

Those Who Have Less in Life Must Have More in Roads: Bus Rapid Transit and the Constitutional Basis for Public Transportation

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I. INTRODUCTION

“*I’ve run through the gates of hell.*”¹ Dan Brown’s depiction of Metro Manila in his fictional work *Inferno* raised the hackles of Metro Manila officials back in 2013² and spurred the outraged denials and sardonic quips of the public on the supposed moniker.³ Citing “six-hour traffic jams, suffocating pollution,

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1. DAN BROWN, *INFERNO* 352 (2014).
2. Associated Press, *Manila upset at Dan Brown’s ‘gates of hell’ line in Inferno*, TELEGRAPH, May 23, 2013, available at <http://www.telegraph.co.uk/news/worldnews/asia/philippines/10076441/Manila-upset-at-Dan-Browns-gates-of-hell-line-in-Inferno.html> (last accessed Jan. 31, 2017).
3. Ira Agting, *Net reacts to Dan Brown’s ‘gates of hell’*, available at <http://www.rappler.com/entertainment/29910-dan-brown> (last accessed Jan. 31, 2017).

and a horrifying sex trade,”⁴ *Inferno*’s character Sienna Brooks, “could only gape in horror,”⁵ having never seen poverty in that scale.⁶

In a 2014 study conducted by the Japan International Cooperation Agency (JICA), traffic congestion in Metro Manila was estimated to cost ₱2.4 billion every year in 2012, or up to ₱6 billion a day by 2030 as traffic jams worsen.⁷

In addition, JICA reported that the three major urban problems of Metro Manila — traffic congestion, natural disasters (e.g., flood, earthquake, typhoon, landslide, etc.), and affordable housing — are interrelated, and that these challenges need to be addressed to ensure that the economic benefits spill over to other areas.⁸

In response, the Philippine government adopted the “Roadmap for Transport Infrastructure Development for Metro Manila and its Surrounding Areas” (Roadmap)⁹ — a study “cit[ing] strategies to reduce traffic congestion significantly before it impacts the lower-income group who will be [hit the hardest] when congestion worsens by 2030.”¹⁰ The Roadmap “outlines short-term and long-term components, citing the need to boost infrastructure development such as new gateway airports and seaports, improved road networks and expressways, [an] integrated urban mass[]transit network in Metro Manila, road-based public transport

4. BROWN, *supra* note 1, at 351.

5. *Id.*

6. GMA News, In Dan Brown’s *Inferno*, a rape in Manila, called ‘gates of hell’, available at <http://www.gmanetwork.com/news/story/309521/lifestyle/in-dan-brown-s-inferno-a-rape-in-manila-called-gates-of-hell> (last accessed Jan. 31, 2017).

7. Katerina Francisco, Fix traffic or PH can lose P6B daily by 2030 — JICA, available at <http://www.rappler.com/business/economy-watch/51824-ph-cost-traffic-jica> (last accessed Jan. 31, 2017).

8. National Economic and Development Authority, Roadmap for Transport Infrastructure Development for Metro Manila and Its Surrounding Areas (Region III and Region IV-A) at 5, available at https://www.jica.go.jp/philippine/english/office/topics/news/c8hovm00008wr871-att/140902_01.pdf (last accessed Jan. 31, 2017).

9. *Id.*

10. Japan International Cooperation Agency, JICA transport study lists strategies for congestion-free MM by 2030, available at <https://www.jica.go.jp/philippine/english/office/topics/news/140902.html> (last accessed Jan. 31, 2017).

modernization, and ‘soft’ components such as upgrading of traffic management system.”¹¹

Among the projects included in the Roadmap are Bus Rapid Transit (BRT) projects along the corridors of Quezon Avenue, Circumferential Road 5 (C5), and Ortigas.¹² However, the BRT is a fairly new concept in the Philippines. The Cebu BRT project was initially deferred pending submission of a proof of concept, with the statement from then President Benigno S. Aquino III that if experimentation is to be made with regard to the BRT, it should not be done “on billions worth of project.”¹³

The Cebu BRT project was eventually approved,¹⁴ making it the first BRT project to be implemented in the Philippines. The Cebu BRT project and the proposed Epifanio de los Santos Avenue (EDSA) BRT project are part of the major projects of the new Department of Transportation (DOTr) administration under Secretary Arturo P. Tugade.¹⁵

In this Article, the concept of the BRT will be discussed, including the legal implications to other road users of its implementation and operation.

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11. Japan International Cooperation Agency, JICA readies transport infra roadmap for Mega Manila, *available at* <https://www.jica.go.jp/philippine/english/office/topics/news/130801.html> (last accessed Jan. 31, 2017).
 12. National Economic and Development Authority, Roadmap for Transport Infrastructure Development for Metro Manila and Its Surrounding Areas (Region III and Region IV-A) (Final Report Summary) at tbl. 6.1 E (3), *available at* <http://www.neda.gov.ph/wp-content/uploads/2015/03/FR-SUMMARY.-12149597.pdf> (last accessed Jan. 31, 2017).
 13. Doris C. Bongcac, *Neda defers bus rapid transport project in Cebu*, PHIL. DAILY INQ., Dec. 2, 2012, *available at* <http://newsinfo.inquirer.net/316857/neda-defers-bus-rapid-transport-project-in-cebu> (last accessed Jan. 31, 2017).
 14. Doris C. Bongcac, *NEDA approves BRT project for Cebu City*, CEBU DAILY NEWS, May 30, 2014, *available at* <http://cebudailynews.inquirer.net/31354/neda-approves-brt-project-for-cebu-city> (last accessed Jan. 31, 2017).
 15. Darwin G. Amojelar, *Govt mulling over LRT-2 dismantling*, MANILA STAND., Aug. 12, 2016, *available at* <http://manilastandard.net/business/213135/govt-mulling-over-lrt-2-dismantling.html> (last accessed Jan. 31, 2017).

The Department of Transportation and Communications has been reorganized into the Department of Information and Communications Technology and Department of Transportation (DOTr).

An Act Creating the Department of Information and Communications Technology, Defining its Powers and Functions Appropriating Funds Therefor, and for Other Purposes, [Department of Information And Communications Technology Act of 2015], Republic Act No. 10844 (2015).

II. BUS RAPID TRANSIT

BRT has been defined as a “high-quality bus-based transit system that delivers fast, comfortable, and cost-effective urban mobility through the provision of *segregated right-of-way infrastructure*, rapid and frequent operations, and excellence in marketing and customer service.”¹⁶ It “essentially emulates the performance and amenity characteristics of a modern rail-based transit system[,] but at a fraction of the cost.”¹⁷

In the Philippines, BRT is defined by Department of Transportation and Communications Department Order No. 2015-11¹⁸ as a “modern and efficient bus service type”¹⁹ with the following operational characteristics:

- (a) Operating along a lane or roadway dedicated to public transport vehicles for all or portions of its route;
- (b) With on board Closed Circuit Television (CCTV), [four] cameras, continuous recording of minimum past 72 hours of operation;
- (c) With vehicle tracking via on-board Global Positioning System (GPS) devices;
- (d) With Automatic Fare Collection System (AFCS);
- (e) With free Wi-Fi for all passengers;
- (f) With on-board automated bus arrival electronic display and announcement system;
- (g) With vehicle floor height that permits level boarding and alighting at BRT stations;
- (h) Drivers under salary, with no compensation linked to ridership, but with incentives for better customer service and reduction of accidents; and
- (i) Operating under the direction of a system manager or control center that coordinates vehicles on the same route and ensures compliance with the service plan.²⁰

16. Institute for Transportation and Development Policy, *Bus Rapid Transit Planning Guide*, at 1, available at <https://www.itdp.org/wp-content/uploads/2014/07/Bus-Rapid-Transit-Guide-Complete-Guide.pdf> (last accessed Jan. 31, 2017) [hereinafter *BRT Planning Guide*] (emphasis supplied).

17. *Id.*

18. Department of Transportation and Communications, *Further Amending Department Order No. 97-1097 to Promote Mobility*, Department Order No. 2015-11, Series of 2015 [D.O. No. 2015-11, s. 2015] (May 8, 2015).

19. *Id.*

The BRT system is composed of BRT corridors, defined as “[a] section of road or contiguous roads served by a bus route or multiple bus routes with a minimum length of [three] kilometers (1.9 miles) that has dedicated bus lanes.”²¹ It is generally agreed that BRT corridors have five essential elements,²² namely:

- (a) Dedicated [right-of-way];
- (b) Busway alignment;
- (c) Off board fare collection;
- (d) Intersection treatments; and
- (e) Platform level boarding.²³

These five elements are critical in preventing traffic congestion and, consequently, in increasing efficiency while lowering cost.²⁴ The most defining and essential feature of the BRT system is that it must have a dedicated or segregated right-of-way infrastructure²⁵ —

A dedicated right-of-way is vital to ensuring that buses can move quickly and unimpeded by congestion. Physical design is critical to the self-enforcement of the right-of-way. Dedicated lanes matter the most in heavily congested areas where it is harder to take a lane away from mixed traffic to dedicate it as a busway.

Dedicated lanes can be segregated from other vehicle traffic in different ways, but physical separation typically results in the best compliance and the easiest enforcement. Physical separation includes a physical impediment to entering and exiting the lanes. Some physical barriers, such as fences, prevent vehicles from entering and exiting bus lanes entirely, while other barriers, such as curbs, can be carefully mounted to enter or exit the bus lanes. In some designs[,] the bus stations themselves can act as barriers.²⁶

The benefits of public transport initiatives, in general, and BRT, in particular, are tremendous. Time savings benefit to transit users and mixed traffic vehicles, fuel savings from public transport operations, air quality

20. *Id.* (emphasis supplied).

21. Institute for Transportation & Development Policy, *The BRT Standard* at 4, available at <https://www.itdp.org/wp-content/uploads/2014/07/BRT2016-REV7.75.pdf> (last accessed Jan. 31, 2017).

22. *Id.* at 26.

23. *Id.* (emphasis supplied).

24. *Id.*

25. *Id.*

26. *Id.* at 28.

improvements, greenhouse gas emission reductions, noise and vibration reductions and other environmental improvements, transit system employment, amenity benefits to transit passengers, city image, urban form, and political goodwill are all measurable factors to indicate the overall benefit that such initiatives bring to the city and the quality of life to its inhabitants.²⁷ Notably, aside from these benefits,

there exist multiplier impacts that can further increase the value to a municipality. For example, public transport projects can lead to reduced public costs associated with vehicle emissions and accidents. Such impacts include costs borne by the health care system, the police force, and the judicial system. In turn, by reducing these costs, municipal resources can be directed towards other areas such as preventative health care, education, and nutrition.²⁸

BRT is also distinctly advantageous due to

its relatively *low infrastructure costs* and ability to *operate without subsidies*. BRT's ability to be implemented within a short period ([i.e., one to three] years after conception) also has proven to be a significant advantage. The flexible and scalable nature of BRT infrastructure also means that the systems can be cost-effectively adapted to a range of city conditions.²⁹

All that being said, it must be emphasized that BRT is not the only solution to the traffic problem. A city utilizes multiple forms of mass transit systems, such as metro rail, light rapid transit, monorail, suburban rail, and standard bus systems.³⁰ Municipalities can take advantage of one or all of them, depending on the local circumstances and other factors such as infrastructure and land costs, operational costs, design and implementation considerations, performance, and economic, social, and environmental impacts.³¹

III. THE PHILIPPINE LEGAL FRAMEWORK ON ROAD USE

In the Philippine setting, national roads are, by and large, considered public domain and freely used by both private and public vehicles. Administration and maintenance of public highways throughout the country (except for those that are the responsibility of other agencies) are vested in the

27. BRT Planning Guide, *supra* note 16, at 46.

28. *Id.*

29. *Id.* at 1-2.

30. *Id.*

31. *Id.*

Department of Public Works and Highways (DPWH),³² while the primary policy, planning, regulating, and implementing agency on transportation is the Department of Transportation and Communications, which is now the DOTr.³³

In terms of differentiating between the two agencies, the Supreme Court ruled that

[u]nder Section 1 of [Executive Order No.] 546, the Ministry of Public Works (now DPWH) assumed the public works functions of the Ministry of Public Works, Transportation and Communications. [A]mong the functions of the Ministry of Transportation and Communications (now Department of Transportation and Communications []) were to (1) formulate and recommend national policies and guidelines for the preparation and implementation of an integrated and comprehensive transportation and communications systems at the national, regional, and local levels; and (2) regulate, whenever necessary, activities relative to transportation and communications and prescribe and collect fees in the exercise of such power.³⁴

Republic Act No. 7160,³⁵ otherwise known as the Local Government Code, grants local government units (LGUs) the authority to exercise powers and discharge functions necessary and appropriate to efficient and effective provisions of basic services and facilities relating to transportation and roads,³⁶ such as:

- (1) Maintenance of barangay roads and bridges (for barangay);³⁷
- (2) Infrastructure facilities such as municipal roads and bridges (for a municipality);³⁸

32. Office of the President, Reorganizing the Ministry of Public Works and Highways, Redefining its Powers and Functions and for Other Purposes, Executive Order No. 124, Series of 1987 [E.O. No. 124, s. 1987], § 5 (Jan. 30, 1987).

33. Office of the President, Reorganizing the Ministry of Transportation and Communications Defining Its Powers and Functions and For Other Purposes, Executive Order No. 125, Series of 1987 [E.O. No. 125, s. 1987], § 4 (Jan. 30, 1987).

34. *Mirasol v. Department of Public Works and Highways*, 490 SCRA 318, 342 (2006) (emphases omitted).

35. An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T. CODE], Republic Act No. 7160 (1991).

36. See LOCAL GOV'T. CODE, § 17.

37. LOCAL GOV'T. CODE, § 17 (b) (1) (v).

- (3) Traffic signals and road signs (for a municipality);³⁹
- (4) Infrastructure facilities such as provincial roads and bridges (for municipality);⁴⁰
- (5) Adequate transportation facilities (for a city);⁴¹
- (6) Closure and opening of local roads, pursuant to an ordinance;⁴²
- (7) Regulation of the use of any local road or street or thoroughfares by a duly enacted ordinance;⁴³ and
- (8) Granting of franchises to tricycles.⁴⁴

For LGUs, the power to close a road covers both local and national roads.⁴⁵ Thus, a property permanently withdrawn from public use may be used or conveyed for any purpose for which other real property belonging to the LGU concerned may be lawfully used or conveyed.⁴⁶ In addition, no permanent closure of any local road, street, alley, park, or square shall be affected unless there exists a compelling reason or sufficient justification therefor such as, but not limited to, change in land use, establishment of infrastructure facilities, projects, or such other justifiable reasons as public welfare may require.⁴⁷

The only restriction on public roads can be found in Presidential Decree No. 17,⁴⁸ otherwise known as the Revised Philippine Highway Act, as amended, which states that “[i]t shall be unlawful for any person to usurp any portion of a right-of-way, to convert any part of any public highway,

38. *Id.* § 17 (b) (2) (viii).

39. *Id.*

40. *Id.* § 17 (b) (3) (vii).

41. *Id.* § 17 (b) (4) (i).

42. *Id.* § 21 (a).

43. LOCAL GOV'T. CODE, § 21 (d).

44. *Id.* §§ 447 (a) (3) (vi) & 458 (a) (3) (vi).

45. DARYL BRETCH M. LARGO, *THE ESSENTIALS OF LOCAL GOVERNMENT LAW IN THE PHILIPPINES* 137 (2013 ed.).

46. *Id.* (citing LOCAL GOV'T. CODE, § 21).

47. *Id.* (citing Rules and Regulations Implementing the Local Government Code of 1991, Administrative Order No. 270, art. 44 (1992)).

48. Revising the Philippine Highway Act of Nineteen Hundred Fifty Three, Presidential Decree No. 17 (1972) (as amended).

bridge, wharf[,] or trail to his own private use or to obstruct the same in any manner.”⁴⁹

IV. SEGREGATION OF ROADS FOR
THE EXCLUSIVE USE OF BRT AS A VALID EXERCISE OF POLICE POWER

Based on this legal framework, it is posited that the segregation of the road right-of-way for the exclusive use of BRT is a valid exercise of police power by the State.

Noted constitutionalist Fr. Joaquin G. Bernas, S.J., citing jurisprudence, states that —

Police power has been characterized as ‘the most essential, insistent and the least limitable powers, extending as it does to all the great public needs[.]’ Negatively, it has been defined as ‘that inherent and plenary power in the State, which enables it to prohibit all that is hurtful to the comfort, safety[,] and welfare of society.’ The most frequently cited definition, however, has been Chief Justice [Lemuel] Shaw’s classic statement which calls police power ‘the power vested in the legislature by the [C]onstitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes[,] and ordinances, either with penalties or without, not repugnant to the [C]onstitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.’⁵⁰

In 2006, the Supreme Court deemed that “[t]he use of public highways by motor vehicles is subject to regulation as an exercise of the police power of the [S]tate.”⁵¹ Thus, Administrative Order (A.O.) No. 1⁵² by the then Ministry of Public Works and Communications, the predecessor of the DPWH and DOTr, which made it unlawful to “drive any bicycle, tricycle,

49. *Id.* § 23.

50. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 101 (2009 ed.) (citing *United States v. Pompeya*, 31 Phil. 245, 253-54 (1915); *Commonwealth v. Alger*, 61 Mass. 53 (1851) (U.S.); *Churchill v. Rafferty*, 32 Phil. 580, 603 (1915); & *People v. Pomar*, 46 Phil. 440, 447 (1924)).

51. *Mirasol*, 490 SCRA at 348 (citing *Wall v. King*, 109 F.Supp. 198 (D. Mass. 1952) (U.S.); *Munz v. Harnett*, 6 F.Supp. 158 (S.D.N.Y. 1933) (U.S.); & *Schwartzman Service v. Stahl*, 60 F.2d 1034 (W.D. Mo. 1932) (U.S.)).

52. Department of Public Works and Highways, Revised Rules and Regulations Governing Limited Access Highways, Administrative Order No. 1 [DPWH A.O. No. 1] (Feb. 19, 1968).

pedicab, motorcycle[,] or any vehicle (not motorized)” on limited access highways was upheld as constitutional.⁵³ In that case, the Court stated that

[t]he police power is far-reaching in scope and is the ‘most essential, insistent[,] and illimitable’ of all government powers. The tendency is to extend rather than to restrict the use of police power. The sole standard in measuring its exercise is reasonableness. What is ‘reasonable’ is not subject to exact definition or scientific formulation. No all-embracing test of reasonableness exists, for its determination rests upon human judgment applied to the facts and circumstances of each particular case.

We find that [A.O. No.] 1 does not impose unreasonable restrictions. It merely outlines several precautionary measures, to which toll way users must adhere. These rules were designed to ensure public safety and the uninhibited flow of traffic within limited access facilities. They cover several subjects, from what lanes should be used by a certain vehicle, to maximum vehicle height. The prohibition of certain types of vehicles is but one of these. None of these rules violates reason. The purpose of these rules and the logic behind them are quite evident. A toll way is not an ordinary road. The special purpose for which a toll way is constructed necessitates the imposition of guidelines in the manner of its use and operation. Inevitably, such rules will restrict certain rights. But the mere fact that certain rights are restricted does not invalidate the rules.

Consider Section 3 (g) of [A.O. No.] 1, which prohibits the conduct of rallies inside toll ways. The regulation affects the right to peaceably assemble. The exercise of police power involves restriction, [which is] implicit in the power itself. Thus, the test of constitutionality of a police power measure is limited to an inquiry on whether the restriction imposed on constitutional rights is reasonable, and not whether it imposes a restriction on those rights.

None of the rules outlined in [A.O. No.] 1 strikes us as arbitrary and capricious. The DPWH, through the Solicitor General, maintains that the toll ways were not designed to accommodate motorcycles and that their presence in the toll ways will compromise safety and traffic considerations. The DPWH points out that the same study the petitioners rely on cites that the inability of other drivers to detect motorcycles is the predominant cause of accidents. Arguably, prohibiting the use of motorcycles in toll ways may not be the ‘best’ measure to ensure the safety and comfort of those who ply the toll ways.

However, the means by which the government chooses to act is not judged in terms of what is ‘best,’ rather, on simply whether the act is reasonable. The validity of a police power measure does not depend upon the absolute assurance that the purpose desired can[,] in fact[,] be probably fully

53. *Id.* § 3 (h).

accomplished, or upon the certainty that it will best serve the purpose intended. Reason, not scientific exactitude, is the measure of the validity of the governmental regulation. Arguments based on what is 'best' are arguments reserved for the Legislature's discussion. Judicial intervention in such matters will only be warranted if the assailed regulation is patently whimsical. We do not find the situation in this case to be so.⁵⁴

In this case, as in others, police power was used to justify public safety measures, such as building regulations, the regulation of the carrying of deadly weapons, the requirement of rotational participation in patrol duty, regulation of gasoline stations and movie theatres, and the use of city roads.⁵⁵ What about measures meant to address traffic congestion?

The case of *Metropolitan Manila Development Authority v. Viron Transportation Co., Inc.*⁵⁶ is informative in this wise —

As early as *Calalang v. Williams*,⁵⁷ the Supreme Court recognized that traffic congestion is a public, not merely a private, concern. The Court therein held that public welfare underlies the contested statute authorizing the [then] Director of Public Works to promulgate rules and regulations to regulate and control traffic on national roads.

Likewise, in *Luque v. Villegas*,⁵⁸ this Court emphasized that public welfare lies at the bottom of any regulatory measure designed 'to relieve congestion of traffic, which is, to say the least, a menace to public safety.' As such, measures calculated to promote the safety and convenience of the people using the thoroughfares by the regulation of vehicular traffic present a proper subject for the exercise of police power.⁵⁹

In the course of addressing traffic congestion, the DOTr has identified Cebu City and the Quezon Avenue, C5, and Ortigas corridors for BRT

54. *Mirasol*, 490 SCRA at 348-50 (citing *Ichong, etc., et al. v. Hernandez, etc.*, and *Sarmiento*, 101 Phil. 1155, 1163 (1957); *Department of Education, Culture and Sports v. San Diego*, 180 SCRA 533 (1989); *City of Raleigh v. Norfolk Southern Railway Co.*, 4 N.C. App. 1 (N.C. Ct. App. 1969) (U.S.); *Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83 (1954) (U.S.); & *Hunter v. Owens*, 80 Fla. 812, 86 So. 839 (1920) (U.S.)).

55. BERNAS, *supra* note 50, at 102.

56. *Metropolitan Manila Development Authority v. Viron Transportation Co., Inc.*, 530 SCRA 341 (2007).

57. *Calalang v. Williams et al.*, 70 Phil. 726 (1940).

58. *Luque v. Villegas*, 30 SCRA 408 (1969).

59. *Id.* at 369 (citing *Calalang v. Williams et al.*, 70 Phil. 726, 733 (1940) & *Luque v. Villegas*, 30 SCRA 408, 422-23 (1969)).

implementation⁶⁰ with the hopes that, through better quality public transportation, cities will experience faster and more efficient mass public travel and improved traffic flow, resulting in improved productivity and clear economic gains for the city.⁶¹ Other benefits from reducing congestions consist in not only “help[ing] raise the money needed for the alternatives[,] but also [in having] a long list of equally valuable positive side effects from reduced pollution and greenhouse gas emissions to losing less money to non-local fuel suppliers, to increasing safety, to making our communities and region more livable.”⁶²

Having established that traffic congestion is a public safety concern, dedicating part of the road as exclusive BRT lanes can be adjudged as a valid exercise of police power.

V. SEGREGATION OF ROADS FOR THE EXCLUSIVE USE OF BRT
IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE

In *Mirasol v. Department of Public Works and Highways*,⁶³ petitioners claimed that A.O. No. 1 “introduces an unreasonable classification by singling [] out motorcycles from other motorized modes of transport.”⁶⁴ In that case, the Court held that the classification was constitutional⁶⁵ stating that the “[p]etitioners’ contention that [A.O. No.] 1 unreasonably singles out motorcycles is specious ... [C]lassification by itself is not prohibited. A classification can only be assailed if it is deemed invidious, that is, it is not based on real or substantial differences.”⁶⁶ Likewise, the Court concluded that “[r]eal and substantial differences exist between a motorcycle and other forms of transport sufficient to justify its classification among those prohibited from plying the toll ways.”⁶⁷

In a like manner, significant differences exist between public and private transportation. The scarcity of road space means that policies should be in place to maximize the efficiency and avoid the inefficiency of existing road

60. National Economic and Development Authority, *supra* note 12, at tbl. 6.1 E (3).

61. See BRT Planning Guide, *supra* note 16, at 46.

62. Steven Miller, Traffic Congestion: Why It’s Increasing and How to Reduce It, *available at* http://www.livablestreets.info/traffic_congestion_why_its_increasing_and_how_to_reduce_it (last accessed Jan. 31, 2017).

63. *Mirasol v. Department of Public Works and Highways*, 490 SCRA 318 (2006).

64. *Id.* at 347.

65. *Id.* at 352.

66. *Id.* at 351.

67. *Id.* at 352.

space use in terms of the number of passengers. As mentioned earlier, a dedicated right-of-way is vital to ensuring that BRT buses can move quickly and unimpeded by congestion — thus, leading to more economical use of the road space.

VI. BRT AND HIGH QUALITY PUBLIC TRANSPORTATION AS A SOCIAL JUSTICE MEASURE

Social justice in the 1987 Constitution is the embodiment of the principle that those who have less in life should have more in law.⁶⁸ Section 9 of Article II provides that “[t]he State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living[,] and an improved quality of life for all.”⁶⁹

Section 1 of Article XIII of the 1987 Constitution⁷⁰ translates the same principle into a duty of the State to attend “to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.”⁷¹

The link between social justice and primacy of public transportation is also quite clear. The segregation of BRT exclusive busways from general traffic is a statement that higher capacity modes of public transportation are being advocated for the betterment of the majority of road users, i.e., commuters. BRT advocate and Mayor of Bogotá, Colombia, Enrique Peñalosa in an interview stated that

[i]f all citizens are equal, then somebody who is walking or on a bike has a right to the same amount of road space as somebody in a Rolls-Royce or luxury car. And a bus with 150 passengers has a right to 150 times more road space than a car with one passenger. Which means we should give exclusive lanes to buses and create [BRT] systems; [it is] the only solution ... Today, [it is] almost as unjust and absurd to see a bus in a traffic jam as it was, a century or so ago, not to allow women to vote.⁷²

68. BERNAS, *supra* note 50, at 1237.

69. PHIL. CONST. art. II, § 9.

70. PHIL. CONST. art. XIII, § 1.

71. BERNAS, *supra* note 50, at 1238.

72. Mike Herd, *A bus in a traffic jam? It's as unjust as it once was not to allow women to vote*, GUARDIAN, Oct. 17, 2016, available at <https://www.theguardian.com>.

Finally, the 1987 Constitution explicitly provides under National Economy and Patrimony in Article XII, Section 6 that

[t]he use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.⁷³

The rights of private car owners are subject to regulation when the use thereof endangers the common good of the community.⁷⁴ The implementation of BRT as a traffic and transport improvement measure by the government scales higher in terms of priority, as common good demands that the means to achieve the more efficient use of road space take precedence over an individual's right to travel — or, in the words of the Supreme Court, “[t]he right to travel does not entitle a person to the best form of transport or to the most convenient route to his destination.”⁷⁵

As explained by the Court in *Marcos v. Manglapus*,⁷⁶ the Universal Declaration of Humans Rights⁷⁷ speaks of the

‘right to freedom of movement and residence within the borders of each state’ ... separately from the ‘right to leave any country, including his own, and to return to his country’ ... [T]he [International Covenant on Civil and Political Rights] guarantees the ‘right to liberty of movement and freedom to choose his residence’ ... and the right to ‘be free to leave any country, including his own’ ... which rights may be restricted by such laws as ‘are necessary to protect national security, public order [(ordre public)], public health or morals or the separate rights and freedoms of others.’⁷⁸

com/cities/2016/oct/17/enrique-penalosa-mayor-bogota-colombia-bus-traffic-un-habitat (last accessed Jan. 31, 2017).

73. PHIL. CONST. art. XII, § 6.

74. *North Negros Sugar Co. v. Hidalgo*, 63 Phil. 664, 699 (1936).

75. *Mirasol*, 490 SCRA at 353.

76. *Marcos v. Manglapus*, 177 SCRA 668 (1989).

77. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

78. *Marcos*, 177 SCRA at 687 (citing Universal Declaration of Human Rights, *supra* note 77, art. 13 & International Covenant on Civil and Political Rights art. 12, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)).

VII. THE CASE OF *NYAYA BHOOMI V. GNCT OF DELHI AND ANR*

Implementation of transportation projects is not a simple affair. In addition to the usual engineering challenges, legal obstacles — particularly in right-of-way acquisition — are also a significant cause of delay for infrastructure projects. BRT projects are particularly susceptible to legal challenges owing to the relative novelty of the concept.

The Delhi BRT System consisted of 14 corridors with the first corridor between Ambedkar Nagar and Moolchand being set for construction in 2008.⁷⁹ It was meant to address the serious traffic congestion problems in Delhi, whose roads are choked with private car users, the minority, in a city where “less than 10% people ... use private cars [and] [m]ore than 33% travel by buses and 30% walk to work,” according to Geetam Tiwari, a road safety expert and professor at the Indian Institute of Technology.⁸⁰ Delhi’s car population has grown from 3.3 million in 2000 to 2001 to nearly seven million in 2010 to 2011 with 1,500 to 1,600 vehicles being registered daily.⁸¹

A petition, stated to be in the interest of the public, was instituted before the High Court of Delhi by Nyaya Bhoomi, a non-governmental organization, challenging the implementation of the Delhi BRT System in behalf of car owners, highlighting that “as a result of the of the BRT corridor[,] travelling time between Ambedkar Nagar and Moolchand for cars has increased by 23 minutes, resulting in 1.5 [liters of] extra petrol being consumed.”⁸² The petition also stated that “[n]o consideration is given to the value of the time of the car users who are generally wealth creators such as managers, directors, etc., as they waste extra 20 minutes traveling on BRT Route.”⁸³

According to the pleading as stated in the facts of the case,

79. Manu Balachandran, After years of commuter agony and crores of rupees, Delhi’s infamous BRTS is being scrapped, *available at* <https://qz.com/460647/after-years-of-commuter-agony-and-crores-of-rupees-delhis-infamous-brts-is-being-scrapped> (last accessed Jan. 31, 2017).

80. Rajesh Joshi, Delhi row over bus lane reveals class divide, *available at* <http://www.bbc.com/news/world-asia-india-19572583> (last accessed Jan. 31, 2017).

81. *Id.*

82. *Nyaya Bhoomi v. GNCT of Delhi and ANR*, W.P. (c) No. 380/2012, Oct. 8, 2012, ¶ 5, *available at* http://lobis.nic.in/d_dir/dhc/PNJ/judgement/18-10-2012/PNJ18102012CW3802012.pdf (last accessed Jan. 31, 2017) (India).

83. *Id.*

[t]he petition highlights the problem faced when the said 5.6[-kilometer] segment of the BRT corridor was operationalized. It is pleaded that the existing road [has a] divider in between, resulting [into] two segments on either side of the road divider; each having width of 50 feet[,] 13 feet thereof has been ... dedicated exclusively for buses[,] [] 23 feet for other motorized transport vehicles[,] and 11 feet for pedestrians and non-motorized transport vehicles. Furnishing data as of the year 2010, it is pleaded that as of said year[,] 29,849 buses were plying in Delhi[,] [] as against [6,375,033] other motorized vehicles such as cars, two wheelers, three wheelers[,] and taxis. It is pleaded that it was most irrational to dedicate 13 feet width of road for only 29,849 buses and 23 [feet] for [6,375,033] other motorized vehicles. It has been highlighted that for every one bus[,] there are approximately two hundred other motorized vehicles on the roads of Delhi[,] and[,] thus[,] the space allocation in the ratio 1:1.75 is not only unjust[,] but is arbitrary and unreasonable. It stands highlighted that whereas bus lanes remain empty 90% of the time, the other part of the carriage way is more than chock-a-block full; in fact[,] bursting on the seams.⁸⁴

As a remedy, the petitioner prayed that the Court allow mixed traffic to enter the segregated lanes with the buses plying on the left curb.⁸⁵ It urged the “[scrapping] of BRT on the ground that [scarce] public space[,] i.e.[,] roads[,] is being wasted by creating [a] dedicated corridor for buses, which corridor remains empty most of the time, and against that[,] cars and two wheelers jostle[] for space.”⁸⁶

The High Court of Delhi ruled against the petition, stating that —

The problems of Government are practical ones and may justify rough accommodations which[,] at first blush[,] may appear to be illogical and may perhaps even appear to be unscientific. But such criticism has not to be hastily expressed. What is best may not always be discernable; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to judicial review. It is only its palpable arbitrary exercise of power, which can be declared void.

...

These are essential matters of Government policies which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environment implications or amount to clear abuse of power.⁸⁷

84. *Id.*

85. *Id.*

86. *Id.* ¶ 15.

87. *Id.* ¶¶ 26-27.

The Court took cognizance of Delhi's traffic congestion, air pollution, and public health concerns, and the measures to address it. It stated that,

In the area of road transport, if an existing system is sought to be replaced by a more organized system, capable of better regulations and discipline, then[,] this is an urban transport philosophy, reflected in the decision of the Government. Such a philosophy may have its merits and [demerits]. But[,] they are best left to the wisdom of the executive[.] [I]n such matters of policy[,] the accepted principle is that the Court should not interfere. Moreover, in the context of the ever-changing social scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramification[s] and can put the clock back by a number of years.

It is the principal purpose of a Government to promote the interest of the general public rather than to distribute public goods to restrictive private benefit. The Government has the policy option to adopt any method or technique in managing transportation, goods[,] and human[s], provided the same is within the constitution and legal limits.⁸⁸

The Delhi BRT project was included in the statutory Master Plan for Delhi and had the force of law.⁸⁹ The High Court

[accepted] the fact that the overall data available would certainly make BRT relevant and[,] for the purposes of a Court adjudication[,] it cannot be said that the decision to implement BRT is so arbitrary, irrational[,] and absurd that notwithstanding it being a matter of policy, should be struck down by a Court.⁹⁰

The scattered evidence placed before [the High Court], taken together, clearly suggests that the Government has taken a conscious decision that road space should be made freely available to the entire citizenry. The policy promotes the interest of the general public rather than to distribute public space for restrictive private benefit.⁹¹

The High Court also commented that

[t]he argument [] that those who create wealth travel on the roads by cars[,] and [that] their time is precious[,] is too egalitarian an argument and ignores [the fact] that[,] unless labor meaningfully participates hand in hand with the capital, by itself the capital would create no wealth. Interests or concerns, beyond what belongs to any [one] of the 160 million people of Delhi have to be adjudicated[,] keeping in view the interest of all and not a

88. *Nyaya Bhoomi*, W.P. (c) No. 380/2012, ¶¶ 28-29.

89. *Id.* ¶ 13.

90. *Id.* ¶ 32.

91. *Id.* ¶ 39.

few or a group. Besides[,] ... [for] these ‘wealth creators[,]’ [the High Court is] ... sure [that they] would like to live in a developed country; and we remind ourselves that *a developed country is not one where the poor own cars. It is one where the rich use public transport.*⁹²

VIII. CONCLUSION

The Delhi BRT System was scrapped⁹³ three years later after the petition was dismissed in 2012.⁹⁴ Its closure was attributable to the lack of effective planning in the design of the system and the lack of enforcement in the implementation of the segregated corridor.⁹⁵ Delhi’s political leaders decided to abandon the project instead of rehabilitating it.⁹⁶ However, the case remains to be the most relevant example of the legal framework of urban transport policy.

This sobering fact is a trial to the DOTr and LGU leadership — that, as many as there are successful experiments in BRT implementation, there are equally as many failures. This notwithstanding, the principles discussed in the case of the Delhi BRT are still consistent with Philippine constitutional law doctrines regarding the use of police power, equal protection, and social justice. These are important contributions to the legal scholarship of road based transportation — a very contentious topic in the past and current administration. They remain instructive to the legal community as to the constitutional basis of public transportation, and hopefully lead to more support for public transportation reform initiatives.

92. *Id.* ¶ 40 (emphasis supplied).

93. Times News Network, Delhi government scraps BRT corridor system, *available at* <http://timesofindia.indiatimes.com/city/delhi/Delhi-government-scrap-BRT-corridor-system/articleshow/48161316.cms> (last accessed Jan. 31, 2017).

94. *Nyaya Bhoomi*, W.P. (c) No. 380/2012, ¶ 53.

95. Neha Lalchandani, BRT project failed due to bad planning: Sisodia, *available at* <http://timesofindia.indiatimes.com/city/delhi/BRT-project-failed-due-to-bad-planning-Sisodia/articleshow/46951755.cms> (last accessed Jan. 31, 2017).

96. *Id.*