument as built heritage.<sup>119</sup> The National Cultural Heritage Act's definition of "built heritage" covers the structure's settings and landscapes with notable historical and cultural significance.<sup>120</sup> However, Torre de Manila was built beyond the setting of the Rizal monument and park, and the landscape where it was built was not considered of historical and cultural significance until recently, when the condominium was already built. It is located 700 meters behind the Rizal monument and 400 meters from the park.<sup>121</sup> The Implementing Rules of the National Heritage Act expounded that the CDO does not only cover the violation of heritage laws but also the protection of World Heritage property and works of National Artists.<sup>122</sup> The Rizal monument is neither a World Heritage Site nor a work of a National Artist.<sup>123</sup>

Heritage advocates cite the Venice Charter to rationalize their claim that DMCI committed a violation of heritage laws; hence, their petition to demolish Torre de Manila should be granted. Invoking the Venice Charter is advantageous for their position since it expands the definition of historic monuments to cover also their setting.<sup>124</sup> Unfortunately, the Philippines is not legally bound by this Charter since it is not a signatory to it.<sup>125</sup>

Apart from the Venice Charter, the Petitioners also invoked the NHCP Guidelines,<sup>126</sup> specifically the principle on dominance, wherein it is stated that vista points and visual corridors to monuments must be "clear for unobstructed viewing appreciation and photographic opportunities."<sup>127</sup> The Guidelines, however, are merely recommendatory and are not legally binding since it was never published as a law.<sup>128</sup> There is also no "international custom" established on protecting the sightline of historical

119. Ernie Reyes, NCCA orders stop to construction of Torre de Manila, *available at* <http://interaksyon.com/article/102991/ncca-orders-stop-to-construction-of-torre-de-manila> (last accessed Aug. 31, 2016).

120. National Cultural Heritage Act of 2009, art. II, § 3 (f).

121. Ambeth Ocampo, *Torre de Manila: Heritage laws require updating*, PHIL. DAILY INQ., Sep. 6, 2015, *available at* <http://opinion.inquirer.net/88286/torre-de-manila-heritage-laws-require-updating> (last accessed Aug. 31, 2016).

122. Rules and Regulations Implementing the National Heritage Act of 2009, Republic Act No. 10066, § 5 (c) (2013).

123. Ocampo, *supra* note 121.

124. Venice Charter, *supra* note 51, arts. 1 & 7.

125. Tan, *supra* note 118 & Ocampo, *supra* note 121.

126. NHCP, *supra* note 50.

127. *Id.* at 2.

128. Katerina Francisco, Torre de Manila: No law protecting sightline of nat'l monuments, *available at* <http://www.rappler.com/nation/102552-supreme-court-torre-de-manila> (last accessed Aug. 31, 2016).

monuments or sites, as evidenced by the dearth of international instruments referring to such.<sup>129</sup>

#### 1. Nuisance *Per Se* or Nuisance *Per Accidens*

With no law clearly prohibiting Torre de Manila, the Civil Code provision on nuisance becomes the last resort of KOR for a cause of action. Under the Civil Code, a nuisance can be characterized as something that “annoys or offends the senses,”<sup>130</sup> or “shocks, defies, or disregards decency or morality.”<sup>131</sup> KOR, at first, argued that Torre de Manila is a nuisance *per se*, but eventually changed its argument to nuisance *per accidens*.<sup>132</sup> The former is a nuisance under any circumstances and directly endangers public safety, while the latter is a nuisance depending on the conditions and circumstances surrounding its existence.<sup>133</sup> A nuisance *per se* can be abated summarily whereas a nuisance *per accidens*, being a question of fact, requires hearing to determine whether the subject is indeed a nuisance which should be abated.<sup>134</sup>

When they changed their argument from nuisance *per se* to nuisance *per accidens*, KOR essentially asked the Supreme Court to try and determine facts. The Supreme Court, not being a trier of facts, must decide a case based on the facts and arguments already presented to them and cannot accept new evidence.<sup>135</sup> What KOR should have done is to bring the case before a trial court to establish that Torre de Manila is indeed a nuisance before elevating the case to the Supreme Court for review.<sup>136</sup> Going directly to the Supreme Court bypasses all the lower courts and violates the principle of the hierarchy of courts.<sup>137</sup> The reasoning of KOR that the Petition was directly filed before the Supreme Court because of the urgency of the issue, which the

129. *Id.* & Tan, *supra* note 118.

130. CIVIL CODE, art. 694 (2).

131. *Id.* art. 694 (3).

132. Katerina Francisco, SC justices hit Torre de Manila petitioners for bypassing ‘slow’ courts, *available at* <http://www.rappler.com/nation/99966-supreme-court-torre-de-manila-knights-of-rizal> (last accessed Aug. 31, 2016) [hereinafter Francisco, SC justices].

133. Salao v. Santos, 67. Phil. 547, 550-51 (1939).

134. *Id.*

135. Francisco, SC justices, *supra* note 132.

136. *Id.* & Tarra Quismundo, SC grills anti-Torre de Manila lawyer: Why bypass lower courts?, PHIL. DAILY. INQ., July 22, 2015, *available at* <http://newsinfo.inquirer.net/706750/sc-justices-grill-knights-of-rizal-on-plea-to-demolish-torre-de-manila> (last accessed Aug. 31, 2016) [hereinafter Quismundo, *Why bypass lower courts?*].

137. Quismundo, *Why bypass lower courts?*, *supra* note 136.



lower courts will not be able to handle, is both presumptuous and unfair to the lower courts.<sup>138</sup>

KOR cannot use the argument that the issue is of “transcendental importance” since there is no clear violation of a law nor rights of the general public. The issue is, for lack of a better term, “sensationalized.” The arguments of both sides border closer to appeals to the emotions than to actual legal reasoning. Without any clear law to rely on, the Supreme Court is faced with the difficulty of promulgating a decision that will neither violate the rights of one party nor be contrary to procedural due process. The issue has become less of the actual “photobombing” of the Torre de Manila and more of the insufficiency and incoherence of Philippine laws as regards protecting cultural heritage.

## 2. Overlapping Jurisdictions and Conflicting Positions

The dispute has now turned into a “blame game” among the different government units and agencies. Among the local government unit (LGU) of Manila and the three Philippine cultural agencies, namely the NCCA, NHCP, and the National Museum, none wants to take responsibility for how the Torre de Manila issue reached its current state and how it was not resolved earlier — and not when it is already more than 20 floors above the ground.<sup>139</sup>

The NCCA is mandated to formulate policies for the development of culture and arts and preserve Filipino cultural heritage, among others.<sup>140</sup> The NHCP is the agency primarily responsible for the promotion of Philippine history through the maintenance and administration of national shrines, monuments, and historical sites, and the restoration, conservation, and protection of historical objects.<sup>141</sup> The National Museum is tasked to preserve and protect national cultural treasures (e.g., the Rizal Monument) and important cultural properties.<sup>142</sup> The National Museum cleared the construction by deciding that the area where the building is to be erected had no cultural significance and does not alter any national cultural treasure or important cultural property.<sup>143</sup> NHCP belatedly realized that it could have prevented the construction, as it has the authority to extend the buffer

138. *Id.*

139. Pia Ranada, PH cultural agencies in need of major overhaul?, *available at* <http://www.rappler.com/nation/73274-ph-cultural-agencies-nhcp-ncca-national-museum-overhaul> (last accessed Aug. 31, 2016).

140. Law Creating the National Commission for Culture and the Arts, § 8.

141. GovPH, National Historical Commission of the Philippines Mandate, *available at* <http://nhcp.gov.ph/about-us/mandate> (last accessed Aug. 31, 2016).

142. Cultural Properties Preservation and Protection Act, § 4.

143. Ranada, *supra* note 139.

zone and limit the height of Torre de Manila.<sup>144</sup> Meanwhile, the procurement of a CDO by the NCCA is still being questioned for being without authority, since the construction of Torre de Manila does not currently violate any law.<sup>145</sup>

But the fault does not lie in these three agencies alone. The local government of the city of Manila also had a hand in the allowance of the construction of Torre de Manila. DMCI was granted a building permit despite an ordinance preventing the construction of buildings that will obstruct the sightline of historical and cultural sites.<sup>146</sup> While the ordinance was vetoed, the construction was suspended only until the Manila Zoning Board granted an exemption to DMCI.<sup>147</sup> The issue of granting the permit had become political, with then Mayor Lim and current Mayor Estrada passing the blame back and forth between themselves.<sup>148</sup>

With all the questions surrounding who should grant and who should suspend the construction of Torre de Manila, the jurisdiction and authority of these agencies and the local government unit of Manila, is muddled.

### *B. Finding a Solution*

#### 1. “Protected Vista” Law

Modernization and conservation of cultural heritage must complement rather than oppose each other. Modernization, through the rise of tall buildings and other modern edifices, is considered a normal occurrence all over the world. Although the conservation of cultural heritage sites ought not to impede modernization, it should still be considered before a particular building or structure is erected. In other countries, buildings and skyscrapers are built alongside cultural heritage sites without any complaints from heritage advocates.<sup>149</sup> According to renowned urban planner Felino “Jun” Palafox Jr.,

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144. *Id.*

145. Tetch Torres-Tupas, *SC orders NCCA to explain why it stopped Torre de Manila construction*, PHIL. DAILY INQ., Feb. 10, 2015, available at <http://newsinfo.inquirer.net/671945/sc-orders-ncca-to-explain-why-it-stopped-torre-de-manila-construction> (last accessed Aug. 31, 2016).

146. Francisco, *TIMELINE*, *supra* note 3.

147. *Id.*

148. Albert Lawrence Idia, *Torre de Manila controversy: Lack of context reduces issue to photobombing*, available at <http://cmfr-phil.org/media-ethics-responsibility/ethics/torre-de-manila-controversy-lack-of-context-reduces-issue-to-photobombing> (last accessed Aug. 31, 2016).

149. Beverly Natividad, *Modern structures blend with heritage sites elsewhere — but laws are in place: Palafox*, available at <http://interaksyon.com/article/115964/modern-structures-blend-with-heritage-sites-elsewhere---but-laws-are-in-place-palafox> (last accessed Aug. 31, 2016).

in London, Vancouver, San Francisco, and Barcelona, heritage sites and modern buildings coexist and complement each other.<sup>150</sup> This is because of the so-called “protected vista” laws.<sup>151</sup> With this law, before a permit for the construction of a structure is granted, the view that it will obstruct and the topography of the city should be considered.<sup>152</sup>

## 2. Department of Culture

The creation of a Department of Culture to be the overall government agency in charge of preserving, protecting, and promoting Philippine history and culture is advisable. With the overlapping and unclear authority and functions of the NCCA, NHCP, and the National Museum, there is a need for a chief agency that will coordinate with these three sub-agencies for the furtherance of one main goal. The department will be held accountable for all government decisions on cultural heritage.

Senator Loren Regina B. Legarda filed a bill in 2014 for the passing of a law creating a Department of Culture, which will absorb the existing agencies on culture and history, including the NCCA, the NHCP, and the National Museum.<sup>153</sup> According to the bill, the Department “shall be the primary policy, planning, coordinating, implementing, regulating[,] and administrative entity of the executive branch of the National Government that will identify, protect, preserve, conserve, regulate, develop[,] and promote the culture and cultural heritage of the Philippines.”<sup>154</sup> Unfortunately, this bill has not yet been passed into a law.

## V. WRIT OF *PAMANA*

One of the prayers of KOR is the creation of a Writ of *Pamana* as a remedy for future issues involving historical and cultural heritage sites and other

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150. *Id.*

151. *Id.*

152. *Id.*

153. An Act Creating the Department of Culture, Defining its Powers and Functions, Rationalizing and Strengthening its Attached Agencies, Appropriating Funds Therefor, and for Other Purposes, S.B. No. 2208, 16th Cong., 1st Reg. Sess. (2014).

154. *Id.*

manifestations of cultural identity.<sup>155</sup> It is analogous to the Writ of *Kalikasan*, another remedy that originated in the Philippines.<sup>156</sup>

If the Writ of *Kalikasan* is a remedy in line with the Constitutional provision on the right to a balanced and healthful ecology of the people,<sup>157</sup> the Writ of *Pamana* would be a remedy enforcing the right to arts and culture of the people to foster patriotism and nationalism.<sup>158</sup> The advantage of having this writ is that it will be a specialized remedy focused only on issues on conservation of cultural heritage.<sup>159</sup> It elevates culture and history into a matter of transcendental importance.

The writ will serve as a speedy remedy since it “exempts” cultural heritage issues from the strict rules of *locus standi* and jurisdiction. First, similar to the Writ of *Kalikasan*, the remedy will be available to all natural or juridical persons or entities authorized by law representing the right of people to culture.<sup>160</sup> Second, the petition for the Writ of *Pamana* can be filed directly before the Supreme Court or the Court of Appeals, saving time, effort, and money, as compared to going through the regular process of filing first with the lower courts before it goes to the higher courts.<sup>161</sup> This could have prevented KOR’s problem of having bypassed the lower courts, which is currently an issue in the Torre de Manila case.

## VI. CONCLUSION

The Torre de Manila issue highlights the insufficiency of and contradictions among Philippine laws on cultural heritage. Balancing urbanization and conservation of cultural heritage sites can be a challenge, especially for a country that determines progress through the existence of buildings and other infrastructures. The Author submits that being a developing country is one of the factors that affect the thinking of Filipinos that modernization and

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155. Mark Merueñas, Supreme Court to NCCA: Why did you stop Torre de Manila Construction?, *available at* <http://www.gmanetwork.com/news/story/431823/lifestyle/artandculture/supreme-court-to-ncca-why-did-you-stop-torre-de-manila-construction> (last accessed Aug. 31, 2016).

156. Philippine Daily Inquirer, *In the Know: Writ of kalikasan—Proudly Filipino*, PHIL. DAILY INQ., Sep. 17, 2014, *available at* <http://globalnation.inquirer.net/111233/in-the-know-writ-of-kalikasan-proudly-filipino> (last accessed Aug. 31, 2016).

157. PHIL. CONST. art. II, § 16.

158. PHIL. CONST. art. II, § 17.

159. Rappler, SC asked to order Torre de Manila demolition, *available at* <http://www.rappler.com/nation/68958-torre-de-manila-knights-rizal-supreme-court> (last accessed Aug. 31, 2016).

160. See RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, Apr. 13, 2010, ch. III, rule 7, § 1.

161. *Id.*

cultural heritage cannot co-exist. There is a mentality that one has to be given up to achieve the other. It is also one reason why urban planning and cultural heritage conservation are so foreign a concept to many Filipinos.

A positive development of of this issue is that it has exposed how inadequate Philippine laws and the authority granted to its cultural agencies are in protecting, conserving, and promoting cultural heritage sites. It has also brought the notion of cultural heritage conservation to the next level, allowing such sites to complement, and even stand out through proper coordination with, a city's urbanization plan. In the future, perhaps urban planning can even be utilized to make prominent and attractive a cultural heritage site.

The authority, function, and jurisdiction of cultural agencies should also be reviewed and cleared to avoid any overlap. The unclear and contradictory functions of cultural agencies are sometimes taken advantage of to circumvent cultural heritage laws. The issue, thus, boils down to accountability. The agencies become apprehensive in granting permits because they do not want to be blamed in case of problems, or they become evasive when a problem arises because of an alteration to a cultural heritage site that they either granted or acquiesced. This attitude of cultural agencies corrodes their authority — how can one expect them to protect these cultural heritage sites if they are unsure and unwilling to take a firm stand on issues surrounding it?

Protection and conservation of cultural heritage sites (and its other manifestations) should also be considered as an issue of great importance and public interest, especially in terms of cultural identity. Remedies that can speedily and easily resolve issues should be made available since during this time of modernization and urbanization, issues on cultural heritage conservation and protection will most likely recur.

This Essay has enumerated measures that can strengthen the laws implementing the State policy on protecting and promoting culture. However, these laws (e.g., the “protected vista” law or Writ of *Pamana*) if granted, cannot retroactively apply to Torre de Manila. Doing such would violate the right to due process and the right to property of DMCI. Hence, the only hope of heritage advocates is for the Supreme Court to decide that the condominium building has committed a violation based on existing laws. If not, then the Torre de Manila issue can only serve as a lesson to protect and give importance to Philippine cultural heritage sites in the future.