MODERNIZING RULEMAKING IN PHILIPPINE ADMINISTRATIVE LAW: DRAWING LESSONS FROM THE UNITED STATES

by

Jose Arturo Cagampang de Castro

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Committee in charge:
Professor Kenneth A. Bamberger
Professor Richard M. Buxbaum
Professor Trond K. Petersen

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Abstract

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Jose Arturo Cagampang de Castro

Doctor of Juridical Science
University of California, Berkeley

Professor Kenneth A. Bamberger, Chair

Administrative rulemaking as currently practiced by agencies in the Philippine administrative bureaucracy is beset by a host of recurring issues that reflect the remnants of an outdated, autocratic rulemaking system that is in dire need of much-needed reform. Although the Philippines has, since 1987, adopted the statutory baseline procedures for agency rulemaking, there is as yet no one-to-one correspondence between what is prescribed by law, and what is actually practiced by agencies.

This work addresses the problematic nature of Philippine rulemaking by filling in its statutory interstices and doctrinal gaps with pertinent lessons from the United States (U.S.). This approach to the problem is supported by several findings. Owing to the shared history between the two nations, their respective systems of public and administrative law have many similarities. Philippine courts have in many cases adopted US case doctrines in the Philippine setting. They could thus very well do the same for agency rulemaking, which is an area of US administrative law that is robustly developed with judicial gloss. At the statutory level, the laws on administrative rulemaking procedure in both countries provide for (a) notice, (b) hearing, and (c) publication of legislative rules as their common foundational backbones. Thus, although the rulemaking provisions of the 1987 RAC are concededly not as detailed as those of the US Administrative Procedure Act (APA), the potential benefits of drawing from US precedents for purposes of modernizing agency rulemaking in the Philippines can be concretely realized.

Chapter 1 of this dissertation provides a background of agency rulemaking as it is currently practiced in the Philippines, and explains why it is problematic. Contemporary examples of problematic rulemaking from the

Department of Finance, the Bureau of Internal Revenue, the Philippine National Police, the Bureau of Customs, and the Land Transportation Office are presented to show the recurring ailments of the autocratic rulemaking practices being used in the Philippines. The ramifications of these rulemaking practices within and outside the Philippines are also discussed.

Chapter 2 of this work delves into the history and development of Philippine administrative law, including its roots and origins from the US, in order to clarify the connections and similarities between the two jurisdictions. The shared history between the two countries supports the propriety of mining US administrative law and policy for purposes of modernizing Philippine administrative law and rulemaking. This chapter also reveals how the current rulemaking practices have been carried over from the pre-1987 era of Philippine administrative law, characterized by the general lack of trans-substantive administrative procedures for agency rulemaking.

Chapter 3 discusses the place of administrative agencies and agency rulemaking in the Philippines. This chapter initially discusses the foundations that justify the existence of administrative agencies; the general concept of what they are, and the different perspectives upon which they are seen; and the legitimacy issues arising from their existence, and their exercise of derivative governmental authority. The different types of administrative agencies in the Philippines—the constitutional agencies, semi-constitutional agencies, and statutorily created agencies—and their respective rulemaking functions, are also discussed. Taking account of their places as governmental actors in the Philippine bureaucracy is particularly important because there are agencies that invariably engage in rulemaking but are exempt from the coverage of the statutory baseline rulemaking procedures under the 1987 RAC.

Chapter 4 presents a modern rulemaking framework for the Philippines, sketched from an overall analysis of the 1987 Philippine Constitution, the 1987 RAC, other relevant Philippine statutes, and Philippine case law, as supplemented in their interstices and doctrinal gaps with pertinent developments from the administrative law of the US

Chapter 5 synthesizes the findings and interconnections of the previous chapters, and presents the conclusions and recommendations of the dissertation. With the objective of setting a concrete path towards realizing the potentials of modern rulemaking in the Philippines, this chapter also provides a summarized list of 8 observations that are recommended for adoption in the Philippines.

For my parents:

Soledad Monteroso Cagampang-De Castro, LL.B., LL.M., S.J.D.

and

Arturo Makalintal De Castro, LL.B., LL.M., S.J.D.

Modernizing Rulemaking in Philippine Administrative Law: Drawing Lessons from the United States

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CHAPTER ONE
INTRODUCTION

Chapter One Outline:

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§1.3. Overview of the Dissertation

§1.1. Introduction to the Dissertation

Administrative rulemaking as practiced by administrative agencies in the Philippines is currently beset by a host of recurring issues that reflect the remnants of an outdated, autocratic rulemaking system that is in dire need of much-needed reform and development.

This work intends to address the problematic nature of Philippine rulemaking by filling in its statutory interstices and doctrinal gaps with pertinent lessons from the United States of America (US or USA). To find proper basis for this approach, the shared history between the two nations shall be explored in order to find relevant similarities in their respective systems of public and administrative law. The historical development and the theoretical underpinnings of the law on agency rulemaking in the Philippines shall also be examined in order to shed light on how rulemaking as it is now practiced in the country came to be.

This work is also intended to be both expository and critical. It is expository in that it seeks to present and expound upon the current state of administrative rulemaking in the Philippines. The reason for this is that written academic works in the field of rulemaking in Philippine administrative law are currently few,[1] and much of the scholarly texts written prior to 1987 have been rendered outdated by the passage of the 1987 Philippine Revised Administrative Code (1987 RAC) and the 1987 Philippine Constitution.[2] The need for exposition is animated by the dearth of organized material on the subject,[3] and the current absence of a definitive scholarly work that focuses on the subject of rulemaking in Philippine administrative law.[4] The purposes of exposition are two-fold. First, it aims to provide a clear picture of the administrative bureaucracy and the governmental actors within it, and their current and evolving roadmap for agency rulemaking. Second, it aims to lay down the predicates necessary for the reader to properly identify, frame, and discuss the recurring issues that make the current practices in Philippine administrative rulemaking problematic, both in the legal and practical sense,

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[1] As of 2013, there are only two current textbooks on Philippine Administrative Law: (1) Hector S. De Leon and Hector M. De Leon, Jr., Administrative Law: Text and Cases (2013) (De Leon & De Leon, Jr., *Admin.Law*); and (2) See Carlo L. Cruz, *Philippine Administrative Law* (2003) (Cruz, *Phil.Admin.Law*).

[2] See, for example, Lorenzo M. Tanada & Francisco Carreon, 2 *Political Laws of the Philippines* (1962). (Tanada & Carreon, *Political Laws of the Phils.* (1962).

[3] De Leon & De Leon, Jr., *Admin. Law* iv.

[4] The two works available as of 2013 are both text books: one consisting of 479 pages, of which roughly more than ½ has been devoted to administrative adjudication and roughly 2/10 to administrative rulemaking, *see* De Leon & De Leon, Jr., *Admin. Law*; and the other consisting of 605 pages, of which almost ¾ has been devoted to an appendix reproduction of the 1987 RAC. *See* Cruz, *Phil. Admin. Law* (2003).

with a critical view towards its continuous improvement. Accordingly, it will provide a detailed study of the relevant provisions of the 1987 Philippine Constitution, the 1987 Revised Administrative Code of the Philippines (1987 RAC), and other relevant Philippine statutes and case law on administrative law and agency rulemaking. Constitutional, statutory, and case law at the federal level in the US shall likewise be discussed insofar as they are deemed relevant and applicable in order to shed further light and meaning on the subject, particularly on the more modern developments in the field of administrative law. Appropriate research into the relevant secondary sources from both jurisdictions is also included.

§1.2. Why Rulemaking is Problematic in the Philippines

Administrative rulemaking in the Philippines is now at a crossroad with more and more members of the affected sectors of society clamoring for a more responsive process for formulating the rules and regulations of the various administrative agencies.

Procedurally, the criticisms stem from the agency's failure to adequately invite the submission of, and to consider, the views of the affected members of society. The situations resulting in public frustration include, among others, instances wherein (a) the significant information, such as the factual and scientific data, which the agency relied upon to support its rules are either lacking or unavailable; (b) the binding rules are formulated and finalized by the agency on its own, without public participation; (c) the notice of the proposed rulemaking is either lacking or inadequately being given to the affected sectors; (d) having notified the affected sectors, the agency neither received nor compiled their views and inputs, and other significant data, in an administrative docket for the agency's consideration; (e) having notified and received public views and comments, the agency did not duly consider the inputs that bear significance to the proposed rulemaking.[5]

The agency rules themselves provide no clue as to whether or not the agency had afforded the affected sectors the proper opportunity to submit their views, and as to whether the concerns raised by the latter had indeed been addressed, or at the very least considered, by the issuing agency.[6] They also provide little assistance on the reasoning used by the agency in coming up with its finalized version. The rules and regulations often do not specify on their

[5] *See* §1.2.1 of this work.

[6] For examples of various implementing rules and regulations that do not provide such particulars, *see* http://www.gov.ph/section/laws/republic-acts/implementing-rules-and-regulations/.

faces that public participation had been conducted prior to their adoption. In many instances, the rules merely provide no more than mere assertions that the issuing agency had undertaken prior consultations with the affected sectors and that it was issuing the rules in accordance with its statutory mandate,[7] thereby leaving the legal question of the adequacy of the agency's rulemaking processes subject to the agency's mere *ipse dixit*.[8]

§1.2.1. Contemporary Examples

News items regarding the public's frustration about the inadequacy of both the rulemaking process and the final rules issued by the different agencies of the national government regularly crop up, with many of them taking particular issue on the variability of the rulemaking practices of the different agencies, and the chronic insufficiency of those practices in terms of addressing the common, and at times conflicting and competing, concerns of various sectors of the public at large.

Some of the more notable examples of problematic rulemaking in the Philippines are provided in the following subsections. All these examples reflect the recurring ailments of an outdated, autocratic rulemaking system, the practice of which is in dire need of reform, development, and modernization.

§1.2.1.1. Bureau of Internal Revenue Regulations on the Electronic Filing System for Income Tax Returns

On September 5, 2014, the Philippine Department of Finance (DOF) and the Bureau of Internal Revenue (BIR) issued Revenue Regulation No. 6-2014,[9] which mandated certain taxpayers to use the electronic BIR forms in the

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[7] These agency assertions are often indicated in the 'Whereas Clauses" of the rules and regulations. *See* for example, the *Implementing Rules and Regulations*, Republic Act No. 10591, available at http://www.gov.ph/2013/12/07/implementing-rules-and-regulations-of-republic-act-no-10591/ last accessed on April 19, 2015; For another example, *see* Department of Energy Circular No. 2014-09-0017, *re: Amending the Rules and Regulations Implementing the National Electrification Act of 2003*, available at http://www.doe.gov.ph/doe_files/pdf/Issuances/DC/DC2014-09-0017.pdf last accessed on April 19, 2015.

[8] To lay down rule and regulations based on the officer or agency's mere "say so" is indicative of arbitrariness and capriciousness. *See National Tire Dealers & Retreaders Association, Inc. v. Brinegar*, 491 F.2d 31, 40 (D.C. Cir. 1974). (Court regarded the Secretary of Transportation's "statement of the reasons for his conclusion that the requirements are practicable is not so inherently plausible that the court can accept it on the agency's mere ipse dixit.")

[9] *See* Bureau of Internal Revenue (BIR) Regulation No. 6-2014, re: *"Prescribing the Mandatory Use of Electronic Bureau of Internal Revenue Forms (eBIR Forms) in Filing of All Tax Returns by Non-Electronic Filing and Payment System (Non-eFPS) Filers Particularly Accredited Tax Agents/Practitioners, Accredited Printers of Principal and Supplementary Receipts/Invoices, and One-Time Transaction (ONETT) Taxpayers,"* available at http://www.bir.gov.ph/images/bir_files/internal_communications_1/Full%20Text%20RR%202014/RR%206-2014.pdf last accessed on April 19, 2015.

preparation and filing of their returns starting September 01, 2014.[10] On March 17, 2015, they again issued Revenue Regulation 5-2015, which imposed monetary fines and civil penalties to taxpayers who fail to file their returns in electronic form.[11] On March 30, 2015, the BIR issued Revenue Memorandum Circular No. 14-2015 to provide guidelines in using the electronic platform for the filing of income tax returns (ITR) for the taxable year 2014, due on April 15, 2015.[12] However, as the filing date for the income tax returns drew near, it was reported that even the BIR's own personnel were confused by the electronic forms and filing procedures, and that the BIR has not effectively informed both its own personnel and the public about who are covered and how to do it.[13] The platform used by the BIR in its electronic filing system was also incompatible with almost half of all the computers in the country.[14] The Tax Management Association of the Philippines (TMAP) also complained that there was no consultation by the BIR and there was no adequate time to educate the various stakeholders, which include the taxpayers, the revenue district offices, and the accredited banks.[15]

The issue became so controversial, that a Philippine senator publicly asked the BIR to extend its deadline, noting not only the confusion within the BIR itself but also that many taxpayers would be facing penalties even though they had wanted to pay their taxes.[16] The BIR then softened its previous stance of strict implementation,[17] and ended up extending the filing date.[18]

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[10] *See* BIR Revenue Regulation No. 6-2014 §1.

[11] *See* BIR Revenue Regulation No. 5-2015, re: Amendment to RR No. 6-2014 and Imposition of Penalties for Failure to File Returns Under the Electronic Systems of the BIR by Taxpayers Mandatorily Covered by eFPS or eBIR Forms, available at http://www.bir.gov.ph/images/bir_files/internal_communications_1/Full%20Text%20RR%202015/RR%205-2015/RR%205-2015.pdf, last accessed on April 19, 2015.

[12] *See* BIR Memorandum Circular No. 14-2015, available at http://www.bir.gov.ph/images/bir_files/internal_communications_1/rmc_no_14-2015.pdf, last accessed on April 19, 2015.

[13] *See* ANC Business Nightly, *The Tax Management Association of the Philippines says even the BIR's own people are confused by the electronic forms and filing -- or e-forms and e-filing*, April 9, 2015, available at http://www.abs-cbnnews.com/video/business/04/09/15/tmap-bir-e-filing-system-not-working-properly last accessed on April 19, 2015.

[14] *See* GMA News, *BIR's Online System is Incompatible with Half of all PHL Computers, Data Shows*, April 13, 2015, available at http://www.gmanetwork.com/news/story/469154/scitech/technology/bir-s-online-system-is-incompatible-with-half-of-all-phl-computers-data-shows last accessed on April 19, 2015.

[15] ABS-CBN News, *BIR hit with Complaints over E-Filing Policy*, available at http://www.abs-cbnnews.com/business/04/08/15/bir-hit-complaints-over-e-filing-policy last accessed on April 19, 2015.

[16] Inquirer News, *Senator Bam Aquino asks BIR to extend Deadline for E-Filing of Tax Returns*, available at http://newsinfo.inquirer.net/684509/bam-aquino-asks-bir-to-extend-deadline-for-e-filing-of-tax-returns last accessed on April 19, 2015.

[17] Inquirer News, *BIR to strictly implement E-Filing System*, available at http://business.inquirer.net/188934/bir-to-strictly-implement-e-filing-system last accessed on April 19, 2015.

§1.2.1.2. Implementing Rules and Regulations of the Firearms and Ammunition Regulation Law

In 2013, the Philippine Congress passed Republic Act (RA) No. 10591, otherwise known as the "Comprehensive Firearms and Ammunition Regulation Act." The law mandated the Chief of the Philippine National Police (PNP) to formulate its implementing rules and regulations, after public hearings and consultation with the concerned sectors of the society.[19] By the end of that same year, the PNP issued its Implementing Rules and Regulations (IRR) for RA 10591.[20] Although consultations were held, it excluded some members of the gun owners' community,[21] and a number of people showed up to complain that they were neither invited to participate nor informed of the consultations.[22] Participants were mostly businesses, sports shooters, and some gun clubs,[23] and as per the account of one of them, PROGUN,[24] they had no assurance that their comments and suggestions will be taken into consideration in the final draft of the IRR.[25]

On its face, the IRR merely invoked its legal mandate under RA 10591 and made the bare assertion that it was promulgated "after due public hearings and consultations."[26] It made no mention of whether and what major issues of policy were ventilated during the public hearings, or the PNP's reactions and its ultimate position on pending issues.[27] Interested parties composed of individual gun owners and groups made calls for clarifications and changes in

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[18] Rappler.com, *BIR Extends Deadline for E-Filing to June 15, 2015*, available at http://www.rappler.com/business/211-governance/89685-bir-extends-deadline-electronic-filing, last accessed on April 19, 2015.
[19] Republic Act (RA) No. 10591 §44.
[20] *See* IRR of RA 10591, available at http://www.gov.ph/2013/12/07/implementing-rules-and-regulations-of-republic-act-no-10591/ last accessed on April 13, 2015.
[21] *See* Peaceful Responsible Owners of Guns (PROGUN), *An Open Letter to President Aquino: PNP rubber Stamp for Implementing Rules and Regulations for RA 10591?* August 13, 2013, available at http://progun.ph/content/open-letter-president-aquino-pnp-rubber-stamp-implementing-rules-and-regulations-ra-10591 last accessed on April 13, 2015.
[22] PROGUN, *Update on the IRR of RA 10591*, August 15, 2013 available at http://progun.ph/content/update-irr-ra-10591 last accessed on April 13, 2015.
[23] *See* Bea Cupin, *"Gun Owners ask Police: Why pick on us?"* January 11, 2014, available at http://www.rappler.com/nation/47743-gun-ownership-control last accessed on April 13, 2015.
[24] PROGUN website available at http://progun.ph/category/tags/ra-10591 last accessed on April 13, 2015.
[25] PROGUN, *Comments and Suggested Inputs to the PNP Draft IRR for RA 10591*, September 3, 2013 available at http://progun.ph/content/comments-and-suggested-inputs-pnp-draft-implementing-rules-and-regulations-ra-10591 last accessed on April 13, 2015.
[26] *See* Whereas and introductory clauses, IRR of RA 10591, available at http://www.gov.ph/2013/12/07/implementing-rules-and-regulations-of-republic-act-no-10591/ last accessed on April 13, 2015.
[27] *See* IRR of RA 10591, *id.*

the IRR.[28] In response, the PNP publicly stated that it was enforcing the rules but was willing to make adjustments based on feedback.[29] Court cases were then filed assailing both RA 10591 and the IRR for being unconstitutional.[30] The controversy gained so much public traction that even the Philippine Senate probed into the matter.[31] In August 2015, the PNP Firearms & Explosives Office announced that the IRR would be revised in order to streamline the process and the IRR.[32]

§1.2.1.3. Department of Finance Order re: Fiscal Incentives applicable to Registered Enterprises in the Economic Zones constituted from the former American Military Bases

In 2008, the DOF issued Department Order (DO) No. 3-08[33] on the IRR for RA 9400.[34] §12[35] of DO 3-08 became particularly controversial because it carved out and limited the fiscal incentives available to the registered enterprises located in the special economic zone areas which were formerly used as American military bases, such as the Subic Special Economic Zone (Subic SEZ), the Clark Special Economic Zone (Clark SEZ), the Poro Point Freeport Zone (Poro Point FZ), the Morong Special Economic Zone (Morong SEZ), the John Hay Special Economic Zone (John Hay SEZ), and covered by incentives provided under a special law, RA 7227, as amended by RA 9400, known as the "Bases Conversion and Development Act of 1992" (BCDA).

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[28] *See* Cupin, *"Gun Owners ask Police: Why pick on us?"* January 11, 2014, available at http://www.rappler.com/nation/47743-gun-ownership-control last accessed on April 13, 2015; *See also* Ray Butch Gamboa, *The Gun Law IRR is Out*, January 25, 2014 available at http://www.philstar.com/business/2014/01/25/1282669/athe-gun-law-irr-out last accessed on April 13, 2015.

[29] *See* Cupin, *id.*

[30] A copy of the complaint is available at http://progun.ph/category/tags/ra-10591 last accessed on April 13, 2015.

[31] PROGUN, *Philippine Senate conducts hearing for review of RA 10591*, May 21, 2014 available at http://progun.ph/content/philippine-senate-conducts-hearing-review-ra-10591 last accessed on April 13, 2015.

[32] *See* Business World News, *"Police to Streamline Gun License Issuance Further,"* available at http://www.bworldonline.com/content.php?section=Nation&title=police-to-streamline-gun-license-issuances-further&id=113217 last accessed on September 4, 2015. ("…the revisions are being discussed by a technical working group from the police force which includes legal experts, adding that different stakeholders including gun advocacy groups are being consulted.").

[33] DOF DO 3-08, available at http://www.dof.gov.ph/wp-content/uploads/2011/05/D-O_3-feb-13_2008.pdf last accessed on April 19, 2015.

[34] *See* RA 9400, available at http://www.bcda.gov.ph/file_attachments/0000/1629/RA_9400.pdf last accessed on April 19, 2015.

[35] *See* DOF DO 3-08 §12, available at http://www.dof.gov.ph/wp-content/uploads/2011/05/D-O_3-feb-13_2008.pdf last accessed on April 19, 2015. ("Section 12. Exclusivity of Incentives. It is understood that henceforth, registered Ecozone and Freeport Enterprises already availing of the incentives and benefit under R.A. 9400 in accordance with these rules shall be expressly disqualified from availing of other incentives and benefits defined and/or granted under other laws, rules and regulations.")

Prior to DO 3-08, all registered enterprises in the different economic zones across the country—existing either under the Philippine Economic Zone Act (PEZA) or as a Special Economic Zone (SEZ)—enjoyed the same benefits under a system of harmonized incentives pursuant to several interrelated laws. The panoply of incentives was uniformly applied to all registered enterprises regardless of whether they were located in the economic zones that were formerly American military bases (BCDA SEZ), or in other ordinary economic zones located elsewhere.[36] This uniformity enhanced the attractiveness of all the economic zones to all investors in general, which in turn increased the nation's competitiveness in attracting foreign investments. Investors were able to choose the economic zone within which to invest, without having to worry much about the extent of incentives that are available, resulting in a more balanced distribution of foreign investments in all the various economic zones in the country.[37]

The uniform grant of the same incentives was a key consideration for foreign investors in locating their facilities in the BCDA SEZs. For example, investments in the Subic SEZ had increased by 153.96%, from $2.346 billion in 2005 to US$5.958 billion in 2009. During that same period, it attracted 314

[36] *See Subic Bay Metropolitan Authority (SBMA) v. DTI, BOI, and DOF*, case records on appeal to the Office of the President, Republic of the Philippines, 5-12. (Statutory provisions for fiscal incentives specifically applicable to the special economic zones under the BCDA are provided in RA 7227, as amended by RA 9400. On the other hand, there are also other laws, such as EO 226 s. 1987, known as the Omnibus Investment Code, and RA 7916, known as the Special Economic Zone Act, all of which provide for other fiscal incentives which may be availed of by qualified enterprises in general, including those located in the BCDA Economic Zones, such as the Subic and Clark Freeport Zones. These laws provide for an intricate system of incentives available for enterprises located within the country's economic zones:

1. Registered enterprises in PEZA Economic Zones.—RA 7916 provides PEZA registered enterprises in PEZA Economic Zones directly with the 5% tax on gross income earned in lieu of national and local taxes, and with all applicable incentives under EO 226 s. 1987 or the Omnibus Investment Code expressly by statutory reference. Accordingly, registered enterprises in PEZA Economic Zones also enjoyed EO 226 s. 1987 incentives such as but not limited to the income tax holiday, duty-free importation of capital equipment, and other tax incentives.
2. Registered enterprises in the SSEZ and other BCDA economic zones covered by RA 7227, as amended by RA 9400.—RA 9400 provides enterprises within the Special Economic Zones created under the BCDA Act (RA 7227 as amended by RA 9400) directly with the 5% tax on gross income earned in lieu of national and local taxes, as well as duty-free importation of capital equipment. However, due to the silence of RA 7227, RA 9400 and EO 226 s. 1987, enterprises within these special economic zones were previously allowed to register with the BOI and additionally avail of applicable incentives under EO 226 s. 1987, they were therefore effectively able to avail of the income tax holiday, and other tax incentives under EO 226 s. 1987.)

[37] *See id.*

foreign investment projects with corresponding foreign direct investments (FDI) value of US$2.465 billion.[38]

DO 3-08 changed the uniform grant of incentives that by introducing §12 under which the incentives available to enterprises in the PEZA economic zones were no longer available to enterprises located in the BCDA SEZs under R.A. 9400. The evident intent behind § 12 was to remove the "double" availment of incentives among locators in the BCDA SEZs under the general incentives law on Philippine Economic Zones, R.A. 7916 as amended by R.A. 8748, (PEZA), and the special law on the conversion of military bases into special economic zones (BCDA SEZs), RA 9400. A perusal of both laws, however, shows that the perceived double availment of incentives was inexistent because the regime prior to DO 3-08 provided a uniform set of incentives for enterprises located in both PEZA and BCDA SEZ areas, and the incentives under the PEZA were made available to the BCDA SEZs subject to non-duplication. With §12 removing the incentives previously available under the PEZA law, the incentives available to enterprises within the BCDA SEZs were thus limited to those provided in the BCDA law.[39] This caused much disdain on the part of those enterprises that have already invested in the BCDA SEZs, as well as on the part of the concerned government agencies and instrumentalities therein.[40]

Perceiving the adverse impact of the said provision on existing and prospective investments in the BCDA SEZs, several government agencies expressed their objections to §12, pointing out that there was no provision of law providing for the exclusivity of incentives and benefits, and that there was no legal authority for DO 3-08 to provide such limitations.[41] Other affected entities, both public and private, have likewise publicly voiced their concern and opposition to Section 12, DO 3-08. Due to the government's sudden turn

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[38] Among the biggest of these FDIs is HHIC-Phil (Hanjin Shipping), which committed US$1 billion and US$0.68 billion in 2006 and 2007, respectively, and radically boosted the FDIs in the Freeport by more than 12,864 percent for the period 2006-2009. In June 2006, Hanjin Shipping opened a P40-million modern training center in the SSEZ. *See SBMA v. DTI, BOI, and DOF*, case records on appeal to the Office of the President, Republic of the Philippines, 3-4, citing http://www.sbma.com/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=96 last accessed on March 21, 2011.

[39] RA 9400, amending RA 7227.

[40] *See SBMA v. DTI, BOI, and DOF*, *id.* at 13-21.

[41] *See id.* at 5-12, Annex C, C-1, D. (The IPP Steering Committee of the Philippine Board of Investments promulgated a Joint Resolution requesting the DOF to immediately amend §12, DO 3-08 to allow the sequential enjoyment of incentives, without duplicity of the same or similar incentives. The Subic Clark Alliance for Development Council (SCADC) wrote the DOF Secretary requesting for §12's reconsideration in order to allow Freeport Zone locators to enjoy the incentives under existing laws at least on a sequential, if not simultaneous, application. The Philippine Department of Trade and Industry (DTI) wrote the DOF Secretary requesting the amendment of §12, DO 3-08, reminding the latter that the Joint Foreign Chambers of the Philippines, SCADC and PIPP Steering Committee had already taken up the issue.)

around in the incentive scheme that it had offered, several locators and foreign investors held off their plans for expansion in the BCDA SEZs.[42] The Joint Foreign Chambers of the Philippines also observed that DO 3-08 made SEZs unacceptable to potential foreign investors.[43] In response, the DOF issued a letter on November 24, 2010, denying the request to have §12 amended. The controversy dragged on for years, with appeals being filed before the Office of the President.

On April 16, 2013, the DOF Secretary issued DO 18-2013,[44] which amended §12 by adding that qualified enterprises already enjoying incentives under other preferential regimes should have their registrations thereunder cancelled before they may subsequently avail of the benefits provided under Republic Act No. 9400.[45] However, like its predecessor, DO 3-08, the amendatory department order did not mention any of the significant comments that led to its issuance, or of how the DOF had adequately considered those various comments in finalizing the amendments.

§1.2.1.4. Bureau of Customs change of policy re: Inspection of Balikbayan Boxes

In August 2015, the Bureau of Customs (BOC) publicly announced its imposition of tougher measures on balikbayan boxes.[46] Balikbayan Boxes are packages of personal effects and/or "pasalubongs" sent by Filipinos residing or working abroad to their families or relatives in the Philippines to enhance Philippine tradition and culture for the promotion and preservation of strong family ties through love and caring expressed in gift-giving.[47] They are generally tax and duty free for as long as the items are non-commercial in nature and quantity, and their value does not exceed US$500.00.[48] Citing the

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[42] *See* Manila Bulletin News, *Clark Freeport Zone Locators holding off expansion on IT Holiday issues*, available at http://www.mb.com.ph/node/300710/clark-freeport-zone-locator last accessed on March 21, 2011; The Philippine Star News, *3 Japan Firms hold expansion plans*, available at http://208.184.76.174/Article.aspx?articleId=618247&publicationSubCategoryId=66; also http://www.tucp.org.ph/news/index.php/2010/10/3-japan-firms-defer-expansion-plans/, both last accessed on March 21, 2011.

[43] *Id.*

[44] DOF DO 18-2013, available at http://www.dof.gov.ph/wp-content/uploads/2012/12/DO_18-2013.pdf last accessed on April 19, 2015.

[45] *Id.* at §1.

[46] *See* Philippine Star News, *Customs to impose tighter rules for Balikbayan Boxes*, available at http://www.philstar.com/headlines/2015/08/18/1489373/customs-impose-tighter-rules-balikbayan-boxes, last accessed on September 1, 2015.

[47] *See* Bureau of Customs (BOC) website, Chapter VII. Balikbayan Boxes, available at http://customs.gov.ph/balikbayan-boxes/ last accessed on September 1, 2015.

[48] *Id.*

need to curb smuggling through these boxes, the BOC Commissioner made a public statement that the BOC was allowed by law to "do a 100% check of boxes," and that Customs officers "will seize prohibited shipments and revoke registrations of forwarders or consolidators" for violations.[49] Accordingly, the stricter policy to be pursued by the Bureau was to conduct intrusive random physical inspections as a vital anti-smuggling measure.[50]

The announcement sparked public uproar in the Overseas Filipino Workers (OFWs) communities around the world, and among their relatives in the Philippines, in addition to other concerned stakeholders.[51] Labor groups, overseas Filipino workers groups and individuals around the world denounced the BOC's new policy for being anti-OFW alleging that it begins with the sweeping assumption that OFWs are into technical smuggling, and that it is in reality a new revenue scheme calculated to rake in some P600 million each year from the small articles being sent home by OFWs.[52] The Secretary of the Department of Labor and Employment (DOLE) opposed the Bureau's new policy.[53] Migrant workers advocate Susan Ople observed that, although customs inspection was provided by law, the announced policy, characterized as a form of "check now, explain later" method, was markedly different from the BOC's usual practice, and that the latter should have held dialogues with the OFWs first before changing its previous policy.[54]

The furor over the BOC's new policy found its way online, with thousands of Filipinos expressing their protest.[55] The Philippine Senate initiated legislative investigations upon the online protest made by about 80,000

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[49] *See* Rappler News, *Don't Abuse Balikbayan Box Privileges – Customs*, available at http://www.rappler.com/move-ph/balikbayan/103041-dont-abuse-balikbayan-box-privileges-customs, last accessed on September 1, 2015.

[50] *See* Interaksyon News, *Customs sticks to Balikbayan Random Checks as OFWs' Petition Gains*, available at http://www.interaksyon.com/business/116455/customs-sticks-to-balikbayan-box-random-checks-as-ofws-petition-gains last accessed on September 1, 2015.

[51] *See* Interaksyon News, *25-year old BOC Balikbayan Box Memo object of Renewal Call*, available at http://www.interaksyon.com/business/116491/25-year-old-boc-balikbayan-box-memo-object-of-renewal-call last accessed on September 1, 2015.

[52] *See id.*

[53] *See* ABS-CBN News, *BOC No more random checks on Balikbayan boxes,* available at http://www.abs-cbnnews.com/business/08/24/15/boc-no-more-random-checks-balikbayan-boxes last accessed on September 1, 2015.

[54] *See* CNN Philippines, *BOC under fire for Policy on Balikbayan Boxes*, available at http://cnnphilippines.com/news/2015/08/25/Bureau-of-Customs-under-fire-for-policy-on-balikbayan-boxes-Ivy-Saunar.html last accessed on September 1, 2015.

[55] *See* Manila Bulletin, *Random Balikbayan Box Search Stopped*, available at http://www.mb.com.ph/random-balikbayan-box-search-stopped/#lZMCU8WQ2X7K3su0.99 last accessed on September 1, 2015.

Filipinos asking Congress to stop the BOC's plan.[56] Members of the Philippine Senate and the House of Representatives publicly rebuked the BOC, stating that the latter should have consulted with the stakeholders first,[57] and echoed the public's concerns regarding the loss of items during customs inspection.[58] The Vice President of the Philippines hinted at the BOC's callousness and insensitivity over the concerns of the OFWs.[59] The Secretary of Justice announced that, even if the law had provided the BOC with the power to inspect, the existing reliance that the OFWs had regarding the Bureau's traditional practice of minimal scrutiny for those boxes required that the BOC must at the very least specify a change in circumstances to justify its change in policy, otherwise it may appear arbitrary.[60]

The Philippine President also stepped in and called the DOF Secretary and the BOC Commissioner to a meeting. The BOC's newly announced policy of randomly opening balikbayan boxes was forthwith stopped. In lieu thereof, physical examination of balikbayan boxes would be undertaken only when the conduct of non-intrusive x-ray and K-9 examinations would yield derogatory findings of prohibited items; and, if physical inspection were warranted, an Overseas Workers Welfare Administration (OWWA) representative or a designated officer of an OFW Association should be present during the physical inspection, together with provisions for CCTV monitoring of the inspection areas.[61] Upon being questioned by the Senators during the Senate hearing, the BOC Deputy Commissioner admitted that the BOC had no proof that balikbayan boxes were being used to smuggle contraband into the country. Thereafter, the Customs Commissioner issued a public apology.[62]

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[56] *See* Manila Bulletin, "Random Balikbayan Box Search Stopped," available at http://www.mb.com.ph/random-balikbayan-box-search-stopped/#lZMCU8WQ2X7K3su0.99 last accessed on September 1, 2015.

[57] *See* Philstar News, *BOC told: Justify Plan to Inspect Balikbayan Boxes*, available at http://www.philstar.com/headlines/2015/08/23/1491136/boc-told-justify-plan-inspect-balikbayan-boxes last accessed on September 1, 2015. (Senator Marcos: "Commissioner Lina, you are a public servant. It is your duty to consult with stakeholders first before embarking on any draconian measure that would turn their lives upside-down. You seem bent on bullying our OFWs while turning a blind eye on the large-scale smuggling that goes on in nearly all ports across the country.")

[58] *Id.*

[59] *Id.*

[60] Philstar News, *De Lima tells Customs: Explore other Methods in Balikbayan Inspection*, available at http://www.philstar.com/headlines/2015/08/24/1491704/de-lima-tells-customs-explore-other-methods-balikbayan-box-inspection last accessed on September 1, 2015.

[61] *See* GMA News, *Use X-Rays and K-9s instead: PNoy Stops Customs Inspections of Balikbayan Boxes*, available at http://www.gmanetwork.com/news/story/534185/news/nation/pnoy-stops-customs-inspections-of-balikbayan-boxes#sthash.fBSVHtzg.dpuf last accessed on September 1, 2015.

[62] See GMA News, *Customs Chief Apologizes to OFWs over Balikbayan Box issues*, available at http://www.gmanetwork.com/news/story/535480/news/pinoyabroad/customs-chief-lina-apologizes-to-ofws-over-balikbayan-box-issue last accessed on September 3, 2015.

§1.2.1.5. Land Transportation Office Revised Rules on Licenses for Professional Drivers and Conductors

On September 22, 2015, the Secretary of the Department of Transportation and Communication (DOTC) approved the Land Transportation Office's (LTO) issuance of Administrative Order (AO) No. AVT-2015-029, known as the Revised Rules and Regulations Governing the Issuance of Professional Driver's Licenses and Conductor's Licenses.[63] On its face, AO AVT-2015-029 did not indicate that the agency published or circulated notices of its proposed rules, and that interested parties were afforded the opportunity to submit their views prior to the adoption of the rules.[64] Neither did the AO provide any agency explanation as to why prior notice and comment was not practicable.[65] The AO merely stated that it was being issued in accordance with the provisions RA 4136,[66] as amended,[67] which empowers the LTO Director to promulgate the IRR with the approval of the DOTC Secretary.[68] RA 4136 is silent on the need for public participation in the agency's rulemaking.[69]

The new rules imposed additional burdens for the renewal of professional driver's licenses,[70] including a requirement that the application must be accompanied by pertinent clearances from the PNP and the National Bureau of Investigation (NBI).[71] After the new rules took effect on November 9, 2015, a group of tricycle drivers filed a case for injunctive relief.[72] The Senate also inquired into the regulation during its budget deliberations for DOTC. The Senate President Pro-Tempore questioned the new directive for adversely affecting the livelihood of professional drivers, and the Senate President joined him in pressuring the DOTC Secretary into suspending the administrative order in order to avoid further delays in the agency's budget

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63 AO AVT-2015-029 available at the LTO website, http://www.lto.gov.ph/images/Home/Advisory/AVT_2015_029.pdf last accessed on December 4, 2015.
64 *See* VII(2) Revised Administrative Code of the Philippines (RAC) §9 (1987).
65 *See id.*
66 RA 4136, known as "The Land Transportation and Traffic Code."
67 *See* Batas Pambansa (BP) Blg. 398.
68 *See* RA 4136 §4(d)(1); *See also* BP 398 §14.
69 *See* VII(2) RAC §9 (1987).
70 DOTC Press Statement dated October 23, 2015, available at http://www.gov.ph/2015/10/23/lto-reforms-issuance-drivers-licenses/ last accessed on December 4, 2015.
71 *See* AO AVT-2015-029, Item III (c), available at the LTO website, http://www.lto.gov.ph/images/Home/Advisory/AVT_2015_029.pdf last accessed on December 4, 2015.
72 *See* The Philippine Star Global Headlines, *DOTC Suspends Order on NBI Clearance for Driver's License*, available at http://www.philstar.com/headlines/2015/11/25/1525687/dotc-suspends-order-nbi-clearance-drivers-license last accessed on December 4, 2015.

approval.[73] The issues raised in the Senate were based on the agency's arbitrariness in imposing additional qualifications that are overly broad,[74] unduly burdensome,[75] and redundant.[76] Proposals were then discussed for improving the regulation.[77] The Senate President concluded that the policy clearly needed further study.[78] On November 24, 2015 and despite its laudable substantive objective of promoting public safety, the DOTC Secretary ordered the suspension of AO AVT 2015-029.[79]

§1.2.1.6. Land Transportation Office Rules on Restricting the Use of Pre-1975 Vintage Cars on Public Roads

On April 2, 2016, the DOTC/LTO issued and published AO RPC-2016-033, requiring the registration of vintage cars manufactured prior to 1975 that are either operational or in storage, and restricting their use on public roads only to weekends and holidays.[80] After its publication, AO RPC-2016-

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[73] *Id.*

[74] *Id.*; *See also* CNN Philippines, *Transport officials suspend new rule on pro driver's license*, available at http://cnnphilippines.com/news/2015/11/25/DOTC-gives-in-to-senators-suspends-new-rule-drivers-license.html, last accessed on December 4, 2015. ([Senate President] Drilon questioned the move and asked the DOTC officials about criminal charges which would possibly merit a denial of an application. He pointed out that there could be pending raps against an applicant but these could have no bearing on an individual's capacity to drive a vehicle.)

[75] *See* Rappler.com, *DOTC suspends new rule on professional driver's license*, http://www.rappler.com/nation/113935-dotc-suspends-lto-order-requirements-professional-drivers-license, last accessed on December 4, 2015. (The senators said the requirement adds another layer of red tape to motorists' license applications, with Recto pointing out that drivers will have to wait in long queues to secure clearances from the two agencies.)

[76] *See* The Philippine Star Global Headlines, *"DOTC Suspends Order on NBI Clearance for Driver's License,"* (11-25-2015). ("Why do you need two clearances?" Senate President Pro-Tempore Recto asked. "Why can't the LTO think of better ways… so that there will be no additional expense for the applicant?" he added.)

[77] *Id.* ([Senator] Recto proposed that the NBI and the PNP provide a "negative list" where those charged with crimes be put into the LTO database so that they can be barred from getting their professional licenses… Interviewed after the hearing, LTO chairman Tan said the agency would speed up the writing of the guidelines for the new directive. The DOTC assistant secretary said the guidelines enumerate the crimes to be covered by the administrative order that would bar a person from getting a professional driver's license.) *See also* Rappler.com, *DOTC suspends new rule on professional driver's license,* (Instead of requiring applicants to go through long lines, [Recto] proposed "file sharing" among the agencies, where both the NBI and PNP "electronically and manually provide the LTO with their databases on persons with criminal records.")

[78] *See id.* ([Senate President] Drilon also said that the policy merits further study as there are criminal charges that do not have bearing on one's qualification to drive, but could be basis for the denial of application. Among other things, the administrative order requires clearance "that the applicant has not been convicted of any offense involving moral turpitude or reckless imprudence resulting from reckless driving." But the senators said that pending cases involving libel or illegal assembly, for example, should not be made a basis for rejecting a license application because these do not have bearing on one's capacity to drive.)

[79] *See* The Philippine Star Global Headlines, *DOTC Suspends Order on NBI Clearance for Driver's License,* (11-25-2015).

[80] *See* Philippine Star News, *LTO limits Vintage Cars on Roads*, available at http://www.philstar.com/metro/2016/04/05/1569528/lto-limits-vintage-cars-roads, last accessed on April 15, 2016; *See* The Standard News, *Declaring War on Vintage Cars*, available at http://manilastandardtoday.com/opinion/columns/everyman/202985/declaring-war-on-vintage-cars.html last accessed on April 15, 2016.

033 was met with public disapproval, with the affected sectors decrying its issuance for being discriminatory.[81] Even though the rulemaking proposal had been pending since 2015,[82] the agency did not pursue any notice-and-comment process on it,[83] and no contemporaneous agency record was ever generated to show either the existence of legislative facts or the agency's reasoned deliberation on AO RPC-2016-033.

In view of the public backlash, the DOTC/LTO issued a press statement on April 6, 2016, or merely four (4) days after issuing AO RPC-2016-033, to recall the rule's publication and announce its conduct on April 7, 2016 of the first of a series of consultations with the different auto groups.[84] Doubtful about whether a mere press statement could override a duly published agency rule, an affected group asked the DOTC/LTO to issue an express repeal of AO RPC-2016-033.[85] It also questioned the propriety of having "consultations" instead of a hearing.[86]

§1.2.2. Ramifications of the Current Rulemaking Practices

The problematic nature of the current rulemaking process being utilized in the Philippines has several unfavorable effects, leading to serious concerns both at the national and international level, *to wit*—

§1.2.2.1. National & Domestic Concerns: Issues of Legitimacy and Accountability

No matter how well-meaning the rule or regulation may be, if proper notice and comment procedures were not undertaken, the likelihood that the rule or regulation, once issued, would be met with skepticism, if not opposition, by the affected sectors of the public would be increased. This is palpable in situations where the conduct of notice and comment could have

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[81] *See* Auto Industriya website, *LTO denies discrimination versus vintage cars,* available at http://www.autoindustriya.com/auto-industry-news/lto-denies-discrimination-versus-vintage-cars.html last accessed on April 15, 2016.
[82] *Id.*
[83] *Id.*
[84] See Auto Industriya website, *LTO recalls administrative order against vintage cars*, available at http://www.autoindustriya.com/auto-industry-news/lto-recalls-administrative-order-against-vintage-cars.html last accessed on April 15, 2016.
[85] *See* Tessa R. Salazar, *LTO recalled the publication, not the AO vs. vintage cars—LR Club PH,*" Philippine Daily Inquirer, April 29, 2016; *See also* Topgear website, *Land Rover Club PH formally petitions LTO to repeal vintage-car policy*, available at http://www.topgear.com.ph/news/motoring-news/land-rover-club-ph-formally-petitions-lto-dotc-to-rethink-vintage-car-policy-a00058-20160413-lfrm last accessed on April 15, 2016.
[86] *Id.* ("Daang Matuwid [straight path] mandates transparency of a public hearing, not a coffee shop consultation for ease of under the table envelopes.")

resulted in the early detection of possible discrepancies, roadblocks, and flaws in the regulatory scheme; and in the prior contribution of significant scientific findings, information and data by the members from the affected sectors who are in a better position to produce and synthesize them, and which the agency concerned could not have had access to in view of the limited government resources. One good example of this is the BIR's rollout of the electronic system for filing the 2015 income tax returns without considering the compatibility of the system's electronic platform with the computers used by a significant number of taxpayers.[87] Another example is the BOC's unilateral change in policy on the inspection of balikbayan boxes.

The proliferation of public controversy every time a new agency rule is issued also generates a negative perception upon the competence of the administrative agency and its personnel. The imposition of a set of rules without the public having had the meaningful opportunity to participate and comment thereon prior to the rule's issuance alienates the affected members of the public, and invites the latter's criticism, and gives them basis to fully blame the agency if the regulatory system established by the rules turn out to be flawed or infeasible. The effects of alienation, in turn, adversely affects not only the agency and its personnel but also the members of the reigning administration, all the way up to the persons occupying the politically accountable branches of government that are supposed to keep the agency in check. The alienation and its effects become all the more acute when the issued rules, like those of the BIR, affect not just a specific sector in society but all the members of the voting population, because the public perceives the effectiveness, efficiency, and competence of the administrative agencies as a reflection of the performance of the ruling administration.

The butterfly effect of agency performance on the politically accountable institutions theoretically should serve as motivations for the President and Congress to supervise, control and oversee the agencies. In theory, the members of these politically accountable branches of government—acting individually as representatives of their respective voting constituencies, and collectively as principal institutions—should operate as political avenues to check instances of abuse in the administrative agencies' exercise of rulemaking discretion. In reality, however, and except for the most public of controversies, it is difficult for these principal institutions to effectively, constantly, and efficiently police all exercises of agency discretion in view of the number, scale,

[87] See GMA News, *BIR's Online System is Incompatible with Half of all PHL Computers, Data Shows*, April 13, 2015, available at http://www.gmanetwork.com/news/story/469154/scitech/technology/bir-s-online-system-is-incompatible-with-half-of-all-phl-computers-data-shows last accessed on April 19, 2015.

and varying specializations of the different administrative agencies; the limited resources that Congress and the President respectively have; and their preoccupation with campaigns during every election cycle.

There are likewise concerns about the legitimacy of both the binding nature of agency rules, and the fact that they are being imposed by administrators and agency personnel who were neither selected nor placed in office by members of the public, or the sector concerned. Administrators and agency personnel are certainly not like the President, members of Congress, or the courts, whose legitimacy for wielding governmental authority over the citizenry can be traced from either their direct mandates from the voting public and their respective constituencies, or the constitutional stature and express vestment of governmental authority upon their respective institutions. Administrators and administrative agencies enjoy neither of these direct sources of legitimacy from the body politic, with their authority being derivative on the basis of appointment and delegation, and with their activities being made in capacities that are concededly subordinate to the constitutional institutions upon which the three great powers of government are principally vested. In other words, the direct nexus between the exercise of executive, legislative and judicial powers by President, Congress, and the courts, respectively, and the people from whom those powers emanate, does not exist as regards these administrative agencies.

§1.2.2.2. International Concerns: Effect on Globalization & Regionalization

In order to further improve its status as a developing country in an increasingly global environment, the Philippines needs to stimulate its economic development by encouraging the influx of foreign investment from both public and private sources. Foreign investment, in turn, involves huge sums of money, and entails long-term planning, expansion and execution. The decision to invest is thus affected by several considerations, among which is the regulatory environment in the host country.

The decision of foreign investors on which country to locate and how much to invest are informed by clear assessments, not just of the costs of production, but also of the familiarity, predictability, and stability of the regulatory environment in that prospective location. This is evident in the above example regarding the DOF's turn-around on the benefits and incentives available to foreign firms that already invested heavily in the special economic zones. Surprised with what was perceived as the Philippine government's

unilateral change of the rules in the middle of the game, the Japanese firms and other locators that have already invested in the Freeport zones have decided to withhold their previously laid plans for expansion.[88] These acts could also very well have sent a chilling message to other potential foreign investors regarding the predictability and stability of the Philippine regulatory system, and the general trustworthiness of the Philippine government.

The Philippines' adoption of the beneficial features of the administrative systems of developed nations, such as the US, will contribute greatly in enhancing the familiarity, predictability, and stability of the country's regulatory climate for purposes of encouraging foreign investment. Modernizing Philippine rulemaking would foster system familiarity among prospective foreign investors, as well as advance the uniformity between the regulatory environments in the Philippines on the one hand, and the US and other developed nations, on the other. For investors, a higher degree of familiarity with, as well as predictability, trustworthiness and stability in, the regulatory systems of the host country will favorably impact their assessment of the regulatory risks of their prospective investment.

1.3. Overview of the Dissertation

This chapter already provides a background of agency rulemaking as it is currently practiced in the Philippines. It also explains why Philippine rulemaking is problematic, as exemplified by contemporary examples from the DOF, BIR, PNP, BOC, DOTC, and LTO.

Chapter 2 of this work provides a historical perspective of the development of administrative law in the Philippines and its origins from the US, in order to unveil the connections and similarities between the two jurisdictions, and to bolster the propriety of extracting lessons from the administrative law and regulatory policies of the US for adoption in the Philippine setting. Chapter 2 also analyzes how agency rulemaking as it is currently being practiced in the Philippines had been carried over from the pre-1987 era of Philippine administrative law, characterized by the general lack of trans-substantive procedures for agency rulemaking.

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[88] *See* The Philippine Star News, *3 Japan Firms hold expansion plans*, available at http://208.184.76.174/Article.aspx?articleId=618247&publicationSubCategoryId=66; *See also* TUCP website, http://www.tucp.org.ph/news/index.php/2010/10/3-japan-firms-defer-expansion-plans/, both last accessed on March 21, 2011.

Chapter 3 looks into the place of administrative agencies and agency rulemaking in the Philippines. Preliminary matters for discussion in that chapter include the foundations that justify the existence of administrative agencies; the general concept of what they are, and the different perspectives in which they are seen; and the legitimacy issues arising from their existence, and their exercise of derivative governmental authority. The different types of administrative agencies in the Philippines, i.e., constitutional agencies, semi-constitutional agencies, and statutorily created agencies, are also analyzed in relation to their respective rulemaking functions. Taking account of their respective places as governmental actors in the Philippine bureaucracy is particularly important because there are agencies that invariably engage in rulemaking but are exempt from the coverage of the statutory baseline rulemaking procedures under the 1987 RAC.

Chapter 4 attempts to lay down a modern rulemaking framework for the Philippines. In doing so, a thorough consideration of the 1987 Philippine Constitution, the 1987 RAC, other pertinent Philippine statutes, and Philippine case law is made. To complete the overall framework, the statutory interstices and doctrinal gaps in the Philippine setting is supplemented with pertinent lessons from the US, using the statutory requirements of (a) notice, (b) hearing, and (c) publication as the statutory foundations for rulemaking that are common to both jurisdictions.

Chapter 5 contains the observations, conclusions and recommendations on the Philippine administrative rulemaking framework. Taken as a whole, this work shows that the existing rulemaking paradigm in Philippine administrative law is clearly problematic, with contemporary agency practices stemming largely from the Philippine bureaucracy's continued reliance on pre-1987 administrative processes and theoretical notions that have either become antiquated or rendered outdated by the subsequent developments in modern administrative law. The constitutional and statutory footings for modernizing rulemaking in Philippine administrative law need further clarification, refinement, and supplementation if they are to be tools for good governance.

CHAPTER TWO
HISTORICAL PERSPECTIVES ON THE DEVELOPMENT OF ADMINISTRATIVE LAW AND RULEMAKING IN THE PHILIPPINES

Chapter Two Outline:

§2.1. Chapter Abstract
§2.2. The Origins of Philippine Administrative Law
- §2.2.1. Administrative Codes of the Philippines
  - §2.2.1.1. The 1917 Revised Administrative Code (1917-1987)
  - §2.2.1.2. The 1987 Revised Administrative Code (1987-present)

§2.3. The Evolution of Philippine Rulemaking in the 20th Century
- §2.3.1. Pre-1987 Administrative Rulemaking
  - §2.3.1.1. No Uniform Set of Procedures for Rulemaking
  - §2.3.1.2. Watering Down the Rule Publication Requirement
  - §2.3.1.3. Era of Unbridled and Secret Rulemaking
  - §2.3.1.4. Judicial Activism against Secret Rulemaking
- §2.3.2. Post-1987 Administrative Rulemaking
  - §2.3.2.1. The Philippine Statute on Administrative Procedure
  - §2.3.2.1 Two-Pronged Approach to Agency Rulemaking
    - §2.3.2.1.1. Public Participation
    - §2.3.2.1.2. Full Publication
- §2.3.3. Motivations that led to the 1987 Reforms
  - §2.3.3.1. Restoring Democracy
  - §2.3.3.2. Institutionalizing Public Participation and People Empowerment in Government Affairs
  - §2.3.3.3. Fostering Transparency in Government Affairs

§2.4. A Comparative View of the Historical Development of Rulemaking Procedures in the Philippines and the United States
§2.5. Promising Possibilities for Modernizing Administrative Law and Rulemaking in the Philippines

§2.1. Chapter Abstract

Administrative law in the Philippines evolved largely from the system of public law transplanted into the Philippine islands during the American occupation. After Spain ceded the Philippines to the US under the Treaty of Paris of 1898, the US took over the reigns of government of the Philippine Islands in the 1900s. Its occupation of the islands resulted in the passage of organic laws and administrative codes that established the Philippine administrative bureaucracy under a tripartite system of government, even as they paved the way for Philippine independence. Significant among the administrative statutes enacted during the American occupation was the Revised Administrative Code of 1917 (1917 RAC), which figured heavily in the evolution and development of Philippine administrative law in view of its longevity. Several decades after Philippine independence, the 1917 RAC remained in force in the Philippine islands, surviving several constitutional changes and martial law. It was only in 1987, after the people power revolution, that the 1917 RAC was revised and updated with the passage of the Revised Administrative Code of 1987 (1987 RAC). Although administrative law was for a time not among the traditionally recognized parts of Philippine law,[89] it was eventually recognized as an important and integral part of the legal system of the Philippines.[90]

This chapter maps out the development of the Philippine law on administrative procedure,[91] with particular regard to rulemaking,[92] with the objective of uncovering the operative historical anchor point from which Philippine administrative law developed towards its current state as a branch of Philippine public law. From that historical perspective, this chapter assesses the propriety of drawing lessons from the US, and its promising possibilities in terms of modernizing agency rulemaking in the Philippines. Another objective of this chapter, which relates to rulemaking in particular, is to account for how the agency rulemaking process in the Philippines had remained torpid, marked by the lack of a statutory set of uniform rulemaking procedures for the most part of the 20th century. Account shall also be taken of the events that provided

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[89] Tanada & Carreon, *2 Political Law* 486 (1962), citing 4 Am. Jur. 291-294. Examples of traditionally recognized parts of Philippine law are constitutional law, civil law, and criminal law.
[90] *Id.*
[91] *See* VII RAC (1987), also known as Executive Order No. 292 s. 1987 (EO 292 s. 1987), available at http://www.gov.ph/1987/07/25/executive-order-no-292/ last accessed on April 24, 2015.
[92] *See* VII(2) RAC (1987), *id.*

the impetus for the much-needed reform in the agency rulemaking process via the imposition of a statutory set of baseline procedures[93] under Book VII of the 1987 RAC. Delving into the history of administrative law and rulemaking in the Philippines provides the proper perspective for appreciating how the law has developed over time in the continuing effort to keep pace with the ever-evolving administrative state.[94]

§2.2. The Origins of Philippine Administrative Law

The Philippine legal tradition is a mixed system of civil law and common law.[95] It derives its civil law background from having been under the Spanish regime, while its common law background originated from its subsequent occupation by the US pursuant to the 1898 Treaty of Paris.[96] This mixed system had its beginnings from the effects of the 1898 treaty cession between Spain and the US. The civil law tradition continued in the Philippines mainly in the area of private law, because the laws that regulated the intercourse and general conduct of individuals remained in force in the islands despite the 1898 treaty cession.[97] The 1898 treaty cession, however, had the effect of abrogating all political laws then existing in the Philippine islands,[98] thereby paving the way

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[93] VII(2) RAC (1987).

[94] *Cf.* Keith Werhan, *Principles of Administrative Law* 2 (2014) hereinafter "Werhan, *Principles of Admin.Law*" ("Some sense of history is necessary to an understanding of administrative law because much of this jurisprudence has developed over a long period of time and on the run, in a continuing effort to keep up with the evolution of the administrative state.")

[95] *See* Cesar L. Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 Phil.L.J. 42 (1990); Gamboa, *The Meeting of the Roman Law and the Common Law in the Philippines*, 49 Phil. L.J. 304 (1974); *See also* http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php last accessed on November 18, 2015 (Placing the Philippines in the category that includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.)

[96] 30 Stat. 1754 (1898).

[97] Examples of these private laws are the Spanish Codigo Civil, which remained in force in the Philippines during and after the American occupation until its replacement by RA 386, known as the Civil Code of the Philippines, and the Spanish Code of Commerce. *See Macariola v. Asuncion*, A.M. No. 133-J May 31, 1982 [En Banc] ("…the present Code of Commerce is the Spanish Code of Commerce of 1885, with some modifications made by the "Commission de Codificacion de las Provincias de Ultramar," which was extended to the Philippines by the Royal Decree of August 6, 1888, and took effect as law in this jurisdiction on December 1, 1888."); *see also American Ins. Co. v. 356 Bales of Cotton*, 26 US 511 (1828). (Only those laws that regulated the intercourse and general conduct of individuals remained in force until altered by the US).

[98] *See Macariola v. Asuncion*, *id.* (The Court declared that Art.14 of the Code of Commerce, which prohibited judges from engaging in commerce, holding any office, or have any direct, administrative, or financial intervention in commercial or industrial companies within their jurisdiction, had been abrogated upon the transfer of sovereignty from Spain to the US and later on from the US to the Republic of the Philippines. Despite being in the Code of Commerce, the provision was deemed to be in the nature of an administrative law because it regulates the conduct of certain public officers and employees with respect to engaging in business: hence, political in essence.) *See also Roa vs. Collector of Customs*, 23 Phil. 315, 330, 311 [1912]); *People vs. Perfecto*, 43 Phil. 887, 897 [1922]; *Ely's Administrator vs. United States*, 171 US 220 (1969); *American and Ocean Ins. Cos. vs. 356 Bales of Cotton*, *id.*

for the transplant of a governmental legal system of American origin. Although the Filipino revolutionaries during the Spanish-American war had, in anticipation of independence, already established the 1st Philippine Republic shortly before the war ended,[99] that governmental system was short lived. The US did not accord recognition to the 1st Philippine Republic, and the Filipino revolutionaries were treated as rebels in an insurrection that was quelled by September 8, 1902.[100]

With the abrogation of both the Spanish governmental regime and the fledgling republic established by the Filipino revolutionaries, the Philippines was a virtual blank slate upon which the US had the opportunity of directly transplanting its system of administrative law. The period of American occupation spanned more than four (4) decades—from the treaty cession on December 10, 1898 until its recognition of Philippine independence on July 4, 1946—during which period, the US introduced a system of government that significantly laid the groundwork for the development of public administrative law and governance in the Philippines.

The Philippines was initially governed through "Philippine Commissions" whose members were appointed by the US President. The governor-general was the head of the commission, and was vested with the powers of the chief executive of the government of the Philippines.[101] The 2nd of these Philippine Commissions issued laws that replaced the antiquated Spanish ordinances and established American-style systems for the judiciary, the civil service, and the municipal government.[102] Political development in the Philippine islands at that time was characterized as rapid and particularly

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[99] *See* Maximo M. Kalaw, *The Development of Philippine Politics* 125-127 (1891) available at http://quod.lib.umich.edu/p/philamer/afj2233.0001.001/129?page=root;size=100;view=image last accessed on October 22, 2014. (The first Philippine constitution, also known as the Malolos Constitution, was patterned largely from the constitutions of France, Belgium, and the South American countries of Mexico, Brazil, Nicaragua, Costa Rica and Guatemala. The American Constitution did not have a direct influence in it.)

[100] *Id.* (The first Philippine Republic inaugurated by the Philippine revolutionaries under the Malolos Constitution in anticipation of Philippine independence after the war was relatively short-lived. The US treated the Philippine revolutionaries as rebels, and their resistance from American occupation as an insurrection. By September 8, 1902, the American authorities in the Philippines had certified that the insurrection had ceased and that a condition of general and complete peace had been established.)

[101] *Id.* at 184-186; *see also* Federal Research Division, Library of Congress, *Philippines Country Studies* 27 (1991), hereinafter "FR Div. Cong. Lib., *Phil. Country Studies,*" available at http://heinonline.org/HOL/Page?handle=hein.cow/cowcs0068&div=15&collection=cow&set_as_cursor=clear#59 last accessed on October 22, 2014. (The First Philippine Commission appointed on January 20, 1899 and headed by Dr. Jacob Sherman, recommended the immediate establishment of a civilian government. The Second Philippine Commission appointed on March 16, 1900, and headed by William Howard Taft, exercised legislative as well as limited executive powers over the Philippine islands.)

[102] *See* FR Div. Cong. Lib., *Phil. Country Studies*, *id.* at 13-20, 28.

impressive due to the complete lack of representative institutions under the Spanish regime.[103]

The US Congress passed several organic laws for the Philippines, the most significant of which were the Philippine Organic Act of 1902, the Jones Act of 1916, and the Tydings-McDuffie Act of 1934, which served as organic charters that led to the adoption of the tripartite system of government for the Philippines, and provided the transitional measures towards Philippine independence. The Philippine Organic Act of 1902,[104] known as the "Philippine Bill of 1902," ratified and confirmed the creation and grant of authority to the Philippine commissions by the US President,[105] thereby giving legislative imprimatur upon the pre-1902 establishment of the judiciary, the civil service, and the municipal government for the Philippine Islands by the Philippine Commissions. The law further provided for a temporary civil government with an executive branch headed by an American Governor General, and a bicameral legislative branch with the Philippine Commission composed of Americans as the upper house, and the Philippine Assembly composed of elected Filipinos constituting the lower house.[106] That law also established a bill of rights and the fundamental principles of governance for the Philippine Islands.[107] The Jones Act of 1916,[108] known as the "Jones Law," phased out the Philippine Commission and replacing it with a Senate whose members were duly elected Filipinos, to serve as the upper house of the Philippine legislature.[109] The Tydings-McDuffie Act of 1934[110] authorized the drafting of a republican constitution for the government of the Commonwealth of the Philippines,[111] and provided for other transitional measures towards the complete withdrawal of US sovereignty and Philippine independence.[112]

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[103] *Id.* at 28.

[104] Philippine Organic Act of 1902 (July 1, 1902), c. 1369, 32 Stat. 691; *Dorr v. United States*, 195 US 138, 143-44 (1904).

[105] Philippine Organic Act of 1902, *id.* at §1-3.

[106] *Id.* at §6-7.

[107] *Id.* at §5, et.seq.

[108] Jones Act, 39 Stat. 545, c. 416. (August 29, 1916)

[109] *Id.* at §12-14. N.B. The Philippine Assembly was also renamed as the "House of Representatives." Although the Philippines would later depart from this bicameral system under the 1934 Constitution, as well as the 1973 Constitution and its amendments and revisions, the bicameral system introduced under the Jones Law has been re-instituted under the 1987 Constitution and is now the current general legislative structure in the Philippines. *See* Phil. Const., art. VI, §1; Joaquin G. Bernas, S.J., *The 1987 Constitution of the Republic of the Philippines: A Commentary* 675-676 (2009), hereinafter "Bernas, *1987 Philippine Constitution.*"

[110] The Philippine Independence Act, 48 Stat. 456 (March 24, 1934) available at http://www.thecorpusjuris.com/laws/constitutions/item/tydings-mcduffie-act.html last accessed October 31, 2014.

[111] *Id.* at §1-2.

[112] *Id.*

The US had, in conjunction with its preparation of the Philippines for independence, shaped and implemented within the islands a tripartite system of public administration that consisted of the executive, the legislative, and the judiciary as principal institutions of government. That, together with the gradually increasing Filipino participation in the public service and governance sector, provided meaningful opportunities for Filipinos to gain familiarity with that system and how it worked, thus paving the way for its adoption in the country. The tripartite system of government became the precursor of the governmental framework under the subsequent Philippine constitutions. Thus, the US played a significant role in the early days of administrative law in the Philippines.

The influence of the US common law tradition was particularly pervasive in the areas of Philippine public and political law, including its administrative law,[113] and that influence continued even as the Philippines transitioned towards independence from American rule in 1946 and onwards. Even now, the Philippines still uses the system of case reporting and judicial precedents adopted from the US,[114] and its judicial decisions applying or interpreting the laws or the Constitution form part of the Philippine legal system.[115] At the constitutional level, the 1987 Philippine Constitution embraces American constitutionalism by adopting the republican form of government under a tripartite system.[116] The Philippines thus patterned its constitutional distribution of governmental powers among three separate branches from the US Constitution.[117]

§2.2.1. Administrative Codes of the Philippines

Administrative codes provide the statutory framework that serve as the supporting undercarriage for the Philippine organic statutes, and the Philippine constitutions.

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[113] *Macariola v. Asuncion*, A.M. No. 133-J May 31, 1982 (En Banc) ("…political law embraces constitutional law, law of public corporations, administrative law, including the law on public officers and elections.")

[114] Cesar L. Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 Phil.L.J. 42, 45 (1990) ("In its theory of judicial precedents, therefore, the Philippine hybrid legal system has blended together the underlying philosophies of the principle of stare decisis of the common law system, and the evolving principles of judicial precedents of the civil law systems."); *see Ting v. Velez-Ting*, G.R.No. 166562, March 31, 2009 (The Philippine Supreme Court discussed the historical development of the Philippine doctrine of adherence to precedents or stare decisis and its origins in England and the US [citing Chief Justice Reynato S. Puno's dissenting opinion in *Lambino v. Commission on Elections*, 505 SCRA 160 (2006).

[115] Phil.Civil Code art.8; *see also Ting v. Velez-Ting, id.*.

[116] *See* Bernas, *1987 Philippine Constitution* 57, 677-678. (It was the system with which Filipinos had become most familiar.)

[117] *See Marcos v. Manglapus*, 178 SCRA 760, 763-765 (1989).

§2.2.1.1. The 1917 Revised Administrative Code (1917-1987)

During the American occupation, the Philippine Assembly passed the Acts No. 2657 and 2711 to institute the Administrative Code for the Philippines. The first of these statutes—Act No. 2657 passed on July 1916[118]—was promptly revised by Act No. 2711,[119] known as the 1917 Revised Administrative Code (1917 RAC), which took effect on October 1, 1917.[120]

The 1917 RAC followed the tripartite system of government under the Jones Law,[121] and fashioned a Philippine government whose powers were distributed by law among three (3) separate branches: the executive, the legislative, and the judiciary; and contained the organization, powers, and general administration of the Philippine government, its bureaus, provinces, and other political subdivisions.[122] Among the most notable feats of the 1917 RAC was its longevity—it lasted for almost 7 decades, from 1917 to 1987.

Not only did it survive the American occupation under the Philippine organic charters (1917-1935),[123] and the Philippine commonwealth under the 1935 Philippine Constitution (1935-1946),[124] it remained in effect for several decades after Philippine independence (1946-1987). The 1917 RAC outlasted the 3rd Republic (1946-1972), and remained intact even during martial law and the 4th Republic (1972-1986) under the 1973 Philippine Constitution,[125] and the subsequent constitutional amendments of 1976, 1980, and 1981.[126] Martial law

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[118] Act 2657, approved December 31, 1916; *See Smith, Bell & Co. v. Rafferty*, G.R. No. L-14466 January 26, 1920.
[119] *See* Act 2711, approved March 10, 1917, available at http://www.gov.ph/1917/03/10/act-no-2711/ last accessed on October 24, 2014.
[120] *Smith, Bell & Co. v. Rafferty*, G.R. No. L-14466 January 26, 1920.
[121] Jones Act, 39 Stat. 545, c. 416.
[122] Act 2711.
[123] Jones Act, 39 Stat. 545, c. 416; The Philippine Independence Act, 48 Stat. 456.
[124] Phil. Const. (1935), available at http://www.gov.ph/constitutions/the-1935-constitution/ last accessed on April 10, 2015. N.B. The 1935 Philippine Constitution underwent 2 amendments. While it initially provided for a unicameral legislature (National Assembly), this was changed to a bicameral system in 1940, during the Philippine Commonwealth period. *See* Philippine National Assembly Resolution No. 73 dated April 11, 1940; *See also* Presidential Proclamation 650 s. 1940, giving public notice of the US President's approval of the constitutional amendments in Philippine National Assembly Resolution No. 73 s. 1940, available at http://www.gov.ph/1940/12/04/proclamation-no-650-s-1940/ last accessed on February 28, 2015. The other amendment was instituted in 1947 by the Philippine Congress under Commonwealth Act 733 regarding the grant of parity rights to US citizens in the exploration, development and utilization of natural resources, as well as the operation of public utilities, in the Philippines. *See* Commonwealth Act 733; *see also* Official Gazette website, *Evolution of the Philippine Constitution*, available at http://www.gov.ph/constitutions/constitution-day/ last accessed on February 24, 2015.
[125] *See* Official Gazette website, *id.* (The 1973 Philippine Constitution was ratified on January 17, 1973).
[126] *Id.* (The 1973 Philippine Constitution was amended on October 16-17, 1976, on January 30, 1980, and April 7, 1981).

and the 4th Philippine Republic marked an era that reflected the rise of the Philippine presidency to a position of prominence and supremacy among the three great institutions of the government, with the presidential declaration of martial law in 1972 providing the means for unlocking the constitutional constraints imposed by the separation of powers doctrine.[127] With the imposition of martial law, the Philippine presidency exercised not just executive authority but also extraordinary legislative powers. Wielding both executive and legislative powers, the Philippine President promulgated issuances that were invariably labeled as "Executive Orders" (EO), "Letters of Instructions" (LOI), Proclamations (Procl'n) and Presidential Decrees (PD), which blurred if not obliterated the line separating the exercise of executive and legislative authority.[128] The President also promulgated issuances that amended and supplemented the 1917 RAC, thereby consolidating and further strengthening the presidential control over the administrative bureaucracy.[129] The 1917 RAC was nonetheless kept largely intact, and attempts to recodify it in 1978 were unsuccessful.[130]

It was only in 1987, after the end of martial rule in the Philippines, that the 1917 RAC was revised pursuant to an executive order issued after the successful People Power Revolution of 1986 had installed a new President.[131]

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[127] Phil. Const. art. VII, §10(2), to wit:

> Section 10. (1) xxx
>
> (2) The President shall be commander-in-chief of all armed forces of the Philippines, and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under Martial Law.

[128] Free Telephone Workers Union v. Minister of Labor and Employment, 108 SCRA 757 (1981). (The "fundamental principle of separation of powers of which non-delegation is a logical corollary becomes even more flexible and malleable" in view of the semi-parliamentary features of the 1973 Constitution.)

[129] Notable among these executive orders and presidential decrees were Executive Order No. 19 series of 1966, entitled, "PRESCRIBING RULES AND REGULATIONS FOR APPEALS TO THE OFFICE OF THE PRESIDENT FOR FINALITY OF DECISIONS THEREOF", available at http://www.gov.ph/1966/04/02/executive-order-no-19-s-1966/ last accessed on December 10, 2014; Presidential Decree No. 1416 entitled, "GRANTING CONTINUING AUTHORITY TO THE PRESIDENT OF THE PHILIPPINES TO REORGANIZE THE NATIONAL GOVERNMENT", issued on June 9, 1978. (This law provided the President with absolute authority to reorganize the government at his discretion.); and Presidential Decree No. 1772 issued on January 15, 1981, amending Presidential Decree No. 1416. (The amendment expressly provided guidelines and standards for the President's authority, presumably to address the separation of powers and non-delegation concerns attendant in PD 1416.)

[130] See 2nd Whereas Clause, Executive Order No. 292 s. 1987 available at http://www.gov.ph/1987/07/25/executive-order-no-292/ last accessed on April 10, 2015.

[131] See Federal Research Division, Library of Congress, Philippines Country Studies 191, 195 (1991) available at http://heinonline.org/HOL/Page?handle=hein.cow/cowcs0068&div=15&collection=cow&set_as_cursor=4&men_tab=srchresults&terms=People|power|philippines&type=matchall#1 last accessed on October 24, 2014.

§2.2.1.2. The 1987 Revised Administrative Code (1987-present)

The People Power Revolution[132] signaled the end of the 4th Philippine Republic, and ushered in a new era of administrative governance that was predicated upon changes in the government bureaucracy both at the constitutional and statutory level.

The newly installed President issued Procl'n No. 3 on March 25, 1986,[133] mandating the prompt drafting of a new constitution,[134] as well as a government reorganization that shall prioritize measures that promote economy, efficiency, and eradicate graft and corruption.[135] The 1987 Philippine Constitution was drafted,[136] and subsequently ratified by the people on February 1987.[137] Shortly thereafter, on July 25, 1987, the Philippine President issued Executive Order No. 292 (EO 292 s. 1987), instituting the 1987 Revised Administrative Code (1987 RAC).[138] At the constitutional level, the 1987 Constitution marked the return of normal constitutional government in the Philippines.[139] At the statutory level, the 1987 RAC provided the meaningful changes in administrative structures and procedures to carry out the laudable objectives of the 1987 Constitution.[140] Both the 1987 Constitution and the 1987 RAC are currently in force and effect throughout the Philippine islands.

The 1987 RAC incorporates in a unified statute[141] the major structural, functional and procedural principles and rules of governance,[142] with the

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[132] The peaceful revolt began in 1983 and gathered momentum since then, culminating in what is now known as the EDSA People Power Revolution in February 1986. For a more detailed narrative of the events, *see* Bernas, *1987 Philippine Constitution* xli-xliv (2003).

[133] Also known as the Philippine Freedom Constitution. *See* Procl'n 3 (1986), available at http://www.gov.ph/constitutions/ last accessed on December 1, 2014.

[134] *See* Phil.Freedom Const. art.V; *see* Procl'n 3, *id.*

[135] *See* Phil.Freedom Const. *id.* at artII, §1. *See* Procl'n 3, *id.*.

[136] *Id.* at art.V, §1-5.

[137] See Official Gazette website, available at http://www.gov.ph/constitutions/ last accessed on December 1, 2014. (The 1987 Constitution was approved by the 1986 Constitutional Commission on October 12, 1986 and presented to President Corazon C. Aquino on October 15, 1986. It was ratified on February 2, 1987 by a plebiscite and proclaimed in force on February 11, 1987.)

[138] *See* 1987 Revised Administrative Code of the Philippines, "RAC (1987)" or Executive Order (EO) No. 292 series of 1987, available at http://www.gov.ph/1987/07/25/executive-order-no-292/ last accessed on October 24, 2014.

[139] See Phil.Freedom Const. art.V, §2; Procl'n 3 (1986).

[140] *See* RAC 4th Whereas Clause (1987), available at http://www.gov.ph/1987/07/25/executive-order-no-292/ last accessed on October 24, 2014.

[141] The 1987 RAC was issued in the exercise of extraordinary legislative powers which the Philippine President possessed until the 1st Congress of the 5th Philippine Republic was convened. *See* Section 1, Article 2, Procl'n 3, art.2, §1 (1986), available at http://www.gov.ph/1986/03/25/proclamation-no-3-s-1986-2/ last accessed on October 6, 2015.

[142] *See* RAC 3rd Whereas Clause (1987), available at http://www.gov.ph/1987/07/25/executive-order-no-292/ last accessed on October 24, 2014.

objectives of enhancing the effectiveness of government,[143] and providing optimum benefit to the people.[144] Functionally, it provides the legislative details for the government organization and structure broadly set forth in the 1987 Constitution.

The 1987 RAC is similar to its predecessor statutes in terms of being the general law that provides the statutory undercarriage and sub-constitutional framework for the entire Philippine administrative bureaucracy; and allocates the respective mandates, powers, and functions for the public institutions and agencies. What sets the 1987 RAC significantly apart from its predecessors is that it dedicates an entire Book VII towards providing a minimum set of administrative procedures for administrative agencies,[145] a feature that was palpably absent in both Act Nos. 2657 and 2711. Through Book VII, the 1987 RAC counter-balanced the allocation of governmental powers to the different administrative agencies with a uniform statutory set of baseline procedural constraints aimed at rationalizing the latter's exercise of those powers.

§2.3. The Evolution of Philippine Rulemaking in the 20th Century

The judicial validation of statutory grants of administrative rulemaking authority in the Philippines can be traced as far back as the 1908 case of *United States v. Barrias*.[146] As early as 1914, the Philippine Supreme Court in *United States v. Molina*,[147] had already articulated the underlying reason for allowing agencies to exercise rulemaking authority, to wit:

> In the very nature of things in many cases it becomes impracticable for the legislative department of the Government to provide general regulations for the various and varying details for the management of a particular department of the Government. It therefore becomes convenient for the legislative department of the Government, by law, in a most general way, to provide for the conduct, control, and management of the work of the particular department of the Government; to authorize certain persons, in charge of the management, control, and direction of the particular department, to adopt certain rules and regulations providing for

[143] *See id.* at 4th Whereas Clause.
[144] *Id.* at 3rd Whereas Clause.
[145] *Id.* at VII.
[146] *United States v. Barrias*, G.R.No. 4349, September 24, 1908 (The Court sustained the validity of par. 70 and 83, Circular No. 397 issued by the Insular Collector of Customs pursuant to Act No. §5, 8 against allegations of undue delegation of legislative powers.)
[147] *United States v. Molina*, G.R.No. L-9878, December 24, 1914.

> the detail of the management and control of such department. Such regulations have uniformly been held to have the force of law, whenever they are found to be in consonance and in harmony with the general purposes and objects of the law.[148]

Since then, and for the greater part of the 20th century, Philippine administrative agencies were granted increasingly broad authorities to promulgate rules to carry out the provisions of particular laws.[149]

Under Philippine constitutional law, agency rulemaking was justified under two theories.[150] The 1st theory permits administrative agencies to fill in the interstices left by statute, thereby acting as agents of Congress in providing the details of legislation.[151] The 2nd theory, referred to as the "theory of contingent legislation," posits that Congress may pass legislation the actual operation of which, by its terms, would be contingent upon the existence of facts to be determined by an administrative agency.[152] In supporting the phenomenon of subordinate legislation, both theories rest on the following basic assumptions: (1) that the functions being performed by the administrative agencies merely involve law-execution, and not law-making;[153] (2) that the delegations to the administrative agencies did not involve subject matters that are of such importance as to warrant the full and entire regulation by the legislature itself;[154] and (3) that the discretion exercised by the subordinate agency is limited in scope and breadth.[155] Under both theories, the Philippine

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[148] *Id.*

[149] Cruz, *Phil.Admin.Law* 23 (2003 Ed.); *see also Solid Homes v. Payawal*, 177 SCRA 72 (1989). (Statutes conferring powers on administrative agencies must be liberally construed to enable them to discharge their assigned duties in accordance with the legislative purpose.)

[150] Bernas, *1987 Philippine Constitution* 686. (Both theories were adopted from the opinions of Chief Justice Marshall of the US Supreme Court.)

[151] *Id.* at 664, citing *Wayman v. Southward*, 10 Wheat 1, 42 (1825); *Kilusang Mayo Uno Labor Center v. Garcia, Jr.*, 239 SCRA 386 (1994); *Department of Agrarian Reform v. Sutton*, 473 SCRA 392 (2006); *See* De Leon & De Leon Jr., *Admin. Law* 84-85.

[152] Bernas, *id.,* citing *The Brig Aurora*, 7 Cr. 382.

[153] *Id.*

[154] *Id.*, citing Chief Justice Marshall in *Wayman v. Southward*, 10 Wheat 1, 42 (1825) ("The line has not been exactly drawn which separate those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.")

[155] *Compania General de Tabacos v. Board of Public Utility*, 34 Phil. 136 (1916) (The Court held that Act 2307 was unconstitutional insofar as it delegated to the Board of Public Utilities the power to require every public utility to furnish an annual detailed report of finances and operations in such forms and containing such matters as the Board may prescribe, on the ground that the scope of the delegation was general and broad. "The Legislature seems simply to have authorized the Board of Public Utility Commissioners to require what information the board wants. It would seem that the Legislature, by the provision in question, delegated to the Board xxx all of its powers over a given subject-matter in a manner almost absolute, and without laying down a rule or even making a suggestion by which that power is to be directed, guided or applied."); *See Edu v. Ericta*,

legislature exclusively determined what the law shall be, with administrative agencies only possessing the administrative discretion on how the law shall be executed, enforced, and implemented.[156] Administrative agencies were considered as mere implementers of determinations made through a democratic legislative process,[157] and rulemaking was a means by which agencies were able to transmit the active powers of the state from the source to the point of application—to apply the law and fulfill the legislature's mandate.[158]

The foregoing framework corresponds with the "transmission belt" model of administrative law under which administrative agencies were viewed merely as necessary instruments or "transmission belts" to implement the will of the democratically controlled legislature.[159] Agency intrusions into private liberties were, in that context, permissible because they were commanded and controlled by a legitimate source of authority (Congress).[160] From the standpoint of constitutional law, statutory delegations for rulemaking should ideally be complete in all their respective terms and conditions when they leave the legislature, so that the agencies will have nothing to do but enforce it; and the delegating laws should provide sufficient standards that specify the limits of

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35 SCRA 481,496-7 (1970) ("To determine whether or not there is an undue delegation of legislative power, the inquiry must be directed to the scope and definiteness of the measure enacted.")

[156] *Cruz v. Youngberg,* 56 Phil., 234, 239 (1931); *Rubi, Et. Al. v. The Provincial Board of Mindoro*, 39 Phil., 660 (1919); *Araneta v. Gatmaitan*, G.R. Nos. L-8895 & L-9191, April 30, 1957; Cruz, *Phil. Admin. Law* 25, citing 42 Am. Jur. 343; *see also Tio v. Videogram Regulatory Board*, 151 SCRA 208 (1987), citing *Cincinnati, W & Z.R. Co. vs. Clinton County Comrs,* 1 Ohio St. 88 (1852). (The Court upheld the validity of PD 1987 §11, which gave the Videogram Regulatory Board the power to "solicit the direct assistance of other agencies and units of the government and deputize, for a fixed and limited period, the heads or personnel of such agencies and units to perform enforcement functions for the Board," because it was "merely a conferment of authority or discretion as to its execution, enforcement, and implementation. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made.")

[157] *See* Cary Coglianese, *Administrative Law*, reproduced in Paul B. Baltes and Neil J. Smelser, *International Encyclopedia of Social and Behavioral Sciences* 1: 85-88 (Elsevier, 2001) available at http://www.hks.harvard.edu/m-rcbg/research/c.coglianese_international.encyclopedia_administrative.law.pdf last accessed on October 6, 2015.

[158] Cruz, *Phil.Admin.Law* 37.

[159] *See* Coglianese, *Administrative Law*, in Baltes & Smelser, *International Encyclopedia of Social and Behavioral Sciences 1: 85-88* (2001).

[160] *Id.*; *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev., 1675, 1684, 1711 (1974-1975) (Stewart, *Reformation of Admin.Law*), citing Bele, *the Expansion of American Administrative Law*, 30 Harv. L. Rev. 430-431 (1917); *Reagan v. Farmers' Loan & Trust Co.*, 154 US 362, 394 (1894) (The agency becomes merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislature.); Frank Goodnow, *The Principles of Administrative Law of the United States* 6-7 (1905); M. Vile, *Constitutionalism and the Separation of Powers* 277-80 (1967).

the delegate's authority, announce the legislative policy, and express the conditions under which the law shall be implemented.[161]

§2.3.1. Pre-1987 Administrative Rulemaking

Rulemaking remained largely the same during the 1917 RAC's effectivity from 1917 to 1986, with constraints and limitations that were largely constitutional and substantive in nature.[162] In terms of judicial review, the hurdles that administrative agencies had to overcome consisted mainly of the doctrine against delegation of legislative authority,[163] the Philippine version of the *"ultra vires*" doctrine,[164] and the requirements of reasonableness and non-arbitrariness.[165] As early as 1914, the Philippine Supreme Court had laid down the sweeping pronouncement that administrative rules and regulations have the

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[161] Cruz, *Phil.Admin.Law* 28-31. *See Mun. of Cardona v. Binangonan*, 36 Phil. 547 (1917); *Rubi v. Prov. Board*, 39 Phil. 660 (1919); *United States v. Ang Tang Ho*, G.R. No. 17122, February 27, 1922; *People v. Vera*, 65 Phil. 56 (1937); *People v. Rosenthal*, 68 Phil. 328 (1939); *Int. Hardwood v. Pangil Fed. of Labor*, 70 Phil. 602 (1940); *Pangasinan Transportation v. Public Service Commission*, 70 Phil. 221 (1940); *People v. Exconde*, 101 Phil. 1125 (1957); *Pelaez v. Auditor General*, 15 SCRA 569, 576-577 (1965); *Edu v. Ericta*, 35 SCRA 481 (1970); *Free Telephone Workers Union v. Minister of Labor*, G.R. No. L-58184 October 30, 1981; *Abakada Guro Party List v. Ermita*, 469 SCRA 1, 115-116 (2005); *BOCEA v. Teves*, G.R. No. 181704, December 6, 2011; *See also Philippine Air Lines, Inc. v. Civil Aeronautics Board*, 270 SCRA 538 (1997) (citing Isagani Cruz, *Philippine Political Law* 97 [1996] and borrowing the United States Supreme Court's language in *Schechter Poultry Corp v. United States*, 295 SCRA 495 [1935]).(To be valid, the delegation itself must be circumscribed by legislative restrictions, not a "roving commission" that will give the delegate unlimited legislative authority. It must not be a delegation "running riot" and "not canalized with banks that keep it from overflowing." Otherwise, the delegation is in legal effect an abdication of legislative authority, a total surrender by the legislature of its prerogatives in favor of the delegate.)

[162] *See* Cruz, *Phil.Admin.Law* 37-39. N.B. On the part of Congress as the principal delegating institution, the requirement is that the delegation must be complete and sufficient in order to hurdle the non-delegation doctrine. On the part of the agency to whom the power is delegated, the requirement is that the legislative rules should fall within the standards and limitations set by the law.

[163] *See Mun. of Cardona v. Binangonan*, 36 Phil. 547 (1917); *Rubi v. Prov. Board*, 39 Phil. 660 (1919); *United States v. Ang Tang Ho*, G.R. No. 17122, February 27, 1922; *People v. Vera*, 65 Phil. 56 (1937); *People v. Rosenthal*, 68 Phil. 328 (1939); *Int. Hardwood v. Pangil Fed. of Labor*, 70 Phil. 602 (1940); *Pangasinan Transportation v. Public Service Commission*, 70 Phil. 221 (1940); *People v. Exconde*, 101 Phil. 1125 (1957); *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959; *Edu v. Ericta*, 35 SCRA 481 (1970); *Free Telephone Workers Union v. Minister of Labor*, G.R. No. L-58184 October 30, 1981; *Abakada Guro Party List v. Ermita*, 469 SCRA 1, 115-116 (2005); *BOCEA v. Teves*, G.R. No. 181704, December 6, 2011.

[164] *See United States v. Barrias*, 11 Phil 327 (1908); *United States v. Molina*, 29 Phil 119 (1914). (Rules and regulations cannot extend the law); *People v. Santos*, 63 Phil 300 (1936) (An administrative order is invalid when it exceeds the regulatory power vested in the administrative agency.); *Chinese Flour Importers Ass'n v. Price Stabilization Board*, 89 Phil.439 (1951) (Where an administrative order betrays inconsistency or repugnancy to the provisions of the Act, the mandate of the Act must prevail); *Santos v. Estenzo*, 109 Phil 419 (1960) (An administrative agency cannot amend an act of Congress); *Victorias Milling Co. v. Social Security Commission*, 4 SCRA 627 (1962) (A rule is binding on the courts so long as…its scope is within the statutory grant); *Teoxon v. Board of Administrators*, G.R.No. L-25619, June 30, 1970; *See People v. Maceren*, G.R.No. L-32166, October 18, 1977 (The Secretary of Agriculture and the Commissioner of Fisheries exceeded their authority in issuing Fisheries AOs 84 & 84-1 penalizing electro-fishing because the Fisheries Law, RA 3512, did not expressly prohibit electro-fishing.)

[165] *See Taxicab Operators of Metro Manila v. Board of Transportation*, 117 SCRA 597 (1982) (The Court held that the agency had met the standard of reasonableness and absence of arbitrariness as required by due process.)

force of law,[166] and by 1957, even extended the greatest weight to an administrative agency's interpretation of its own rules and regulations.[167]

§2.3.1.1. No Uniform Set of Procedures for Rulemaking

The 1917 RAC did not have a general set of administrative procedures for agency rulemaking. That statutory gap remained for over 2/3 of a century (70 years) spanning the Philippine Commonwealth period,[168] the 3rd Philippine Republic,[169] martial law, and the 4th Philippine Republic.[170] The lacuna is explainable in part because the 1917 RAC pre-dated the Administrative Procedure Act of the US (US APA) by almost 29 years.[171] There was also little opportunity for the Philippines to have studied and adopted a Philippine analogue of the US APA because the critical periods from 1939 to 1946 during which the US Congress deliberated and passed its APA coincided with the 2nd World War and the Japanese occupation of the Philippine Islands.[172] Even after Philippine independence, the statutory gap persisted and consequently, much of the beneficial features and advantages of the modern rulemaking process, including the right to public participation in the proposal and formulation of

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[166] *United States v. Molina*, 29 Phil 119 (1914) (Such regulations have uniformly been held to have the force of law, whenever they are found to be in consonance and in harmony with the general purposes and objects of the law… Such regulations, once established and found to be in conformity with the general purposes of the law, are just as binding upon all of the parties, as if the regulations had been written in the original law itself (citing *United States v. Grimaud*, 220 US 506; *Williamson vs. United States*, 207 US 425; *United States v. United Verde Copper Co.*, 196 US 207.) *See Valerio v. Secretary of Agriculture and Natural Resources*, 117 Phil 729, 733; *Antique Sawmills v. Zayco*, 17 SCRA 316 (1966); *People v. Maceren*, G.R.No. L-32166, October 18, 1977; *Espanol v. Philippine Veterans Administration*, 137 SCRA 314 (1985). (Moreover, it is an elementary rule in administrative law that administrative regulations and policies enacted by administrative bodies to interpret the law which they are entrusted to enforce, have the force of law, and are entitled to great respect.); *Hijo Plantation, Inc. v. Central Bank*, G.R.No. L-34526, August 9, 1988.

[167] *See Gekueko v. Araneta*, G.R. No. L-10182, December 24, 1957 (Authorities sustain the doctrine that the interpretation given to a rule or regulation by those charged with its execution is entitled to the greatest weight by the Court construing such rule or regulation, and such interpretation will be followed unless it appears to be clearly unreasonable or arbitrary.)

[168] 1935-1946.

[169] 1946-1972.

[170] 1972-1986.

[171] The United States Congress passed the US APA on June 11, 1946.

[172] In 1939, the US Attorney General's Committee on Administrative Procedure was constituted at the request of then President Roosevelt. The Committee submitted its Report on the APA to Congress in 1941. *See Final Report of the Attorney General's Committee on Administrative Procedure*, available at http://archive.law.fsu.edu/library/admin/1941report.html last accessed on January 21, 2016). N.B. The relevant time period from 1942 to 1945 within which the US Congress conducted its legislative deliberations prior to the passage of the US APA coincided with the Japanese occupation of the Philippines during the 2nd World War. From 1945 to 1946, after the war ended and the US had regained control of the islands, the Philippines shifted its focus on after-war repair and restoration, as well as on the recognition of its independence. The US recognized Philippines as an independent state on July 4, 1946—a few weeks after the US APA was passed on June 11, 1946.

agency rules, and the procedural means to effectuate it, had been absent for the greater part of the 20th century.

The statutory absence of generally applicable administrative procedures for rulemaking was crucial. The agency rulemaking process, particularly for the rule formulation phase, had no clear constitutional hook under the 1935 and 1973 Philippine Constitutions from which the Philippine courts could anchor the judicial imposition of a uniform set of procedures for agency rulemaking.[173] Prior to 1987, the right of the people and their organizations to reasonable participation in social, political, and economic decision-making was not constitutionally recognized,[174] and the judicial power of review over arbitrary and capricious administrative rulemaking action had not been expressly included in the Philippine Constitution.[175] Rule formulation also did not implicate constitutional due process considerations,[176] in the same manner as agency adjudications.[177] Without the requirement for public participation in agency rulemaking and its resulting development of an administrative rulemaking file, docket or record, pre-1987 administrative agencies did not engage in the reasoned explanation of their rulemaking determinations. The Philippine courts merely relied on the agency or solicitor's *post facto* explanations on agency rules, and on the court's own divination of the reasons and bases used by the agency.

The old notion that considered the administrative agency's process of formulating rules and regulations as being analogous to the legislature's drafting of legislative bills[178] also led to the belief that prior notice and hearing was not

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[173] The Court would later on, during the latter half of the 20th century, use the Constitution's due process clause as a constitutional hook for making the rule publication phase of agency rulemaking an indispensable requirement to the effectivity of rules and regulations. *See Tanada v. Tuvera*, G.R.No. L-63915, April 24, 1985, affirmed on December 29, 1986.

[174] *Cf.* Phil. Const. (1935 & 1973) with Phil.Const. art XIII, §16.

[175] *Cf.* Phil.Const. (1935 & 1973) with Phil.Const. art VIII, §1.

[176] *See Vigan Electric Light Co., Inc. v. Public Service Commission*, 10 SCRA 46 (1964); *Philippine Consumers Foundation v. Secretary of Education*, 153 SCRA 622 (1987). (The function of prescribing rates by an administrative agency may be either a legislative or an adjudicative function. If it were a legislative function, the grant of prior notice and hearing to the affected parties is not a requirement of due process.); *cf. Bi-Metallic Investment Co. v. Colorado*, 239 US 441 (1915). (Due process does not apply to procedures incidental to the formulation of rules. However, the procedures established by the legislature are controlling.)

[177] The Philippine Supreme Court had, as early as 1940, laid down the fundamental procedural requirements for administrative adjudicatory proceedings. It did so by utilizing the due process clause as its constitutional hook. *See Ang Tibay v. Court of Industrial Relations*, 69 Phil. 635 (1940).

[178] *See Balmaceda v. Corominas*, G.R.No. L-21971, September 5, 1975 (A "rule (or a 'regulation' — a term used interchangeably with 'rule') is the product of rule making, and rule making is the part of the administrative process *that resembles* a legislature's enactment of a statute [citing Kenneth C. Davis, *Administrative Law Treatise* 275, et.seq. (1958)].)

compulsory for agency rulemaking,[179] except when expressly required by law.[180] The existence of mandatory administrative rulemaking procedures thus depended largely upon the particular statutory enactments, and in terms of having a general law, the Philippines had none. The concept of public participation in rule development was virtually inexistent, save for those few instances where the specific delegating statute itself required it. Absent a general law prescribing a uniform set of administrative procedures for rulemaking, administrative agencies looked primarily at the specific law that they were implementing.[181] The threshold inquiry was whether the legislature had, via the enabling statute itself, expressly vested the administrative agency with delegated rulemaking authority. If the statute did so, then by that provision, a clear delegation of subordinate legislative authority was given for the agency to issue rules and regulations that were "like legislation"[182] with the force and effect of law, binding not only within the agency but also upon 3rd persons and the public—otherwise known as legislative rules.[183] On the other hand, if the statute did not, then by that lack of express delegation, the legislature has deemed that the administrative agency cannot exercise the power of subordinate legislation, and consequently, the latter may only exercise its inherent authority[184] to issue rules that are not legislative in nature—otherwise known as non-legislative rules—such as general statements of policy and

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[179] N.B. This old notion later gave way to the practical observation that even Congress is bound by the legislative procedures set by the Constitution, and, as directly elected representatives of the people, every legislator is given the opportunity to participate in the drafting of a legislative bill under the legislative process. In contrast, appointive administrative agency officials do not have direct mandates from the people, thereby giving rise to serious legitimacy concerns regarding their authority to issue publicly binding rules and regulations. In modern rulemaking, the statutory requirement for public participation is a legitimating factor that is considered as the agency equivalent of the legislative process. (*See* Chapter 1, 3, 4 of this work.)

[180] 73 CJS *Public Administrative Bodies* §98, cited in Cruz, *Phil.Admin.Law* 53.

[181] The delegating statute may provide rulemaking procedures with public participation via (a) the formal notice and trial-type hearing, (b) the informal notice and comment, or (c) a hybrid mixture of both formal and informal processes. *See* Chapter 4 of this work.

[182] Jacob E. Gersen, *Legislative Rules Revisited*, Univ. of Chicago Public Law & Legal Theory Working Paper No. 168, 6 (2007) ("The legislative rule label is attractive in the sense that rules issued via notice and comment rulemaking often make new law or establish new policy that has the binding force of law. Such rules are therefore like legislation. The legal distinction is between rules that must be promulgated using notice and comment rulemaking proceedings and those that may be validly issued without such procedures.)

[183] *Id.* (The distinction between legislative and non-legislative rules pre-dates the US APA, and the statutory text implicitly incorporated the preexisting doctrinal distinction.) *See also, Skidmore v. Swift and Co.*, 323 US 134, 139 (1944) (Prior to the APA, the US Congress did not grant an Administrator the power to make legislative rules, but rather only to offer nonbinding interpretations.)

[184] Kenneth C. Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919,930 (1948); John Fairlie, *Administrative Regulation*, 18 Mich.L.Rev. 181, 183-188 (1920); See also Kristin E. Hickman and Richard J. Pierce, Jr., *Federal Administrative Law: Cases and Materials* 417 (2014). (Legal Scholars have long claimed that all agencies have the inherent authority to issue non-legislative rules, derived from the power to execute the laws; the head of an agency must be able to coordinate the efforts of subordinate employees, and in so doing will establish policies and procedures to guide their actions, including issuing official interpretations of statutes.); *See also* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo.L.J.833, 876 (2001).

interpretations of the law, which may bind agency employees, but may not be legally enforced as binding against the public.[185]

After having determined that the specific statute had expressly vested the administrative agency with substantive rulemaking authority, the next inquiry was whether the statute had also imposed procedures for the agency's exercise thereof. If the specific statute did not impose procedures for rulemaking, such absence meant that the administrative body could formulate legislative rules in its exclusive discretion and on the basis of information it acquired through any method.[186] This unfettered discretion, in turn, meant that the agency could conduct rulemaking on its own, without public participation[187] or even publication,[188] provided that the final rule as promulgated was within the substantive standards set by the delegating statute. On the other hand, if the specific delegating statute had expressly prescribed a certain procedure for the conduct of rulemaking, then the agency had to strictly comply.[189] Otherwise, the agency's failure to do so would result in the nullity of the act of rulemaking itself, including any final rule issued pursuant thereto, since it would be void and without any force and effect under the general precepts of law.[190] In such instances, the Philippine courts could pass upon the validity of the agency's rulemaking process and mandate the agency's compliance with the rulemaking procedures because the delegating law itself had provided the statutory requirements that the courts needed.[191]

In situations where the specific delegating law itself prescribed the procedure for agency rulemaking, the Philippine courts had adopted the view

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185 Hickman & Pierce, Jr., *Fed.Admin.Law* 417 (2014).

186 *See* 73 CJS *Public Administrative Bodies* §98, cited in Cruz, *Phil. Admin.Law* 53 (2003).

187 N.B. The conduct of notice and comment, as well as trial type hearings, in agency rulemaking is generally viewed by agencies as burdensome, time consuming, and costly.

188 At the time, the general law that required publication was Phil.Civil Code, art. 2 which stated that "[L]aws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is otherwise provided." The government had taken the position that "laws" referred only to legislative statutes, and that the phrase "unless it is otherwise provided" meant that "publication was not always imperative" and that the enactment or issuance itself may dispense with publication altogether. It was only in 1986, that the government's position was judicially overruled, and the need for rule publication and its due process implications were definitively settled. (*See Tanada v. Tuvera*, G.R.No. L-63915, April 24, 1985, affirmed on December 29, 1986).

189 *Victorias Milling Co. v. SSC*, 114 Phil 555 (1962).

190 *See* Phil.Civil Code, art.5, 7 par.3. "Article 5. Acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity." "Article 7. xxx Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution."

191 *Victorias Milling*, 114 Phil 555 (1962). (A rule is binding on the courts so long as the procedure fixed for its promulgation is followed and its scope is within the statutory authority granted by the legislature, even if the courts are not in agreement with the policy stated therein or its innate wisdom [citing Davis, *Administrative Law* 195-197]).

that the statute's procedural provisions were indispensable and essential conditions that the legislature had imposed for the agency's valid exercise of the legislative authority delegated to it.[192] Agencies had no inherent authority to issue rules and regulations that had the same legally binding effect upon the public as statutes, and they could only do so pursuant to a specific and valid delegation of legislative authority.[193] As such, the agency's authority to issue legally binding rules—also known as legislative rules or the power of subordinate legislation—was considered to be derivative of, and dependent upon, the substantive and procedural conditions set forth by the legislature.[194] The case scenarios in which the foregoing view had been made, however, were peculiar in their results.

In *People v. Jolliffe*,[195] the accused, who was convicted of attempting to transport gold without a license in violation of the Monetary Board's Circular No. 21 in relation to RA 265, assailed the validity of Circular No. 21 because the circular did not, on its face, indicate that prior presidential approval had been obtained as procedurally required by RA 265.[196] The Court observed that the Monetary Board had no authority on its own to issue circulars that subjected transactions in gold to license because RA 265 procedurally required the prior presidential approval of such issuances,[197] but nevertheless affirmed the accused's conviction and upheld the validity of Circular No. 21. The Court supplied the circular's perceived procedural deficiency[198] by applying the rebuttable presumption of regularity in the Monetary Board's performance of

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[192] *Id.* (Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute… The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this sense, it has been said that rules and regulations are the product of a delegated power to create new or additional legal provisions that have the effect of law.[Davis, *Administrative Law* 194].); *See also People v. Jolliffe*, G.R.No. L-9553, May 13, 1959 (The Monetary Board authority to issue circulars subjecting gold transactions to license requires compliance with the procedure under §74, R.A. 265 which prescribes presidential approval).

[193] Hickman & Pierce, Jr., *Fed.Admin.Law* 417 (2014) citing *Chrysler Corp v. Brown*, 441 US 281, 301-02 (1979).

[194] Rules and regulations with the force of law are interchangeably referred to as legislative rules, substantive rules, or subordinate legislation. *See* Victorias Milling, *id.* (Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this sense, it has been said that rules and regulations are the product of a delegated power to create new or additional legal provisions that have the effect of law.)

[195] *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959.

[196] R.A. 265 §74.

[197] *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959

[198] The deficiencies were lack of prior presidential approval and incomplete publication. *See People v. Jolliffe*, G.R.No. L-9553, May 13, 1959

administrative duties,[199] and relying on the doctrine of qualified political agency.[200]

In *Victorias Milling Co. v. Social Security Commission*,[201] the petitioner company assailed the Social Security Commission's (SSC) Circular No. 22 on the ground that it changed the agency's previous definition of the term "compensation" under Circular No. 7, by excluding overtime pay and bonus in the computation of the employers' and employees' respective monthly premium contributions,[202] without complying with the procedural requirements under §4(a) of the delegating law, RA 1161.[203] The SSC countered that it could dispense with the rulemaking procedures under RA 1161 because Circular No. 22 was but an "administrative interpretation of the statute, or a mere statement

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[199] *Id.* ("xxx, since it has no authority to subject transactions in gold to license, unless the President agrees thereto, it is, in effect, the duty of the Board to obtain the assent of the Executive to the policy of requiring said license at a particular time, either upon adoption of the resolution of this effect, or prior thereto. As a consequence, it must be presumed — in the absence of proof to the contrary, which is wanting — that such duty has been fulfilled in the case at bar. (Citing Gelhorn, *Administrative Law: Cases and Comments* 315-316; *United States v. Fletcher*, 148 US 84, 89-90, and *Villena v. Secretary of Interior*, 67 Phil 451, 463.

[200] *Id.* citing *Villena v. Secretary of Interior*, 67 Phil 451, 463 (After serious reflection, we have decided to sustain the contention of the government in this case on the broad proposition, albeit not suggested, that under the presidential type of government which we have adopted and considering the department organization established and continued in force by paragraph 1, section 21, Article VII, of our Constitution, all executive and administrative organizations are adjuncts of the Executive Department, the heads of the various executive departments are assistant and agents of the Chief Executive, and, except in cases where the Chief Executive is required by the Constitution or the law to act in person or the exigencies of the situation demand that he act personally, the multifarious executive and administrative functions of the Chief Executive, presumptively the acts of the Chief Executive. [Citing *Runkle vs. United States*, 122 US 543 [1887]; *United States v. Eliason*, 10 Law ed. 968 [1839]; *Pones vs. United States*, 137 US 202 [1890]; *Wolsey vs. Chapman*, 101 US 755 [1880]; *Wilcox vs. Jackson*, 10 Law ed. 264 [1836].)

[201] *Victorias Milling*, 114 Phil 555 (1962). (When an administrative agency promulgates rules and regulations, it "makes" a new law with the force and effect of a valid law, while when it renders an opinion or gives a statement of policy, it merely interprets a pre-existing law (citing Parker, *Administrative Law* 197; Davis, *Administrative Law* 194). Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this sense, it has been said that rules and regulations are the product of a delegated power to create new or additional legal provisions that have the effect of law… A rule is binding on the courts so long as the procedure fixed for its promulgation is followed and its scope is within the statutory authority granted by the legislature, even if the courts are not in agreement with the policy stated therein or its innate wisdom… On the other hand, administrative interpretation of the law is at best merely advisory, for it is the courts that finally determine what the law means.)

[202] *Id.*

[203] RA 1161 §4(a) empowered the SSC "to adopt, amend and repeal subject to the approval of the President such rules and regulations as may be necessary to carry out the provisions and purposes of this Act."

of general policy or opinion as to how the law should be construed," and not a binding "rule or regulation" contemplated under §4 (a), RA 1161.[204]

The Court in *Victorias Milling* upheld the validity of Circular No. 22 by initially recognizing that agency issuances could be classified based on whether they had the binding effect of law upon the public, and that that classification was determinative of whether the agency should comply with the rulemaking procedures set by law. According to the Court, the "rules or regulations" contemplated under §4(a), RA 1161 referred to binding "administrative rules or regulation," as opposed to mere "administrative interpretations of the law whose enforcement is entrusted to an administrative body."[205] Rules or regulations thus referred to administrative issuances that (a) are a product of a delegated power to create new or additional legal provisions that particularizes the details and manner of carrying out the law; (b) partake the nature of a statute because the administrative agency makes a new law with the force and effect of a valid law; (c) may be enforced by penal sanctions provided in the law; (d) are promulgated pursuant to the procedure or authority conferred upon the administrative agency by law; and (e) are binding on the courts, regardless of whether they are in agreement with the policy or innate wisdom thereof, so long as the procedures fixed for its promulgation are followed and its scope is within the statutory authority granted by the legislature.[206] "Administrative interpretations of the law," on the other hand, were simply an administrative agency's opinion, statement of policy, or interpretation of a pre-existing law, which are merely advisory at best.[207]

After differentiating between binding and non-binding rules, the Court shoehorned Circular No. 22 into the latter category and readily assented to the SSC's proposition that the circular was exempt from the specific rulemaking procedures imposed by RA 1161.[208] The Court overlooked the SSC's non-

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[204] *Victorias Milling*, 114 Phil 555 (1962). (There can be no doubt that there is a distinction between an administrative rule or regulation and an administrative interpretation of a law whose enforcement is entrusted to an administrative body.)

[205] *Id.* N.B. Although the Court used the phrases, "administrative rule or regulation" and "administrative interpretation of the law," in order to avoid any confusion in its judicial construction of what the phrase "rules and regulations" in RA 1161 §4(a) meant, administrative issuances that fall under either or both these phrases are covered under the general rubric of "rules" for purposes of discussing the topic of rulemaking as a whole.

[206] *Id.*

[207] *Id.*

[208] *Id.* ("Circular No. 22 in question was issued by the SSC, in view of the amendment of the provisions of the Social Security Law defining the term "compensation" contained in Section 8 (f) of Republic Act No. 1161 which, before its amendment, reads as follows: "(f) Compensation — All remuneration for employment include the cash value of any remuneration paid in any medium other than cash except (1) that part of the remuneration in excess of P500 received during the month; (2) bonuses, allowances or overtime pay; and (3) dismissal and all other payments which the employer may make, although not legally required to do so."

compliance with the rulemaking procedures set forth under §4(a), R.A. 1161, as well as Circular No. 22's non-publication, because its reading of the circular showed that it simply changed the previously circularized definition of "compensation" to conform with the subsequent legislative amendment to the term's statutory definition, without adding anything new to the statute by way of additional duty or detail.[209]

Victorias Milling was significant in at least two respects. First, it recognized that administrative issuances were classified as either binding or non-binding,[210] and, second, it sought to flesh out the distinctions between the two by essentially tracking the differences between legislative and non-legislative rules.[211] In making the distinction, the Court relied upon US sources that explained the underlying rationale for the US APA's express exemption of "interpretative rules and general statements of policy" from its informal notice-and-comment procedures for substantive rulemaking.[212] Interestingly, under the US APA, "interpretative rules and general statements of policy" fell under those categories of rules that were exempt from rulemaking procedures because they had no binding effect of law, and as such, were neither legislative nor substantive in nature.[213] *Victorias Milling* also provided a glimpse of the Court's level of deference on these two different types of administrative issuances—(a) legislative rules, regardless of wisdom or policy, were considered binding so long as statutory procedures for its promulgation were followed and their scope fell within the statutory authority granted by the legislature; and (b) non-legislative rules, such as "administrative interpretation of the law," were at best merely advisory.[214]

Republic Act No. 1792 changed the definition of "compensation" to: "(f) Compensation — All remuneration for employment include the cash value of any remuneration paid in any medium other than cash except that part of the remuneration in excess of P500.00 received during the month." It will thus be seen that whereas prior to the amendment, bonuses, allowances, and overtime pay given in addition to the regular or base pay were expressly excluded, or exempted from the definition of the term "compensation", such exemption or exclusion was deleted by the amendatory law. It thus became necessary for the Social Security Commission to interpret the effect of such deletion or elimination. Circular No. 22 was, therefore, issued to apprise those concerned of the interpretation or understanding of the Commission, of the law as amended, which it was its duty to enforce. It did not add any duty or detail that was not already in the law as amended. It merely stated and circularized the opinion of the Commission as to how the law should be construed.")

[209] *Id.*

[210] *Cf. Nueno v. Angeles*, 76 Phil 12 (1946), where the Court observed that not all of the President's issuances as Chief Executive had the force and effect of law, and that issuances without binding effect were not legislative interpretations of the law. In that regard, *Victorias Milling* effectively expressed what *Nueno* logically implied—that, like presidential issuances, not all agency issuances had the force and effect of law.

[211] *See* Hickman & Pierce, Jr., *Fed.Admin.Law* 417.

[212] *See Victorias Milling,* 114 Phil 555 citing the works of Parker and Davis on Administrative Law; *See* also 5 U.S.C. §553(b & d); Hickman & Pierce, Jr., *Fed.Admin.Law* 417, 542-543.

[213] *Id.*

[214] *See Victorias Milling, id.*; *see also Teoxon v. Board of Administrators*, G.R.No. L-25619, June 30, 1970.

Taken together, however, the results of *Jolliffe*[215] and *Victorias Milling*[216] did little to address the problem of agency discretion in the Philippine setting. In *Jolliffe*, the Court's expedient use of the presumption of regularity[217] to address the plaintiff's allegations of procedural deficiencies in agency rulemaking effectively shielded the administrative agency from an evidentiary burden that it was in the best position to discharge. In *Victorias Milling*, the Court's validation of an otherwise procedurally infirm administrative issuance by characterizing it as a non-binding "administrative interpretation of the law,"[218] practically afforded agencies with another avenue for skirting the statutory procedural safeguards for administrative rulemaking. Interestingly enough, the rulemaking procedure specifically prescribed by the statutes in both cases involved the process of presidential approval, and not public participation.

Jolliffe[219] and *Victorias Milling*[220] were also peculiar in that they involved statutory grants of rulemaking authority coupled with specialized sets of rulemaking procedures for the agency to follow.[221] Delegating statutes during those times rarely contained specific rulemaking procedures, and naked statutory grants of rulemaking authority were the prevailing norm. In most instances, statutes did little more than empower agencies to issue the necessary rules and regulations for the proper implementation thereof.[222] The prevailing norm, taken together with the absence of a generally applicable statutory set of

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[215] *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959.

[216] *Victorias Milling*, 114 Phil 555.

[217] *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959 ("xxx, since it has no authority to subject transactions in gold to license, unless the President agrees thereto, it is, in effect, the duty of the Board to obtain the assent of the Executive to the policy of requiring said license at a particular time, either upon adoption of the resolution of this effect, or prior thereto. As a consequence, it must be presumed — in the absence of proof to the contrary, which is wanting — that such duty has been fulfilled in the case at bar.")

[218] *Victorias Milling*, 114 Phil 555.

[219] *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959. (Under RA 265 §74, prior presidential approval was required for Monetary Board issuances that would subject transactions in gold to license.)

[220] *Victorias Milling*, 114 Phil 555. (RA 1161 §4(a) empowered the SSC "to adopt, amend and repeal subject to the approval of the President such rules and regulations as may be necessary to carry out the provisions and purposes of this Act.")

[221] N.B. The statute in *Jolliffe*, RA 265, also provided for a general delegation of authority to the Monetary Board to "[P]repare and issue such rules and regulations as it considers necessary for the effective discharge of the responsibilities and exercise of the power assigned to the Monetary Board and to the Central Bank under this Act." *People v. Jolliffe*, G.R.No. L-9553, May 13, 1959.

[222] *See*, for examples, the following statutes: PD 70 §5; RA 3779 §28(h); RA 124 §2, as amended by RA 951; RA 4693 §3; PD 897 §3; PD 527 §4; *see* RA 1410 §5, *cf. Balmaceda v. Corominas*, G.R.No. L-21971, September 5, 1975 (The Secretary of Commerce and Industry promulgated the Consolidated Rules and Regulations pursuant to the naked grant of authority under RA 1410 §5, "to draft, promulgate and publish such rules and regulations as it may deem necessary" to implement said law); RA 1400 §6(4), *cf. Cuneta v. Castaneda*, G.R.No. L-20025, January 31, 1964. (The Land Tenure Administration promulgated Admin.Circular No. 1 pursuant to RA 1400 §6[4]).

rulemaking procedures, meant that in most instances, administrative agencies could freely formulate legislative issuances without much procedural constraint, and treat them in the same manner as non-legislative issuances. With virtually no procedural distinction as far as rule formulation and publication was concerned, agencies with naked rulemaking authority could freely blur the line between legislative and non-legislative administrative issuances. That, coupled with the difficult task of distinguishing between legislative and non-legislative rules,[223] left the judiciary somewhat ambivalent as to the true nature of particular administrative issuances, as illustrated in *Interprovincial Autobus Co. v. Collector of Internal Revenue*,[224] and *Secretary of Finance v. Arca.*[225]

In *Interprovincial Autobus*,[226] the plaintiff assailed Finance Regulation No. 26 dated September 16, 1924, directing tax officers to collect taxes in all cases where the bill of lading or receipt failed to state the shipment's value, based on the substantive ground of unreasonableness. The Court upheld the regulation as reasonable,[227] and declared it as being authorized under §79(B), 1917 RAC on the blanket rulemaking authority of Department Heads.[228] *Interprovincial Bus*, however, was unclear in its treatment of the regulation as being either legislative or non-legislative. The Court initially described the regulation as a mere "directive to the tax officers"[229] that neither purported to "change or modify the law"[230] nor "create a liability to the stamp tax" [231] in cases where the receipts did not state the value of the goods. These statements downplayed

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[223] *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); *Chisholm v. FCC*, 538 F.2d 349, 393 (D.C.Cir. 1976); *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); Richard J. Pierce, Jr. *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547-548 (2000); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale Law Journal 276, 278-279, 286-287 (2010).

[224] *Interprovincial Autobus Co. v. Collector of Internal Revenue*, G.R.No. L-6741, January 31, 1956; 98 Phil 290 (1956).

[225] *Secretary of Finance v. Arca*, G.R.No. L-25924, April 18, 1969.

[226] *Interprovincial Autobus*, 98 Phil 290.

[227] *Id.* ("We find that the regulation is not only useful, practical and necessary for the enforcement of the law on the tax on bills of lading and receipts, but also reasonable in its provisions.")

[228] II(I)5 RAC §79(B) (1917) in full, reads as follows:

SECTION 79 (B). Power to regulate. – The Department Head shall have power to promulgate, whenever he may see fit to do so, all rules, regulations, orders, circulars, memorandums, and other instructions, not contrary to law, necessary to regulate the proper working and harmonious and efficient administration of each and all of the offices and dependencies of his Department, and for the strict enforcement and proper execution of the laws relative to matters under the jurisdiction of said Department; but none of said rules or orders shall prescribe penalties for the violation thereof, except as expressly authorized by law. All rules, regulations, orders, or instructions of a general and permanent character promulgated in conformity with this section shall be numbered by each Department consecutively each year, and shall be duly published.

Chiefs of Bureaus or offices may, however, be authorized to promulgate circulars of information or instructions for the government of the officers and employees in the interior administration of the business of each Bureau or office, and in such case said circulars shall not be required to be published.

[229] *Interprovincial Autobus,* 98 Phil 290 (1956).

[230] *Id.*

[231] *Id.*

Finance Regulation No. 26 by characterizing it as a non-legislative issuance, specifically one that was internal between superior and subordinate within the department, which involved a general policy statement on how to treat receipts that did not show any valuation. As such, it belonged to the first type of issuances described in §79(B), 1917 RAC as being "necessary to regulate the proper working and harmonious and efficient administration" [232] of the department. The Court then switched gears and recognized that the regulation affected 3rd parties because it "impliedly required the statement of the value of the goods in the receipts; so that the collection of the tax can be enforced,"[233] and created "a presumption of the liability of the taxpayer." [234] It then stated curtly that the regulation fell within the 2nd type of issuances described in §79(B), 1917 RAC, because it was "essential to the strict enforcement and proper execution of the law which it seeks to implement," [235] and that it had "the force and effect of law," [236] thereby indicating that the regulation was also a legislative issuance. The Court then concluded its equivocal ratiocination about the validity of Regulation No. 26 by applying the principle of legislative approval by re-enactment. [237]

In *Arca,*[238] the Finance Secretary issued the 1965 memorandum to the Customs Commissioner directing the latter to observe the re-appraised dutiable valuations of several types of listed remnants. Adversely affected by the reappraised valuations, the petitioners filed suit claiming that the 1965 memorandum was invalid due to non-compliance with the rulemaking procedures prescribed by the Tariff and Customs Code for fixing tariffs, and for lack of publication. Holding that the 1965 memorandum was valid, the Court held that it was similar to the regulation in *Interprovincial Autobus*—a "regulation" falling within the scope of the Finance Secretary's administrative powers under the 1917 RAC,[239] and having "the force and effect of law."[240]

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[232] II(I)5 RAC §79(B) (1917).
[233] *Interprovincial Autobus*, 98 Phil 290.
[234] *Id.*
[235] II(I)5 RAC §79(B) (1917).
[236] *Interprovincial Autobus*, 98 Phil 290 (1956). (The regulation above quoted falls within the scope of the administrative power of the Secretary of Finance, as authorized in Section 79 (B) of the Revised Administrative Code, because it is essential to the strict enforcement and proper execution of the law which it seeks to implement. Said regulations have the force and effect of law.")
[237] *Id.* ("Another reason for sustaining the validity of the regulation may be found in the principle of legislative approval by re-enactment. The regulations were approved on September 16, 1924. When the National Internal Revenue Code was approved on February 18, 1939, the same provisions on stamp tax, bills of lading and receipts were reenacted. There is a presumption that the Legislature reenacted the law on the tax with full knowledge of the contents of the regulations then in force regarding bills of lading and receipts, and that it approved or confirmed them because they carry out the legislative purpose.")
[238] *Secretary of Finance v. Arca*, G.R.No. L-25924, April 18, 1969.
[239] *Id.*; *see* II(I)5 RAC §79(B) (1917).
[240] *Arca*, G.R.No. L-25924, April 18, 1969, citing *Interprovincial Autobus*, 98 Phil. at 294-295.

The Court, however, also affirmed the agency's assertion that the 1965 memorandum was a mere guidance document between superior and subordinate,[241] stating that the issuance was "intended to be no more than a guideline to appraisers in the determination of the correct value of remnants at the time of importation," and as such, it did not implicate statutory procedures for the fixing of tariff rates.[242]

Even if the 1965 memorandum did not involve the fixing of tariff rates—thereby making the statutory rulemaking procedures for fixing tariff rates irrelevant—the Court's characterization thereof as "having the force and effect of law" should have triggered the need for publication in accordance with §79(B), 1917 RAC,[243] and prior case law.[244] The Court, however, concluded that publication was not necessary because the 1965 memorandum was "neither a law (statute), nor an implementation of a law authorizing its issuance," and did "not prescribe a penalty for its violation."[245] In sum, the Court made two contradicting findings—first, it acknowledged that the memorandum was a legislative rule that had the force and effect of law, and then considered it as a non-legislative rule that did not require compliance with the statutory requirements for legislative rulemaking.

Arca and *Interprovincial Autobus* were part and parcel of the jurisprudential conversation that began to take shape as the Philippine courts grappled with the rising phenomenon of agency rulemaking.[246] The importance of these

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[241] *Arca, id.* ("As correctly pointed out by the Solicitor General, "the Secretary of Finance issued his controverted memorandum as a value information to guide the Commissioner of Customs, the Collectors of Customs and customs appraisers in the determination of the correct market value or price of the remnants, used clothing and impregnated fabrics. The Secretary simply relayed to his subordinates in the Bureau of Customs the action to be taken in the assessment of the duties on said importation in the importer fails to present clear and convincing evidence regarding the true valuation of his importation. In the assessment of the correct duties to be imposed, the appraiser must utilize all available data and information to guide him in arriving at the true value of the imported goods.")

[242] *Id.*

[243] See II(I)5 RAC §79(B) (1917), last sentence of par. 1:

> SECTION 79 (B). Power to regulate. – …All rules, regulations, orders, or instructions of a general and permanent character promulgated in conformity with this section shall be numbered by each Department consecutively each year, and shall be duly published.
>
> Chiefs of Bureaus or offices may, however, be authorized to promulgate circulars of information or instructions for the government of the officers and employees in the interior administration of the business of each Bureau or office, and in such case said circulars shall not be required to be published.

[244] *See People v. Que Po Lay*, 94 Phil. 640 (1954).

[245] *Arca*, G.R.No. L-25924, April 18, 1969, citing Phil.Civil Code, art. 2; RAC §11 (1917) *cf. Victorias Milling*, G.R.No. L-16704, March 17, 1962; *Philippine Blooming Mills Co. v. Social Security System*, 17 SCRA 1077 (1966); *Que Po Lay*, *id.*

[246] Note that *Arca* significantly differed from *Interprovincial Autobus* in terms of the grounds used by the plaintiff in assailing the rule's validity. In *Interprovincial Autobus*, the Court's obscure treatment of the legislative or non-legislative nature of the agency issuance was of minor relevance to the resolution of the case because the plaintiff grounded its claim only on substantive grounds, thereby waiving issues on the rule's validity based on

decisions lay not in the ambivalence of their treatment of the legislative and non-legislative dichotomy, but in the early judicial recognition that the legislative vis-à-vis non-legislative rule distinction was relevant for purposes of determining whether statutory rulemaking procedures were applicable to particular agency rules. Both these cases also served to highlight one procedural rulemaking requirement that was generally applicable to all administrative agencies—the requirement of publication.

§2.3.1.2. Watering Down the Rule Publication Requirement

In the Philippines, the post-facto publication of agency rules undertook an interesting journey towards being a requirement for rule effectivity. Statute-wise, the 1917 RAC categorically mandated that statutes "passed by the (Philippine Legislature) National Assembly" shall take effect after the lapse of a certain period after complete publication in the Official Gazette,[247] but had no equivalent provision for agency rules and regulations.[248] Subsequently, Act No. 2930 and Commonwealth Act No. 638 listed "all executive and administrative orders and proclamations, except such as have no general applicability," among the issuances to be published in the Official Gazette.[249] By 1950, the Civil Code of the Philippines had mandated that "(L)aws shall take effect after fifteen days following the completion of their publication either in the Official Gazette or in a newspaper of general circulation in the Philippines, unless it is otherwise provided."[250]

Faced with the foregoing statutes, government agencies insisted that agency rules were not "laws" as contemplated by both the Philippine Civil Code and the 1917 RAC, and maintained that the statutory listing of items for publication in the Official Gazette under Act No. 2930 and Commonwealth Act No. 638 was not equivalent to a positive mandate for publication before

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the agency's use or non-use of statutory rulemaking procedures. Thus, the Court had little occasion to delve into the procedural issues of whether the administrative agency was required to—and whether it did—comply with statutorily set rulemaking procedures on rule formulation and publication. *Arca*, on the other hand, dealt squarely with the procedural issues that were left untouched in *Interprovincial Autobus*. *Interprovincial Autobus* was ill-suited as precedent for *Arca* because in the latter, the distinction between legislative and non-legislative rules was determinative of the rule's validity based on procedural grounds.

[247] III RAC §11 (1917).

[248] The closest provision, X RAC §35, listed down the contents of the Official Gazette. The provision, however, did not explicitly mention any other type of administrative issuance, other than executive orders and "such other official documents as are usually published in an Official Gazette which may be designated for publication by the (Governor General) President of the Philippines." It merely provided that publication in the Official Gazette shall be prima facie evidence of authenticity. Cf. *Tanada v. Tuvera*, 136 SCRA 27 (1985), and 146 SCRA 446 (1986).

[249] Commonwealth Act 638 §1; *See also* Act 2930.

[250] Phil.Civil Code art. 2.

agency rules became effective and binding.[251] The pre-1987 Philippine judiciary's response to the positions taken by the government agencies on the need for rule publication was not consistent.

In 1954, the Philippine Supreme Court in *People v. Que Po Lay*[252] declared that, for purposes of effectivity, publication was a necessary pre-requisite even for agency rules.[253] In that case, the Court reversed the trial court decision finding the accused guilty of illegally possessing foreign currency in violation of Central Bank Circular No. 20, stating that—

> In the present case, although Circular No. 20 of the Central Bank was issued in the year 1949, it was not published until November 1951, that is, about 3 months after appellant's conviction of its violation. It is clear that said circular, particularly its penal provision, did not have any legal effect and bound no one until its publication in the Official Gazette or after November 1951. In other words, appellant could not be held liable for its violation, for it was not binding at the time he was found to have failed to sell the foreign exchange in his possession thereof.[254]

Although the Court agreed with the Solicitor General's contention that Commonwealth Act No. 638 and Act No. 2930's statutory listing of issuances to be published in the Official Gazette did not amount to a positive requirement of publication prior to effectivity,[255] it ruled for acquittal based on a broad construction of the word "laws" in Article 2 of the Philippine Civil Code, stating that the term included not just statutes but also agency issuances that had the force and effect of law.[256]

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[251] *Que Po Lay*, G.R.No. L-6791, March 29, 1954 ("We agree with the Solicitor General that the laws in question (Act 2930 and Commonwealth Act 638) do not require the publication of the circulars, regulations and notices therein mentioned in order to become binding and effective. All that said two laws provide is that laws, resolutions, decisions of the Supreme Court and Court of Appeals, notices and documents required by law to be of no force and effect. In other words, said two Acts merely enumerate and make a list of what should be published in the Official Gazette, presumably, for the guidance of the different branches of the Government issuing same, and of the Bureau of Printing.")

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.* ("All that said two laws provide is that laws, resolutions, decisions of the Supreme Court and Court of Appeals, notices and documents required by law to be of no force and effect. In other words, said two Acts merely enumerate and make a list of what should be published in the Official Gazette, presumably, for the guidance of the different branches of the Government issuing same, and of the Bureau of Printing.")

[256] *Id.* citing *Manresa, I Codigo Civil Español 52* and *United States vs. Molina*, 29 Phil. 119.

After *Que Po Lay*, government agencies pivoted on their position on Article 2 of the Philippine Civil Code, this time by claiming that the phrase "unless it is otherwise provided," meant that the specific "law" itself—as broadly construed in *Que Po Lay* to include both statutes and administrative issuances—could dispense with the publication requirement altogether. They asserted that position, and by 1966, the Court in *Philippine Blooming Mills Co., Inc. v. SSS*[257] gave its assent.

In *Philippine Blooming Mills*, the appellant filed a refund claim for social security premiums paid for the Japanese technicians who were temporarily employed for 6 months, based on §3(d), Rule I of the IRR of RA 1161. The SSS denied the claim because a subsequent amendatory IRR had imposed the additional requirement of membership in the SSS System for at least 2 years. The original IRR, duly approved by the President pursuant to §4(a), RA 1161 and published in the Official Gazette, stated that any amendment thereto subsequently adopted shall take effect on the date of its approval by the President.[258]

The amendatory IRR was approved by the President on January 14, 1958, but was published in the Official Gazette only on November 1958. During the intervening period after the amendatory IRR's presidential approval but prior to its publication, the appellant's terminated their temporary employment of the Japanese technicians and filed their claims for the refund of the premium contributions.[259] The Court affirmed the denial of the appellant's claim by characterizing the original IRR as "law" and held that its express provision declaring subsequent amendments effective upon approval of the President was controlling.[260] It then stated that publication was not needed for the amendatory IRR based on its reading that "under Article 2 of the Civil Code, the date of publication of laws in the Official Gazette is material for the purpose of determining their effectivity, only if the statutes themselves do not so provide."[261] *Philippine Blooming Mills* effectively gave administrative agencies the discretion to do away with the statutorily mandated publication requirement

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[257] *Philippine Blooming Mills v. SSS*, G.R.No. L-21223, August 31, 1966.
[258] *Id.*
[259] *Id.*
[260] *Id.* ("In the present case, the original Rules and Regulations of the SSS specifically provide that any amendment thereto subsequently adopted by the Commission, shall take effect on the date of its approval by the President. Consequently, the delayed publication of the amended rules in the Official Gazette did not affect the date of their effectivity, which is January 14, 1958, when they were approved by the President. It follows that when the Japanese technicians were separated from employment in October, 1958, the rule governing refund of premiums is Rule IX of the amended Rules and Regulations, which requires membership for 2 years before such refund of premiums may be allowed.")
[261] *Id.*

under Article 2 of the Civil Code by simply issuing rules that were effective immediately.

§2.3.1.3. Era of Unbridled and Secret Rulemaking

The Court's ruling in *Philippine Blooming Mills*, coupled with the lack of generally applicable statutory procedures for rule formulation and the Court's ambivalent rulings in *Interprovincial Bus* and *Arca*, underscored the era of unbridled administrative rulemaking in the Philippines.

The statutory gap in administrative rulemaking procedure also coincided with the gradual consolidation in the Philippine President of direct control over agency rulemaking. The 1935 Philippine Constitution vested the President with the power of control over all executive department, bureaus, or offices.[262] In 1939, the Court in *Villena v. Secretary of Interior,*[263] broadly interpreted this power by adopting the qualified political agency doctrine under the unitary executive theory from early American jurisprudence.[264] By 1957, the Court in *Araneta v. Gatmaitan*[265] upheld the President's unprecedented act of directly exercising the rulemaking authority that the Philippine legislature had statutorily delegated upon the Secretary of Agriculture.[266] By 1972, the Philippine President had declared martial law, which empowered his office to exercise both executive and legislative authority.

Just as administrative agencies grew accustomed to formulating legislative rules and regulations on their own and even in secret,[267] the practice of secret rulemaking was fostered further as presidential legislative decrees delegated to the agency not just the rulemaking function, but also the discretion

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[262] Phil.Const. art.X, §10[1].

[263] *See Villena v. Secretary of Interior*, 67 Phil. 451, 463 (1939).

[264] *Id.* citing *Runkle v. United States*, 122 US 543 (1887); *United States v. Eliason*, 10 Law. Ed. 968 (1839); *Jones v. United States*, 137 U. S. 202 (1890); *Wolsey v. Chapman*, 101 US 755 (1880); *Wilcox v. Jackson*, 10 Law. Ed. 264 (1836).

[265] *Araneta v. Gatmaitan,* 101 Phil. 328 (1957).

[266] *Id.* (Under §75 and 83 of the Fisheries Law, the restriction and banning of trawl fishing from all Philippine waters come within the powers of the Secretary of Agriculture and Natural Resources… However, as the Secretary of Agriculture and Natural Resources exercises its functions subject to the general supervision and control of the President of the Philippines (citing RAC §75 [1917]), the President can exercise the same power and authority through executive orders, regulations, decrees and proclamations upon recommendation of the Secretary concerned (citing *id.* at §79-A). Hence, Executive Orders Nos. 22, 66 and 80, series of 1954, restricting and banning of trawl fishing from San Miguel Bay (Camarines) are valid and issued by authority of law.)

[267] N.B. In this practice, administrative agencies were apparently mirroring what the Philippine President at the time was doing—promulgating decrees, proclamations, executive orders, rules and regulations in the exercise of extraordinary legislative powers.

as to whether or not to conduct public participation in its rule formulations.[268] The issuance of increasingly broad statutes that contained vague, general, and ambiguous delegations of governmental powers to the administrative agencies [269] effectively impaired, undermined, and broke down the "transmission belt" theory under the traditional model [270] of Philippine administrative law. All these contributed towards the establishment of an authoritarian government in which the people were alienated and prevented from notice and participation in the government policymaking processes. Much of rulemaking by the government agencies during martial law were made with the people being kept in the dark, with the concerned sectors of the public not being given the benefit of meaningful participation in rulemaking. That "darkness," in turn, was further exacerbated by the governmental suppression of the need to publish and circulate the final rules.[271]

The main procedural requirement that administrative agencies had to comply with was the publication requirement under the Philippine Civil Code of 1950.[272] The authoritarian government, however, was able to suppress the need for publication by asserting their own interpretation that Article 2 of the Civil Code does not cover presidential issuances, as well as administrative rules and regulations, and that publication may be expressly dispensed with in the specific law, presidential issuance, rules or regulations so issued or enacted.[273] Although this stance had been criticized and assailed on due process grounds, the criticisms and the cases filed assailing the effectivity of unpublished laws, PDs, and agency suffered inertia during martial law and the 4th Republic (1973-1986).[274] It was only towards the end of the 4th Republic that judicial activity

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[268] *See,* for example, the powers of the Board of Transportation under PD 101 as discussed in *Taxicab Operators of Metro Manila v. Board of Transportation*, 117 SCRA 597 [1982].

[269] *See Municipality of Cardona v. Municipality of Binangonan*, 36 Phil. 547 [1917]); *Rubi v. Provincial Board*, 39 Phil. 660 [1919]); "public interest" (*People* vs. *Fernandez and Trinidad*, G. R. No. 45655, June 15, 1938; *People v. Rosenthal*, 68 Phil. 328 [1939], citing *New York Central Securities Corporation* vs. *United States*, 287 US 12, 24, 25 and *ALS Schechter Poultry Corp. v. United States*, 295 US 495, 540 (1935); *International Hardwood v. Pangil Federation of Labor*, 17 Phil. 602 [1940]; *Edu v. Ericta*, 35 SCRA 481 (1970).

[270] *See* Stewart, *Reformation of Admin.Law,* 88 Harv. L. Rev. 1676 (1974-1975). ("Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the "transmission belt" theory of administrative law. Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials, major questions of social and economic policy are determined by officials who are not formally accountable to the electorate, and both the checking and validating functions of the traditional model are impaired.")

[271] *See Tanada v. Tuvera*, 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).

[272] See 1 Phil.Civil Code art.2.

[273] Many of the PDs, Procl'ns, EOs, as well as agency rules and regulations that were issued at that time had provided that they shall take effect immediately. See *Tanada I*, 136 SCRA 27 (1985), and *Tanada II*, 146 SCRA 446 (1986).

[274] *Tanada I & II, id.*

began to stir and rally behind the due process concerns arising from the non-publication of legislative agency rules.

§2.3.1.4. Judicial Activism against Secret Rulemaking

In 1985, as popular discontent mounted heavily and the power of martial rule waned, the Philippine Supreme Court in *Tanada v. Tuvera,*[275] (*Tanada I*) declared that the publication requirements for laws implicated due process concerns, and were therefore necessary pre-requisites for effectivity.[276] Months after the 4th Republic ended in February 1986, the Philippine Supreme Court again issued another decision in the same case (*Tanada II*) on December 29, 1986 to further bulk up its judicial gloss over the statutory publication requirements. The Court declared that administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant to a valid delegation, and that the publication must be in full.[277] The Court also emphatically stated that:

> The days of the secret laws and the unpublished decrees are over. This is once again an open society, with all the acts of the government subject to public scrutiny and available always to public cognizance. This has to be so if our country is to remain democratic, with sovereignty residing in the people and all government authority emanating from them…. Laws must come out in the open in the clear light of the sun instead of skulking in the shadows with their dark, deep secrets. Mysterious pronouncements and rumored rules cannot be recognized as binding unless their existence and contents are confirmed by a valid publication intended to make full disclosure and give proper notice to the people. The furtive law is like a scabbarded saber that cannot feint, parry, or cut unless the naked blade is drawn."

The decision was also quick to point out the practical limitations of the then existing statutory requirement for publication in the Official Gazette, which at the time was erratically released and of limited readership.[278] However, after observing that newspapers of general circulation could better perform the function because they are more easily available, have a wider readership, and

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[275] *Id.*
[276] *See Tanada I, id.* (Administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation.)
[277] *Id.*
[278] *Id.*

come out regularly, the Court stopped short of directly mandating the publication of laws, rules and regulations in the newspapers, and left the matter for the legislature to correct.[279] Because the drafting and ratification of the 1987 Philippine Constitution was still pending at that time, legislative power still resided with the Philippine President of the 5th Republic,[280] and she promptly took the Court's cue.

§2.3.2. Post-1987 Administrative Rulemaking

Proceeding from the Philippine Supreme Court's declarations in *Tanada I & II*,[281] the President issued EO 200 on June 18, 1987,[282] which amended the Philippine Civil Code to provide the publication of laws in newspapers of general circulation as an alternative to the Official Gazette.[283] Shortly thereafter, the President also issued EO 292 s. 1987, instituting the 1987 RAC.[284]

Promulgated in quick earnest after the people power revolution had ended the 4th Republic, and after more than a decade of martial rule (1972-1986) in the Philippines, the 1987 RAC was a significant response to the grave governance concerns that marred the previous regime. Through the issuance of the 1987 RAC, the 5th Republic instituted important structural and procedural changes that constitute significant milestones in Philippine administrative law, among which is the institutionalization of a baseline set of administrative procedures.[285]

§2.3.2.1. The Philippine Statute on Administrative Procedure

Book VII of the 1987 RAC imposes a set of generally applicable administrative procedures[286] that cuts across the many different substantive fields of administration and regulation,[287] and provides a common floor of

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[279] *Id.*
[280] President Corazon C. Aquino.
[281] *Tanada II*, 146 SCRA 446 (1986).
[282] EO 200 (1987), available at http://www.gov.ph/1987/06/18/executive-order-no-200-s-1987/ last accessed on May 2, 2015.
[283] See EO 200 §2 (1987).
[284] EO 292 (1987), or RAC (1987).
[285] *Id.* at VII.
[286] *Id.*.
[287] *Cf.* Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, and Michael E. Herz, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 3 (2011). ("Administrative law deals with the general principles and rules that cut across particular substantive fields and apply to administrative agencies generally." These principles include three basic bodies of law, one of which is "statutory law, including above all the Administrative Procedure Act [APA].")

minimum processes for administrative agencies to validly undertake specific administrative actions in the realm of adjudication and rulemaking.[288] Book VII fills the long-standing statutory gap in Philippine administrative law by operating as the Philippine equivalent of the Administrative Procedure Act (APA) that had been instituted in the US as early as 1946.[289]

§2.3.2.1 Two-Pronged Approach to Agency Rulemaking

The provisions of Chap.2, Book VII of the 1987 RAC provide the statutory procedures for rulemaking[290] that cover both the rule formulation[291] and final rule publication[292] phases of the legislative rulemaking by the statutorily created administrative agencies. In doing so, the 1987 RAC employs a two-pronged approach to agency rulemaking that involves public participation[293] and full publication,[294] both of which are collectively envisioned as an effective means for counter-balancing agency discretion. Both prongs also serve, empower, and protect the people and their organizations by keeping them out of the "dark," during and after the conduct of rulemaking by the administrative agencies. The rulemaking provisions instituted in Book VII, 1987 RAC thus constitute a radical departure from, as well as an effective response to the misgivings of, the capricious and variable rulemaking processes that administrative agencies had utilized prior to the 1987 RAC's passage.

§2.3.2.1.1. Public Participation

The 1987 RAC was effectively designed as the statutory counterpart to the 1987 Philippine Constitution in reestablishing the Philippines as a democratic and republican state, a status it held prior to the declaration of martial law in 1972.[295] In accordance with that objective, both the 1987 Constitution and the 1987 RAC categorically provide the immutable right to

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[288] VII RAC (1987).
[289] VII RAC (1987) is composed of 4 chapters, to wit: (1) General Provisions, (2) Rules and Regulations, (3) Adjudication, and (4) Administrative Appeal in Contested Cases, *cf.* the US APA, available at http://www.legisworks.org/congress/79/publaw-404.pdf last accessed on April 30, 2015. Other countries, such as Germany, have also instituted their own statutes on administrative procedure. *See* Verwaltungsverfahrensgesetz (VwVfG), available at http://www.iuscomp.org/gla/statutes/VwVfG.htm last accessed on April 25, 2015.
[290] VII(2) RAC (1987).
[291] *Id.* at §9.
[292] *Id.* at §3-8.
[293] *See* II(1) RAC §1 (1987) in relation to VII(2):§9 thereof.
[294] *Id.* at VII(2):§3-8, with emphasis on §4 re: Effectivity; *Cf.* Phil.Civil Code, art.2, as amended.
[295] *See* Phil. Const. art.II §1 (1987).

effective and reasonable public participation at all levels of social, political, and economic decision-making in favor of the people and their organizations.[296]

The 1987 RAC facilitates and implements the constitutional and statutory right to public participation through, among others, the general imposition of mandatory administrative procedures upon the Philippine administrative bureaucracy.[297] In that regard, §9, Chap.2, Book VII, 1987 RAC provides the means by which public participation, as a constitutionally provided human right[298] reiterated in §1, Chap.1, Book II of the 1987 RAC, is particularized, facilitated, and procedurally implemented in the field of agency rulemaking.[299]

The constitutional and statutory right to public participation, and the procedural provisions for its implementation, collectively constitute one of the two significant prongs that embody the major structural changes in administrative rulemaking under the 1987 RAC. Public participation democratizes the agency's rulemaking process in line with the people power revolution's rebuke of the martial law idea of autocratic rule. More importantly, it also opens the doors of Philippine administrative law to the plethora of advantages and benefits of the modern rulemaking process.[300]

§2.3.2.1.2. Full Publication

The requirement of full publication of the agency rules represents the other prong in the post-1987 approach to agency rulemaking. The publication requirement is concededly more familiar because its statutory existence pre-dates the 1987 RAC, and its indispensability finds basis in the constitutional right to due process of the law.[301] The requirement, however, has been strengthened all the more post-1987 through the imposition of stricter and more particularized statutory directives for the agencies' filing and publication of their final rules under the 1987 RAC,[302] and the Philippine Civil Code.[303]

Article 2 of the Philippine Civil Code was amended via EO 200 s. 1987 in order to address the Court's observation on the practical inadequacy of the

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[296] *See id.* at art.XIII §16 in relation to II(1) RAC §1(8) (1987).
[297] VII(2) RAC §9 (1987).
[298] *See* Phil.Const. art. XIII, §16.
[299] *See* II(1) RAC §1 (1987) in relation to VII(2): §9 thereof.
[300] *See* §4.2.1 of this work on "Advantages of Rulemaking."
[301] Phil. Const. art III, §1.
[302] *See* VII(2) RAC §3-7 (1987).
[303] Phil.Civil Code art.2, as amended; *see Tanada I & II*, 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).

printed version of the Official Gazette as a means for notifying the public of all laws in accordance with constitutional due process.[304] For administrative rules and regulations, the publication requirements under Article 2 of the Civil Code were further supplemented with additional impositions under Chapter 2, Book VII of the 1987 RAC.[305] Administrative agencies are thus mandated to publish their final rules in the Official Gazette or newspaper of general circulation,[306] as well as to file the requisite number of copies thereof with the University of the Philippines Law Center[307] as requisites for the agency rules' effectivity.[308] As an additional measure, the law provides that only those rules and regulations duly filed or published in the bulletin or the codified rules are entitled to mandatory judicial notice.[309]

§2.3.3. Motivations that Led to the 1987 Reforms

The reforms in administrative procedures under the 1987 RAC were meant to address the governance concerns of the pre-1987 martial law regime that was perceived as abusively authoritarian and dictatorial.[310] The significance of these reforms as it relates to administrative rulemaking is best understood in the context of the motivations that led to their adoption by the 5th Philippine Republic.

§2.3.3.1. Restoring Democracy

First among these motivations is the restoration of democracy. Martial law and the expanded powers of the President under the 1973 Constitution and its amendments resulted in "authoritarianism."[311] The framers of the 1987 Philippine Constitution shunned the idea of authoritarianism and expressed, in no uncertain terms, the categorical return of the Philippines as democratic state.[312] In doing so, the framers decided not just to retain the 1935 formulation of the Philippines as a republican state[313] and its meaning under American

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304 *Id.*
305 *See* VII(2) RAC §3-7 (1987).
306 Phil.Civil Code art.2, as amended; *see Tanada I & II*, 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).
307 *See* VII(2) RAC §3(1987).
308 *See id.* at §4.
309 *Id.* at §8.
310 *See* Carl H. Lande, *Authoritarian Rule in the Philippines: Some Critical Views*, 55(1) Pacific Affairs 80-93 (1982), available at http://www.jstor.org/stable/2756904?seq=1#page_scan_tab_contents last accessed on May 12, 2015.
311 Bernas, *1987 Philippine Constitution* 58 (2003).
312 Phil.Const. art.II, §1 (1987).
313 Phil.Const. art.II, §1 (1935), *to wit*: "Section 1. The Philippines is a republican state. Sovereignty resides in the people and all government authority emanates from them."

constitutional theory,[314] but to also include the word "democratic" in that description.[315] Although being a republican state in American constitutional theory already meant having a democratic government,[316] the framers still chose to expressly describe the Philippines as a "democratic" state, if only to emphasize the 1987 Constitution's vision of having not just a representative government but one that shares some aspects of direct democracy.[317]

§2.3.3.2. Institutionalizing Public Participation and People Empowerment in Government Affairs

Having only just freed the country from authoritarian rule via the direct exercise of peaceful People Power, another underlying motivation is that of empowering the people under the democratic notion of society. Accordingly, the framers put in place several constitutional provisions—both specific and general—that ensure the democratization of the government's policy and decision-making processes.

The 1987 Constitution guarantees that all workers shall "participate in policy and decision-making processes affecting their rights and benefits as may be provided by law."[318] The constitution also recognizes the right of farmers, farmworkers, landowners, cooperatives, and other independent farmer's organizations "to participate in the planning, organization, and management of" the agrarian reform program;[319] and mandates the State to defend the "right of families or family associations to participate in the planning and implementation of policies and programs that affect them."[320] Perhaps the most significant and all encompassing of these constitutional provisions is §16, Article XIII, which provides for the constitutional right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making:

> SECTION 16. The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged.

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[314] Bernas, *1987 Philippine Constitution* 57-59 (2003). (The 1987 framers "preferred to retain the formulation of the 1935 Constitution and the meaning it embodied as understood by the 1935 Convention, a meaning borrowed from American constitutional theory, i.e., a republican form of government is one which is democratic.)

[315] *See* Phil.Const. artII, §1.

[316] Bernas, *1987 Philippine Constitution* 57 (2003).

[317] *Id.* at 59.

[318] *See* Phil.Const. art.XIII §3 (1987).

[319] *Id.* at art. XIII §5.

[320] *Id.* at art.XV §3(4).

> The State shall, by law, facilitate the establishment of adequate consultation mechanisms.[321]

The newly installed President and her administration[322] also shared this motivation to democratize the affairs of government. Thus, as the constitutional framers went about meticulously drafting the 1987 Constitution with the objective of arriving at a republican and democratic governmental structure and organization, so too was the President and her administration fastidiously preparing the 1987 RAC to provide the underlying legislation that would supply the implementing details of that constitution.

The idea of democracy and its allied notion of people empowerment through reasonable participation in government affairs were clear drivers that animated the 1987 constitutional changes in public governance. As such, the relevant provisions of the 1987 RAC concretizes, in binding and effective statutory form, the constitutional right to public participation envisioned under the 1987 Philippine Constitution.[323] As regards agency rulemaking in particular, the 1987 RAC expresses the precepts of democracy and people empowerment by providing both the statutory counterpart for the constitutional right to public participation, and the uniform set of generally applicable administrative rulemaking procedures needed for its effective and reasonable exercise.[324]

§2.3.3.3. Fostering Transparency in Government Affairs

Aside from the ideals of democracy and people empowerment that animated the statutory recognition of the right to public participation and provision for its exercise, additional motivations arose from the need to address the lack of transparency and due notice regarding government affairs.

At the constitutional level, the framers bolstered the right to information and access to public documents[325] by expressly including government research data used as basis for policy development within the coverage of that

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[321] *Id.* at art.XIII §16.
[322] The Encyclopedia Britannica provides a profile reference on then President Maria Corazon Cojuangco Aquino, available at http://www.britannica.com/biography/Corazon-Aquino, last accessed on March 10, 2016.
[323] *See* Phil.Const. art.XIII §16 (1987).
[324] *See* II(1) RAC §1, in relation to VII(2):§9 thereof. N.B. The right to public participation, and the uniform procedure for its exercise in the different administrative agencies across different fields, under the 1987 RAC were not theretofore provided in the previous administrative codes of the Philippines.
[325] *See* Phil.Const. art.III §7.

constitutional right.[326] The Philippine Supreme Court, for its part, also expressed shades of these concerns in *Tanada v. Tuvera.*[327]

In the 1985 case of *Tanada*[328] (*Tanada I*), the Court expressed concern about the problems arising from the executive's unhampered ability to churn out legislative issuances that were binding on the people despite being both "secret" and "unpublished."[329] Dealing primarily with the need for publication, the Court voiced the need for transparency in the executive's conduct of its extraordinary legislative functions—

> Perhaps at no time since the establishment of the Philippine Republic has the publication of laws taken so vital significance that at this time when the people have bestowed upon the President a power heretofore enjoyed solely by the legislature. While the people are kept abreast by the mass media of the debates and deliberations in the Batasan Pambansa—and for the diligent ones, ready access to the legislative records—no such publicity accompanies the law-making process of the President.[330]

Tanada I, however, was primarily concerned with the legislative issuances of the Philippine President in the exercise of extraordinary legislative powers during the martial law and dictatorship eras.[331] Thus, after noting this problematic lack of transparency in the process of executive rulemaking, the Court stopped short of opening up the process of rule formulation.[332] Also,

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[326] Bernas, *1987 Philippine Constitution* 370-371 (2003). N.B. This constitutional right to information may be cross-referenced with *Nova Scotia Food*, 568 F.2d 240 (2d Cir. 1977).

[327] *See Tanada I & 2*, 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).

[328] *Id.*

[329] *Tanada I, id.*

[330] *Id.*

[331] *Id.*

[332] This was understandable because only the issue of publication was raised in that case, and there was as yet no statutory provision for public participation rights and procedures in rulemaking. The Court's circumspection about imposing procedures for rule formulation may also have been because the main issue in the 1985 decision was the President's exercise of rulemaking powers. With the President being an institution principally vested with governmental authority by the Constitution, it would have been questionable to apply the administrative rulemaking procedures upon him without sufficient constitutional and statutory bases. The same, however, cannot be entirely said as regards the component units of the President's office. *See Citizens for Responsibility and Ethics v. Office of Administration*, 566 F.3d 219 [DC Cir.2009]; *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 US 136, 156 [1980]; *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 [DC Cir. 1996]; *Sweetland v. Walters*, 60 F.3d 852, 854 [DC Cir. 1995]; *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1042 [DC Cir. 1985]; *Meyer v. Bush*, 981 F.2d 1288, 1293, 1297 [DC Cir. 1993]; *Soucie v. David,* 448 F.2d 1067, 1073 (D.C. Cir. 1971). (Applying the test of "wielding substantial authority independently of the President" in order to determine whether units or entities in the Office of the President are to be considered as "administrative agencies" that are covered by the Administrative Procedure Act, the Freedom of Information Act, and the Privacy Act, and other similar statutes.)

with its statutory arsenal being limited at that time to the publication provisions in the Civil Code,[333] the Court focused on layering its judicial gloss on the publication requirements of final rules and its implications upon the fundamental right to due process.[334]

The *Tanada I* decision is notable in that it questioned how entities other than the legislature were able to carry out legislative rulemaking in secrecy and in the dark, even as the legislature itself was bound by the constitution's imposition of the legislative procedures. In discussing the congressional legislative process[335] and pointing to the existence of legislative records on the congressional deliberations for the passage of laws,[336] *Tanada I* effectively debunked the antiquated logic that justified the administrative agencies' unbridled ability to formulate binding rules on their own and in secret based on the flawed notion that the legislature could itself have performed that essentially legislative function without much procedural constraint.[337] Thus, although prior notice and comment were, as a general rule, not constitutionally required by due process in agency rulemaking,[338] judicial doctrine started bearing shades of prompting the legislature to impose rulemaking procedures as part of the statutory conditions for the administrative agency's exercise of the governmental authority delegated to it.[339]

The Court followed up on *Tanada I* by issuing another decision in the same case (*Tanada II)*, this time listing down what are covered by its ruling regarding the mandatory publication of legislative issuances.[340] Administrative

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[333] Phil.Civil Code, art.2.
[334] *Tanada I*, 136 SCRA 27 (1985).
[335] The legislative process is currently found in Phil.Const. artVI, §26 (1987).
[336] The requirement of having legislative records is currently found in Phil.Const. art.VI §17(4).
[337] *See* De Leon & De Leon Jr., *Admin. Law: Text and Cases* 155 (2013), citing 1 Am. Jur. 2d 896.
[338] *Central Bank of the Philippines vs. Cloribel*, 44 SCRA 30-7 (1972). ("[W]here the function of the administrative body is legislative, notice of hearing is not required by due process of law [See Oppenheimer, Administrative Law, 2 Md. L.R. 185, 204, supra, where it is said: 'If the nature of the administrative agency is essentially legislative, the requirements of notice and hearing are not necessary. The validity of a rule of future action which affects a group, if vested rights of liberty or property are not involved, is not determined according to the same rules which apply in the case of the direct application of a policy to a specific individual] ... It is said in 73 C.J.S. Public Administrative Bodies and Procedure, § 130, pages 452 and 453: 'Aside from statute, the necessity of notice and hearing in an administrative proceeding depends on the character of the proceeding and the circumstances involved. In so far as generalization is possible in view of the great variety of administrative proceedings, it may be stated as a general rule that notice and hearing are not essential to the validity of administrative action where the administrative body acts in the exercise of executive, administrative, or legislative functions."); *See also, Abella, Jr. v. Civil Service Commission*, 442 SCRA 507 (2004). (Prior notice to, and hearing of every affected party is not required since there is no determination of past events or facts that have to be established or ascertained.) *See* De Leon & De Leon, *Admin.Law: Text and Cases* 155 (2013).
[339] N.B. This work posits that the agency procedures for the rule formulation phase in the Philippine setting are constitutionally moored by the right to public participation. See Phil. Const art.XIII §16 (1987).
[340] *Tanada II*, 146 SCRA 446 (1986).

rules and regulations were categorically included if they were legislative in nature, i.e., intended to have the binding force and effect of law.[341] The inclusion was logical, considering that the concerns regarding "secret" and "unpublished" laws were likewise, if not more acutely, applicable to the rulemaking functions of administrative agencies.

Tanada I and II provided a glimpse of the motivational objectives that led to the 1987 reforms in administrative rulemaking. According to the Court, the objective was for the Philippines to have "once again," "an open society with all acts of the government subject to public scrutiny" and "available always to public cognizance."[342] The Court highlighted the need for achieving that objective, stating that it "had to be so if our country is to remain democratic, with sovereignty residing in the people and all government authority emanating from them."[343]

Having little to work with in terms of statutory authority, the Court intimated that proper changes should be made by legislation,[344] to which the President responded by issuing EOs 200 and 292 s. 1987.[345] Not only did she amend Article 2 of the Civil Code by including newspapers of general circulation as a means to publish and disseminate laws, the President also bulked up the filing and publication requirements needed for the effectivity of administrative rules and regulations.[346] The President also addressed the Court's concern about secrecy and lack of transparency in the administrative rulemaking process by explicitly instituting the general law on administrative rulemaking procedures[347] that provide a reasonable and effective public participation process,[348] which ensures both openness and transparency in the rule formulation phase, so that administrative rules and regulations are not anymore to be formulated "in secret."[349]

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[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] *Id.*
[345] EO 200 (1987) was a short amendment of Article 2 of the Civil Code, made as a clear and direct response to the judiciary's observation regarding the practical inadequacy of the Official Gazette. On the other hand, EO 292 (1987), or the 1987 RAC, is more voluminous because it is the general law on the entire governmental structure and organization. The President's response to the judiciary's exhortations and statement of objectives in *Tanada I & II* can be seen in many of the 1987 RAC's provisions, particularly in II(1), and VII thereof.
[346] *See* VII(2) RAC (1987).
[347] *Id.*
[348] *Id.* at VII(2) §9.
[349] *Tanada II*, 146 SCRA 446 (1986).

§2.4. A Comparative View of the Historical Development of Rulemaking Procedures in the Philippines and the United States

The concept of rulemaking as it is practiced in the Philippines still essentially follows the simplistic view that administrative agencies are mere adjuncts of Congress, with the administrative rules and regulations that they formulate merely filling up the interstices in the specific laws that they were tasked to implement. The traditional view that currently prevails in the Philippines holds, as a general rule, that prior notice and comment are not required in rulemaking,[350] the logic behind it being that, since the legislature could itself have performed that essentially legislative function without notice or hearing, then the administrative agencies need not require notice and hearing as a prerequisite for the conduct of rulemaking.[351] That notion, in turn, took its cue from old American precedents under which notice and hearing were not considered pre-requisites for 'legislative' action.[352] The problem with that notion, however, is that it has been rendered outdated by the changes and developments in the statutory and jurisprudential environment in which it operates.

In the US, that antiquated view was statutorily dispensed with as early as 1946 when the US Congress passed the Administrative Procedure Act (APA),[353] which imposed upon federal administrative agencies a uniform set of statutory requirements for agency rulemaking, which generally consists of procedures for public participation via notice and comment, and publication.[354] The usual procedure prescribed by the US APA has for its central feature the publication of the proposed rules so that interested parties may make written comments.[355]

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[350] *Central Bank of the Philippines vs. Cloribel*, 44 SCRA 30-7 (1972); *Abella, Jr. v. Civil Service Commission*, 442 SCRA 507 (2004) (Prior notice to, and hearing of every affected party is not required since there is no determination of past events or facts that have to be established or ascertained); De Leon & De Leon, *Admin.Law: Text and Cases* 155 (2013).

[351] *See* De Leon, *id.*, citing 1 Am. Jur. 2d 896.

[352] *See Bi-metallic Investment Co. v. State Board of Equalization*, 239 US 441 (1915) (Holding that due process protections are not implicated in rulemaking); *Phelps Dodge Corp. v. NLRB*, 313 US 177, 194 (1941); *ICC v. Chicago, Rock Island & Pac. Ry.*, 218 US 88, 102 (1910); John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 17 fn.29 (2003).

[353] 5 U.S.C. §551, et. seq., (June 11, 1946). N.B. The US APA was enacted shortly before the US formally recognized Philippine independence under the *Treaty of General Relations and Protocol* dated July 4, 1946, available at https://treaties.un.org/doc/Publication/UNTS/Volume%207/v7.pdf last accessed on October 20, 2015.)

[354] 5 U.S.C. §553; For a brief discussion on the rulemaking process in theory and practice in the US, *see* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105(2) NW Univ. L.Rev. 471, 476-479.

[355] *See* Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 7 (1979).

The statutory requirements for rulemaking under the US APA, however, received little attention in the early years following its enactment,[356] with the old approach still then considered as a common notion.[357] The old notion, however, exacerbated the problem of agency discretion[358] in the area of rulemaking as agencies continued to promulgate ever-increasing numbers of rules and regulations[359] with minimal constraint. Administrative agencies were acting like Congress in exercising governmental power, effectively making law via binding rules and regulations under broadly-worded statutory delegations, but they did so without the procedural safeguards that were analogous, or at least comparable, to what was required of Congress.[360] The old notion overlooked the reality that even Congress itself acts under a constitutionally imposed legislative committee system in which all the representatives directly elected by the people participate in the making of laws that bind the public, a system which at its best is a superb procedure for the development and understanding, and for the reflection of, democratic desires.[361]

In the decades following its effectivity, the US APA began to figure prominently in addressing the problem of agency discretion in the area of rulemaking. By the 1970s, a more robust and modern approach to the administrative rulemaking process had begun developing, driven by judicial decisions that applied and interpreted the US APA.[362] Thus, for example, it

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356 Daniel A. Farber & Anne Joseph O-Connell, *The Lost World of Administrative Law*, 92 Texas Law Review 1137, 1143-1144 (2014).

357 *See* Davis, *Discretionary Justice* 7.

358 During the New Deal Era in the US in the 1930s, administrative agencies proliferated as part of President Roosevelt's response to the Great Recession. This gave rise to the problem of agencies exercising too much discretion unchecked. In 1939, President Roosevelt approved the Attorney General's recommendation to form a committee for purposes of looking into much-needed procedural reforms in administrative procedure. In 1941, the Attorney General's Committee on Administrative Procedure issued its *Final Report on the Administrative Procedure Act.* (*See* http://archive.law.fsu.edu/library/admin/1941report.html last accessed on November 2, 2015). In 1946, the US Congress passed the US APA, imposing procedural requirements that are generally applicable across the board to the decisional processes of the administrative agencies. *Id.*

359 *See* Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 376; Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 (2) Virginal L. Rev. 253, 255 (1986).

360 *See* Martin Shapiro, *APA: Past, Present, Future*, 72 Va.L.Rev. 447, 453 (1986). (Although agencies were acting in a quasi-legislative capacity, they were not required to jump through as many procedural hoops as Congress typically did in legislating. Congress normally held oral hearings on pending legislation, a full draft of which was already on the docket, and issued a rather elaborate committee report to explain a bill as it went to the floor of the House or Senate. In contrast, the APA simply required an agency to give notice only of its intention to make a rule. It did not have to submit a draft. It had to receive written comments, but no hearing was required. It merely had to provide a "concise" and "general" statement accompanying its rule.)

361 Davis, *Discretionary Justice* 65.

362 *See United States v. Nova Scotia Food,* 568 F.2d 240 (2d Cir. 1970) (Administrative agency must make available for public comment the scientific data upon which it based its proposed rule.); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 929 (1974). (Agencies are required to respond to material comments from members of the regulated industries.); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615

was held that while agencies had a good deal of discretion in expressing the basis of a rule, they do not have quite the prerogative of obscurantism reserved to the legislatures.[363] Courts also held agencies to a high standard of articulation—one that would enable the courts to see what major issues of policy were ventilated during the rulemaking process, and why the agency reacted to them as it did—the objective of which was to render judicial review of agency rulemaking meaningful as an adequate safeguard against arbitrariness.[364] Agencies were judicially required to respond in a reasoned manner to significant comments received in the rulemaking process,[365] and they must explain how they resolved significant problems raised in the comments,[366] because the need for the agency's response and explanation was inextricably intertwined with its receipt of comments.[367] Today, rulemaking in the US is considered as the most decidedly synoptic of policy devices.[368] It can be utilized by the agency as a virtual duplicate of the legislative committee process, but quicker and less expensive.[369] Under the informal rulemaking process prescribed by the US APA, anyone and everyone is allowed to express himself or herself, and to call attention to the impact of various possible policies on his or her business, activity, or interest; and the agency's staff sifts and summarizes the presentations and prepares its own studies.[370] The procedure is both fair and efficient.[371] By allowing all interested parties to participate, rulemaking becomes democratic in nature.[372] Much experience proves that it usually works beautifully, with many states adopting state analogues of the federal rulemaking procedures after discovering the advantages thereof.[373] These characteristics have contributed immensely towards enhancing the quality and comprehensiveness of rules and regulations.[374]

In the Philippines, rulemaking in its current state can hardly be considered as a synoptic and democratic policy device, with the government

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(D.C. Cir. 1973) (Agencies must disclose, for potential comment, the methodology used for determining whether compliance with the proposed rule was feasible.)

363 *See Nova Scotia Food*, 568 F.2d 240 citing *FCC v. RCA Commc'ns, Inc.* 346 US 86, 90 (1953) (Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.)

364 *See Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (1968); *Nova Scotia Food*, 568 F.2d 240 (2d Cir. 1970) (Agencies must articulate a response to comments of cogent materiality).

365 *United States Satellite Broad. Co., Inc. v. FCC*, 740 F.2d 1177,1188 (D.C. Cir. 1984).

366 *Action on Smoking & Health v. C.A.B.,* 699 F.2d 1209, 1216 (D.C. Cir. 1975).

367 *Id.*; *Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975).

368 Colin Diver, *Policymaking Paradigms in Administrative Law*, 95(2) Harv. L. Rev. 393, 406 (1981).

369 Davis, *Discretionary Justice* 65 (1979).

370 *Id.*

371 *Id.*

372 *Id.* at 66.

373 *See*, for example, Calif. Gov't Code §§11420-27; Davis, *Discretionary Justice* 7 fn.14 (1979).

374 *See* Richard J. Pierce, Jr., *Administrative Law Treatise* §6.8 on *The Many Advantages of Rules and Rulemaking* (2010); Hickman & Pierce, Jr., *Fed.Admin.Law* 424-425.

still continuing to rely on the old notion that allowed administrative agencies to wield rulemaking or quasi-legislative authority without much procedural constraint. The situation is attributable in part to the lack of statutory changes in the Philippine rulemaking milieu for more than four decades since Philippine independence from the US occupation.[375] It was only in 1987 that the Philippines instituted a general statute on administrative procedure[376] to complement the provisions of the 1987 Philippine Constitution.[377]

Even though both the 1987 Philippine Constitution and the 1987 RAC have been in effect for more than 28 years, Philippine jurisprudence on rulemaking has yet to reach that stage of judicial cultivation and scholarly development in which the optimal benefits and advantages of the modern rulemaking process could be achieved. The 1987 Philippine Constitution has already enshrined the right to reasonable public participation,[378] which right has been statutorily recognized and specifically implemented in the area of agency rulemaking by the 1987 RAC.[379] Even then, clear parameters for invalidating agency rules and regulations based on the administrative agency's failure to provide for sufficient public participation in its conduct of rulemaking have yet to be judicially established.[380] The 1987 Philippine Constitution has also expanded the judicial power to include the conduct of arbitrary and capricious review[381] in addition to the traditional power of judicial review over agency rules and regulations,[382] but the Philippine courts have yet to switch from divining the agency's reasons for rulemaking, to instituting the doctrinal standards of agency articulation that would render the exercise of judicial review meaningful as a constitutional check against arbitrariness in the agency's conduct of rulemaking.[383] Considering that it has been more than two and a half decades since the passage of the 1987 Philippine Constitution, and the

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375 The Philippines did not have a general law on administrative procedure until the issuance of EO 292 (1987) instituting the 1987 RAC. The predecessor of EO 292 (1987) is Act 2711 or the 1917 RAC, which pre-dated the US APA by more than 28 years.

376 VII RAC (1987).

377 *See* Phil.Const. (1987).

378 Phil.Const. art.XIII §16 (1987).

379 *See* II(1) RAC §1[8] in relation to VII(2): §9 thereof.

380 The right to public participation is crucial in agency rulemaking considering that the agency's receipt of comments from the public triggers the indispensable need for the agency to respond to the comments, and to articulate and explain its resolution of significant problems raised in the comments. (*See United States Satellite Broad. Co., Inc. v. FCC*, 740 F.2d 1177,1188 (D.C. Cir. 1984); *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C. Cir. 1975); *Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975).

381 Phil. Const. art.VIII §1.

382 *See id.* at §5(2)(a) cf. VII(4) RAC §§25, 26 (1987).

383 *See Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (1968); *Nova Scotia Food*, 568 F.2d 240 (2d Cir. 1970) (Agencies must articulate a response to comments of cogent materiality).

1987 RAC, it is high time to take steps toward growth, modernization and development in agency rulemaking.

§2.5. Promising Possibilities for Modernizing Administrative Law and Rulemaking in the Philippines

The Philippines is perhaps the only nation in South East Asia unrivaled in terms of having had a direct and substantial history of being under the US for more than four (4) decades—from December 10, 1898 until the July 4, 1946. Due to this, the historical and legal development of its field of public administrative law and governance was, and continues to be, significantly influenced by the American legal system.

The mixed civil law and common law legal tradition currently prevailing in the islands is a factor favorable to the potential of drawing lessons from American administrative law for purposes of modernizing Philippine administrative law and rulemaking.[384] With the abrogation of all political laws in the Philippine islands as a result of the Spanish cession in favor the US,[385] and with the US having planted the seeds of what has grown to be the Philippine system of government, the influence of the common law tradition that has found its way into the Philippines has become particularly pervasive in the area of Philippine public and political law, including its administrative law.[386] The Philippines has continued with its use of the system of case reporting and judicial precedents adopted from the US,[387] and its judicial decisions applying or interpreting the laws or the Constitution formed part of the Philippine legal system.[388] At the constitutional level, the Philippine

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[384] *See* Cesar L. Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 Phil.L.J. 42 (1990); Gamboa, *The Meeting of the Roman Law and the Common Law in the Philippines*, 49 Phil. L.J. 304 (1974); *See also* http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php last accessed on November 18, 2015 (Placing the Philippines in the category that includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.)

[385] *See Macariola v. Asuncion*, A.M. No. 133-J May 31, 1982 (En Banc); *Roa vs. Collector of Customs*, 23 Phil. 315, 330, 311 [1912]); *People vs. Perfecto*, 43 Phil. 887, 897 (1922); *Ely's Administrator vs. United States*, 171 U.S. 220; *American and Ocean Ins. Cos. vs. 356 Bales of Cotton*, 7 L. Ed. 242, 255.

[386] *Macariola, id.* N.B. The case of *Ang Tibay v. Court of Industrial Relations*, 69 Phil. 635 (1940) provides a good example of how pervasive the common law tradition is in the Philippine administrative law.

[387] Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 Phil.L.J. at 45 ("In its theory of judicial precedents, therefore, the Philippine hybrid legal system has blended together the underlying philosophies of the principle of stare decisis of the common law system, and the evolving principles of judicial precedents of the civil law systems."); *Ting v. Velez-Ting*, G.R.No. 166562, March 31, 2009 (The Court discussed the historical development of the Philippine doctrine of adherence to precedents or stare decisis and its origins in England and the US [citing *Lambino v. Commission on Elections*, 505 SCRA 160 (2006), Chief Justice Puno, dissenting op.]

[388] Phil.Civil Code, art.8. *See also Velez-Ting, id.*

Constitution continues to embrace aspects of American constitutionalism, and adopts the republican form of government under a tripartite system.[389] At the statutory level, the 1917 RAC anchored the statutory regime of the Philippine government even as the country underwent several constitutional changes.[390] The 1917 RAC was finally revised by the 1987 RAC in order to complement the 1987 Philippine Constitution and its restoration of separation of powers under a presidential system of government.[391] As it currently stands, the Philippine Constitution's distribution of governmental powers among three separate branches is in many ways similar to the US Constitution.[392]

American administrative law thus holds promising possibilities for modernizing the state of administrative law and rulemaking in the Philippines. In view of the shared history between the US and the Philippines, the legal systems of both countries are similar enough to foster and accommodate the Philippines' adoption of the modern developments in the field of administrative law in the US; and Philippine courts have already been mining US precedents for applicable doctrines and principles in order to enrich its jurisprudence on administrative law.[393] This observation holds true in terms of agency rulemaking. With the 1987 RAC's establishment of administrative procedures that cover both the rule formulation and rule publication phases of administrative rulemaking, the major steps entailed in the rulemaking process generally applicable to administrative agencies in the Philippines are now

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[389] *See* Bernas, *1987 Philippine Constitution* 57, 677-678 (2009).

[390] *See* Official Gazette website, http://www.gov.ph/constitutions/ last accessed on December 1, 2014 (The 1935 Constitution was replaced by the 1973 Constitution ratified on January 17, 1973; The 1973 Philippine Constitution was amended on October 16-17, 1976, on January 30, 1980, and April 7, 1981)

[391] Bernas, 1987 Philippine Constitution 678 (2009).

[392] *See Marcos v. Manglapus*, 178 SCRA 760, 763-765 (1989).

[393] In the area of Philippine administrative law, a prime example of this phenomenon is the landmark case of *Ang Tibay*, 69 Phil. 635 (1940), which was decided during the Philippine Commonwealth period. In that case, the Philippine Supreme Court laid down a list of seven cardinal requirements in administrative adjudicatory proceedings, despite the lack of statutory provisions expressly providing them. The Court used the due process clause, despite the clause's brevity, as the constitutional hook for imposing the common law requirements for administrative adjudications. The Court drew on principles from both US and Philippine case precedents, i.e., *Morgan v. United States*, 304 U.S. 1; *Edwards v. McCoy*, 22 Phil. 598; *City of Manila vs. Agustin*, G.R. No. 45844, November 29, 1937; *Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board*, 301 U.S. 142; *Appalachian Electric Power v. National Labor Relations Board*, 93 F. 2d 985 (4th Cir.); *National Labor Relations Board v. Thompson Products*, 97 F. 2d 13 (6th Cir.); *Ballston-Stillwater Knitting Co. v. National Labor Relations Board*, 98 F. 2d 758, 760 (2nd Cir.); *Interstate Commerce Commission v. Baird*, 194 U.S. 25; *Interstate Commerce Commission v. Louisville and Nashville R. Co.*, 227 U.S. 88; *United States v. Abilene and Southern Ry. Co.,* 74 Law. Ed. 624); *Consolidated Edison Co. v. National Labor Relations Board*, 59 S. Ct. 206. N.B. The common law requirements in *Ang Tibay* have since been reiterated by the Philippine Supreme Court in reviewing appealed cases involving administrative adjudications. *See Department of Health v. Camposano*, 496 Phil. 886 (2005); *Ombudsman v. Reyes*, G.R. No. 170512, October 5, 2011.

broadly comparable to the rulemaking process in the US APA, which has been characterized as the most decidedly synoptic of policy devices.[394]

The potentials of the modern rulemaking process have yet to be achieved on the ground in the Philippines. Although the Philippines has, since 1987, adopted its statutory version of a more synoptic rulemaking process, there is as yet no one-to-one correspondence between what is prescribed in the 1987 RAC and other applicable laws, on the one hand, and what is actually practiced by agencies in reality, on the other. That is where the problem still lies. The question thus remains: "Decades after martial law, is the Philippines still in the dark?"

In the Philippines, the problem of discretion in agency rulemaking is compounded by several factors. With no baseline procedures to canalize and provide structure to agency rulemaking for the greater part of the 20th century, the Philippine administrative bureaucracy has grown accustomed to the practice of secret rulemaking.[395] Although baseline rulemaking procedures have been instituted in 1987,[396] there remain statutory interstices that have yet to be authoritatively filled in by the Philippine judiciary[397] for purposes of unlocking the full panoply of advantages and benefits attendant in a fully synoptic rulemaking process.[398] Those statutory interstices, in turn, continue to sow uncertainty as to how administrative agencies should go about adequately complying with the statutory requirements, particularly in the area of rule formulation.[399] The attempt towards the direction of clarity in that regard is contained in Chapter 4 of this work.

In addition, the intricacies attendant in the different types of administrative agencies in the Philippines also presents another factor that further complicates the task of addressing the issue of agency rulemaking discretion. Not all the agencies in Philippine administrative bureaucracy are statutorily created, and not all of them are subject to the mandatory rulemaking procedures under the 1987 RAC.[400] The 1987 Philippine Constitution has created and established constitutional and semi-constitutional agencies, some of

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394 Colin Diver, *Policymaking Paradigms in Administrative Law*, 95(2) Harv.L.Rev. 393, 406 (1981).
395 *See* Chapter 1 of this work for exemplars of problematic rulemaking in the Philippines.
396 *See* VII(2) RAC (1987).
397 *See* Phil. Civil Code, art.8-10.
398 For a discussion on the various advantages and benefits of the modern administrative rulemaking process, see Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8 on *The Many Advantages of Rules and Rulemaking* (2010); Hickman & Pierce, Jr., *Fed.Admin.Law* 424-425.
399 This is in stark contrast to the rule publication phase, which has been judicially fine-tuned in *Tanada I and II*. *See Tanada v. Tuvera*, G.R.No. L-63915, April 24, 1985, affirmed on December 29, 1986.
400 *See* VII(1) RAC §§1, 2(1) (1987).

which are not covered by the statutory baseline procedures for agency rulemaking under the 1987 RAC.[401] As for statutorily created administrative agencies, Book VII generally covers all of them, excepting only those that are expressly exempted from its scope.[402] Also at the heart of the 1987 RAC's all encompassing coverage is the question of what constitutes an administrative agency for that law's purposes. All these will be tackled in the next chapter (Chapter 3) on the place of administrative agencies and administrative rulemaking in the Philippines.

[401] *Id.*
[402] *Id.*

CHAPTER THREE
THE PLACE OF ADMINISTRATIVE AGENCIES AND ADMINISTRATIVE RULEMAKING IN THE PHILIPPINES

Chapter Three Outline:

§3.1. Chapter Abstract
§3.2. Foundations of Administrative Law
- §3.2.1. What is an agency?
  - §3.2.1.1. Colloquial Perspective
  - §3.2.1.2. Constitutional Law Perspective
  - §3.2.1.3. Administrative Law Perspective
- §3.2.2. Coverage of Administrative Law
- §3.2.3. Issues of Legitimacy on the Delegation of Authority to Agencies

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- §3.3.1. Administrative Agencies at the Constitutional Level
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    - §3.3.1.2.3. Independent Economic Planning Agency (IECPA)
      - §3.3.1.2.3.1. Rulemaking by the IECPA
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§3.4. Changing Paradigms on the Philippine Administrative Structure

§3.1. Chapter Abstract

The existence of administrative agencies and their exercise of coercive government power have come to be an accepted part of the Philippine government, with the administrative bureaucracy exercising almost absolute rulemaking authority for the greater part of the 20th century.[403] This assured place of administrative agencies and their exercise of government power, however, is more apparent than real.

As a developing country undergoing socio-economic transition,[404] the Philippines continues to struggle with the constant tension between the need for a strong state to enforce laws and impose order, on the one hand, and the need for constraints on governmental power to make room for individual rights, on the other.[405] The task of sorting out and determining the legitimacy of the agencies and their exercise of governmental authority—and thereby preventing arbitrary rule—remains a central, continuing concern for the country, as it is in other states with transitioning economies.[406] That task involves determining the legitimacy, not only of the governmental authority being exercised, but also of the governmental actors purporting to wield it. Consequently, this chapter delves into the place of administrative agencies and administrative rulemaking in the Philippines, recognizing that a complete picture of the modern rulemaking process could not be attained in the Philippine setting without accounting for the administrative agencies as governmental actors, and the reasons underlying their ability to exercise the powers of government.

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[403] For the historical perspective, *see* Chapter 2 of this work. *See also* Chapter 1 of this work for current examples of problematic rulemaking in the Philippines. *See also Gerochi v. Department of Energy*, 527 SCRA 696, 719-720 (2007); *BOCEA v. Teves*, G.R.No. 181704, December 6, 2011. (The delegation of legislative power to specialized administrative agencies constitutes an exception to the principle of non-delegation of powers.)

[404] See http://www.worldbank.org/en/news/press-release/2016/04/11/philippines-sustains-strong-growth-amidst-difficult-global-environment last accessed on August 3, 2016.

[405] *See* World Bank, *From Plan to Market, World Development Report 1996,* 88 (Oxford University Press, Oxford, 1996), which devotes a principal chapter to *"Legal Institutions and the Rule of Law"*, and another to *"Property Rights and Enterprise Reform,"* cited in Michael Taggart, *The Province of Administrative Law* (1997). (Kindle Locations 4549-4551).

[406] *Id. ("*People in countries with a well-established rule of law rarely stop to wonder where it comes from. But transition economies need to start over, to replace arbitrary rule by powerful individuals and institutions with a rule of law that inspires the public trust and respect that will enable it to endure… . Transition economies struggle with a constant tension between, on the one hand, the need for a strong state to enforce laws and impose order and, on the other, the need for constraints on state power to make room for individual rights. Sorting out where state power is legitimate and where it is not is a constant task of governments everywhere. But whereas established market economies argue these questions at the margin, transition governments are completely refiguring the enforcement functions of public institutions.")

This chapter starts by discussing the general concept of what administrative agencies are, how they came to be, and the different perspectives upon which they are seen. The legitimacy issues arising from their exercise of derivative governmental authority are also discussed, before going to the next section that deals specifically with the Philippine administrative setting.

The Philippine setting is peculiar in that although its administrative bureaucracy is composed mainly of statutorily created administrative agencies, not all agencies are created by statute. There are administrative agencies at the constitutional level. The 1987 Philippine Constitution has either established or mandated the existence of administrative bodies, albeit with varying degrees of constitutional completion. These agencies have to be accounted for because of the added complexity they present to the Philippine rulemaking framework. Some of these constitutional bodies are directly vested with rulemaking authority under the Constitution, and some are excluded from the coverage of the statutory baseline of rulemaking procedures imposed by the 1987 RAC.[407] Many of the agencies were created at the constitutional level in view of the importance and controversial nature of their respective functions, and their exercise of those functions often result in suits that find their way into Philippine case law and judicial doctrine. Accounting for the different constitutional agencies thus becomes all the more imperative in order to avoid the risk of any misconception regarding the precedential value of case law involving each of them, as applied to pending and future cases involving either the statutorily created administrative agencies, or other constitutional agencies.

After discussing administrative agencies at the constitutional level, the next section tackles the topic of agencies at the sub-constitutional, statutory level. The section starts with the general framework for the sprawling Philippine administrative bureaucracy, and a discussion on the relationship between the 1987 Philippine Constitution, the 1987 RAC, and the various enabling laws or agency charters. The intricacies between the statutorily created administrative agencies on the one hand, and the Office of the President, on the other, are then explicated, with particular focus on the relationship between them, and the significant differences that separate the former as a class from the latter.

The different classes of statutorily created administrative agencies as generally established by the 1987 RAC are then explored via an approach that runs along the vertical lines of the hierarchical organization for the traditional

[407] See VII(2) RAC (1987).

executive branch agencies as marked by the administrative relationships of supervision and control between the superior and subordinate administrative agencies, and traverses the lateral lines of attachment and its various permutations as regards the independent and regulatory agencies. The exploration yields interesting correlations between the nature and extent of the governmental power so delegated, and the level of executive and departmental control over, between, and among the different agencies. As a general proposition, it appears that the executive control over an administrative agency is at its highest when the latter's functions are purely executive in nature. Where there is a delegation of essentially legislative or judicial powers—or a combination thereof—upon the administrative agency, the level of executive control over it is decreased. The level of independence granted by the statute to an administrative agency is largely influenced by the extent to which the agency's functions are less of an executive nature, and more of a legislative or judicial character. Administrative agencies with functions that are predominantly, if not almost exclusively, legislative or judicial in nature, or both, enjoy the highest degree of independence from executive control. Also, there may be exceptional instances where executive control over an agency's exercise of executive functions can be statutorily withheld, such as when the existence of executive control would clearly result in a conflict of functions, or conflict of interest situation, on the part of the agency exercising control; or when the exercise of the statutorily delegated authority to a specific agency is heavily dependent on that agency's particular field of expertise.

This chapter concludes with a section that lays down the relevant observations on the current Philippine administrative setting, and discusses them in connection with the apparent change in the treatment of administrative agencies and administrative rulemaking in the Philippines. The traditional model of administrative law has resulted in the proliferation of administrative agencies with ever broadening delegations of governmental authority, thereby giving rise to the problem of agency discretion. That problem, and the traditional model's inadequacy in addressing it, provided the impetus for changing the traditional model as the predominant paradigm for the Philippine administrative state.[408] The Philippine administrative bureaucracy, and the governmental actors within it, thus underwent structural changes that were codified under the 1987 RAC. In terms of rulemaking, those structural changes have been coupled by the statutory institutionalization of the constitutional right to public participation. With that, the stage is already set for Philippine

[408] *See* Chapter 2 of this work. N.B. The situation came to a head during the authoritarian regime of the 4th Philippine Republic, culminating in the Philippine revolution that ousted authoritarian rule. The Philippines was thereafter restored as a democratic and republican state under the 5th Republic.

administrative law to continue with its reformation towards a modern and more responsive public participation based model of administrative rulemaking.

§3.2. Foundations of Administrative Law

Administrative agencies were borne out of sheer necessity, and have become an essential part of the Philippine government.[409] The reason for this is stated in *Solid Homes v. Payawal*,[410] to wit:

> As a result of the growing complexity of the modern society, it has become necessary to create more and more administrative bodies to help in the regulation of its ramified activities. Specialized in the particular fields assigned to them, they can deal with the problems thereof with more expertise and dispatch than can be expected from the legislature or the courts of justice.[411]

Modern society is progressing at a frantic and unprecedented pace, with social, economic, and technological innovations converging to create a world in which matters that had long been considered as dreams or myths—such as the internet superhighway, the ability to communicate in real time at a global scale, worldwide and regional integration—are fast becoming realities.[412] These developments, in turn, have and will continue to spawn further complications that result in either new areas of concern or more complex iterations of past problems, all of which would invariably require expert governmental regulation of a kind that the more traditional institutions of the executive (President; Prime Minister), the legislative (Congress; Parliament), and the judiciary (Supreme Court; Appellate and Trial Courts) may be ill-equipped to undertake promptly and at the first instance.

The ever growing complexity of the social and economic problems during the last century gave rise to the need for governmental control and

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[409] Tanada & Carreon, *Political Laws of the Phils.* 486 (1962) citing 4 Am. Jur. 291-294.
[410] *Solid Homes v. Payawal*, G.R.No. 84811, August 29, 1989.
[411] *Id.*; *See also Philippine Int'l Trading Corp. v. Angeles*, 263 SCRA 421, 444-45 (1996).
[412] *See* Jonas Rabinovitch, *Participation, Transparency and Efficiency: The True Indicators of Modernization in the 21st Century*, World Resource Institute Center for Sustainable Cities, September 23, 2015, available at http://thecityfix.com/blog/participation-transparency-efficiency-true-indicators-modernization-21st-century-jonas-rabinovitch/ last accessed on February 19, 2016. ("For the first time in its history, humankind possesses the technological and social means to consolidate communications between the public sector, the private sector and the civil society in unprecedented ways.")

supervision of an increasing number of private activities, and it was that particular necessity which led to the creation of a sphere of governmental activity that embraced in itself all three aspects of governmental powers, legislative, executive and judicial, requiring the services of specialists and experts.[413] The rise of administrative bodies is one of the most significant legal trends of the last century, and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.[414]

Among the more effective traditional governmental responses to is the devolution of governmental power upon subordinate administrative institutions, either through the delegation of authority and functions to existing officials, or the creation of new offices for the purpose.[415] Because the legislature cannot foresee every contingency involved in the particular problem it is seeking to control, it has become customary for it to delegate to each newly created instrumentality of the executive department the power to make regulations to carry the statute into effect.[416]

§3.2.1. What is an agency?

Although the term "agency" is widely and commonly used, there is still no bright line definition for characterizing government offices or entities as agencies, and for explaining their respective roles in the government.[417] Attempts at workable definitions have been made in the past.

The term has been defined broadly, as referring to those centers of gravity of the exercise of administrative power upon which substantial powers to act have been vested;[418] and it has also been defined specifically, as referring to governmental authorities, other than a court and other than a legislative body, which affect the rights of private parties through the exercise of their delegated powers of either adjudication or rulemaking, or both.[419] Distinguishing agencies from other government offices and entities is often essential for establishing the applicability of various statutes that govern agency

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413 Tanada & Carreon, *Political Laws of the Phils.* 486 (1962).
414 *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).
415 Tanada & Carreon, *Political Laws of the Phils.* 486-487 (1962).
416 *Id.*
417 Hickman & Pierce, Jr., *Fed.Admin.Law* 5 (2014).
418 James Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U.Pa.L.Rev. 1, 419 (1970).
419 Kenneth Culp Davis, *Administrative Law and Government* 11 (1960).

action.[420] Accordingly, statutes can provide for different legal definitions of what constitutes an agency depending upon the legislative objective to be achieved. One prime example is the 1987 RAC and its dual definition of what constitutes an "agency."

The risk of using too broad a definition, however, is that of overreach, imprecision, and the resulting inability to account for the substantial differences between administrative agencies, on the one hand, and the other government offices and entities, on the other—differences that matter greatly in the study of administrative law. The risk of using too specific a definition, on the other hand, is that it could result in the undue exclusion of governmental entities that could very well be within the ambit of administrative agencies. The name by which a particular government office is designated—a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division, or agency—offer little in terms of clarifying the matter,[421] because the government entity's name is more a matter of style and preference rather than of substance.[422]

The 1987 RAC provides for distinct definitions of what constitutes an "agency." The Introductory Provisions defines an "agency" in its all-encompassing and most general sense by stating that an "[A]gency of the Government refers to any of the various units of the Government, including a department, bureau, office, instrumentality, or government-owned or controlled corporation, or a local government or a distinct unit therein,"[423] with further sub-classifications based on whether such agencies are national[424] or local,[425] and on whether they are to be considered a department[426] or an instrumentality,[427] among others.[428] This broad definition, however, is

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[420] Hickman & Pierce, Jr., *Fed.Admin.Law* 5 (2014). (Some statutes explicitly define agency for their purposes, although not necessarily in the same way.)

[421] Davis, *Administrative Law and Government* 11 (1960) (Nothing of substance hinges on the choice of name.)

[422] Even the legislative act of naming an administrative agency as a "court" was not by itself immaterial. *See Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). (Bankruptcy courts under the Bankruptcy Act were held not to be judicial courts. In holding the bankruptcy courts unconstitutional, the United States Supreme Court looked into the broad grant of judicial powers upon them, and the substantial differences between bankruptcy "judges" and judges in the judicial branch).

[423] Introductory Provisions RAC §2(4) (1987).

[424] *Id.* at §2(5). (National Agency refers to a unit of the National Government.)

[425] *Id.* at §2(6). (Local Agency refers to a local government or a distinct unit therein.)

[426] *Id.* at §2(7). (Department refers to an executive department created by law. For purposes of Book IV, this shall include any instrumentality, as herein defined, having or assigned the rank of a department, regardless of its name or designation.)

[427] *Id.* at §2(10). (Instrumentality refers to any agency of the National Government, not integrated within the department framework vested with special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter.

applicable only as a default; it does not apply when a different meaning is required by the specific words of the text, by the context as a whole, or by a particular statute.[429] An example of legal texts or a particular statute that requires a different meaning of the term is provided in Book VII of the same code itself.[430]

Book VII on Administrative Procedure states that an agency "includes any department, bureau, office, commission, authority or officer of the National Government authorized by law or executive order to make rules, issue licenses, grant rights or privileges, and adjudicate cases; research institutions with respect to licensing functions; government corporations with respect to functions regulating private right, privileges, occupation or business; and officials in the exercise of disciplinary power as provided by law."[431] In providing this detailed yet illustrative and non-exclusive definition,[432] the law effectively places all government agencies within its scope and makes the requirements of administrative procedure for agency rulemaking and adjudication generally applicable to all of them,[433] excepting only those government institutions that could demonstrate either that they do not fall within the foregoing definition or that they fall within the exceptions specifically listed in Book VII.[434]

The introductory provisions thus treat the subject of "agencies" in general while Book VII treats it in specific relation to the types of government agencies that must comply with the law on administrative procedure. These two statutory definitions also highlight the dual meaning of the term "agency" as used in the colloquial and constitutional sense, and as a legal term of art in Philippine administrative law.

§3.2.1.1. Colloquial Perspective

This term includes regulatory agencies, chartered institutions and government-owned or controlled corporations.)

[428] *Id.* at §2(7-9, 11-13).

[429] *See id.* at §2.

[430] *See* VII(1) RAC §2 (1987).

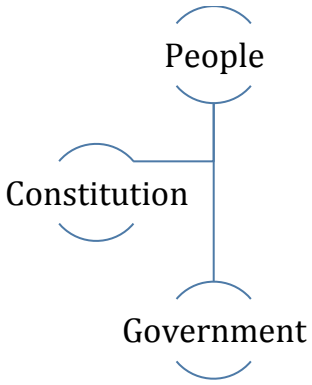
[431] *See id. at* §2(1).

[432] *See* M. Douglass Bellis, *Statutory Structure and Legislative Drafting* 11 (Federal Judicial Center 2008) ("Including" means "Not Limited To") available at http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/$file/draftcon.pdf last accessed on November 4, 2015.

[433] VII(1) RAC §1 (1987).

[434] *Id.* N.B. Book VII expressly excepts the Congress, the Judiciary, the Constitutional Commissions, military establishments in all matters relating exclusively to Armed Forces personnel, the Board of Pardons and Parole, and state universities and colleges, from its coverage.

The term "agency" is commonly used to refer to any of the units of the Government of the Republic of the Philippines.[435] Accordingly, the term is broad enough to include not just the primary institutions of government, but also the other constitutional bodies, the different agencies in the administrative bureaucracy, the local government units,[436] and autonomous regions.[437] This definition corresponds to the "colloquial sense" of the term, rooted mainly on the notion that the Philippines is a democratic and republican state where sovereignty resides in the people and all government authority emanates from them.[438] The entirety of government and its various institutions exercise their respective powers and functions as "agents," or more appropriately, "agencies," under the terms and conditions of that "agency agreement" called the Constitution, which the Filipino people had executed as the "principal." Thus, the people, on the one hand, are considered as the source of ultimate legal authority, and all the government offices, on the other hand, are collectively considered as repositories of the authority delegated by the people, on the other.[439] Under this macro-level perspective, every unit of government is generally referred to as an "agency" with less regard for the details and levels of relationships that go into the governmental bureaucracy. This is illustrated by the figure below:



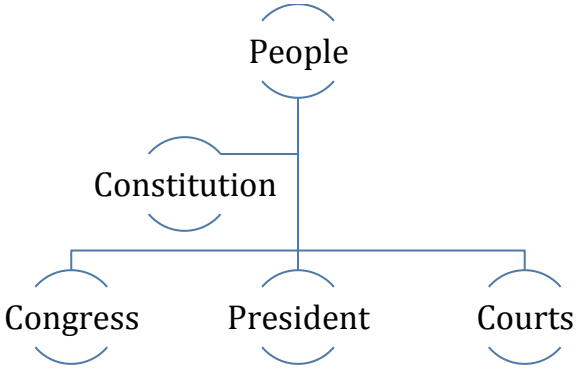
§3.2.1.2. Constitutional Law Perspective

The term "agency" as utilized in the ordinary and colloquial sense is also employed invariably in the study of constitutional law. This is understandable, considering that the constitution's main role is to establish and outline the

[435] Introductory Provisions, RAC §2(1 & 4) (1986).
[436] Phil. Const. art.X §1-14 (1987).
[437] *Id.* at §15-21.
[438] *Id.* at art.II §1; *The Diocese of Bacolod v. COMELEC*, G.R. No. 205728, January 21, 2015 (En Banc) ("All governmental authority emanates from our people.").
[439] Bernas, *1987 Philippine Constitution* 55 (2009). (The republican form of government was adopted and borrowed by the Philippines from American constitutional theory.)

broader structural apparatus of governance and accountability, in which the administrative bureaucracy is the great unspoken.[440]

Under the Philippine constitutional system, the powers of government are distributed among three coordinate, independent, and co-equal branches, namely, the legislative, the executive, and the judicial, as ordained and promulgated in the Constitution,[441] which is the highest expression of the will of the Filipino people.[442] This is illustrated by the figure below:



Thus, in terms of governmental structure, Philippine constitutional law focuses extensively upon the primary organs or institutions that are constitutionally vested with sovereign power, namely: the President,[443] the Congress,[444] and the Judiciary,[445] with less emphasis upon other governmental entities except insofar as the latter are covered by specific constitutional provisions and principles,[446] or when their exercise of governmental authority implicates constitutional considerations.[447]

§3.2.1.3. Administrative Law Perspective

[440] Susan Rose-Ackerman and Peter L. Lindseth, *Comparative Administrative Law* 117 (2010); Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, University of Chicago Public Law & Legal Theory Working Paper No. 331, 2010.

[441] *See* Phil.Const. Preambular Clause; Bernas, *1987 Philippine Constitution* 4 (2009). ("The identification of the Filipino people as the author of the constitution also calls attention to an important principle: that the document is not just the work of representatives of the people but of the people themselves who put their mark of approval by ratifying it in a plebiscite.")

[442] *People v. Vera*, G.R. No. L-45685, November 16, 1937; Bernas, *id.* (The Constitution is the manifestation of the sovereign will of the Filipino people.)

[443] Phil. Const. art.VII (1987).

[444] *Id.* at art. VI.

[445] *Id.* at art.VIII.

[446] *See* for example, the Independent Constitutional Commissions, Phil. Const.art.IX; The Office of the Ombudsman, *id.* at art.XI §5, et.seq.; Local Government, *id.* at art.X.

[447] *See Tanada I*, G.R.No. L-63915, April 24, 1985. (Holding that all statutes and legislative rules should be published, and that the law could not be interpreted to read that the publication requirement could altogether be dispensed with because "such omission would offend due process.")

The term "agency" as broadly defined in the 1987 RAC's Introductory Provisions would be useable but inadequate from an administrative law viewpoint because it tends to lump all the different government units up under a general designation without taking particular account of the specific nuances between the different governmental units at the statutory, sub-constitutional level, although it may be sufficient for use both in the ordinary sense and in the context of discussing constitutional issues.

§3.2.2. Coverage of Administrative Law

As an area of study, administrative law digs into the statutory details of the government structure set by the Constitution[448] and covers the governing laws and legal principles on the creation, administration and regulation of government agencies.[449] It delves into the functional relationships existing between the administrative bureaucracy, on the one hand, and the constitutional institutions, on the other, as well as those existing between and among the institutions in the administrative bureaucracy itself. It concerns itself with the legitimacy of having governmental powers and functions further devolved and delegated to administrative authorities, the validity of having administrative institutions exercise those powers in order to affect private parties, and the legality of their methods and procedures for doing so.[450]

The foregoing concerns are also co-related with the relative proximity of the administrative bureaucracy to the people as the ultimate source of their authority,[451] which is a factor that is less accentuated in the constitutional understanding of what agencies are. The different relationships between the people as the ultimate source of governmental authority, and the different government units that are exercising it, are not always direct. The Government of the Republic of the Philippines is composed of a sprawling bureaucracy

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[448] N.B. Because administrative law is largely governed by statute, there are areas within it that are partially addressed, if at all, by constitutional law.

[449] *See* Cornell University Law School, Legal Information Institute, available at https://www.law.cornell.edu/wex/administrative_law last accessed on November 4, 2015 (Defining Administrative Law as a "[B]ranch of law governing the creation and operation of administrative agencies. Of special importance are the powers granted to administrative agencies, the substantive rules that such agencies make, and the legal relationships between such agencies, other government bodies, and the public at large.")

[450] *See* Werhan, *Principles of Admin.Law* 2 (Administrative law comes into play at any point where a government agency steps in to alter the legal rights of citizens, corporations, or other entities.)

[451] Proximity in this regard poses an interesting paradox in that agencies are among the government entities closest to the people in terms of being active governmental instruments that directly affect and regulate the latter's rights and interests, while at the same time being among the farthest from the people in terms of the latter's collective and consensual grant of sovereign authority to be governed (*See* Phil.Const.art.II §1).

composed of government entities and instrumentalities of different levels. At the top are the three primary institutions expressly mentioned in the vesting clauses of the 1987 Philippine Constitution—the President as to executive power,[452] the Congress as to legislative power, [453] and the courts as regards judicial power.[454] As primary institutions they are considered as the principal repositories that derive their legitimacy for wielding the totality of governmental authority directly from the people through the Constitution, each being supreme within its own sphere.[455]

The Constitution also provided for administrative bodies that, at the constitutional level, are (a) organizationally and functionally complete,[456] such as the Constitutional Commissions[457] and the Office of the Ombudsman;[458] and (b) organizationally and functionally incomplete, such as the Commission on Human Right,[459] whose institutional establishment and full operation still requires congressional action.[460] The Constitution likewise makes mention of various administrative agencies for specific purposes,[461] and whose manners of creation and provisions of governmental authority are left for Congress to provide by law.[462]

Outside of the three principal institutions of the Congress, the President, and the Judiciary, and other constitutional bodies, the existence of all other government entities is assumed under the general rubric of being a "department, bureau, office, or agency."[463] These institutions are statutory

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[452] Phil.Const. art.VII §1 (1987).
[453] *Id.* at art.VI §1 (1987).
[454] *Id.* at art.VIII §1 (1987).
[455] *See Angara v. The Electoral Commission*, G.R. No. L-45081, July 15, 1936.
[456] Bernas, *1987 Philippine Constitution* 1002 (2003 Ed.) (Because they "perform vital functions of government, it is essential that they be protected against outside influences and political pressures." N.B. While the statement pertained to the Constitutional Commissions, it is applicable to the Office of the Ombudsman as well.)
[457] Phil.Const.art.IX (1987).
[458] *Id.* at art.XI §5, et.seq.
[459] *Id.* at art.XIII §17, et.seq.
[460] *Id.* at art.XIII §18-19; Bernas, *1987 Philippine Constitution* 1274 (2009); *CHR Employees v. CHR*, G.R.No. 155336, July 21, 2006 (The CHR is not on the same level as the Constitutional Commissions.)
[461] *See* for example, Phil.Const. art.XII §9,15; art.XIII §13 (1987).
[462] *Id.*
[463] Insofar as the administrative bureaucracy is concerned, the 1987 Philippine Constitution merely makes generic mentions of agencies, departments, bureaus, offices, and instrumentalities, and assumes their existence at the sub-constitutional level. *See id.* at art.VI §§13, 14, 22, 25(3); art.VII §§13, 16, 17, 18; art.VIII §§1, 12; art.IX(A) §2; art.IX(B) §§2(1), 3, 7; art.IX(C) §§2(4), 4; art.IX(D) §§ 2(1) & 4; art.X §21; art.X §14; art.XI §§12, 13(1, 2, 5); art.XII §§9, 10, 15; art. XIII §§13, 16, 18(9).

creations whose powers and functions, including the manner in which they exercise them, are derived from and limited by law.[464]

§3.2.3. Issues of Legitimacy on the Delegation of Authority to Agencies

At the statutory level, the law provides a hierarchy within the administrative bureaucracy,[465] as well as different administrative relationships that govern the various administrative agencies.[466] There are thus varying degrees of separation between the people as the ultimate source of authority, and the administrative agencies that exercise governmental authority. These degrees of separation, in turn, often give rise to serious legitimacy concerns brought about by having different institutions exercising governmental authority without express constitutional imprimatur, with those concerns being rendered more and more acute in situations where the governmental actor is rendered unaccountable to the politically accountable institutions of government;[467] or when the statutory delegation of governmental power is so broad that it amounts to a total surrender of the legislature's prerogative, or constitutes a grant of virtually unlimited legislative authority in favor of the delegate;[468] or when the governmental actor aggrandizes itself by exercising powers beyond the scope of its legal authority;[469] or when the governmental actor is able to exercise its authority in a manner inconsistent with the

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[464] N.B. The 1987 RAC is the general law that reorganized and created most of the institutions comprising the current administrative bureaucracy in the Philippines. In addition, the Philippine legislature has also passed several special laws that created other agencies.

[465] *See* IV(1-6) RAC (1987).

[466] *See id.* at IV(7, 8, 9).

[467] *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. 477 (2010) (The Court held that the statutory scheme whereby PCAOB officers could be removed only "for good cause shown" by officers of the Securities and Exchange Commission, who in turn could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office," provided for dual layers of protection that limited the President's removal powers in violation of the separation of powers doctrine.)

[468] N.B. The legitimacy issues arise because of the tension which the legislative grant of its powers to the administrative agencies creates vis-à-vis the doctrine of separation of powers, the constitutional due process concerns, and the principle of *delegata potestas non potest delegari*, under which the legislature is prohibited from further devolving and delegating its power to other institutions. *See* Bernas, *1987 Philippine Constitution* 685-696 (2009) citing Corwin, *Constitution of the United States of America* 95 (1964); *See also Philippine Airlines v. CAB*, G.R. No. 119528. March 26, 1997.

[469] *Cf. Ople v. Torres*, G.R.No. 127685, July 23, 1998 (The Court declared AO 308 on the adoption of a national computerized identification reference system unconstitutional because "[S]uch a System requires a delicate adjustment of various contending state policies — the primacy of national security, the extent of privacy interest against dossier-gathering by government, the choice of policies, etc… involves the all-important freedom of thought. As said administrative order redefines the parameters of some basic rights of our citizenry *vis-a-vis* the State as well as the line that separates the administrative power of the President to make rules and the legislative power of Congress, it ought to be evident that it deals with a subject that should be covered by law.")

delegating law;[470] or when the discretion so delegated is exercised unreasonably, arbitrarily, or whimsically.[471]

It can readily be seen from the foregoing that while the Constitution affords fundamental protections and limitations upon governmental authority that apply to all governmental entities across the board, that document alone does not provide the encompassing details of governance for the entire legal system in which administrative law operates. From an administrative law perspective, the Constitution constitutes the tip of the iceberg—an important document that provides the broad strokes for the structure of the Philippine government. At the sub-constitutional level, statutes such as the 1987 RAC and the different charters creating administrative agencies provide much of the substantive and procedural standards and limitations that administrative agencies have to comply with in their conduct of administrative actions.

§3.3. The Philippine Administrative Setting

The 1987 Philippine Constitution outlines in broad strokes the organization of the Philippine government, with statutes providing much of the details necessary to complete the Philippine administrative setting. Accordingly, statutes account for the creation and establishment of a huge bulk of the administrative agencies in the Philippines. Nonetheless, the 1987 Philippine Constitution is peculiar in that in addition to establishing the Congress, [472] the President, [473] and the Judiciary, [474] as the three principal governmental institutions vested with what generally amounts to the entire gamut of governmental powers, it also provides for other governmental entities such as the "Constitutional Commissions," which are specialized entities that have dedicated constitutional functions covering such vital areas as "Elections",

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[470] *Office of the Solicitor General v. Ayala Land Inc.*, G.R. No. 177056, September 18, 2009 (If Rule XIX is not covered by the enabling law, then it cannot be added to or included in the implementing rules. The rule-making power of administrative agencies must be confined to details for regulating the mode or proceedings to carry into effect the law as it has been enacted, and it cannot be extended to amend or expand the statutory requirements or to embrace matters not covered by the statute. Administrative regulations must always be in harmony with the provisions of the law because any resulting discrepancy between the two will always be resolved in favor of the basic law.); *See also Land Bank v. Court of Appeals*, 327 Phil. 1048, 1052 (1996).

[471] *Solicitor General v. Ayala Land, id.* ("…assuming arguendo that the DPWH Secretary and local building officials do have regulatory powers over the collection of parking fees for the use of privately owned parking facilities, they cannot allow or prohibit such collection arbitrarily or whimsically. Whether allowing or prohibiting the collection of such parking fees, the action of the DPWH Secretary and local building officials must pass the test of classic reasonableness and propriety of the measures or means in the promotion of the ends sought to be accomplished."); *See also Acebedo Optical Company, Inc. v. Court of Appeals*, 385 Phil. 956, 969 (2000).

[472] Phil.Const.art.VI (1987).

[473] *Id.* at art.VII.

[474] *Id.* at art.VIII.

"Audit", "Civil Service", and "Human Rights"; and agencies with special names, such as the "Office of the Ombudsman," which takes charge of prosecuting graft and corruption cases. The Constitution also mandates the creation of independent agencies to be constituted by law, such as the central monetary authority, which is currently the "Bangko Sentral ng Pilipinas" (BSP); and the independent economic planning agency, which is currently the "National Economic Development Authority" (NEDA). Other agencies are also specially mentioned in the Constitution, such as the "Armed Forces of the Philippines" (AFP) as "protector of the people," in view of their relevance to the People Power Revolution that put an end to martial rule and reestablished a democratic and republican government in the Philippines. These special agencies are vested with constitutional attributes and particularly enumerated powers, duties and functions, albeit with varying degrees of constitutional creation and independence.[475]

§3.3.1. Administrative Agencies at the Constitutional Level

The existence of the aforementioned constitutional entities in the Philippine administrative setting complicates the discussion of the overall relationship between administrative agencies and the three principal repositories of governmental authority. Although considered as administrative agencies, these entities differ in significant respects from other administrative agencies that are statutorily created. As far as their constitutional stature and attributes are concerned, they challenge the notion that administrative agencies are subordinate to the three principal repositories of governmental authority.

Due to the vital nature of their constitutionally allocated functions, these entities are often embroiled in suits, thereby resulting in the proliferation of case law on their administrative actions. In such cases, the courts invariably treat these constitutional entities as administrative agencies, and apply the principles of administrative law upon their exercise of governmental powers.[476] Although they are indeed administrative agencies, these constitutional entities differ in significant respects from the other administrative agencies that are predominantly or wholly created by statute. The 1987 Revised Administrative Code also treats many of these constitutional agencies differently from the major branches of government[477] by discussing them under Book V,[478] which is

[475] *See id.* at art. IX, XI, XII, XIII.
[476] See for example Delos Santos v. COA, G.R.No. 198457, August 13, 2013 (The Court characterized the Commission on Audit as a constitutionally-created administrative agency.)
[477] See II(5,6) RAC (1987).

separate and distinct from Book III on the Office of the President and Book IV on the Executive Branch. The differences between the constitutionally created administrative agencies vis-à-vis those that are statutorily created thus compels the use of an approach that starts from the constitutional level to the statutory level in order to accurately map out the structure of the Philippine government, and determine the proper places of these administrative agencies and their rulemaking functions in the Philippine setting.

In terms of rulemaking, the 1987 Philippine Constitution vests some of these entities with the power to issue rules. The constitutional nature of that grant supplants the need for express congressional authorization for their exercise of rulemaking functions; and affords them with some degree of insulation from interference in their conduct of rulemaking, excepting only those matters that have constitutional implications.[479] Consequently, some constitutional entities are exempted by law from the coverage of Book VII, which prescribes the general set of procedural requirements that all administrative agencies have to comply with for purposes of administrative rulemaking.[480]

§3.3.1.1. Independent Constitutional Bodies

Independent constitutional bodies are administrative agencies specially created under the 1987 Philippine Constitution that are constitutionally mandated to be independent[481] because they perform key governmental functions,[482] the effective performance of which requires that they be outside and beyond the control and influence of the political arms of the government bureaucracy.[483] The constitutional manner of their creation[484] and the constitutional grant of specific privileges, powers, and functions upon them,[485] are all attributes that cannot be altered or amended except through the cumbersome process of constitutional amendment and/or revision.[486] They

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[478] V RAC (1987) covers the Civil Service Commission (Title I-A), Commission on Audit (Title I-B), Commission on Elections (Title I-C), Commission on Human Rights (Title II-A), Office of the Ombudsman (Title II-B), and the National Economic Development Authority(Title II-C).

[479] *See Tanada I*, G.R.No. L-63915, April 24, 1985. (Holding that the publication requirement for rules could not altogether be dispensed with because "such omission would offend" constitutional due process.)

[480] *See* VII(1) RAC §1.

[481] *See* Phil.Const. art.IX(A) §1, art.XI §5, art.XIII§17(1) (1987).

[482] *Carpio v. Executive Secretary*, G.R.No. 96409, February 14, 1992; Bernas, *1987 Philippine Constitution* 1035 (2009).

[483] *See Carpio, id.* N.B. Independent constitutional bodies are not constitutionally placed under any of the three traditional branches the government; and they are certainly not under the control of the President.

[484] *See* Phil.Const. artIX(A) §1; art.XI §5 (1987).

[485] *See id.* at §§5-6; art.IX(B) §3; art.IX(C)§§2-5, 9, 11; art.IX(D)§2-4; art.XI §§12-14.

[486] *See id.* at art. XVII.

are (a) the Constitutional Commissions under Article IX of the 1987 Philippine Constitution,[487] and (b) the Office of the Ombudsman under Article XI of the 1987 Philippine Constitution.[488]

The importance of their functions in the entire scheme of governmental checks and balances, and the need to avoid the risks attendant in having those functions exercised for partisan political ends,[489] provide justifications for strengthening their independence. Thus, in many respects these constitutional agencies have attained equal status as the three traditional branches of government: (a) in the manner by which the members of the Constitutional Commissions and the Ombudsman can be are removed which is through impeachment and conviction in the same manner and for the same specific causes as the President, the Vice-President, and members of the Supreme Court; [490] (b) in their constitutionally mandated fiscal autonomy[491] in the same manner as the judiciary;[492] (c) in the protection against the diminution of the salaries of the members of the Constitutional Commissions, as well as those of the Ombudsman and his/her deputies, during their tenure[493] or term[494] in the same way as those of the President,[495] the Vice-President,[496] and the justices and judges of the judiciary; [497] and (d) in the constitutional grant of authority to promulgate their respective rules of procedure.[498]

In order to protect their integrity as independent constitutional bodies,[499] and to aid them in the fulfillment of their respective mandates, these constitutional bodies enjoy constitutional limitations and protections that are designed to eliminate, reduce, or otherwise render more cumbersome, the different means of temptation, leverage, and influence that the political

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[487] *Id.* at art. IX.

[488] *Id.* at art.XI §§5-14. N.B. The Office of the Ombudsman was not provided for in the Phil.Const.(1935).

[489] *Carpio*, G.R.No. 96409, February 14, 1992 ("As these Commissions perform vital governmental functions, they have to be protected from external influences and political pressures.")

[490] *See* Phil.Const.art.XI §2.

SECTION 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.

[491] *See id.* at art.IX(A)§5; art.XI §14.

[492] *See id.* at art.VIII §3.

[493] *See id.* at art.IX(A)§3.

[494] *See id.* at art.IX §10.

[495] *See id.* at art.VII §6.

[496] *Id.*

[497] *Id.* at art.VIII §10.

[498] *See id.* at art.IX(A)§6; art.XI §13(8).

[499] *Carpio*, G.R.No. 96409, February 14, 1992; Bernas, *1987 Philippine Constitution*1035 (2009).

branches of government may employ against them. First, the Constitution prohibits members of the Constitutional Commissions and the Ombudsman and his/her deputies from engaging in activities that can distract them from their responsibilities or subject them to pressures and temptations.[500] Second, the qualifications, terms, and tenures of office of the members of the Constitutional Commissions, and the Ombudsman and his/her deputies, are all prescribed by the Constitution.[501] Third, as heads of their respective institutions, the members of the Constitutional Commissions and the Ombudsman are removable only via impeachment and conviction in the same manner and for the same specific causes as the President, the Vice-President, and members of the Supreme Court.[502] Fourth, the Constitutional Commissions and the Office of the Ombudsman are constitutionally entitled to fiscal autonomy[503] in the same manner as the judiciary.[504] Fifth, the salaries of the members of the Constitutional Commissions, as well as those of the Ombudsman and his/her deputies, are likewise protected from diminution during their tenure[505] or term[506] in the same way as those of the President,[507] the Vice-President,[508] and the justices and judges of the judiciary.[509] Sixth, they are given the constitutional authority to promulgate their respective rules of procedure.[510]

Although constitutionally created as complete and independent constitutional bodies, these institutions are also authorized to perform such other additional functions as may be provided by law.[511] Legislation may thus provide them with such additional functions as are appropriate to their exercise of their respective constitutional authorities. Accordingly, they have two sources of governmental authority: constitutional and statutory. As far as their constitutionally listed functions are concerned, their activities find legitimacy in the direct grant of governmental authority from the people via the 1987 Philippine Constitution itself and the constitutional separation of powers principle.[512] As for powers and functions not provided in the Constitution,

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[500] Phil.Const. art.IX §2; art.XI §8 (1987); Bernas, *1987 Philippine Constitution* 1037, 1162 (2009).
[501] *Id.* at art.IX(B) §1; art.IX(C) §1; art.IX(D) §1; art.XI §§5, 8-11.
[502] *Id.* at art.XI §2.
[503] *Id.* at art.IX(A) §§5; art.XI §14.
[504] *Id.* at art.VIII §3.
[505] *Id.* at art.IX(A) §3.
[506] *Id.* at art.XI §10.
[507] *Id.* at art.VII §6.
[508] Id.
[509] *Id.* at art.VIII §10.
[510] Id. at art.IX(A) §6; art.XI §13(8).
[511] *See id.* at art. IX(A) §8; art.XI §13(8).
[512] N.B. The constitutional separation of powers principle is also expressly provided by statute under II(1) RAC §1(8) (1987), mandating that "[T]he powers expressly vested in any branch of the Government shall not be

these agencies are like other administrative agencies in that their functions are derivative and largely dependent on legislation.[513] In either instance, their expertise within their respective areas of responsibility serves as an additional legitimating factor for their exercise of their specific governmental powers, in addition to being a means for bolstering their independence and insulation from political influence.

§3.3.1.1.1. Article IX Constitutional Commissions

When Philippine law speaks of constitutional commissions, the term shall include only the independent constitutional bodies under Article IX of the 1987 Philippine Constitution, composed of the Civil Service Commission (CSC),[514] the Commission on Elections (COMELEC),[515] and the Commission on Audit (COA),[516] collectively referred to herein as the "Article IX Constitutional Commissions." The CSC is the personnel office of government,[517] the COA is the auditing office,[518] and the COMELEC is charged with the administration of the electoral process.[519] These constitutional commissions have been judicially categorized as administrative agencies that enjoy the special status of being constitutionally created.[520]

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exercised by, nor delegated to, any other branch of the Government, except to the extent authorized by the Constitution."

513 *See* for example, Phil.Const. art.XII §§9, 15; art.XIII §§13, 16, 18(11) (1987).

514 *Id.* at art.IX(B).

515 *Id.* at art.IX(C).

516 *Id.* at art.IX(D).

517 *Id.* at art.IX-B §3 (1987); *See CSC v. Tinaya*, G.R.No. 154898, February 16, 2005, and *Lazo v. CSC*, 236 SCRA 469 (1994) ("[u]nder the Constitution, the CSC is the central personnel agency of the government charged with the duty of determining questions of qualifications of merit and fitness of those appointed to the civil service.") *See also* Bernas, *1987 Philippine Constitution* 1063-1064 (2009).

518 Phil.Const., *id.* at art.IX(D) §§2-3; *Delos Santos v. Commission on Audit (COA)*, G.R. No. 198457, August 13, 2013 ("The CoA is endowed with enough latitude to determine, prevent, and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds. It is tasked to be vigilant and conscientious in safeguarding the proper use of the government's, and ultimately the people's, property. The exercise of its general audit power is among the constitutional mechanisms that gives life to the check and balance system inherent in our form of government.") *See also Veloso v. COA*, 656 SCRA 767, 776 (2011).

519 *See Bedol v. COMELEC*, 606 SCRA 554, 569-571 (2009) ("The powers and functions of the COMELEC, conferred upon it by the 1987 Constitution and the Omnibus Election Code, may be classified into administrative, quasi-legislative, and quasi-judicial. The quasi-judicial power of the COMELEC embraces the power to resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies; and of all contests relating to the elections, returns, and qualifications. Its quasi-legislative power refers to the issuance of rules and regulations to implement the election laws and to exercise such legislative functions as may expressly be delegated to it by Congress. Its administrative function refers to the enforcement and administration of election laws. In the exercise of such power, the Constitution (Section 6, Article IX-A) and the Omnibus Election Code (Section 52 [c]) authorize the COMELEC to issue rules and regulations to implement the provisions of the 1987 Constitution and the Omnibus Election Code."); Bernas, *1987 Philippine Constitution* 1035 (2009).

520 *See Delos Santos v. COA*, G.R. No. 198457, August 13, 2013; *See also Mendoza v. COMELEC*, G.R.No. 188308, October 15, 2009 ["…, the COMELEC under our governmental structure is a constitutional

In terms of judicial review, the Philippine Supreme Court employs a high level of deference to these constitutional commissions by adopting the general policy of sustaining their decisions based not only on their presumed expertise in the law they are entrusted to enforce, but also on their constitutional creation and the doctrine on separation of powers.[521] In *Delos Santos v. Commission on Audit*,[522] the Philippine Supreme Court stated:

> At the outset, it must be emphasized that the CoA is endowed with enough latitude to determine, prevent, and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds. It is tasked to be vigilant and conscientious in safeguarding the proper use of the government's, and ultimately the people's, property. The exercise of its general audit power is among the constitutional mechanisms that gives life to the check and balance system inherent in our form of government. **Corollary thereto, it is the general policy of the Court to sustain the decisions of administrative authorities, especially one which is constitutionally-created, such as the CoA, not only on the basis of the doctrine of separation of powers but also for their presumed expertise in the laws they are entrusted to enforce. Findings of administrative agencies are accorded not only respect but also finality when the decision and order are not tainted with unfairness or arbitrariness that would amount to grave abuse of discretion.** It is only when the CoA has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, that this Court entertains a petition questioning its rulings.[523] (Emphasis supplied)

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administrative agency and its powers are essentially executive in nature (i.e., to enforce and administer election laws), quasi-judicial (to exercise original jurisdiction over election contests of regional, provincial and city officials and appellate jurisdiction over election contests of other lower ranking officials), and quasi-legislative (rulemaking on all questions affecting elections and the promulgation of its rules of procedure.)]

[521] *See Delos Santos*, *id.*; *Mendoza, id.* ("Thus, our standard of review is grave abuse of discretion, a term that defies exact definition, but generally refers to capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility. Mere abuse of discretion is not enough; the abuse must be grave to merit our positive action.")

[522] *Delos Santos, id.*

[523] *Id.* citing *Veloso*, 656 SCRA 767, 776 (2011).

However, notwithstanding the general policy stated above, the Court has held that these constitutional bodies are accountable to the same substantive standards applicable to rulemaking by all administrative agencies in general. In *Lokin Jr. v. COMELEC*,[524] the Court used its power to review arbitrary and capricious administrative actions in order to invalidate Section 13 of COMELEC Resolution No. 7804, which inserted a new ground for the substitution of a party list nominee[525] not enumerated in the Party List System Act,[526] to wit:

> The COMELEC, despite its role as the implementing arm of the Government in the enforcement and administration of all laws and regulations relative to the conduct of an election, **has neither the authority nor the license to expand, extend, or add anything to the law it seeks to implement thereby.** The IRRs the COMELEC issues for that purpose should always accord with the law to be implemented, and should not override, supplant, or modify the law. It is basic that the IRRs should remain consistent with the law they intend to carry out.
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> Indeed, administrative IRRs adopted by a particular department of the Government under legislative authority must be in harmony with the provisions of the law, and should be for the sole purpose of carrying the law's general provisions into effect. The law itself cannot be expanded by such IRRs, because an administrative agency cannot amend an act of Congress.
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> The insertion of the new ground was invalid. An axiom in administrative law postulates that administrative authorities should

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[524] Lokin Jr. v. COMELEC, G.R. Nos. 179431-32, 180443, June 2010.

[525] *Id.* ("Section 8 of R.A. No. 7941 enumerates only three instances in which the party-list organization can substitute another person in place of the nominee whose name has been submitted to the COMELEC, namely: (a) when the nominee dies; (b) when the nominee withdraws in writing his nomination; and (c) when the nominee becomes incapacitated. The enumeration is exclusive, for, necessarily, the general rule applies to all cases not falling under any of the three exceptions. xxx. Unlike Section 8 of R.A. No. 7941, the foregoing regulation provides four instances, the fourth being when the "nomination is withdrawn by the party." xxx, the COMELEC… established an entirely new ground not found in the text of the provision. Neither was the grant of the unilateral right contemplated by the drafters of the law, who precisely denied the right to withdraw the nomination… The grant thus conflicted with the statutory intent to save the nominee from falling under the whim of the party-list organization once his name has been submitted to the COMELEC, and to spare the electorate from the capriciousness of the party-list organizations.")

[526] *See* RA 7941 §8.

> not act arbitrarily and capriciously in the issuance of their IRRs, but must ensure that their IRRs are reasonable and fairly adapted to secure the end in view. If the IRRs are shown to bear no reasonable relation to the purposes for which they were authorized to be issued, they must be held to be invalid and should be struck down.[527] (Emphasis supplied)

The constitutional powers and functions of these Article IX Constitutional Commissions are complemented at the statutory level by several laws. The 1987 RAC provides a general indication of their placement in the Philippine administrative system as well as a general description of their respective attributes and areas of concern,[528] with special laws usually providing the specific powers, duties, functions, and responsibilities within their respective regulatory areas of expertise.[529] For example, the CSC as provided in Subtitle A, Title I, Book V of the Revised Administrative Code, is particularly tasked to implement the Code of Conduct and Ethical Standards for Public Officer and Employees,[530] and the Civil Service Laws;[531] the COA as provided in Subtitle B, Title I, Book V of the Revised Administrative Code, is particularly tasked under R.A. 7226 to submit annual audit reports to Congress regarding the amounts obligated, treasury and funding warrants issued, and expenditures that all agencies and instrumentalities of the national government had made in favor of each municipality, province, and city;[532] and the COMELEC as provided in Subtitle C, Title I, Book V of the Revised Administrative Code, is particularly tasked to implement various election laws, such as the Omnibus Election Code of the Philippines,[533] the Law on Automated Elections,[534] the Overseas Absentee Voting Act,[535] among others.[536]

§3.3.1.1.1.1. Rulemaking Authority of Article IX Commissions

The 1987 Philippine Constitution directly vests Article IX Constitutional Commissions with rulemaking functions concerning pleadings and practice

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[527] *Lokin*, G.R. Nos. 179431-32, 180443, June 2010.
[528] V(I) RAC (1987). N.B. The 1987 RAC also echoes the constitutional provisions pertinent to the Independent Commissions.
[529] N.B. There are exceptions to this general framework. For example, the COA's functions, duties and responsibilities are particularly provided in Phil.Const. artIX(D) §2.
[530] RA 6713.
[531] PD 807; RA 2260, as amended.
[532] RA 7226 §1.
[533] BP Blg. 881.
[534] RA 9369; RA 8436.
[535] RA 9189.
[536] *See* RA 7166 on Synchronized National and Local Elections, and Electoral Reforms; *see also* RA 7056.

before them or any of their offices, with the only qualification being that such rules shall not diminish, increase, or modify substantive rights.[537] They are also statutorily exempted from the operation of the Revised Administrative Code's Book VII on Administrative Procedure[538]—which exemption is a notable difference between these Article IX Constitutional Commissions and the other types of administrative agencies. They therefore enjoy wide latitude in formulating their own rules of procedure.[539] Aside from the indispensable requirement of publication,[540] Article IX Constitutional Commissions need only consider the specific constitutional provision or the particular statutes delegating additional functions upon them in order to determine whether the law has imposed additional procedural requirements for their valid issuance of legislative rules and regulations.

§3.3.1.1.2. Office of the Ombudsman

The Office of the Ombudsman, which is the Philippine anti-graft agency, is another independent body created under Article XI of the 1987 Philippine Constitution.[541] The Ombudsman, as the protector of the people, is mandated to act promptly on complaints filed in any form or manner against public officials or employees of the government or any subdivision, agency or instrumentality thereof, including government owned or controlled corporations.[542] The Philippine Congress has also enacted R.A. 6770[543] to provide the Ombudsman with powers and functions in addition to those

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[537] *See* Phil.Const. art.IX(A) §6.

[538] *See* VII(1) RAC §1 (1987). N.B. The Office of the Ombudsman is not expressly exempted from the coverage of Book VII on Administrative Procedure, RAC (1987).

[539] The direct assignments of rulemaking to these independent constitutional bodies, Phil.Const. art.IX(A) §6; art.IX(C) §3; art.IX(D) §2(2) (1987), are somewhat similar to the constitutional grant of rulemaking authority to the Philippine Supreme Court, *id.* at art.VIII §5(5). In *Pates v. COMELEC*, G.R.No. 184915, June 30, 2009, where the Philippine Supreme Court discussed its own rulemaking authority, provides some understanding of what procedures these independent constitutional bodies should undergo in their conduct of rulemaking. ("Rulemaking is an act of legislation, directly assigned to us by the Constitution, that requires the formulation of policies rather than the determination of the legal rights and obligations of litigants before us. As a rule, rulemaking requires that we consult with our own constituencies, not necessarily with the parties directly affected in their individual cases, in order to ensure that the rule and the policy that it enunciates are the most reasonable that we can promulgate under the circumstances, taking into account the interests of everyone – not the least of which are the constitutional parameters and guidelines for our actions.")

[540] *See Tañada II*, 146 SCRA 446 (1986). (The publication of laws, rules and regulations is indispensable due to its due process implications.)

[541] Phil.Const. art.XI §§5-14.

[542] *Id.* at art.XI §12; *Uy v. Sandiganbayan*, G.R. Nos. 105965-70, March 20, 2001; Bernas, *1987 Philippine Constitution* 1164 (2009); Note, however, *Khan v. Ombudsman*, G.R.No. 125296, July 20, 2006 (The Ombudsman's jurisdiction over government owned or controlled corporations [GOCCs] extend only to those with original charters.)

[543] *See* RA 6770, known as the Ombudsman Act of 1989, available at http://www.ombudsman.gov.ph/docs/republicacts/Republic_Act_No_6770.pdf last accessed on January 8, 2016.

provided under the 1987 Philippine Constitution.[544] Its powers are largely investigative and prosecutorial with regard to criminal acts committed by public officers, [545] and adjudicative with regard to administrative disciplinary proceedings against erring public servants.[546]

§3.3.1.1.2.1. Rulemaking Authority of the Ombudsman

As for rulemaking, the 1987 Philippine Constitution has directly authorized the Ombudsman to promulgate its rules of procedure.[547] Although this authority has been extensively used in the context of the Ombudsman's conduct of preliminary investigation and administrative disciplinary proceedings,[548] it may utilize the same authority for purposes of promulgating its own procedures for the conduct of rulemaking.[549] However, unlike the Article IX Constitutional Commissions, the Office of the Ombudsman is not among those institutions that are expressly exempted from the operation of Book VII, 1987 RAC, on Administrative Procedure.[550] Accordingly, the Office of the Ombudsman may need to consider both the specific statutes that it is tasked to implement, as well as the requirements of Chapter 2, Book VII of the

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[544] *See Acop v. Ombudsman*, 248 SCRA 566; *Vasquez v. Alino*, 271 SCRA 67 (Ombudsman is by law authorized to investigate criminal offenses committed by public officers even if the offense is not related to the latter's office); *Lastimosa v. Vasquez*, 243 SCRA 497 (The Ombudsman is by law granted the power of contempt in its preliminary investigation proceedings.)

[545] *See Uy v. Sandiganbayan*, G.R.No. 105965-70, March 20, 2001; *Ombudsman v. Enoc*, G.R.No. 145957-68, January 25, 2002; *BIR v. Ombudsman*, G.R.No. 115103, April 11, 2002; *Laurel v. Desierto*, G.R.No. 145368, April 12, 2002; *Honasan v. Panel of Investigating Prosecutors*, G.R.No. 159747, April 13, 2004 (The power to conduct preliminary investigation of crimes committed by public officers is not exclusive to the Ombudsman, but a shared one that is concurrent with the Department of Justice.)

[546] *Ombudsman v. CA*, G.R.No. 160675, June 16, 2006 (Under RA 6770 §§24, 25, the Ombudsman has the administrative disciplinary authority to impose penalties in administrative cases, and to issue preventive suspension orders for public officers who have been administratively charged before it.) *See also Ombudsman v. Madriaga,* G.R.No. 164316, September 27, 2006*; Ledesma v CA,* G.R.No. 161629, July 29, 2005.

[547] *See* Phil.Const. art.XI, §13(8).

[548] *See* Ombudsman AO 7 (1990).

[549] The direct assignments of rulemaking to the Office of the Ombudsman, Phil.Const.art.XI §13(8), are somewhat similar to the constitutional grant of rulemaking authority to the Philippine Supreme Court, *id.* at art.VIII §5(5). Accordingly, *Pates v. COMELEC*, G.R.No. 184915, June 30, 2009, in which the Philippine Supreme Court discussed its own rulemaking authority, provides some understanding of what procedures the Ombudsman ought to provide in its conduct of rulemaking. ("Rulemaking is an act of legislation, directly assigned to us by the Constitution, that requires the formulation of policies rather than the determination of the legal rights and obligations of litigants before us. As a rule, rulemaking requires that we consult with our own constituencies, not necessarily with the parties directly affected in their individual cases, in order to ensure that the rule and the policy that it enunciates are the most reasonable that we can promulgate under the circumstances, taking into account the interests of everyone – not the least of which are the constitutional parameters and guidelines for our actions.")

[550] *See* VII(1) RAC §1 (1987). Note that the Office of the Ombudsman is not expressly exempted from the coverage of Book VII on Administrative Procedure.

1987 RAC, so as to to properly determine the mandatory procedures for rulemaking in order to validly issue legislative rules and regulations.[551]

§3.3.1.2. Constitutionally-Mandated Bodies

The 1987 Philippine Constitution also provides for specific agencies whose creation and completion are either partly or wholly dependent on legislation.[552]

§3.3.1.2.1.The Commission on Human Rights (CHR)

The CHR is constitutionally created to be an independent office.[553] Among its particularly enumerated powers and functions[554] are the tasks to investigate all forms of human rights violations involving civil and political rights, [555] and provide legal measures for the protection of human rights.[556] Like the other independent constitutional bodies, it is constitutionally authorized to adopt its operational guidelines and rules of procedure.[557] The CHR, however, is different from the Article IX Constitutional Commissions and the Office of the Ombudsman because its creation under the 1987 Philippine Constitution is incomplete, and its completion requires legislation.[558] Also, although it is constitutionally mandated to be independent, the CHR does not have the full panoply of safeguards accorded to the Article IX Constitutional Commissions and the Office of the Ombudsman. The term of office, other qualifications, and the disabilities of the CHR chair and members are dependent on legislation.[559] The power to appoint them is vested in the President without need for confirmation by the Commission on Appointments,[560] although their tenure in office cannot be made dependent on

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[551] N.B. This is particularly true as regards the powers and functions sourced purely from statute, and not from the 1987 Philippine Constitution.

[552] N.B. Many of these agencies were not provided for under the 1935 Philippine Constitution.

[553] Phil.Const. art.XIII §17, et.seq. (1987); *Bautista v. Salonga*, G.R.No. 86439, April 13, 1989.

[554] *See id.* at §18.

[555] *Id.* at §18(1).

[556] *Id.* at §18(3).

[557] *Id.* at §18(2).

[558] *See* V(II,A) RAC; *See also* EO 163 (1987).

[559] Phil.Const. art.XIII §17 (2).

[560] *Bautista v. Salonga*, G.R.No. 86439, April 13, 1989 ("Since the position of Chairman of the Commission on Human Rights is not among the positions mentioned in the first sentence of Sec. 16, Art. VII of the 1987 Constitution, appointments to which are to be made with the confirmation of the Commission on Appointments, it follows that the appointment by the President of the Chairman of the (CHR), is to be made without the review or participation of the Commission on Appointments. To be more precise, the appointment of the Chairman and Members of the Commission on Human Rights is not specifically provided for in the Constitution itself, unlike the Chairmen and Members of the Civil Service Commission, the Commission on Elections and the Commission on Audit, whose appointments are expressly vested by the Constitution in the

the pleasure of the President.[561] The CHR does not have fiscal autonomy,[562] even if the release of its approved annual appropriation is mandated to be automatic and regular.[563] It also does not possess the power of adjudication because its principal function is investigatory.[564]

The issue regarding the CHR's status as a commission created under the constitution has been settled in *CHR Employees Ass'n v. CHR,*[565] which declared that the CHR was not covered by the term "constitutional commissions" as contemplated by both the 1987 Philippine Constitution and the 1987 RAC.[566] Thus, although the CHR was made constitutionally independent of the Executive, it is not on the same level with the Article IX Constitutional Commissions.[567]

§3.3.1.2.1.1. Rulemaking Authority of the CHR

The CHR is constitutionally vested with the power to adopt its operational guidelines and rules of procedure.[568] Proceeding, however, from the Supreme Court's pronouncement in *CHR Employees Ass'n v. CHR,*[569] it appears that the CHR is not exempt from the operation of the 1987 RAC's Book VII on Administrative Procedure.[570] Accordingly, its conduct of substantive rulemaking is covered by the general procedural requirements laid down in Chapter 2, Book VII of the Code, and such other additional requirements prescribed by the specific statutes that it is implementing.

President with the consent of the Commission on Appointments."); Sarmiento III v. Mison, G.R. No. 79974, 17 December 1987, 156 SCRA 549.

[561] Bautista v. Salonga, G.R.No. 86439, April 13, 1989 ("Indeed, the Court finds it extremely difficult to conceptualize how an office conceived and created by the Constitution to be independent as the Commission on Human Rights-and vested with the delicate and vital functions of investigating violations of human rights, pinpointing responsibility and recommending sanctions as well as remedial measures therefor, can truly function with independence and effectiveness, when the tenure in office of its Chairman and Members is made dependent on the pleasure of the President. Executive Order No. 163-A, being antithetical to the constitutional mandate of independence for the Commission on Human Rights has to be declared unconstitutional.")

[562] CHR Employees Ass'n v. CHR, G.R.No. 155336, November 25, 2004. (Holding that the reclassification or upgrading of positions in the CHR needed the prior approval of the Department of Budget and Management.).

[563] Sec.17 (4), Art. XIII, 1987 PHIL. Const

[564] See Carino v. CHR, G.R.No. 96681, December 2, 1991 citing Bernas, *1987 Philippine Constitution* 503 (1988). ed., Vol. II p. 503

[565] CHR Employees Ass'n v. CHR, G.R.No. 155336, November 25, 2004.

[566] CHR Employees Ass'n v. CHR, G.R.No. 155336, November 25, 2004. ("From the 1987 Constitution and the Administrative Code, it is abundantly clear that the CHR is not among the class of Constitutional Commissions.")

[567] Carpio v. Executive Secretary, G.R.No. 96409, February 14, 1992.

[568] §18(2), Art. XIII, 1987 PHIL. Const.

[569] CHR Employees Ass'n v. CHR, G.R.No. 155336, November 25, 2004.

[570] See Section 1, Chapter 1, Book VII, 1987 PHIL. Revised Admin Code.

§3.3.1.2.2. Independent Central Monetary Authority (ICMA)

The 1987 Philippine Constitution mandates the establishment of a central monetary authority that is independent.[571] The monetary authority is constitutionally tasked to provide policy direction in the areas of money, banking, and credit;[572] and to supervise the operations of banks, and exercise regulatory powers over the operations of finance companies and other institutions performing similar functions, the particulars of which are prescribed by legislation.[573] Foreign loans may be incurred only in accordance with both the law and the regulations issued by the monetary authority.[574] As for the monetary authority's governing board, the Constitution sets forth certain criteria for membership therein but the Congress may prescribe additional qualifications and disabilities through legislation.[575] Until the Congress otherwise provides, the Central Bank of the Philippines—now known as the Bangko Sentral ng Pilipinas (BSP)—operating under existing laws, shall function as the central monetary authority.[576]

§3.3.1.2.2.1. Rulemaking by the ICMA

In terms of administrative procedures, the Central Bank of the Philippines is not included in the exceptions listed in Book VII of the 1987 RAC.[577] Accordingly, it falls within the coverage of Book VII of the 1987 RAC.[578] Hence, like all other statutorily created administrative agencies, the Central Bank's conduct of legislative rulemaking entails compliance with both the general requirements laid down in Chapter 2, Book VII on Rules and Regulations, and all the other special procedures required under the law that it is specifically tasked to implement.

§3.3.1.2.3. Independent Economic Planning Agency (IECPA)

The 1987 Philippine Constitution provides for the establishment of an independent economic and planning agency headed by the President, but leaves the details of the agency's creation, composition, powers and functions up to

[571] Section 20, Art. XII, 1987 PHIL. Const.
[572] Section 20, Art. XII, 1987 PHIL. Const.
[573] Section 20, Art. XII, 1987 PHIL. Const.
[574] Section 21, Art. XII, 1987 PHIL. Const.
[575] Section 20, Art. XII, 1987 PHIL. Const.
[576] Section 20, Art. XII, 1987 PHIL. Const.
[577] See Section 1, Chapter 1, Book VII, 1987 PHIL. Revised Admin Code.
[578] See Section 1, Chapter 1, Book VII, 1987 PHIL. Revised Admin Code.

legislation.[579] The agency is constitutionally tasked to recommend and implement continuing integrated and coordinated programs and policies for national development, after consultations with the appropriate public agencies, various private sectors, and local government units.[580] The National Economic and Development Authority (NEDA) as re-constituted under the 1987 RAC[581] continues to function as the independent planning agency.[582]

Under the 1987 RAC,[583] NEDA's primary responsibility of formulating continuing, coordinated and fully integrated social and economic policies, plans and programs is statutorily mandated to be based, among others, on the "maximum participation by and consultation with concerned private sector groups, community organizations and beneficiaries and local government units in order to ensure that priority needs are incorporated into such policies, plans, programs and projects."[584] The same Code also gives NEDA the primary responsibility of "studying, reviewing, formulating and recommending continuing, coordinated and fully integrated economic and development policies, plans and programs, including the formulation of annual and medium-term public investment programs, programming official development assistance in the form of grants and concessional loans from foreign governments and multilateral agencies and organizations and the monitoring and evaluation of plan implementation," which responsibility is statutorily conditioned upon the prior conduct of "due consultation with the private sector, community organizations and beneficiaries, local government units and appropriate public agencies."[585]

§3.3.1.2.3.1. Rulemaking by the IECPA

The NEDA is not within the listed exceptions in Book VII of the 1987 RAC.[586] The NEDA's conduct of substantive rulemaking thus requires compliance with both the general requirements laid down in Chapter 2 of the Code's Book VII on Rules and Regulations, and such other additional procedures as may be required under the specific laws that it is tasked to implement.

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[579] See Section 9, Art. XII, 1987 PHIL. Const.
[580] See Section 9, Art. XII, 1987 PHIL. Const.
[581] See Subtitle C, Title II, Book VII, E.O. 292 s. 1987.
[582] See Section 9, Art. XII, 1987 PHIL. Const. cf. Section 2, Chapt.1, Subtitle C, Title II, Book VII, E.O. 292 s. 1987.
[583] Subtitle C, Title II, Book V, E.O. 292 s. 1987.
[584] Section 3(3), Chapt.1, Subtitle C, Title II, Book VII, E.O. 292 s. 1987.
[585] Last par., Section 3, Chapt.1, Subtitle C, Title II, Book VII, E.O. 292 s. 1987.
[586] See Section 1, Chapter 1, Book VII, 1987 PHIL. Revised Admin Code.

§3.3.1.2.4. The Armed Forces of the Philippines (AFP)

The AFP is constitutionally required to be composed of a citizen armed force.[587] The 1987 Constitution provides certain limitations, duties, and functions upon the AFP, but leaves the details of that agency's creation and establishment largely up to legislation.[588] The 1987 RAC[589] places the AFP under the supervision and control of the Department of National Defense, except as may be provided by special laws.[590] In that regard, Congress has passed legislation specifically aimed at modernizing the AFP.[591]

§3.3.1.2.4.1. Rulemaking by the AFP

In terms of administrative procedure, Book VII of the 1987 RAC provides a limited exemption in favor of military establishments.[592] For purposes of rulemaking, military establishments need not comply with Chapter 2, Book VII on Rules and Regulations, for as long as the rule covers "matters relating exclusively to Armed Forces personnel."[593] For substantive rules covering all other matters that are not exclusive to AFP personnel, compliance with Book VII is necessary.[594] Congress may also prescribe in the specific laws to be implemented by the AFP such additional rulemaking procedures as it may deem fit for purposes of that law's implementation.

§3.3.1.3. Other Constitutionally Mandated Bodies

The 1987 Philippine Constitution also mandates the establishment of agencies by generally describing them in relation to their specific purposes or objectives, to wit:

> (1) an agency to promote the viability and growth of cooperatives as instruments for social justice and economic development.[595]

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[587] See Section 4, Art. XVI, 1987 PHIL. Const.
[588] See §4-5, Art. XVI, 1987 PHIL. Const. cf. Chapter 6, Subtitle II, Title VIII, Book IV, RAC (1987).
[589] See Chapter 6, Subtitle II, Title VIII, Book IV, RAC (1987).
[590] See Section 18, Chap.1, Subtitle II, Title VIII, Book IV, RAC (1987).
[591] See R.A. 7898 as amended by RA 10349, otherwise known as the Revised AFP Modernization Act.
[592] See Section 1, Chapter 1, Book VII, RAC (1987).
[593] See Section 1, Chapter 1, Book VII, RAC (1987).
[594] Note, however, that §9, Chap.2, Book VII, RAC (1987), provides for exemptions from the rulemaking requirement of public participation based on "impracticability," which exemption is concededly broad enough to cover matters of national security.
[595] Section 15, Art. XII, 1987 PHIL. Const.

(2) A special agency for disabled persons for rehabilitation, self-development and self-reliance, and their integration into the mainstream of society.[596]
(3) A national language commission composed of representatives of various regions and disciplines which shall undertake, coordinate, and promote researches for the development, propagation, and preservation of Filipino and other languages.[597]
(4) one police force, which shall be national in scope and civilian in character, to be administered and controlled by the National Police Commission.[598]

The manner and details of creating the foregoing agencies, including the grant of rulemaking authority and the procedures for their exercise thereof, are all matters that are dependent upon legislation. Accordingly, there is between them and the other statutorily created administrative agencies, very little difference in terms of institutional treatment at the constitutional level.

§3.3.2. Administrative Agencies at the Sub-Constitutional Level

Administrative agencies at the sub-constitutional level are created and organized by law.[599] Though the 1987 Philippine Constitution makes little mention of the details of the Philippine administrative bureaucracy, it assumes the latter's existence by generally referring to "agencies, departments, bureaus, offices, and instrumentalities" in several provisions scattered all through out its text.[600] Statutorily created administrative agencies have proliferated throughout the decades, and currently constitute a significant bulk of the Philippine administrative bureaucracy.[601] Their rise into prominence in today's modern regulatory state developed as a result of the traditional governmental

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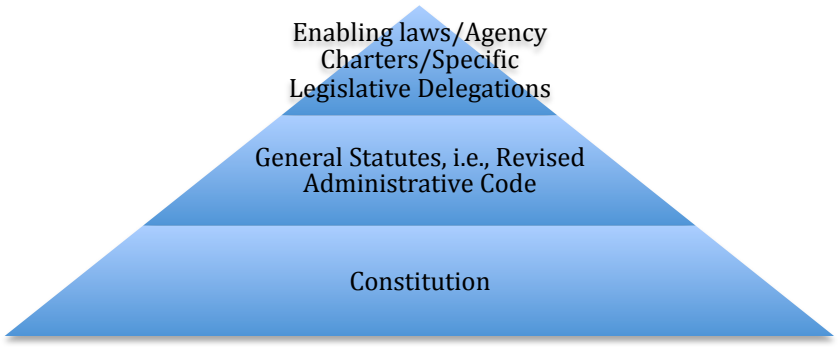
[596] Section 13, Art. XIII, 1987 PHIL. Const.
[597] Section 9, Art. XIV, 1987 PHIL. Const.
[598] Section 6, Art. XVI, 1987 PHIL. Const.; Carpio v. Executive Secretary, G.R.No. 96409, February 14, 1992. ("Article SVI, Section 6 merely mandates the statutory creation of a national police commission that will administer and control the national police force… In fact, it was stressed during the CONCOM deliberations that this commission would be under the President, and hence may be controlled by the President, thru his or her alter ego, the Secretary of Interior and Local Government.")
[599] See Item II, Chapter 3.1 of this work. By way of exception, there are administrative agencies that are constitutionally created.
[600] See Secs. 13, 14, 22, 25(3), Art. VI; Sections 11, 12, 13, 15, 16, 17, 18, 20 Art. VII; Sections 1, 12, Art.VIII; Section 2, Art. IX(A); Section 2(1), 3, 7, Art. IX(B); Section 2(4), 4 Art. IX(C); Sections 2(1) & 4, Art. IX(D); Section 21, Art. X; Section 14, Art. X; Sections 12, 13(1, 2, 5), Art. XI; Section 9, 10, 15 Art. XII; Secs. 13, 16, 18(9), Art.XIII, 1987 PHIL.. Const.
[601] *See* Bernas, *1987 Philippine Constitution* 686 (2009).

framework's perceived ineptitude, inadequacy, and inability to keep pace society's rapid technological and economic growth.[602]

§3.3.2.1. The Statutory Milieu of the Philippine Bureaucracy

The Philippine administrative bureaucracy is shaped and built pursuant to the framework of laws starting with the 1987 Philippine Constitution as the basic foundation; followed by the general statutes governing all administrative agencies in the Philippines; and then followed further by the various special laws that create administrative agencies, and delegate upon them specific powers, duties, functions, and responsibilities.



As illustrated above, the statutory framework that complements the broad organizational base provided by the 1987 Philippine Constitution is composed of two tiers—the first tier relates to the more specific legislative delegations of governmental authority embodied in special laws as well as the different agency charters, while the second tier relates to the general set of laws that cut across and govern all administrative agencies, such as the relevant provisions of the 1987 RAC.[603]

The relationship between the different laws falling under the two statutory tiers, however, is not as readily discernible and straightforward as the hierarchical relationship between the constitution and the statutes.[604] Nevertheless, these statutes are to be harmonized together in order to form a complete, coherent and intelligible system, consistent with the maxim—*interpretare et concordare leges legibus est optimus interpretandi modus*.[605]

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[602] Felix Frankfurter, The Public and Its Government, pp. 5-8 (1930).
[603] See Ople v. Torres, G.R.No. 127685, July 23, 1998.
[604] Art. 7, New Civil Code, RA 386.
[605] R.E. Agpalo, *Statutory Consturction* 269-270 (4th Ed., 1998); *Algura v. The Local Government Unit of the City of Naga*, G.R. No. 150135, October 30, 2006, 506 SCRA 81, 98; *Valencia v. Court of Appeals*, G.R. No. 122363,

§3.3.2.1.1. Tier 1: Enabling Laws and Agency Charters

Each administrative agency has a legislative charter that establishes its existence and organization, and vests it with specific powers pursuant to a valid legislative delegation of governmental authority.[606] The Philippine legislature may also pass enabling statutes that delegate additional powers, duties, functions and responsibilities to already existing agencies. Administrative agencies thus vary greatly in their details,[607] and no single definition captures each category completely.[608] Certain characteristics, however, are more typical than not,[609] and there are statutory and doctrinal norms generally applicable to all agencies that always have to be taken into account.[610] A proper overall appreciation of any particular government agency at the statutory level thus could not be achieved by just delving straight into, and looking exclusively at, the agency's legislative charter or its specific statutory delegation of authority. A solid and adequate knowledge of the relevant provisions of the 1987 RAC, among other statutes that are uniformly applicable to all agencies in general, is thus indispensable.

§3.3.2.1.2. Tier 2: 1987 Revised Administrative Code (1987 RAC)

April 29, 2003, 401 SCRA 666, 680-81; *Baares v. Balising*, G.R. No. 132624, March 13, 2000, 328 SCRA 36, 49; *Cabada v. Alunan III*, G.R. No. 119645, August 22, 1996, 260 SCRA 838, 848; *Republic v. Asuncion*, G.R. No. 108208, March 11, 1994, 231 SCRA 211; *Corona v. Court of Appeals*, G.R. No. 97356, September 30, 1992, 214 SCRA 378, 392; *Dreamwork Const'n v. Janiola*, G.R.No. 184861, June 30, 2009.

606 *Canonizado v. Aguirre*, 323 SCRA 312 (2000); *Tondo Medical Center Employees Ass'n v. CA*, 527 SCRA 746 (2007); *Buklod ng Kawani ng EIIB v. Zamora*, 360 SCRA 718 (2001); *Larin v. Executive Secretary*, 345 Phil 962 (1997). *See Biraogo v. Philippine Truth Commission*, G.R.Nos. 192935 & 193036, December 7, 2010 (Holding that the President's authority to create offices under P.D. 1416 & 1772 is "already stale, anachronistic, and inoperable."); *See also Banda v. Ermita*, G.R.No. 166620, April 2010, Carpio, J., separate and concurring (The creation and abolition of public offices, except for those created by the Constitution, is an unquestionable attribute of the broad and undefined legislative power of Congress. Neither the executive nor the judiciary is possessed with the inherent authority to reorganize the bureaucracy.)

607 Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michael E. Herz, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 29 (2nd Ed. [2011]).

608 See Hickman & Pierce, Jr., *Fed.Admin.Law* 10 (2014). N.B. Much of the variations result from legislative experimentation. Note, however, that the Philippine President has limited authority to alter the statutorily set organizational characteristics of certain agencies under the auspices of reorganization. See §31, Chap.10, Book III, RAC (1987). The President also has limited authority to assign offices and agencies not otherwise assigned by law to any department, or indicate to which department a government corporation or board may be attached. §5, Chap.1, Book IV, EO 292 s. 19987.

609 See Hickman & Pierce, Jr., *Fed.Admin.Law* 10 (2014). N.B. Much of the variations result from legislative experimentation. Note, however, that the Philippine President has limited authority to alter the statutorily set organizational characteristics of certain agencies under the auspices of reorganization. See §31, Chap.10, Book III, RAC (1987). The President also has limited authority to assign offices and agencies not otherwise assigned by law to any department, or indicate to which department a government corporation or board may be attached. §5, Chap.1, Book IV, EO 292 s. 19987.

610 See for example, Book VII, RAC (1987) on Administrative Procedure.

The 1987 RAC is the general law that governs all administrative agencies in the Philippines. Its provisions that generally apply to all administrative agencies, whether established under the Code or by other legislation,[611] constitute the statutory base necessary for properly understanding each and every administrative agency in the Philippines.

Passed in the wake of the 1986 People Power revolution and the birth of the 5th Philippine Republic, the Code was intended to embody the changes in administrative structures and procedures designed to serve the people;[612] and to incorporate the major structural, functional and procedural principles and rules of governance.[613] The Code was thus envisioned as a necessary means for addressing the risks and incidents of agency abuse, and for rationalizing the past century's unprecedented increase of administrative agencies and their expanding ability to wield even broader and more substantial governmental authority in a variety of different contexts.[614]

The Code first lays down the basic guiding principles and policies for the Philippine government[615] before fleshing out the governmental structure envisioned under the 1987 Philippine Constitution. After echoing the constitutional distribution of governmental powers[616] upon the legislative,[617] the judiciary,[618] the executive,[619] the constitutional commissions,[620] and the other constitutional bodies,[621] it then delves into the statutory details of the Philippine administrative bureaucracy under several Books.[622]

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[611] See *Easter Mediterranean Maritime Ltd. v. Surio*, G.R. No. 154213, August 23, 2012 (Holding that appellate jurisdiction over disciplinary proceedings decided by the Philippine Overseas Employment Administration resides with the Secretary of Labor in view of the latter's power of supervision and control under §38(1), Chap. 7, Title II, Book IV of the 1987 RAC *because it was not provided for by R.A. 8042); See* also *Boy Scouts of the Philippines v. COA,* G.R.No. 177131, June 7, 2011 (Holding that the relationship between the BSP constituted under R.A. 7278, and the Department of Education, was an "attachment" under §38(3), Chap. 7, Title II, Book IV of the 1987 RAC.)

[612] See 3rd Whereas Clause, RAC (1987).

[613] See 4th Whereas Clause, RAC (1987).

[614] The same phenomenon happened early on in the United States, resulting in the enactment of the U.S. Administrative Procedure Act. See Hickman & Pierce, Jr., *Fed.Admin.Law* 18-22 (2014).

[615] §1, Chap.1, Book II, RAC (1987).

[616] See Book II, E.O. 292 s. 1987.

[617] Chap.2, Book II, E.O. 292 s. 1987.

[618] Chap.4, Book II, E.O. 292 s. 1987.

[619] Chap. 3, Book II, E.O. 292 s. 1987.

[620] Chap. 5, Book II, E.O. 292 s. 1987.

[621] §29, Chap. 6, Book II, E.O. 292 s. 1987.

[622] See Book III on the Office of the President; Book IV on the Executive Branch; Book V on the Constitutional Commissions and other Constitutional Bodies; Book VI on National Government Budgeting; and Book VII on Administrative Procedure, RAC (1987).

In its Book IV, the Code deals the statutorily-created administrative bureaucracy by initially dedicating the first 14 chapters to establishing the framework for the organizational structure and attributes of,[623] as well as the administrative relationships within,[624] the different types of statutorily-created agencies, consisting of (i) the executive departments,[625] bureaus[626] and offices,[627] as well as (ii) the regulatory agencies and government owned or controlled corporations.[628] That framework, in turn, serves as the uniform frame of reference for the Code's subsequent treatment of the particular agencies under separate Titles of the same Book IV.[629]

The Code's Book VII, which institutionalizes the uniform statutory set of administrative procedures generally applicable to all administrative agencies, constitutes one of the past century's most important changes in the statutory landscape of Philippine administrative law.[630] As the first general statute on administrative procedure in the Philippines, Book VII of the 1987 RAC addresses the long-standing need for improving the uniformity of agency practices and procedures across the entire administrative bureaucracy.[631]

The general applicability of the Code can be gleaned from various provisions that mandate existing agencies to operate and function in accordance with the respective charters, laws, or orders creating, except only as otherwise provided in the Code.[632] All administrative agencies in the executive branch were likewise mandated to operate and function in accordance with their respective charters or laws creating them, except as otherwise provided in that Code or by law.[633] The Code also generally subjects all administrative

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[623] See Chap.1-6,10-14, Book IV, RAC (1987).
[624] See Chap.7-9, Book IV, RAC (1987).
[625] Chap.1-3, Book IV, RAC (1987).
[626] Chap.4 and 6, Book IV, RAC (1987).
[627] Chap.5 and 6, Book IV, RAC (1987).
[628] Chap.9, Book IV, RAC (1987).
[629] The 1987 RAC is divided into the Introductory Provisions, the 7 major books—consisting of (a) Book I on Sovereignty and General Administration, (b) Book II on Distribution of Powers of Government, (c) Book III on the Office of the President, (d) Book IV on the Executive Branch, (e) Book V on the Constitutional Commissions and other Constitutional Bodies, (f) Book VI on National Government Budgeting, and Book VII on Administrative Procedure—and the Final Provisions. Each Book is structurally subdivided into several titles, with each title being subdivided into several chapters consisting of sections containing particular provisions of law.
[630] Prior to the 1987 RAC's enactment, the Philippines lagged behind other countries in terms of having a statute on administrative procedure. The United States had already passed its Administrative Procedure Act (APA) as early as 1946.
[631] The same phenomenon happened early on in the United States, resulting in the enactment of the U.S. Administrative Procedure Act. See Hickman & Pierce, Jr., *Fed.Admin.Law* 18-22 (2014).
[632] See for example §43, Chap.6, Title II, Book IV, RAC (1987).
[633] Section 30, Chap. 10, Title III, Book III, RAC (1987).

agencies to the coverage of its Book VII on Administrative Procedure.[634] The Code was thus intended to pervade and supplant the antiquated statutory provisions and doctrines inconsistent with its fundamental tenets and principles. Accordingly, the processes and requirements prescribed by the Code for administrative actions are generally applicable notwithstanding the agency's creation, establishment, or specific grant of governmental authority under a separate or special law.[635]

§3.3.2.2. Administrative Agencies and the Office of the President

Under the 1987 RAC, administrative agencies are organizationally placed as a component part of the Office of the President.[636] The Code, however, also considers administrative agencies collectively as an entire branch under Book IV that is separate and distinct from the Office of the President Proper under Book III.[637] This separate treatment accords well with the substantial distinction that exists between the Office of the President Proper, on the one hand, and the administrative agencies in the executive branch, on the other.[638]

The Office of the President Proper is composed of different offices or units that advise and assist the President but do not wield substantial authority independently of the latter.[639] The Private Office provides direct services to the President and the first family;[640] the Executive Office is required to be fully responsive to the specific needs and requirements of the President to achieve

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[634] See §1, §2(1), Chap.1, Book VII, RAC (1987).

[635] §1, Chap.1, Book VII, RAC (1987). Like the U.S. APA, the 1987 RAC's processes and requirements for administrative action under Book VII constitute an important means of protections against government abuse. They are designed to perform the same functions as the Constitution's separation of powers, without hamstringing the government's ability to respond rapidly to the nation's problem. See Rachel E. Barkow, *Separation of Powers and the Criminal Law* 2-3 (2005). New York University Public Law and Legal Theory Working Papers. Paper 8. http://lsr.nellco.org/nyu_plltwp/8

[636] §21, Chap.8, Title II, Book III, RAC (1987).

[637] §22, Chap.8, Title II, Book III, RAC (1987).

[638] In the United States, case law has developed the test of "wielding substantial authority independently of the President" in order to determine whether units or entities in the Office of the President are to be considered as "agencies" that are covered by the Administrative Procedure Act, the Freedom of Information Act, and the Privacy Act, and other similar statutes. *Citizens for Responsibility and Ethics v. Office of Administration*, 566 F.3d 219 [DC Cir.2009]; *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 [1980]; *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 [DC Cir. 1996]; *Sweetland v. Walters*, 60 F.3d 852, 854 [DC Cir. 1995]; *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1042 [DC Cir. 1985]; *Meyer v. Bush*, 981 F.2d 1288, 1293, 1297 [DC Cir. 1993]; *Soucie v. David,* 448 F.2d 1067, 1073 (D.C. Cir. 1971).

[639] *See Meyer v. Bush,* 981 F.2d 1288, 1291-93 (D.C. Cir. 1993) (There are "three interrelated factors" relevant to determining whether those who both advise the President and supervise others in the Executive Branch exercise "substantial independent authority"…: (1) "how close operationally the group is to the President," (2) "whether it has a self-contained structure," and (3) "the nature of its delegat[ed]" authority; *See also Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 [DC Cir. 1996], (These three factors are not necessarily to be weighed equally; rather, each factor warrants consideration insofar as it is illuminating in the particular case.)

[640] *See* §24, Chap.9(A), Title III, Book III, RAC (1987).

the purposes and objectives of the latter's office;[641] the Common Staff Support System—consisting of the Cabinet Secretariat, the Presidential Management Staff, the General Government Administration Staff, and the Internal Administrative Staff—facilitates cabinet meetings, provides staff assistance and staff support to the President and his/her office, as well as render auxiliary and support services for the internal administration of the President's office;[642] and the Presidential Assistant/Advisers System merely provides advisory or consultative services to the President.[643] The foregoing offices are quite unlike administrative agencies because they are confined to advising or assisting the President and are not vested by law, or by authority of law, with discretion that can be exercised independently of the President.[644] From the standpoint of administrative law, those offices are considered internal to that of the President, and they are not technically considered as separate administrative agencies for as long as their functions remain within that realm.[645]

Administrative agencies, on the other hand, are conceptually separable from the internal units of the Office of the President proper because their functions go beyond merely assisting and providing advisory and consultative services to the President. Administrative agencies are vested by law with substantial authority[646] or discretion that can be exercised independently of the President,[647] which authority can range from those that are executive in nature[648] to those that are either judicial[649] or legislative[650] in essence.[651] Thus,

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[641] See Chap.9(B), Title III, Book III, RAC (1987) on the Executive Office.

[642] See §28, Chap.9(C), Title III, Book III, RAC (1987).

[643] See §29, Chap.9(D), Title III, Book III, RAC (1987).

[644] See *Meyer v. Bush,* 981 F.2d 1288, 1291-93 (D.C. Cir. 1993); *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 [DC Cir. 1996].

[645] "Dual-hat" issues may arise when an official or a group of officials in the Office of the President proper serve in dual or multiple roles. *See Ryan v. Department of Justice,* 617 F.2d 781, 789 (D.C. Cir. 1980) (unit or official that is part of agency and has non-advisory functions cannot be "non-agency in selected contexts on a case-by-case basis"), and *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 156 (1980) (notes made by National Security Adviser "in his capacity as Presidential adviser, only" not agency records despite NSA's dual role as official of NSC). The exercise by those offices of substantial authority or discretion independent of the President shall render them subject to the general laws applicable to administrative agencies, such as Book VII of the 1987 RAC.

[646] See *Meyer v. Bush,* 981 F.2d 1288, 1291-93 (D.C. Cir. 1993) (There are "three interrelated factors" relevant to determining whether those who both advise the President and supervise others in the Executive Branch exercise "substantial independent authority"…: (1) "how close operationally the group is to the President," (2) "whether it has a self-contained structure," and (3) "the nature of its delegat[ed]" authority; See also *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 [DC Cir. 1996], (These three factors are not necessarily to be weighed equally; rather, each factor warrants consideration insofar as it is illuminating in the particular case.)

[647] See *Meyer v. Bush,* 981 F.2d 1288, 1291-93 (D.C. Cir. 1993); *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558, 565 [DC Cir. 1996].

[648] Relating to enforcement and administration, for example fact-finding and investigation. *See Joson v. Torres*, 290 SCRA 279, 303 (1998); *DENR v. DENR Region 12 Employees*, G.R.No. 149724, August 19, 2003; *Angeles v. Gaite*, G.R.No. 165276, November 25, 2009; *First Women's Credit Corp. v. Perez*, 490 SCRA 774 (2006); *DOH v.*

while administrative agencies generally retain their executive character, they are not purely executive but are only predominantly so,[652] because they are vested

Camposano, 496 Phil.886, 896-897 (2005); *Biraogo v. Philippine Truth Commission of 2010*, G.R.Nos. 192935, 193036, December 7, 2010.

[649] *Biraogo v. Philippine Truth Commission of 2010*, G.R.Nos. 192935, 193036, December 7, 2010 citing *Smart Communications, Inc. et al. v. NTC*, 456 Phil. 145, 156 (2003). ("…Quasi-judicial powers involve the power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by law itself in enforcing and administering the same law. In simpler terms, judicial discretion is involved in the exercise of these quasi-judicial power, such that it is exclusively vested in the judiciary and must be clearly authorized by the legislature in the case of administrative agencies.")

[650] *Smart Communications, Inc. et al. v. NTC*, 456 Phil. 145, 156 (2003).

[651] For a clearer understanding of the amalgam of governmental authority that an administrative agency can exercise, see *Mendoza v. COMELEC*, G.R.No. 188308, October 15, 2009 (Explaining the differences between an administrative agency's exercise of powers that are (a) essentially executive in nature; (b) quasi-judicial, and (b) quasi-legislative.)

[652] The statement that "all executive and administrative organizations are adjuncts of the executive department," See *Joson v. Torres*, 290 SCRA 279, 303 (1998); *DENR v. DENR Region 12 Employees*, G.R.No. 149724, August 19, 2003), is inaccurate in that it fails to account for the existence of administrative agencies that are constitutionally independent from the President, such as the CSC, COA, COMELEC, CHR, and the Office of the Ombudsman. The statement also does not imply that all administrative agencies are solely executive in nature, and thus subject to the exclusive control of the President on all functions specifically delegated upon them by legislation. Neither does it mean that the President's "control," §17, Art.VII, 1987 PHIL. Const., is absolute in all areas in which administrative agencies function because the power constitutionally vested upon the President relates only to executive power. See §1, Art.VII, 1987 PHIL. Const. Under the functionalist approach, Congress is free to allocate authority to subordinate institutions as long as the "overall character or quality" of the relationships between those institutions and the named heads of government is consistent with the latters' performance of their core functions, see *Gary Lawson, Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 857-60 (1990). Accordingly, Congress has not only created administrative agencies whose functions are purely executive, but also further vested many of them with the authority to issue legislative rules that have the force of law, or with the limited jurisdiction to adjudicate certain classes of controversies, or both. *See Biraogo v. Philippine Truth Commission of 2010*, G.R.Nos. 192935, 193036, December 7, 2010("…judicial discretion is involved in the exercise of…quasi-judicial power, such that it is exclusively vested in the judiciary and must be clearly authorized by the legislature in the case of administrative agencies.") Philippine courts have been liberal about validating even the broadest Congressional grants of agency rulemaking and adjudicatory authority for as long as the agency's "power to act in such manner is incidental to or reasonably necessary for the performance of the executive or administrative duty entrusted to it," see *Smart Communications v. NTC*, G.R.No. 151908, 152063, August 12, 2003, because the agencies concerned still retain their "essentially executive or administrative nature." *Id.* Considering that agencies are currently exercising in a subordinate delegated capacity an amalgam of the three great powers of government, it bears reasoning that the President's level of control over an administrative agency and its functions must necessarily correlate with the degree in which the executive nature pervades the governmental powers exercised by the agency. Thus, the President's power of control is at its highest over the administrative agency when the governmental authority exercised by the latter are purely executive or administrative in nature, *see Joson v. Torres*, 290 SCRA 279, 303 (1998); *DENR v. DENR Region 12 Employees*, G.R.No. 149724, August 19, 2003, such as those that are fact-finding or investigatory. *See Angeles v. Gaite*, G.R.No. 165276, November 25, 2009; *First Women's Credit Corp. v. Perez*, 490 SCRA 774 (2006); DOH v. Camposano, 496 Phil.886, 896-897 (2005); *Biraogo v. Philippine Truth Commission of 2010*, G.R.Nos. 192935, 193036, December 7, 2010. The President's power of control is at its lowest when the administrative agency exercises powers that are in nature either legislative (substantive rulemaking) or judicial (adjudication), or both—because powers that are legislative or judicial in nature are not for the President to directly exercise under §1, Art.VII, 1987 PHIL. Const, or to delegate under the Doctrines of Qualified Political Agency and Alter Ego, *see Joson v. Torres*, 290 SCRA 279, 303 (1998); *DENR v. DENR Region 12 Employees*, G.R.No. 149724, August 19, 2003 (Articulating that the doctrines pertain to "…the multifarious executive and administrative functions of the Chief Executive…"); *see also Biraogo v. Philippine Truth Commission of 2010*, G.R.Nos. 192935, 193036, December 7, 2010 citing *Smart Communications, Inc. et al. v. NTC*, 456 Phil. 145, 156 (2003) ("…judicial discretion is involved in the exercise of…quasi-judicial

by law with an amalgam of functions that often combine in essence—albeit in a subordinate capacity—the three great governmental powers that are constitutionally divided among the principal institutions of the President, Congress and the courts.[653] The differences in the essential nature of the particular power vested upon them, in turn, also informs the dynamics of their respective relationships as subordinates not only to the President, but also to the two other principal institutions of government.[654]

§3.3.2.3. Classification of Statutorily Created Administrative Agencies

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power, such that it is exclusively vested in the judiciary and must be clearly authorized by the legislature in the case of administrative agencies"); *Cario v. CHR*, 204 SCRA 483 (1991) (Differentiating the power to investigate as being executive as opposed to the power to adjudicate which is judicial.)

[653] See §1, Art.VI; §1, VII; §1, VIII, 1987 PHIL. Const.

[654] Though administrative agencies are less susceptible to the rigors of the constitutional separation of powers principle as the 3 principal institutions (the President, the Congress, and the Courts) in view of the vesting clauses, see §1, Art.VI; §1, VII; §1, VIII, 1987 PHIL. Const., cf. §1(8), Chap.1, Book II, RAC (1987), the same separation of powers principle preclude any of the three principal institutions from directly controlling the agency's exercise of specific powers that essentially relate to either of the other principal institutions because doing so would constitute an indirect incursion into matters that are directly prohibited by the Constitution. This notion is particularly relevant with regard to the Philippine President who is constitutionally vested only with executive power, and whose constitutional power of control over administrative agencies should thus be necessarily limited to the latter's subordinate exercise of executive power. Though past Philippine constitutions and administrative codes had been interpreted to allow the President's exercise of almost absolute control over agencies—to the point of being able to directly exercise powers that are by nature legislative, see *Araneta v. Gatmaitan*, 101 Phil. 328 (1957), and adjudicatory, *See* EO 19 s. 1966—statutory changes have already been made in the 1987 RAC to rationalize the executive power of control over the administrative bureaucracy. Accordingly, the 1987 RAC provides for various administrative relationships between the administrative agencies and the executive branch departments, each of which provides for different levels of independence from departmental control depending upon the governmental powers being exercised by the administrative agency concerned. The 1987 RAC also provides for administrative procedures for the agency's exercise of substantive rulemaking, also known as legislative rulemaking, *see* Chap.2, Book VII, RAC (1987), as well as agency adjudication. *See* Chap.3, Book VII, RAC (1987). Congress has also been chipping away at presidential appellate jurisdiction over agency adjudications in specific areas. *See for example* House Bill No. 3214 (expanding the jurisdiction of the Court of Appeals to include judgments of the Housing and Land Use Regulatory Board [HLURB], and R.A. 7902 (expanding the appellate jurisdiction of the Court of Appeals to cover decisions of quasi-judicial agencies). Case law has been slow to follow, but it is evolving. *See Tuason v. RD of Caloocan*, G.R.No. 70484, January 29, 1988 (Striking down the President's performance of "what in essence is a judicial function..." or "an exercise of jurisdiction" when he "made a determination of facts, and applied the law to those facts, declaring what the legal rights of the parties were in the premises"), *St. Martin's Funeral Home v. NLRC*, G.R.No. 130866, September 16, 1998. The Philippine Supreme Court has yet to make a current and definitive ruling that rationalizes all its pre and post-martial law doctrine on the matter. For its part, the President's Office has been reluctant in abdicating it's expansive, martial law era ability to undertake acts that are essentially judicial in nature. Despite the current absence of legislative power, the President has issued administrative orders renewing its appellate jurisdiction over agency adjudications. *See* AO 22 s. 2011 and its predecessors, EO 19 s. 1966, AO 18 s. 1987. (For an in-depth discussion on Presidential Appellate Review of Agency Adjudications, *see* Mariel Cristina B. Sadang, *The History of the Exercise of Presidential Appellate Review of Administrative Decisions in Adjudication Proceedings and the Unconstitutionality of the Exercise of such Power With Respect to the Housing and Land Use Regulatory Board*, [January 2016] J.D. thesis pending publication and filing in the Professional Schools Library, Ateneo De Manila University.

In terms of organizational structure, statutorily created administrative agencies are covered under Book IV of the Code, which provides the general framework of the administrative bureaucracy[655] before proceeding onto the several Titles covering the particulars for each executive department.[656] As part of that general framework, the Code lays down the hierarchy that exists within and between all statutorily created administrative agencies,[657] and describes the different types of administrative relationships among them.[658] Interestingly enough, the administrative relationships set by the Code correlate with the varying degrees in which the executive and administrative nature predominates within each class of agencies,[659] and correspond well with the different levels of institutional independence provided by law for agencies falling within each respective class.[660]

Statutorily created administrative agencies in the Philippines generally fall within two broad categories, depending on the different types of administrative relationships provided by the 1987 RAC. These categories are: (a) Traditional

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[655] Chap.1-14, Book IV, RAC (1987). Note that the general framework applies, as a default rule, to all executive branch administrative agencies whether or not established under the 1987 RAC, or under special legislation. See *Easter Mediterranean Maritime Ltd. v. Surio*, G.R. No. 154213, August 23, 2012 (Holding that appellate jurisdiction over disciplinary proceedings decided by the Philippine Overseas Employment Administration resides with the Secretary of Labor in view of the latter's power of supervision and control under §38(1), Chap. 7, Title II, Book IV of the 1987 RAC *because it was not provided for by R.A. 8042); See* also *Boy Scouts of the Philippines v. COA,* G.R.No. 177131, June 7, 2011 (Holding that the relationship between the BSP constituted under R.A. 7278, and the Department of Education, was an "attachment" under §38(3), Chap. 7, Title II, Book IV of the 1987 RAC.)

[656] See Title I to Title XVIII, Book IV, RAC (1987) on the following departments: (i) Foreign Affairs, (ii) Finance, (iii) Justice, (iv) Agriculture, (v) Public Works and Highways, (vi) Education, Culture and Sports, (vii) Labor and Employment, (viii) National Defense, (ix) Health, (x) Trade and Industry, (xi) Agrarian Reform, (xii) Local Government, (xiii) Tourism, (xiv) Environment and Natural Resources, (xv) Transportation and Communications, (xvi) Social Welfare and Development, (xvii) Budget and Management, (xviii) Science and Technology. Note, however, that other government agencies and departments have been created under subsequent legislation. See for example, R.A. 7638 known as the Department of Energy Act of 1992; R.A. 7924, creating the Metropolitan Manila Development Authority headed by a cabinet level chairman. Philippine Presidents have also introduced changes in the governmental structure by exercising their continuing statutory authority to reorganize the executive department. Sec. 31, Chap. 10, Title III, Book III, RAC (1987); See EO 230 s. 1987, reorganizing the National Economic Development Authority (NEDA); EO 366 s. 2004, DIRECTING A STRATEGIC REVIEW OF THE OPERATIONS AND ORGANIZATIONS OF THE EXECUTIVE BRANCH AND PROVIDING OPTIONS AND INCENTIVES FOR GOVERNMENT EMPLOYEES WHO MAY BE AFFECTED BY THE RATIONALIZATION OF THE FUNCTIONS AND AGENCIES OF THE EXECUTIVE BRANCH.

[657] Chap.1-14, Book IV, RAC (1987).

[658] See §38, Chap. 7; Chap.8; Chap.9, Book IV, RAC (1987).

[659] *See,* functionalist approach to the agency's exercise of governmental authority. *Cf.* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 857-60 (1990). ("The functionalist thus infers that Congress is free to allocate authority as it pleases among subordinate institutions (however formalists would characterize them), as long as the "overall character or quality" of the relationships between those the institutions and the named heads of government is consistent with the latters' performance of their core functions.")

[660] See Chap.7, 8, 9, Book IV, RAC (1987).

Executive Branch Agencies, and (b) Independent Agencies. These broad types of agencies are differentiated in terms of the level of independence and autonomy that the agencies enjoy in the exercise of their respective functions.

§3.3.2.3.1. Traditional Executive Branch Agencies

Traditional Executive Branch Agencies consist of the Departments[661] and the agencies within and under each of them[662] that are subject to the agency head's direct line of authority in terms of supervision and control.[663] The linear hierarchy starts above the Department, with the President at the constitutional level expressly having control over "all executive departments, bureaus and offices;"[664] then proceeds at the statutory level, with each executive department exercising control over the executive bureaus and offices under them;[665] and with each executive bureau exercising control over the subordinate executive offices, otherwise known as the regional and field offices.[666]

The 1987 RAC provided in Titles I to XVIII of its Book IV the initial set of Departments in the administrative bureaucracy of the 5th Republic of the

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[661] See Chapter 1, Book IV, RAC (1987).
[662] See Chapter 2-5, Book IV, RAC (1987).
[663] See Chap.8, Book IV, RAC (1987).
[664] §17, Art. VII, 1987 PHIL. Const. Oddly enough, the control clause seems to limit the President's power of control to "all executive departments, bureaus, and offices," while other constitutional provisions provide express reference to the other types of administrative agencies, such as commissions, or boards, §16, Art. VII, 1987 PHIL. Const., and government owned and controlled corporations (GOCCs), §13, Art.VII, 1987 PHIL. Const. One of the constitutional framers, Fr. Joaquin Bernas, is of the opinion that the Philippine President's constitutional power of control is not absolute, and is largely statutory as to certain government instrumentalities—such as government owned and controlled corporations—that in legal category are not on the same level as executive departments, bureaus, or offices. In such instances, the President's power of control may be removed by the legislature depending on the nature of the agency's functions. *See* Bernas, *1987 Philippine Constitution* 894 (2009. "Unlike executive departments, bureaus, or offices, however, which by constitutional mandate must be under the Executive's control, GOCCs may be removed by the legislature form the Executive's control when the nature of their functions is changed). This view, in turn, is supported both at the constitutional level by the aforementioned text of the 1987 PHIL. Const., and at the statutory level by the administrative relationships established by the 1987 RAC and special laws. See Chap.7-8, Book IV, RAC (1987); R.A. 10149. Old pre-1987 case law, on the other hand, have upheld the President's exercise of control over a particular GOCC, NAMARCO, based mainly on specific statutory provisions indicating that NAMARCO had been statutorily placed under the President's direct line of control via the OEC Administrator, and that NAMARCO's functions "partake of the nature of government bureaus or offices." *See NAMARCO v. Arca*, 9 SCRA 648 (1969) (Holding that the President may review and reverse the NAMARCO Board decision dismissing one of its personnel because NAMARCO's statutory framework under the Reorganization Act of 1950 and Executive Order No. 386 s. 1959 shows that its functions "partake of the nature of government bureaus or offices" and that it was statutorily placed under the Executive's control powers.)
[665] §39, Chap.8, Book IV, RAC (1987).
[666] §41, Chap.8, Book IV, RAC (1987).

Philippines.[667] Those Titles, however, were not meant as a finite listing of the departments covered by the Code. The Code mandates that the Executive Branch shall have such Departments as are necessary (a) for the functional distribution of the work of the President and (b) for the performance of their functions.[668] It also generally defines a "Department" by referring to it as an "executive department created by law,"[669] and includes within that definition any instrumentality[670] having or assigned the rank of a department, regardless of its name or designation.[671] The Code thus includes within its general coverage both existing and future departments in the executive branch.[672]

Through the years, statutes have created new Departments.[673] To date, there are departments covering each of the following areas: (i) Foreign Affairs,[674] (ii) Finance,[675] (iii) Justice,[676] (iv) Agriculture,[677] (v) Public Works and Highways,[678] (vi) Education,[679] (vii) Labor and Employment,[680] (viii) National Defense,[681] (ix) Health,[682] (x) Trade and Industry,[683] (xi) Agrarian Reform,[684] (xii) Local Government,[685] (xiii) Tourism,[686] (xiv) Environment and Natural

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667 The 1987 RAC effectively repealed or modified all laws, decrees, orders, rules and regulations, or portions thereof, inconsistent with it. See §27, Final Provisions, Book VII, E.O. 292 s. 1987

668 §1, Chap.1, Book IV, RAC (1987).

669 §2(7), Introductory Provisions, RAC (1987).

670 §2(10), Introductory Provisions, RAC (1987). "(10) Instrumentality refers to any agency of the National Government, not integrated within the department framework vested with special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter. This term includes regulatory agencies, chartered institutions and government-owned or controlled corporations."

671 §2(7), Introductory Provisions, RAC (1987).

672 Note that the Philippine statutory concept of a "Department" digresses from that of *Freytag v. Commissioner*, 501 U.S. 868 (1991) (In holding that the U.S. Tax Court was not a "Department," the Court limited the term "Departments" to Cabinet-level departments for purposes of determining whether the agency head falls within the term "Heads of Departments" which could be vested with the power to appoint. The U.S. Constitution's Appointments Clause prevents Congress from distributing the appointing power too widely by limiting the actors in whom Congress may vest the power to appoint because "widely distributed appointment power subverts democratic government." *Id.* at 886-888.) The Phil. Const., on the other hand, authorizes Congress to vest the power to appoint lower rank officers to heads of departments, agencies, commissions, or boards.)

673 *See* R.A. 7638, known as the "Department of Energy Act of 1992."

674 http://dfa.gov.ph/index.php last accessed on March 11, 2016.

675 http://www.dof.gov.ph/ last accessed on March 11, 2016.

676 http://doj.gov.ph/ last accessed on March 11, 2016.

677 http://www.da.gov.ph/ last accessed on March 11, 2016.

678 http://www.dpwh.gov.ph/ last accessed on March 11, 2016.

679 http://www.deped.gov.ph/ last accessed on March 11, 2016.

680 http://www.dole.gov.ph/ last accessed on March 11, 2016.

681 http://www.dnd.gov.ph/ last accessed on March 11, 2016.

682 http://www.doh.gov.ph/ last accessed on March 11, 2016.

683 http://www.dti.gov.ph/dti/ last accessed on March 11, 2016.

684 http://www.dar.gov.ph/ last accessed on March 11, 2016.

685 http://www.dilg.gov.ph/ last accessed on March 11, 2016.

686 http://www.tourism.gov.ph/pages/default.aspx last accessed on March 11, 2016.

Resources,[687] (xv) Transportation and Communications,[688] (xvi) Social Welfare and Development,[689] (xvii) Budget and Management,[690] and (xviii) Science and Technology.[691] In addition to the foregoing, the President has also exercised the continuing power of reorganization provided by the Code[692] to elevate agencies, such as the Housing and Urban Development Coordinating Council (HUDCC), into a departmental level organization.[693] Congress, for its part, has also passed special laws creating other cabinet-level agencies, some of which—like the Department of Energy under R.A. 7638[694]—are hewed closely in accordance with general provisions in the 1987 RAC in terms of organizational structure, powers, duties and functions; while others—like the Governance Commission for Government Owned and Controlled Corporations (GCG) under R.A.10149[695]—have organizational features, as well as powers, duties, and functions, that deviate in some special details from the Code's general provisions.[696] Statutes have also created various other instrumentalities such as the Metropolitan Manila Development Authority (MMDA), which is headed by a Chairperson holding the rank of a cabinet secretary.[697] Legislative and executive experimentation in this area continues to this very day.

§3.3.2.3.1.1. The Department Proper

Under the 1987 RAC, each Department Proper is headed by a Secretary[698] who is assisted in his or her office by the Undersecretaries,[699] the Assistant Secretaries,[700] and their immediate offices;[701] and by the major staff

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687 http://www.denr.gov.ph/ last accessed on March 11, 2016.
688 http://www.dotc.gov.ph/ last accessed on March 11, 2016.
689 http://www.dswd.gov.ph/ last accessed on March 11, 2016.
690 http://www.dbm.gov.ph/ last accessed on March 11, 2016.
691 http://www.dost.gov.ph/ last accessed on March 11, 2016.
692 §31, Chap. 10, Title III, Book III, RAC (1987).
693 *See* EO 90 s. 1986 in relation to EO 357 s. 1989 and EO 20 s. 2001.
694 R.A. 7638, otherwise known as the Department of Energy Act of 1992; *See* http://www.doe.gov.ph/ last accessed on March 11, 2016.
695 R.A.10149.
696 For example, the GCG is composed as a 5 member commission attached to the Office of the President, headed by a Chairman with a Cabinet Secretary rank, two members with Undersecretary ranks, and two ex-officio members in the persons of the Secretary of Finance and the Secretary of Budget & Management. §5-6, Chap.II, R.A. 10149. Also, unlike other department level agencies that exercise supervision and control over subordinate agencies under their jurisdiction, the GCG mainly acts as a central advisory, monitoring, and oversight body with authority to formulate, implement and coordinate policies for the effective governance of government-owned and controlled corporations. §5, Chap.II, R.A. 10149.
697 *See* Republic Act No. 7924.
698 §6-9, Chap.2, Book IV, RAC (1987).
699 §3(1, 2), Chap.1; §10, Chap.2, Book IV, RAC (1987).
700 §3(3), Chap.1; §11, Chap.2, Book IV, RAC (1987).
701 §3, Chap.1, Book IV, RAC (1987).

units that perform the following department services:[702] (a) Planning,[703] (b) Financial and Management,[704] (c) Administrative,[705] (d) Technical,[706] and (e) Legal.[707]

Department Secretaries are members of the President's Cabinet, and as such, their primary function is to act as adjuncts of the President in the latter's exercise of the executive power vested by the Constitution.[708] As heads of departments, they are subject to the exercise of political oversight and share the President's accountability to the people.[709] Under the doctrine of qualified political agency, also known as the alter ego doctrine, all executive and administrative organizations are adjuncts of the Executive Department, the heads of the various executive departments are assistants and agents of the Chief Executive, and, except in cases where the Chief Executive is required by the Constitution or law to act in person or the exigencies of the situation demand that he act personally, the multifarious executive and administrative functions of the Chief Executive are performed by and through the executive departments, and the acts of the Secretaries of such departments, performed and promulgated in the regular course of business, are, unless disapproved or reprobated by the Chief Executive, presumptively the acts of the Chief Executive.[710] Each head of a department is, and must be, the President's alter ego in the matters of that department where the President is required by law to exercise authority.[711] In that capacity, Department Secretaries have been able to exercise the President's power of control over the executive bureaucracy,[712] subject to the limitations set by law.[713]

Being alter egos to the President, the Department Secretaries exercise executive power are presumed to be by virtue of the President's delegation thereof upon them. They also occupy their positions because of the great trust

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[702] §3(4), Chap.1;§12, Chap.3, Book IV, RAC (1987).
[703] §13, Chap.3, Book IV, RAC (1987).
[704] §14, Chap.3, Book IV, RAC (1987).
[705] §15, Chap.3, Book IV, RAC (1987).
[706] §16, Chap.3, Book IV, RAC (1987).
[707] §17, Chap.3, Book IV, RAC (1987).
[708] *See* §1, Art.VII, 1987 PHIL. Const.
[709] *See Freytag v. Commissioner*, 501 U.S. 868, 886 (1991); *See also U.S. v. Germaine*, 99 U.S. 508, 510-511 (1879).
[710] *Villena v. Secretary of Interior*, 67 Phil 451, 463 (1939); *Angeles v. Gaite*, G.R.No. 165276, November 25, 2009.
[711] *Villena, id.* at 464 citing *Myers v. United States*, 272 U.S. 52 at 133 (1926).
[712] *See De Villa v. City of Bacolod*, G.R. No. 80744, September 20, 1990; *Mondano vs. Silvosa*, 97 Phil. 143,148: *Tuazon vs. Magallanes, Co. Inc.*, G.R. No. L-27811, October 17, 1967; *Lacson vs. Romero*, 84 Phil. 740, 759. N.B.
[713] Unlike the Philippine President, Department Secretaries are not principally vested with executive power, Phil. Const. art.VII §1. As adjuncts or alter egos, they wield executive power in a derivative, delegated, and therefore limited capacity, subject to the limitations set by constitutional and statutory provisions.

and confidence reposed upon them by the Chief Executive.[714] Their respective cabinet offices are therefore highly and predominantly executive and administrative in nature.[715] It should be emphasized, however, that although the nature of their offices are executive to the highest degree, Department Secretaries are not confined to performing purely executive functions.[716] Many of them also exercise rulemaking[717] and adjudicatory functions[718] as delegated by specific statutes, in which instances the control and supervision over their functions are not exclusively with the President.[719]

§3.3.2.3.1.1.1.Departmental Supervision & Control

The Secretary exercises departmental supervision and control pursuant to the provisions of the Code and other statutes. The Code defines supervision and control as including the "authority to act directly whenever a specific function is entrusted by law or regulation to a subordinate; direct the performance of duty; restrain the commission of acts; review, approve, reverse or modify acts and decisions of subordinate officials or units; determine priorities in the execution of plans and programs; and prescribe standards, guidelines, plans and programs."[720] Case law defines the power of control as the power of an officer to alter or modify or nullify or set aside what a subordinate officer has done in the performance of his duties and to substitute the judgment of the former for that of the latter.[721] Thus, officers in control lay down the rules in the performance or accomplishment of an act. If these rules

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[714] *Pimentel v. Ermita*, G.R.No 164978, October 13, 2005.

[715] Note the functionalist approach to the agency's exercise of governmental authority. Cf. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 857-60 (1990). ("The functionalist thus infers that Congress is free to allocate authority as it pleases among subordinate institutions (however formalists would characterize them), as long as the "overall character or quality" of the relationships between those the institutions and the named heads of government is consistent with the latters' performance of their core functions.")

[716] §7(1, 6, 8), Chap.2, RAC (1987); Note that the power under §7(5) is executive with regard to the investigative function.

[717] §7 (2, 3, 4), Chap.2, RAC (1987).

[718] §7 (7), Chap.2; §19-23, Chap.4, RAC (1987).

[719] *See Kendall v. U.S.*, 37 US 524, 525-526 (1838) (The Court rejected the postmaster's argument that it control and supervision over his office resides only with the President. "It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power to control the legislation of Congress and paralyze the administration of justice." To contend that the obligations imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible… It is a sound principle that in every well organized government the judicial powers should be coextensive with the legislative, so far at least as they are to be enforced by judicial proceedings.)

[720] §38(1), Chapter 7, Book IV, RAC (1987).

[721] *Mondano v. Silvosa*, 97 Phil. 143, 147-148 (1955); *Ganzon v. Kayanan*, 104 Phil. 484 (1985); *Ganzon v. Court of Appeals*, 200 SCRA 271 (1991); *Taule v. Santos*, 200 SCRA 512 (1991).

are not followed, they may, in their discretion, order the act undone or redone by their subordinates or even decide to do it themselves.[722] The power of supervision, by itself, is a lesser authority compared to control and encompasses only the power of general oversight[723] to see to it that the laws are faithfully executed.[724] Thus, unless a different meaning is explicitly provided in the specific law governing the relationship of particular agencies, the word "control" shall encompass supervision and control. [725]

As the agency head, the Secretary's power of control is a necessary incident of his or her authority over, and responsibility for, the operation of the Department as an administrative agency.[726] The broad legislative definition of the control power, however, can give rise to the tendency and temptation for the Secretary to concentrate upon his or her office the direct exercise of the entire gamut of the Department's governmental powers, duties, responsibilities, and other allied functions at the expense of efficiency, effectiveness, and economy in optimizing the Department's overall performance. The Code addresses this concern in 3 ways: (a) through delegations of authority,[727] (b) by providing mandatory guidelines for the Secretary's exercise of control,[728] and (c) placing certain administrative agencies outside the coverage of the Secretary's supervision and control.[729] As to the first, the Code couples the express grant upon the Secretary of the authority and responsibility over the Department,[730] with a directive that he or she shall delegate as much authority and responsibility for the Department's operation to the bureau and the regional directors as may be necessary for the latter to implement plans and programs adequately,[731] and also to the extent necessary for the economical, efficient and effective implementation of national and local programs pursuant to the policies and standards developed by each department or agency.[732] The delegation shall be in writing[733] and shall vest authority sufficient to enable the

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[722] *Drilon v. Lim*, 235 SCRA 135, 142 (1994); *Pimentel v. Aguirre*, G.R.No. 132988, July 19, 2000.
[723] §38(2), Chapter 7, Book IV, 1987 RAC; *Mondano v. Silvosa*, 97 Phil. 143, 147-148 (1955); *Ganzon v. Kayanan*, 104 Phil. 484 (1985); *Ganzon v. Court of Appeals*, 200 SCRA 271 (1991); *Taule v. Santos*, 200 SCRA 512 (1991).
[724] *See* Faithful execution clause. 1987 Phil.Const. art.VII §17, sentence 2.
[725] §38(1), Chapter 7, Book IV, RAC (1987).
[726] 1st Sentence, §40, Chap.8, Book IV, RAC (1987).
[727] §40, Chap.8, Book IV, RAC (1987).
[728] §39(1[a-c]), Chap.8, Book IV, RAC (1987).
[729] §39(2), Chap.8, Book IV, RAC (1987).
[730] 1st sentence, §40, Chap.8, Book IV, RAC (1987).
[731] §40, Chap.8, Book IV, RAC (1987).
[732] §40, Chap.8, Book IV, RAC (1987). Note that the regional directors participate in the development of policies and standards within the department or agency.
[733] This requirement is meant to prevent the undue usurpation of authority or official functions. Cf. Art. 177, Revised Penal Code.

delegate to discharge his assigned responsibility.[734] As to the second, the Code provides statutory guidelines for the Secretary's power of control over his or her subordinate bureaus, offices, and agencies. Thus, the Secretary shall encourage and promote both initiative and freedom of action of the subordinate units, affording the latter reasonable opportunity to act before exercising control.[735] With respect to functions involving discretion, experienced judgment or expertise vested by law upon a subordinate agency, control shall be exercised in accordance with the said law.[736] Moreover, even if the subordinate agency is generally subject to the department's control, the Secretary's power is limited only to that of administrative supervision when it comes to the subordinate agency's particular exercise of regulatory functions.[737] Thus, insofar as their exercise of a particular regulatory function is concerned, subordinate agencies enjoy some measure of autonomy—they are to be treated in the same manner as regulatory agencies, subject only to the Secretary's power of administrative supervision.[738] As to the third, the Code expressly provides that its chapter on supervision and control shall not apply to government owned or controlled corporations (GOCCs) and chartered institutions[739] that are attached to the department.[740] This last limitation recognizes the existence of independent agencies that are separate and distinct from the traditional executive branch agencies, and whose administrative relationships with the department do not fall within the latter's direct line of control.

§3.3.2.3.1.2. Bureaus, and Field Offices

"Bureaus" are the principal subdivisions of the Department.[741] As used by the Code, the term also refers to any instrumentality's principal subdivision or unit that is given or assigned the rank of a bureau, regardless of actual name or designation, as in the case of department-wide regional offices.[742] Individual bureaus perform either a single major function or closely related functions,[743] and may have as many divisions as are provided by law for the economical,

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[734] §40, Chap.8, Book IV, RAC (1987).
[735] §39(a), Chap.8, Book IV, RAC (1987).
[736] §39(b), Chap.8, Book IV, RAC (1987).
[737] §39(c), Chap.8 in relation to Chap.9, Book IV, RAC (1987).
[738] *See* §38(2), Chap.7; §39(c), Chap.8; §43, Chap.9, Book IV, RAC (1987).
[739] §2(12), Introductory Provisions, RAC (1987). "Chartered institution refers to any agency organized or operating under a special charter, and vested by law with functions relating to specific constitutional policies or objectives. This term includes the state universities and colleges and the monetary authority of the State."
[740] §39(2), Chap.8, Book IV, RAC (1987).
[741] § 2(8), Introductory Provisions; § 18 (1), Chap 4, Book IV, RAC (1987).
[742] § 2(8), Introductory Provisions, RAC (1987).
[743] Section 18(1), Chap 4, Book IV, RAC (1987).

efficient and performance of their respective functions.[744] Bureaus are sub-classified into Staff and Line Bureaus,[745] each of which is headed by a Director.[746]

§3.3.2.3.1.2.1. Staff Bureaus

Staff Bureaus primarily perform policy, program development and advisory functions.[747] The Directors of Staff Bureaus (a) advise and assist the Office of the Secretary on matters pertaining to the Bureau's area of specialization; (b) Provide consultative and advisory services to the regional offices of the department; (c) Develop plans, programs, operating standards, and administrative techniques for the attainment of the objectives and functions of the bureau.[748] They may also avail themselves of the planning, financial and administrative services in the Department Proper.[749] Staff Bureaus exercise functional supervision[750] over the Department's regional offices.[751]

§3.3.2.3.1.2.2. Line Bureaus

Line Bureaus are directly responsible for the development and implementation of plans and programs within their respective functional specializations, as adopted pursuant to department policies and plans.[752] Accordingly, Line Bureau Directors exercise supervision and control over all divisions and other units, including regional and other field offices, under their respective bureaus;[753] and establish policies and standards for the bureau's operations pursuant to departmental plans and programs.[754] Unlike their counterparts in the Staff Bureau, Line Bureau Directors are expressly vested by the Code with authority to promulgate rules and regulations necessary to carry

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[744] Section 18(3), Chap 4, Book IV, RAC (1987).
[745] Section 18, Chap 4, Book IV, RAC (1987).
[746] Section 18(2), Chap 4, Book IV, RAC (1987)
[747] Section 19(1), Chap 4, Book IV, RAC (1987).
[748] Section 19(2), Chap 4, Book IV, RAC (1987).
[749] Section 19(3), Chap 4, Book IV, RAC (1987).
[750] §24(2), Chap.5, Book IV, RAC (1987).

> "(2) The staff bureau or division shall perform primarily advisory or auxiliary functions and exercise in behalf of the department or agency functional supervision over the regional offices. This shall include authority to develop and set down standards, policies and procedures to be implemented by operating units, and to evaluate continuously such implementation for the purpose of recommending or when authorized, taking corrective measures."

[751] §24(2), Chap.5, Book IV, RAC (1987).
[752] § 20(1), Chap 4; §41(1), Chap.8, Book IV, RAC (1987).
[753] § 20(2[a]), Chap 4; §41, Chap.8, Book IV, RAC (1987).
[754] § 20(2[b]), Chap 4, Book IV, RAC (1987).

out bureau objectives, policies and functions.[755] Line bureaus may also have their own staff units corresponding to the services of the Department Proper, as may be necessary.[756]

§3.3.2.3.1.2.3. Field Offices

To ensure the nationwide distribution of governmental services, integrated regional offices on a department or agency-wide basis are organized in the different administrative regions of the Philippines.[757] Aside from functioning within their respective regions, Regional Offices may also perform departmental or agency functions that require central or interregional action subject to the supervision and control of the department proper or line bureau concerned.[758] District Offices may be established only in cases of clear necessity.[759]

The Regional Offices within a Department may exist on a department or line bureau-wide basis. Regional Offices organized on a department-wide basis are considered by the Code as bureaus in terms of rank.[760] They have units or personnel in which the functional areas of the staff bureaus and services in the department are represented.[761] Line Bureau Regional Offices, on the other hand, have units or personnel in which the functional areas of the primary units of their line bureau are represented.[762] They are considered as the operating arms and regional counterparts of their respective Line Bureaus,[763] and as such, are subject to the latter's supervision and control.[764] Both these types of Regional Offices are also under the Department Secretary's supervision and control.[765]

Each Regional Office is headed by a Regional Director who is responsible for the department or agency functions performed in the region under his jurisdiction.[766] The duties and functions of the Regional Directors

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[755] § 20(2[c]), Chap 4, Book IV, RAC (1987).
[756] § 20(23]), Chap 4, Book IV, RAC (1987).
[757] §21-22, Chap.5, Book IV, RAC (1987).
[758] §24(2), Chap.5, Book IV, RAC (1987).
[759] §26(2), Chap.5, Book IV, RAC (1987).
[760] §2(8), Introductory Provisions, RAC (1987).
[761] §25, Chap.5, Book IV, RAC (1987).
[762] §25, Chap.5, Book IV, RAC (1987).
[763] §41(1), Chap.8, Book IV, RAC (1987).
[764] §41, Chap.8, Book IV, RAC (1987).
[765] *See* §39, Chap.8, Book IV, RAC (1987).
[766] §23, Chap.5, Book IV, RAC (1987).

and their respective offices are largely executive in nature,[767] and therefore subject to the Department Secretary's authority "to review and modify, alter or reverse."[768] The Department Secretary may even initiate promotions and transfers of personnel from one region to another.[769] As the President's alter ego, the Department Secretary may also realign the administrative units in the Regional and Field Offices under his or her Department in order to improve the efficiency and effectiveness of delivering departmental services.[770]

§3.3.2.3.1.3. Other Duties & Functions as may be provided by Law

Much of the Code's enumeration of duties and functions for the Departments, Bureaus, Field Offices, and their respective agency heads confirm their predominantly executive nature. The Code, however, also recognizes that these administrative agencies may also perform such other duties "as may be provided by law."[771] Thus, aside from wielding executive authority, these administrative agencies may also be vested by statute with governmental duties, powers and responsibilities, including the delegation of functions that are of a legislative character, such as the power to issue substantive rules and regulations that have the binding force of law;[772] or of a judicial character, such as the jurisdiction to adjudicate specialized classes of controversies;[773] or both.[774] In such cases, the administrative relationship particularly applicable to the duty or function—and the extent thereof—are defined by (a) the nature of the statutorily provided duty or function, and (b) the specific provisions of the delegating statute.

Thus, with respect to functions involving discretion, experienced judgment or expertise vested by law upon a subordinate agency, control shall be exercised in accordance with the said law.[775] Furthermore, subordinate agencies that are subject to department control, but are also statutorily vested with regulatory functions, are nevertheless to be treated in the same manner as

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[767] *See* §26(1[a-d], 2); §27(1-17), Chap.5, Book IV, RAC (1987).
[768] §28, Chap.5, Book IV, RAC (1987).
[769] §28, Chap.5, Book IV, RAC (1987).
[770] *DENR v. DENR Region 12 Employees*, G.R. No. 149724, August 19, 2003 (The Court upheld the DENR Secretary's realignment of administrative units in the DENR Regional and Field Offices on the basis of being the President's alter ego or qualified political agent in the latter's exercise of the executive power to reorganize administrative regions.); cf. *Chiongbian v. Orbos*, 315 Phil. 251 (1995).
[771] §7(9), Chap.2; § 19(2[d]) & 20(2[d]), Chap 4; §26(e) & §27(17), Chap.5, Book IV, RAC (1987). N.B. The statutory recognition is repeatedly echoed in the different Titles covering specific departments in the 1987 RAC.
[772] *See* Chap.2, Book VII, RAC (1987).
[773] *See* Chap.3, Book VII, RAC (1987).
[774] *See* §1-2[1], Chap.1, Book VII, RAC (1987).
[775] §39(b), Chap.8, Book IV, RAC (1987).

regulatory agencies with particular regard to their exercise of the regulatory functions.[776] Even though they are still generally subject to the Department Secretary's supervision and control on other matters, they enjoy—by way of exception—some measure of independence in their exercise regulatory functions, which is subject only to the Secretary's power of administrative supervision.[777]

The nature of the statutorily provided duty also bears heavily upon the type of administrative relationship that should apply between related agencies. For example, Title III, Book IV of the Code on the Department of Justice (DOJ) initially placed the Office of the Chief State Prosecutor within the Department proper in order to assist the Justice Secretary in exercising supervision and control over the National Prosecution Service (NPS).[778] The same Title III also placed the Public Attorney's Office (PAO) among the constituent units under the DOJ.[779] As it stood then, the statutory powers of the DOJ as an umbrella department included two functions—the investigation and prosecution of criminal offenders, and the extension of free legal assistance/representation to indigent and poor litigants in criminal cases[780]—the existence of which in one and the same agency can give rise to clear conflict of interest situations. Although conflict of interest situations were lessened because the opposing functions are performed separately at the bureau level by the NPS and the PAO, the risks of its occurrence were real and acute at the departmental level at the time when the Justice Secretary had supervision and control upon both agencies.

The Philippine Congress rectified the situation by passing statutes that altered the administrative relationship between the DOJ and the two constituent agencies. The first statute, R.A. 9406, was passed to reorganize and strengthen the PAO's independence.[781] The law took away the Justice Secretary's power of supervision and control by expressly providing that the PAO shall be an "independent and autonomous office" that is "attached" to the DOJ "for purposes of policy and program coordination."[782] The law also mandates that the PAO shall be "the principal law office of the Government in extending free legal assistance to indigent persons in criminal, civil, labor,

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[776] §39(c), Chap.8; §43, Chap.9, Book IV, RAC (1987).
[777] *See* §38(2), Chap.7; §39(c), Chap.8; §43, Chap.9, Book IV, RAC (1987).
[778] §5, §8, Chap.2, Title III, RAC (1987).
[779] §4(4), Chap.1, Title III, RAC (1987).
[780] *See* §3(2, 3), Chap.1, Title III, RAC (1987).
[781] R.A. 9406
[782] *See* §1 & 2, R.A. 9406, amending §4, Chap.1; §14, Chap.5, Title III, Book IV, RAC (1987).

administrative, and other quasi-judicial cases,"[783] and that it "shall independently discharge its mandate."[784] The second statute, R.A. 10071, known as the "Prosecution Service Act of 2010,"[785] changed the scope of the Justice Secretary's supervision and control over the NPS. The law provides that the NPS shall be "primarily responsible for the preliminary investigation and prosecution of all cases involving violations of penal laws under the supervision of the Secretary of Justice."[786] R.A. 10071 also articulates that the broad control powers of the Justice Secretary over the NPS "includes [the] authority to act directly on any matter involving national security[787] or a probable miscarriage of justice…" and "to review, reverse, revise, modify or affirm on appeal or petition for review…final judgments and orders of the prosecutor general, regional prosecutors, provincial prosecutors, and city prosecutors";[788] and retains the Justice Secretary's control and supervision over the Prosecution Staff[789] and the Regional Prosecutors.[790]

Taken together, both R.A. 10071 and R.A. 9406 constitute concrete legislative determinations that address the perceived risk of irregularities within the DOJ by preventing possible conflict of interest situations wherein one of the competing interests may be at a clear disadvantage as opposed to the other. The legislative determination to have departmental control retained over one function, and abdicated as regards the other conflicting function, is also correlated with respective natures of the functions involved. Thus, R.A. 10071's generally affirming the Justice Secretary's power of supervision and control over the NPS is in accordance with the quintessentially executive nature of the latter's primary functions of preliminary investigation and criminal prosecution.[791] On the other hand, R.A. 9406's transformation of the PAO as a statutorily independent agency attached to the DOJ was a reasonable means to safeguard and strengthen the agency's institutional independence and integrity,

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[783] *See* §2, R.A. 9406, amending §14, Chap.5, Title III, Book IV, RAC (1987).
[784] §3, R.A. 9406, inserting a new §14-A, to Chap.5, Title III, Book IV, RAC (1987).
[785] 1, R.A. 10071.
[786] §3, R.A. 10071.
[787] Last par. §4, R.A. 10071. "For purposes of determining the cases which may be acted on, directly by the Secretary of Justice, the phrase "national security" shall refer to crimes against national security as *Provided* under the Penal Code, Book II, Title 1, and other cases involving acts of terrorism as defined under the Human Security Act under Republic Act No. 9372."
[788] §4, R.A. 10071. N.B. The §4 definition of the Justice Secretary's power over the entire NPS is ambiguously worded in that it defines not by way of limitation or enumeration but by reference to examples of what the power includes.
[789] §5, R.A. 10071.
[790] §7, R.A. 10071.
[791] *Castillo v. Villaluz*, 171 SCRA 39 (1989); *People v. Court of Appeals*, G.R.No. 126005, January 21, 1999; *Ho v. People*, 280 SCRA 365 (1997).

considering the nature and importance of its specialized duty of providing legal representation and assistance to indigents.[792]

§3.3.2.3.1.4 Other Agencies within the Department

Some departments have organizational structures that contain other agencies that are not departmental bureaus and field offices in the strict sense[793] but may still be regarded as such, regardless of actual name or designation,[794] because they partake of the latter's nature.[795]

Whether or not these agencies are part of the traditional executive branch department depends upon whether they are subject to departmental control. Department control, in turn, depends largely upon the nature of their respective functions, as well as the applicable administrative relationship provided by law between them and the department to which they are connected. There are agencies whose functions are largely executive in nature and are therefore subject to executive control. Examples of these are the National Bureau of Investigation (NBI)[796] and the NPS,[797] both of which are under the DOJ, and whose respective functions of criminal investigation and prosecution are considered executive in nature.[798] Other examples are the

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[792] Cf. *Morrison v. Olson*, 487 U.S. 654 (1988) (Upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.)

[793] For example, the 1987 RAC initially placed the Parole and Probation Administration (PPA), the Board of Pardons and Parole (BPP), the Public Attorney's Office (PAO), the Commission on Settlement of Land Problems (COSLAP), and the Land Registration Authority (LRA) as constituent units of the Department of Justice. *See* §4, Chap.1, Title III, Book IV, RAC (1987). Another example is the Land Transportation Franchising and Regulatory Board (LTFRB), which, under the 1987 RAC, is a constituent unit of the Department of Transportation and Communications (DOTC). §4, Chap.1, Title XV, Book IV, RAC (1987).

[794] §2(8), Introductory Provisions, RAC (1987).

[795] *See NAMARCO v. Arca*, 9 SCRA 648 (1969) (Holding that the President may review and reverse the NAMARCO Board decision dismissing one of its personnel because NAMARCO's statutory framework under the Reorganization Act of 1950 and Executive Order No. 386 s. 1959 shows that its functions "partake of the nature of government bureaus or offices" and that it was statutorily placed under the Executive's control powers.)

[796] The NBI started as a division of the DOJ under C.A. 181 (1936). In 1947, it was statutorily made one of the DOJ's bureaus under R.A. 157 (1947), and was later given its present name via EO 94 s. 1947.

[797] Last par. §4-7, R.A. 10071

[798] *See Ledesma v. CA*, 278 SCRA 657 (1997); *People v. CA*, G.R.No. 126005, January 21, 1999 (The Court distinguished between the executive determination of probable cause for purposes of commencing a criminal action, as opposed to the judicial determination of probable cause for the issuance of arrest warrants. "The proceedings before a public prosecutor, it may well be stressed, are essentially preliminary, prefatory and cannot lead to a final, definite and authoritative adjudgment of the guilt or innocence of the persons charged with a felony or crime."); *See* also Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framer's Intent*, 99(5) Yale L.J. 1069-1088 (Mar. 1990). N.B. In the Philippines, the constitutional creation of the Ombudsman's Office addressed the separation of powers issue that arose in the U.S. in relation to the statutory creation of an independent counsel or special prosecutor that was outside the President's control powers—which issue was at the time still pending before the U.S. Supreme Court in *Morrison v. Olson*, 108S. Ct. 2597 (1988).

Health and Nutrition Center, and the National Education Testing and Research Center, which are placed under the supervision and control of the Department of Education.[799]

There are also agencies that are statutorily subject to departmental control, but are nevertheless vested with regulatory functions to which departmental control does not extend.[800] An example of this is the Philippine Veterans Affairs Office (PVAO) which is placed under the control of the Department of National Defense (DND),[801] but whose functions are not purely executive in nature because they include the power to adjudicate issues regarding the benefits, pensions and other privileges for veterans, their heirs, and beneficiaries.[802] Another example is the Land Transportation Franchising and Regulatory Board (LTFRB), which is a constituent bureau of the DOTC,[803] which the Code expressly subjects to the supervision and control of the DOTC Secretary.[804] Considering that the LTFRB exercises the quasi-judicial powers with respect to the specialized area of land transportation,[805] and is specifically vested not only with executive,[806] but also adjudicatory[807] and rulemaking[808] powers that involve discretion, experienced judgment, and expertise, the Code generally precludes the DOTC Secretary from directly undertaking the LTFRB's specific regulatory functions and limits the latter's authority thereon to administrative supervision.[809] The LTFRB's decisions in the exercise of its adjudicatory and rulemaking functions are thus made at the first instance by the board sitting en banc,[810] subject to appellate review by the DOTC Secretary.[811]

Separate and distinct from the foregoing agencies are those that are legislatively determined to be outside of departmental control either via direct provision of law or by the nature of their statutory functions, but are nevertheless subject to departmental supervision albeit at varying degrees. Agencies of this type are classified as independent agencies.

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[799] §21, Chap.8, Title VI, Book IV, RAC (1987).
[800] §39(c), Chap.8; §43, Chap.9, Book IV, RAC (1987).
[801] §18, Chap.1, Subtitle II, Title VIII, Book IV, RAC (1987).
[802] *See* §32, Chap.5, Subtitle II, Title VIII, Book IV, RAC (1987), in relation to §39(c), Chap.8; §43, Chap.9, Book IV of the same Code.
[803] §4, Chap.1, Title XV, Book IV, RAC (1987).
[804] §18, Chap.5, Title XV, Book IV, RAC (1987).
[805] §15, Chap.5 Title XV, Book IV, RAC (1987).
[806] §19 (1,7,10,12), Chap.5 Title XV, Book IV, RAC (1987).
[807] §15, §19 (1,2,4,5,6,7,8), Chap.5 Title XV, Book IV, RAC (1987).
[808] §19 (1,3,9,10,11), Chap.5 Title XV, Book IV, RAC (1987).
[809] §39(c), Chap.8 in relation to §43, Chap.9, Book IV, RAC (1987).
[810] §20, Chap.5, Title XV, Book IV, RAC (1987).
[811] §20, Chap.5, Title XV, Book IV, RAC (1987).

§3.3.2.3.2. Independent Agencies

Independent Agencies exist and function outside the control of the traditional executive branch departments.[812] They are legislatively designed to apply their expertise to particular social and economic dilemmas[813] and broad discretion is necessary in order for them to issue and execute technical and scientific decisions effectively and efficiently.[814] Although there is no precise set of organizational features that designate an agency as independent, they tend to be structured differently from traditional executive agencies for purposes of insulating them from political pressure and direct control by either Congress or the President.[815]

Independent agencies have, for their central feature, the notion that expertise is necessary and paramount for the legitimate implementation of congressional policies.[816] It is essential that the administrative officials in these agencies must be experts that possess the aptitude and tools necessary to control social phenomena in the agency's field, thus promoting efficiency and stability in that specific area of government regulation.[817] The ability of agency experts to analyze problems and produce practical solutions requires a heightened degree of political independence from the constitutional branches of government,[818] especially in areas in which the latter are bereft of adequate technical competence.[819] Their specialized expertise also provides the justification for the grant not just of executive authority, but also of broader legislative and adjudicatory powers that independent agencies can exercise within their respective areas of competence. Expertise, as a defining

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[812] Hickman & Pierce, Jr., *Fed.Admin.Law* 11 (2014).
[813] Jeffrey Rudd, The Evolution of the Legal Process School's Institutional Competence Theme: Unintended Consequences for Environmental Law, 33 Ecology L.Q. 1045, 1048 (2006). Available at: http://scholarship.law.berkeley.edu/elq/vol33/iss4/3.
[814] Jeffrey Rudd, The Evolution of the Legal Process School's Institutional Competence Theme: Unintended Consequences for Environmental Law, 33 Ecology L.Q. 1045, 1048 (2006). Available at: http://scholarship.law.berkeley.edu/elq/vol33/iss4/3.
[815] Hickman & Pierce, Jr., *Fed.Admin.Law* 11 (2014).
[816] James Landis, *The Administrative Process* (1938); Felix Frankfurter, *The Public and Its Government* (1930); James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978).
[817] Landis, *The Administrative Process* 15-16 (1938).
[818] Jeffrey Rudd, *The Evolution of the Legal Process School's Institutional Competence Theme: Unintended Consequences for Environmental Law*, 33 Ecology L.Q. 1045, 1048 (2006). Available at: http://scholarship.law.berkeley.edu/elq/vol33/iss4/3.
[819] James O. Freedman, *Expertise and the Administrative Process*, 28 Admin. L.Rev. 363, 363-64 (1976) (Independent agencies flourished during the New Deal due to the perceived inadequacy of the traditional constitutional framework.); Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L.Rev. 421 (1987).

institutional feature, is therefore a source of both legitimacy and independence for these agencies and their respective officials.[820]

Independent agencies are primarily responsible for exercising the governmental authority specifically vested upon them over matters that demand their special competence, especially those that demand their sound exercise of administrative discretion and require their special knowledge, experience, and services in technical and intricate matters of fact.[821]

§3.3.2.3.2.1. Departmental Supervision: General and Administrative

Although not subject to executive control, independent agencies in the Philippines are subject to the power of supervision, also known as the executive's broad power to see to it that the laws are faithfully executed.[822]

Case law defines the power of supervision as the power of mere oversight over another body.[823] Supervising officials merely see to it that the rules are followed, but they themselves do not lay down such rules, nor do they have the discretion to modify or replace them. If the rules are not observed, they may order the work done or redone, but only to conform to such rules. They may not prescribe their own manner of execution of the act. They have no discretion on this matter except to see to it that the rules are followed.[824] Supervision does not warrant interference in the affairs of the agency being

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[820] Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 Cal. L. Rev. 327, 330-331 (2013), Available at: h p://scholarship.law.berkeley.edu/facpubs/1924; Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 NYU L.Rev. 391, 449 (2010); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 Yale L.J. 1032, 1035 (2011).

[821] *See Longino v. General*, 491 Phil. 600, 618-619 (2005); *BF Homes v. Manila Electric Co.*, G.R.No. 171624, December 6, 2010. ("Administrative agencies, like the ERC, are tribunals of limited jurisdiction and, as such, could wield only such as are specifically granted to them by the enabling statutes. In relation thereto is the doctrine of primary jurisdiction involving matters that demand the special competence of administrative agencies even if the question involved is also judicial in nature. Courts cannot and will not resolve a controversy involving a question within the jurisdiction of an administrative tribunal, especially when the question demands the sound exercise of administrative discretion requiring special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact. The court cannot arrogate into itself the authority to resolve a controversy, the jurisdiction of which is initially lodged with the administrative body of special competence.") N.B. The court's observation regarding the agency's primary responsibility or jurisdiction applies equally as well to the agency's rulemaking functions.

[822] 2nd Sentence, §17, Art.VII, 1987 PHIL. Const. N.B. While the control clause under the 1st sentence, §17, Art.VII expressly limits the subjects of executive control to all "executive departments, bureaus, and offices," the faithful execution clause under the 2nd Sentence, §17, Art.VII provides no such coverage limitation. This indicates that the general applicability of the executive duty to ensure the law's faithful execution upon all actors in the administrative bureaucracy.

[823] *See Taule v. Santos*, 200 SCRA 512, 522 (1991); *Pelaez v. Auditor General*, 15 SCRA 569 (1965); *Hebron v. Reyes*, 104 Phil. 175 (1958).

[824] *Drilon v. Lim*, 235 SCRA 135, 142 (1994); *Pimentel v. Aguirre*, G.R.No. 132988, July 19, 2000.

supervised, so long as the latter acts within the scope of its authority.[825] It does not include any restraining authority over the agency being supervised.[826]

The foregoing doctrinal statements on the power of supervision, however, should be correlated with the Code's provisions that sub-classify supervisory authority into two types: (a) administrative supervision[827] and (b) general supervision.[828]

§3.3.2.3.2.1.1. Administrative supervision

Administrative supervision refers to the power of a superior to see to it that subordinates perform their functions according to law.[829] The Code streamlines scope of this power by clarifying what the department can and cannot do when exercising administrative supervision.[830] Administrative supervision is thus statutorily limited to the following activities:

> (a) generally overseeing the agency operations in order to insure their effective, efficient and economical management, but without interference with day-to-day activities;[831]
> (b) requiring the submission of reports and causing the conduct of management audit, performance evaluation and inspection to determine compliance with policies, standards and guidelines of the department;[832]
> (c) taking actions necessary for the proper performance of official functions, including rectification of violations, abuses and other forms of maladministration;[833] and
> (d) reviewing and passing upon agency budget proposals, but may not increase or add to them.[834]

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825 *See Taule v. Santos*, 200 SCRA 512, 522 (1991); *Hebron v. Reyes*, 104 Phil. 175 (1958); *Pimentel v. Aguirre*, G.R.No. 132988, July 19, 2000.
826 *See id.*
827 §38(2), Chap.7, Book IV, RAC (1987).
828 §42, Chap. 9, Book IV, RAC (1987).
829 *De Villa v. City of Bacolod*, G.R.No. 80744, September 20, 1990; *Mondano v. Silvosa*, 97 Phil. 143, 147-148 (1955); *Ganzon v. Kayanan*, 104 Phil. 484 (1985); *Ganzon v. Court of Appeals*, 200 SCRA 271 (1991); *Taule v. Santos*, 200 SCRA 512 (1991).
830 §38(2a), Chap.7, Book IV, RAC (1987). (Administrative supervision shall govern the administrative relationship between a department or its equivalent and regulatory agencies or other agencies as may be provided by law.) Note also that certain traditional executive branch agencies are also to be treated in that same manner but only with particular regard to their exercise of regulatory functions. *See* §39(c), Chap.8; §43, Chap.9, Book IV, RAC (1987).
831 §38(2a), Chap.7, Book IV, RAC (1987).
832 §38(2a), Chap.7, Book IV, RAC (1987).
833 §38(2a), Chap.7, Book IV, RAC (1987).
834 §38(2a), Chap.7, Book IV, RAC (1987).

The Code further clarifies the scope of supervision by expressly stating the activities to which it does not extend, to wit:

> (1) appointments and other personnel actions in accordance with the decentralization of personnel functions under the Code, except when appeal is made from an action of the appointing authority, in which case the appeal shall be initially sent to the department or its equivalent, subject to appeal in accordance with law; [835]
> (2) contracts entered into by the agency in the pursuit of its objectives, the review of which and other procedures related thereto shall be governed by appropriate laws, rules and regulations; [836] and
> (3) the power to review, reverse, revise, or modify the decisions of regulatory agencies in the exercise of their regulatory or quasi-judicial functions.[837]

§3.3.2.3.2.1.2.General supervision

The Code prescribes the power of general supervision as the type of administrative relationship for certain instrumentalities like local government units [838] and laterally attached administrative agencies. [839] In its broader constitutional context, general supervision means no more than ensuring that the laws are faithfully executed or that the entity or agency acts within the law.[840] In the administrative law context, however, the term is more nuanced—administrative agencies that are subject to general supervision have a slightly higher degree of autonomy than those that are under administrative supervision. For example, GOCCs are subject to only to the general supervision of the department to which they are laterally attached.[841] As such, they are largely autonomous on matters of day-to-day administration and

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[835] §38(2b1), Chap.7, Book IV, RAC (1987).
[836] §38(2b2), Chap.7, Book IV, RAC (1987).
[837] §38(2b3), Chap.7, Book IV, RAC (1987).
[838] For example, general supervision is the power that governs the relationship of the President and the local governments. *See* §18, Chap.6, Title I, Book III, RAC (1987) cf. §4, Art.X, 1987 PHIL. Const.; Hebron v. Reyes, 104 Phil. 175 (1958); Pelaez v. Auditor General, 15 SCRA 569, 576 (1965); Drilon v. Lim, 235 SCRA 135, 141 (1994);Ganzon v. CA, 200 SCRA 271 (1991).
[839] 42, Chap.9 Book IV, RAC (1987).
[840] III Records of the 1987 Philippine Constitutional Commission 451-458; Bernas, *1987 Philippine Constitution* 1120 (2009).
[841] 42, Chap.9 Book IV, RAC (1987).

internal operation.[842] However, if they incur an operating deficit at the close of their fiscal year, their relationship with the department is ramped up to that of administrative supervision, and their operating and capital budget shall be subjected to departmental examination, review, modification and approval.[843]

The applicability of the foregoing types of supervisory powers—whether an independent agency is subject to general supervision or administrative supervision—is determined via statute.

It should be emphasized, however, that the legislature has also been evolving and fine-tuning the administrative relationships governing particular regulatory agencies in view of the nature of the latter's functions[844] and the contemporary notions on the relevant norms of constitutional and administrative law,[845] among other relevant considerations[846] gathered from its synoptic legislative process.[847] One such example is the transformation of the PAO from an erstwhile constituent unit of the DOJ, to what is now a statutorily declared independent and autonomous agency attached to the DOJ only for purposes of policy and program coordination, [848] which is in line with the nature of the PAO's function of providing legal representation to indigents.[849] Another example is the National Labor Relations Commission (NLRC). Statutory changes were gradually made to abolish the appellate review authority earlier vested upon the Secretary of Labor, and the President, over the NLRC's decisions,[850] and to have it transferred to the courts of law by way of judicial review,[851] the propriety of which is justified by the essentially judicial

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[842] §38(3b), Chap.7, Book IV, RAC (1987).
[843] §38(3d), Chap.7, Book IV, RAC (1987).
[844] The traditional formalistic view that administrative agencies can exercise only executive functions has given way to the functional realization that administrative agencies also possess functions and duties that resemble legislative as well as judicial powers. *See Smart Comm'ns v. NTC*, G.R.Nos. 151908 & 152063, August 12, 2003. *See* also "quasi-" defined available at http://www.merriam-webster.com/dictionary/quasi, Full Definition of *quasi- 1* : in some sense or degree. *2* : resembling in some degree.
[845] *See* for example, the rise of functionalism as a principal methodological competitor of formalism in the separation of powers arena. *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 857-60 (1990); Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 St. Louis U.L.J. 885, 891 (2005); Harold H. Bruff*, The Incompatibility Principle*, 59 Admin. L. Rev. 225, 226 (2007); William Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases,* 22 Harv. J.L. & Pub. Pol'y 21, 22 (1998); Hickman & Pierce, Jr., *Fed.Admin.Law* 156-157 (2014).
[846] One such consideration is necessity. See Hickman & Pierce, Jr., *Fed.Admin.Law* 91-92 (2014). (At a minimum, agency adjudication relieves courts of burdens they could not possibly assume.)
[847] §26-27, Art. VI, 1987 PHIL. Const.
[848] See §14, Chap.5, Title III, Book IV, RAC (1987), as amended by R.A. 9406 on the PAO.
[849] See §14, Chap.5, Title III, Book IV, RAC (1987), as amended by R.A. 9406 on the PAO.
[850] See P.D. 21, P.D. 442, P.D.1391.
[851] Congress at first indirectly alluded to the Supreme Court's appellate jurisdiction over the NLRC under §9(3), R.A. 7902. The Supreme Court clarified the matter in St. Martin Funeral Home v. NLRC, G.R.No. 130866,

nature[852] of the NLRC's adjudicatory jurisdiction over labor cases.[853] With its functions being almost entirely adjudicatory in nature,[854] the legislature also changed the nature of the NLRC's attachment to the Department of Labor and Employment (DOLE) from one that included both "policy and program coordination, and administrative supervision"[855] to one that is "solely for program and policy coordination."[856] In 2016, R.A.10741 further strengthened the NLRC, and imbued it with characteristics that made the agency hew closely to courts of law.[857] As it stands, Congress has placed the PAO and the NLRC among the roster of independent agencies that enjoy one of the highest statutory levels of autonomy.

§3.3.2.3.2.2. Types of Independent Agencies

Independent agencies have been generally categorized by the Code into (i) Regulatory Agencies,[858] and (ii) Attached Agencies,[859] based on the type of administrative relationship that they have with department to which they are connected, or its equivalent.[860] The 2 sub-classifications, however, are not mutually exclusive, and there are regulatory agencies that are likewise attached to particular departments.

§3.3.2.3.2.2.1. Regulatory Agencies

September 16, 1988, holding that the law must be read as vesting the Court of Appeals with appellate jurisdiction over the NLRC, in accordance with the hierarchy of courts.

[852] Issues on the validity of having agencies exercise adjudicatory authority have always been framed in terms of being undue delegations of the judicial power constitutionally vested upon the regular courts—The transfer of adjudicatory jurisdiction previously exercisable by the courts of law to an administrative agency does not make the power so transferred any less judicial than if it were retained by the courts of law. As early as 1789, agency adjudications have already been characterized as "of a judiciary quality." See James Madison, 12 The Papers of James Madison 265 (C. Hobson & Rutland Ed. 1989).

[853]Case law has upheld the statutory transfer of jurisdiction previously exercised by the regular courts in favor of administrative agencies where the jurisdiction so transferred is narrow and covers a limited class of cases. See Crowell v. Benson, 285 U.S. 22 (1932), (Agency adjudication of workmen's compensation); *Zakonaite v. Wolf*, 226 U.S. 272 (1912), *Turner v. Williams*, 194 U.S. 279 (1904) (Agency adjudication of cases involving aliens); *Monongahela Bridge Co. v. U.S.*, 216 U.S. 177 (1910) (Agency adjudication over unreasonable obstructions to navigation); *Arver v. U.S.*, 245 U.S. 366 (1918); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177 (1938) (Agency adjudication in railroad regulation); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940)(Agency adjudication in fixing prices of coal).

[854] See P.D. 442; §1, R.A. 9347; §1, R.A. 10741. (The NLRC exercises appellate and adjudicatory jurisdiction over disputes involving labor-management relations.)

[855] See §25(5), Chap.6, Title VII, Book IV, RAC (1987).

[856] See §1, R.A. 9347; See also §1, R.A. 10741.

[857] §1 & 2, R.A. 10741.

[858] §38(2), Chap.7, Book IV, RAC (1987).

[859] §38(2a), Chap.7, Book IV, RAC (1987).

[860]See §38(2,3), Chap.7, Book IV, RAC (1987).

Regulatory agencies are those that are "expressly vested with jurisdiction to regulate, administer or adjudicate matters affecting substantial rights and interest of private persons, the principal powers of which are exercised by a collective body, such as a commission, board or council."[861] The Code's definition of a regulatory agency has two components relating to (a) organization and (b) function. Function-wise, regulatory agencies are vested with jurisdiction to make legally binding determinations that affect private rights and interests,[862] through either substantive rulemaking or adjudicatory proceedings, or both, in accordance with Book VII of the Code[863] and their respective legislative charters or delegating laws. Organization-wise, the definition serves to distinguish regulatory agencies from traditional executive branch agencies typically headed by a single person.[864] Regulatory agencies are often headed by a collective, multi-member body rather than by single individuals.[865] Notably, the Code's definition of a regulatory agency is broad enough to include those that are organized as corporate entities governed by a corporate board.[866]

Regulatory agencies are generally subject to administrative supervision,[867] and not control.[868] This distinction is very important because administrative supervision does not include the power to review, reverse, revise, or modify the decisions of regulatory agencies in the exercise of their regulatory or quasi-judicial functions.[869] Administrative supervision thus provides a good measure of independence and autonomy for the regulatory agency. Note, however, that

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[861] §2(11), Introductory Provisions, RAC (1987).

[862] See §1-2[1], Chap.1, Book VII, RAC (1987). See also§2(11), Introductory Provisions, RAC (1987) cf. with http://www.merriam-webster.com/dictionary last accessed on April 4, 2016. "Regulate" as defined in http://www.merriam-webster.com/dictionary/regulate, Regulate: · 1[*a]* : to govern or direct according to rule 1[*b](1)* : to bring under the control of law or constituted authority 1[b]*(2)* : to make regulations for or concerning · *2* : to bring order, method, or uniformity to. · *3* : to fix or adjust the time, amount, degree, or rate of. See "administer" as defined in http://www.merriam-webster.com/dictionary/administer · Administer: Transitive verb *1* : to manage or supervise the execution, use, or conduct of. · *2*[*a]* : to mete out : dispense … ·Intransitive verb 1: to perform the office of administrator.... · *3* : to manage affairs. See "adjudicate" as defined in http://www.merriam-webster.com/dictionary/adjudicate, Adjudicate: to make an official decision about who is right in a dispute, transitive verb: to settle judicially; intransitive verb: to act as judge.

[863] See §1-2[1], Chap.1, Book VII, RAC (1987). See also Chap.2 & 3 of the 1987 RAC for Administrative Procedures for substantive rulemaking and adjudication.

[864] See Hickman & Pierce, Jr., *Fed.Admin.Law* 11 (2014).

[865] §2(11), Introductory Provisions, RAC (1987) cf. Hickman & Pierce, Jr., *Fed.Admin.Law* 11 (2014).

[866] RAC, *id.*

[867] §38(2), Chap.7, Book IV, RAC (1987).

[868] Regulatory agencies are thus distinguished from the traditional executive branch agencies exercising regulatory functions upon which departmental control generally prevails, and is withheld only with regard to their particular exercise of regulatory functions. See §38(2), Chap.7; §39(c), Chap.8; §43, Chap.9, Book IV, RAC (1987). See also §43, Chap.9; §38(2), Chap.7, Book IV, RAC (1987). N.B. under §38(2c), "supervision" shall encompass administrative supervision, unless a different meaning is explicitly provided in the specific law governing the relationship of particular agencies.

[869] §38(2b3), Chap.7, Book IV, RAC (1987).

the administrative relationship governing a particular regulatory agency may also be influenced by whether or not it is attached to a traditional executive branch department, or its equivalent.[870]

§3.3.2.3.2.2.2. Attached Agencies

Attached agencies and corporations enjoy the highest degree of independence among the statutorily created agencies in the Philippine administrative bureaucracy.

Attachment refers to the lateral relationship between the department or its equivalent and the attached agency or corporation for purposes of policy and program coordination.[871] The Code provides for ways in which coordination may be established. First, the department may be represented in the governing board of the attached agency, but this could only be made if permitted by the latter's charter[872]—and there are agency charters that do not provide for such arrangements.[873] If so permitted by the attached agency's charter, the department could provide general policies through its representative in the attached agency's board, which policies shall serve as the framework for the attached agency's internal policies.[874] Second, the attached agency may be required to comply with a system of periodic reporting that reflects the progress of programs and projects.[875]

Unless otherwise specifically provided by the Code or special law,[876] attachment by itself relates to the lateral relationship between the attached

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[870] For example, the National Telecommunications Commission (NTC)—an agency exercising administrative, regulatory and adjudicatory functions created by EO 546 s. 1979 by integrating the Board of Communications and the Telecommunications Control Bureau—was previously under the Ministry of Transportation and Communications. It was transformed via EO 125-A s. 1987 into an attached agency of the Department of Transportation and Communications (DOTC). A series of executive orders then transferred the NTC from the DOTC to the Commission on Information and Communications Technology (CICT), and vice versa. See EO 269 s. 2004; EO 454 s. 2005; EO 648 s. 2008. In 2011, the President exercised his statutorily delegated authority under §31, Chap.10, Title III, Book III, RAC (1987), to issue EO 47 s. 2011 which transferred the NTC to the Office of the President as part of the latter's Other Executive Offices (OEO). N.B. To this date, no court cases have been instituted regarding the transfer.

[871] §38(3a), Chap.7, Book IV, RAC (1987).

[872] §38(3a), Chap.7, Book IV, RAC (1987).

[873] See R.A. 9347, rationalizing the composition of the National Labor Relations Commission.

[874] §38(3a), Chap.7, Book IV, RAC (1987).

[875] §38(3a), Chap.7, Book IV, RAC (1987).

[876] In some instances, the 1987 RAC provides for both attachment and administrative supervision. See §25, Chap.6, Title VII, Book IV, RAC (1987), attaching several agencies to the Department of Labor and Employment (DOLE) for policy and program coordination and administrative supervision. Conversely, some agency charters even provide limitations for the attachment, i.e., that the attachment be "SOLELY for program and policy coordination," See Art.213, P.D.442, as amended by §1, R.A. 9347 on the NLRC; or that the agency

agencies and their respective department,[877] characterized mainly by policy and program coordination.[878] There are instances, however, in which the statute combines attachment with the other types of administrative relationships.[879]

In the Philippine administrative bureaucracy, attached agencies are grouped into the following: (a) government owned and controlled corporations (GOCCs); and (b) regulatory agencies that are expressly attached to a particular department, or its equivalent, by the Code or special law. This sub-classification is, however, not mutually exclusive. The Code recognizes that regulatory agencies may also be organized as GOCCs, in which case they are to be governed by the Code's provisions on GOCCs.[880]

§3.3.2.3.2.2.3. Attached Regulatory Agencies

There are regulatory agencies that are attached by law to specific departments.[881] The attachment may differ in form, ranging from instances where the law prescribes nothing more than simple attachment on a lateral basis,[882] to those in which the law couples attachment with the other types of administrative relationships, such as general supervision[883] or administrative supervision.[884]

"shall be an independent and autonomous office, but attached…for purposes of policy and program coordination." See §14, Chap.5, Title III, Book IV, RAC (1987), as amended by R.A. 9406 on the PAO.

[877] See for example, §42, Chap.6, Title II, Book IV, RAC (1987), which simply provides that the Philippine Crop Insurance Corporation, the Philippine Export and Foreign Loan Guarantee Corporation, the Insurance Commission, the National Tax Research Center, the Central Board of Assessment Appeals, and the Fiscal Incentives Review Board, are hereby attached to the Department of Finance. See also §47, Chap.6, Title IV, Book IV, RAC (1987), attaching several agencies to the Department of Agriculture.

[878] §38(3a), Chap.7, Book IV, RAC (1987).

[879] Other agency charters even provide further qualifications for the attachment, i.e., that the attachment be "SOLELY for program and policy coordination," See Art.213, P.D.442, as amended by §1, R.A. 9347 on the NLRC; or that the agency "shall be an independent and autonomous office, but attached…for purposes of policy and program coordination." See §14, Chap.5, Title III, Book IV, RAC (1987), as amended by R.A. 9406 on the PAO.

[880] §43(1), Chap. 9, Book IV, RAC (1987).

[881] §38(3), Chap.7, Book IV, RAC (1987).

[882] See for example, §42, Chap.6, Title II, Book IV, RAC (1987), which provides that the Philippine Crop Insurance Corporation, the Philippine Export and Foreign Loan Guarantee Corporation, the Insurance Commission, the National Tax Research Center, the Central Board of Assessment Appeals, and the Fiscal Incentives Review Board, are hereby attached to the Department of Finance. See also §47, Chap.6, Title IV, Book IV, RAC (1987), attaching several agencies to the Department of Agriculture. N.B. Other agency charters even provide further qualifications for the attachment, i.e., that the attachment be "SOLELY for program and policy coordination," See Art.213, P.D.442, as amended by §1, R.A. 9347 on the NLRC; or that the agency "shall be an independent and autonomous office, but attached…for purposes of policy and program coordination." See §14, Chap.5, Title III, Book IV, RAC (1987), as amended by R.A. 9406 on the PAO.

[883] §42, Chap.9 Book IV, RAC (1987).

[884] See for example, §25, Chap.6, Title VII, Book IV, RAC (1987), attaching several agencies to the Department of Labor and Employment (DOLE) for policy and program coordination and administrative supervision.

§3.3.2.3.2.2.3.1. Simple Attachment

Considering that attachment by itself creates a lateral relationship for purposes of policy and program coordination,[885] regulatory agencies that are simply attached by statute to a specific department are given a higher degree of independence and autonomy than those that are attached but expressly subject to departmental supervision, whether general or administrative. A clear example of this is the NLRC, an adjudicatory agency whose previous attachment to the Department of Labor and Employment (DOLE) "for policy and program coordination and administrative supervision"[886] was legislatively changed to one that is "solely for program and policy coordination."[887] Similarly, R.A. 9406 reorganized and strengthened the PAO as the principal law office of the government in extending free legal assistance to indigents[888] by providing that it shall be "an independent and autonomous office attached" to the DOJ for "purposes of policy and program coordination."[889] Other examples of mere attachment provided in the Code[890] include the attachment of the National Tobacco Administration, the Sugar Regulatory Commission, the National Food Authority, the Fiber Industry Development Authority, the Fertilizer and Pesticide Authority, among others, to the Department of Agriculture.[891]

§3.3.2.3.2.2.3.2. Attachment + Supervision

Considering that attachment in and of itself merely creates a lateral relationship for coordination purposes,[892] and that supervision implies the existence of a superior-subordinate relationship,[893] the legislative intent to have an attached agency be likewise subjected to departmental supervision—whether general or administrative—should be clearly and unequivocally expressed.[894]

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[885] §38(3a), Chap.7, Book IV, RAC (1987).
[886] See §25(5), Chap.6, Title VII, Book IV, RAC (1987).
[887] See §1, R.A. 9347; See also §1, R.A. 10741.
[888] §2, R.A. 9406.
[889] §4, Chap.1 and §14, Chap.5, Title III, Book IV, RAC (1987), as amended by §1-2, R.A. 9406.
[890] N.B. Subsequent laws and government reorganizations may have already introduced changes to the 1987 RAC's initial allocation of specific administrative relationships between and among agencies and departments.
[891] Chapter 6, Title IV, Book IV, RAC (1987).
[892] §38(3a), Chap.7, Book IV, RAC (1987).
[893] De Villa v. City of Bacolod, G.R.No. 80744, September 20, 1990; Mondano v. Silvosa, 97 Phil. 143, 147-148 (1955) ; Ganzon *v.* Kayanan, 104 Phil. 484 (1985); Ganzon *v.* Court of Appeals, 200 SCRA 271 (1991); Taule *v.* Santos, 200 SCRA 512 (1991).
[894] See §38(2a), Chap.7, Book IV, RAC (1987). (The 1987 RAC provides that administrative supervision "shall govern the administrative relationship" between a department and regulatory agencies "as may be provided by law.")

§3.3.2.3.2.2.3.2.1. Attachment + Administrative Supervision

The Code is replete with provisions that expressly prescribe administrative supervision as the governing relationship between a department and a particular regulatory agency attached thereto.[895] Thus, the National Wages Council is "attached" the DOLE "for policy and program coordination and administrative supervision.[896] The Agricultural Credit Administration is "attached" to the Department of Agrarian Reform (DAR) "for administrative supervision and policy coordination."[897] Also, the National Mapping and Research Information Authority "shall be attached to and under the administrative supervision of" the Department of Environment and Natural Resources (DENR).[898]

§3.3.2.3.2.2.3.2.2. Attachment + General Supervision

Regulatory agencies that are constituted as government owned or controlled corporations (GOCCs),[899] are governed by the 1987 RAC's provisions on GOCCs.[900] In that regard, the Code generally prescribes attachment and general supervision as the governing relationship between all government owned and controlled corporations (GOCCs) and the departments to which they are attached.[901] A good example of this is the Philippine Social Security System (SSS). The SSS is a corporate body created by law[902] that is directed and controlled by a multi-member Social Security Commission (SSC) headed by a Chairperson selected from among its members,[903] and whose general conduct of operations and management functions is performed by an SSS President who serves as the agency's chief executive officer.[904] As a corporate entity, the SSS administers the social security system in accordance with the declared policy of establishing, developing, promoting and perfecting a sound and viable tax-exempt social security system suitable to the needs of the people throughout the Philippines which shall promote social justice and provide meaningful protection to members and their beneficiaries against the

[895] N.B. Subsequent laws and government reorganizations may have already introduced changes to the 1987 RAC's initial allocation of specific administrative relationships between and among agencies and departments.
[896] See for example, §25, Chap.6, Title VII, Book IV, RAC (1987).
[897] §21, Chap.5, Title XI, Book IV, RAC (1987).
[898] §23, Chap.5, Title XIV, Book IV, RAC (1987).
[899] §43(1), Chap.9, Book IV, RAC (1987).
[900] §43[1], Chap.9, Book IV, RAC (1987).
[901] §42, Chap.9 Book IV, RAC (1987).
[902] R.A. 8282, amending R.A. 1161, also known as the Philippine Social Security Law.
[903] §3(a), RA 1161, as amended by §1 R.A. 8282.
[904] §3(b), RA 1161, as amended by §1 R.A. 8282.

hazards of disability, sickness, maternity, old age, death, and other contingencies.[905] In addition to its administrative functions,[906] the SSC exercises rulemaking[907] and adjudicatory powers[908] pursuant to which it can take cognizance of any dispute arising under the SSS Law with respect to coverage, benefits, contributions and penalties, or any related matter. The SSC's decisions are subject to judicial review by the Court of Appeals on questions of law and fact.[909] As a GOCC, the SSS is attached to the Department of Finance (DOF) for purposes of policy and program coordination, and for general supervision.[910]

§3.3.2.3.2.2.4. Gov't owned or Controlled Corporations (GOCCs)

GOCCs refer to agencies that are organized as a stock or non-stock corporation, and vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government directly or through its instrumentalities either wholly, or, where applicable as in the case of stock corporations, to the extent of at least fifty-one (51) per cent of its capital stock.[911] They are attached by law or by executive order to the appropriate department to which they have allied functions.[912] To ensure policy and program coordination, the Code provides that at least 1/3 of the members of the GOCC's governing board should either be a Secretary, Undersecretary, or Assistant Secretary.[913]

As applied to GOCCs, attachment by itself[914] carries with it the power of general supervision by the department to which they are laterally attached.[915] As such, GOCCs enjoy a slightly higher degree of autonomy than agencies that are under administrative supervision.[916] Accordingly, GOCCs are largely

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[905] See §4 in rel. §2, R.A. 1161, as amended by R.A. 8282.
[906] §4 (a[2-7], b[1-11]), R.A. 1161, as amended by R.A. 8282.
[907] §4(a[1]), R.A. 1161, as amended by R.A. 8282. Rulemaking power to issue rules of procedure in adjudicatory cases is provided in §5(a) of the same law.
[908] §5, R.A. 1161, as amended by R.A. 8282.
[909] §5(b-d), R.A. 1161, as amended by R.A. 8282.
[910] See Manual for Corporate Governance for the SSS, available at https://www.sss.gov.ph/sss/DownloadContent?fileName=SSS_Manual_of_Corporate_Governance.pdf last accessed on February 10, 2016.
[911] §3(o), R.A. 10149; §2(13), Introductory Provisions, RAC (1987). N.B. GOCCs may be further categorized by the Department of the Budget, the CSC, and the COA for purposes of the exercise and discharge of their respective powers, functions and responsibilities with respect to such corporations.
[912] 42, Chap.9, Book IV, RAC (1987).
[913] 42, Chap.9, Book IV, RAC (1987).
[914] See for example §21, Chap.6, Title XIII, Book IV, RAC (1987).
[915] §42, Chap.9 Book IV, RAC (1987).
[916] Cf. General supervision also characterizes the relationship of the President and the local governments. See §18, Chap.6, Title I, Book III, RAC (1987) cf. §4, Art.X, 1987 PHIL. Const.; Hebron v. Reyes, 104 Phil. 175

autonomous on matters of day-to-day administration and internal operation.[917] There are, however, exceptional instances whereby the Code or special law directly prescribes administrative supervision over particular GOCCs.[918]

The Code also provides a mechanism that mandates the supervising department or its equivalent to escalate the level of supervision in cases where the GOCC's performance is sub-par. GOCCs are thus required to submit annual audited financial statements to the department,[919] pending which they can continue to operate under the preceding year's budget.[920] If the GOCC incurs an operating deficit at the close of their fiscal year, that will trigger the supervising department to ramp up its power of general supervision to that of administrative supervision.[921] The supervising department shall also subject the GOCC's operating and capital budget to departmental examination, review, modification and approval.[922] The GOCC's subsequent performance will then determine whether or not it will regain its previous level of independence and autonomy.

§3.3.2.3.2.2.4.1. The Governance Commission for GOCCs

Concerned with the overall performance of GOCCs in general, Congress enacted R.A. 10149, known as the "GOCC Governance Act of 2011,"[923] creating the Governance Commission for GOCCs (GCG), a cabinet-level agency attached to the Office of the President that acts as the central advisory, monitoring, and oversight body for GOCCs in accordance with the State's declared policy of actively exercising its ownership rights in GOCCs and ensuring, among others, that (a) the corporate form of organization is judiciously utilized for government activities;[924] (b) that the operations of GOCCs are rationalized and centrally monitored; [925] that all GOCCs are governed by people who are competent, and fully accountable;[926] and that all GOCCs are governed with the utmost degree of professionalism and

(1958); Pelaez v. Auditor General, 15 SCRA 569, 576 (1965); Drilon v. Lim, 235 SCRA 135, 141 (1994);Ganzon v. CA, 200 SCRA 271 (1991). As well as GOCC

[917] §38(3b), Chap.7, Book IV, RAC (1987).

[918] See for example §25, Chap.6, Title VII, Book IV, RAC (1987); §23, Chap.5, Title XIV, Book IV, RAC (1987).

[919] §38(3c), Chap.7, Book IV, RAC (1987).

[920] §38(3d), Chap.7, Book IV, RAC (1987).

[921] §38(3d), Chap.7, Book IV, RAC (1987).

[922] §38(3d), Chap.7, Book IV, RAC (1987).

[923] R.A. 10149.

[924] §2(a), R.A. 10149.

[925] §2(b), R.A. 10149.

[926] §2(e), R.A. 10149.

effectiveness, in a manner that is transparent, responsible and accountable.[927] In consultation with the department to which the GOCC is attached, the GCG evaluates the GOCC's performance with the objective of ascertaining whether the latter should be reorganized, merged, streamlined, abolished or privatized, based, among others, [928] on (a) functional factors, such as relevancy, overlapping, and redundancy; [929] (b) operational factors, such as dormancy, ineffectiveness, and cost inefficiency; [930] and (c) organizational factors.[931] If determined to be in the best interest of the State, the GCG is authorized to implement the reorganization, merger, or streamlining of the GOCC or GOCCs.[932] However, in cases where the GCG determines that the GOCC's abolition or privatization would be in the State's best interest, it shall recommend the same to the President for approval.[933] The GCG is also vested with general rulemaking authority to formulate, implement and coordinate policies,[934] as well as specific rulemaking authority to adopt an ownership and operations manual, as well as government corporate standards for GOCCs.[935]

The GCG's role in promoting corporate governance in each and every GOCC is central.[936] As it stands, GOCCs are now attached not only to a specific department[937] but also to the GCG.[938] There is, however, no legislative intent for the GCG to duplicate the supervisory role of the different departments to which each GOCC is attached.[939] Under the Code, GOCCs are attached to a specific department because they exercise functions that are allied to those of the department, thereby necessitating policy and program coordination between them, as well as general supervision at the departmental level.[940] The attachment to the GCG, on the other hand, is by virtue of the latter's mandate to represent the interests of the entire Republic as a majority

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[927] §2(c), R.A. 10149.
[928]§5, R.A. 10149.
[929]§5(a[1,2,5]) , R.A. 10149.
[930]§5(a[3,4,5]) , R.A. 10149.
[931]§5(a[6]) , R.A. 10149.
[932] See §5(a)[i], R.A. 10149. As worded, the statute gives the GCG the primary authority to act. The President, however, may direct otherwise.
[933] See §5(a)[ii], R.A. 10149.
[934] §5, R.A. 10149.
[935] §5(c), R.A. 10149.
[936] See Cesar L. Villanueva, The Role of the Governance Commission for GOCCs in Promoting Good Governance in GFIs, p. 2 (July 15, 2013) available at https://www.devbnkPhil..com/UserFiles/2%20The%20Role%20of%20the%20GCG%20in%20Promoting%20Good%20Governance%20in%20GFIs.pdf last accessed on April 4, 2016.
[937] §42, Chap.9, Book IV, RAC (1987).
[938]
[939] Id.
[940] §42, Chap.9, Book IV, RAC (1987).

stockholder of each and every GOCC.[941] Moreover, the relationship that the GCG has with the department to which the GOCC is attached is characterized by cooperation. The GCG evaluates and determines the performance and relevance of the GOCC in consultation with the department or agency to which the GOCC is attached.[942] It also engages the participation of the Secretary or highest-ranking official of the relevant agency or department in performing many of its statutory functions over the GOCC.[943] As explained by GCG Chairman Cesar L. Villanueva, speaking at the Good Governance Forum of the Development Bank of the Philippines (DBP)[944]—

> The GCG therefore represents no less than the interest of the majority stockholder in GFIs, promoting no less than the agenda of the Republic, which may be encapsulized into two pillars of *Public Corporate Governance*:
>
> > (a) To promote financial viability and fiscal discipline in GOCCs and GFIs, -- for truly the properties they possess are government properties, and the funds they hold are truly public funds; and
> > (b) To be employed as the State's "significant tools for economic development" and for their "operations [to be] consistent with national development policies and programs."
>
> Unlike private sector stockholders whose main concern is the maximization of shareholder value; the Republic as the majority stockholder in GFIs is primarily to serve the economic and social needs of its people.
>
> DBP is a much a "government corporation" and is it a bank; and consequently, in as much as the BSP ensures that DBP remains a "good, if not an excellent, bank" in the commercial sense, we in the GCG are mandated to ensure that DBP fulfills its public

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[941] Id. at 2-3.
[942] §5(a), R.A. 10149.
[943] Last par. §5, R.A. 10149.
[944] See Cesar L. Villanueva, The Role of the Governance Commission for GOCCs in Promoting Good Governance in GFIs (July 15, 2013) available at https://www.devbnkPhil..com/UserFiles/2%20The%20Role%20of%20the%20GCG%20in%20Promoting%20Good%20Governance%20in%20GFIs.pdf last accessed on April 4, 2016.

interests role under its charter to promote economic and social development in our country.[945]

Congress thus envisions the GCG as an active and effective means for reigning in and rationalizing the GOCCs that are being mismanaged,[946] and to ensure that the latter shall institutionalize and observe proper public corporate governance.[947] Among the GCG's notable accomplishments are the President's approval of the merger of the DBP and the Land Bank of the Philippines;[948] and the abolition of the depleted Retirement and Separation Benefits System of the Armed Forces of the Philippines (AFP-RSBS).[949]

§3.4. Changing Paradigms on the Philippine Administrative Structure

Statutorily created administrative agencies in the Philippines were earlier conceptualized in 1939 under the antiquated notion that they exercise only such powers as are executive and administrative in nature, and that they are solely adjuncts of the Chief Executive, in view of their place in the executive branch[950] and in accordance with the traditional "transmission belt" theory of administrative law that views agencies as mere implementers or executors of the legislative will.[951] The advent of modernization, however, gave rise to the

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[945] See Cesar L. Villanueva, The Role of the Governance Commission for GOCCs in Promoting Good Governance in GFIs, p. 2-3 (July 15, 2013) available at https://www.devbnkPhil..com/UserFiles/2%20The%20Role%20of%20the%20GCG%20in%20Promoting%20Good%20Governance%20in%20GFIs.pdf last accessed on April 4, 2016.

[946] See §4, R.A. 10149. N.B. The GCG law generally covers all GOCCs, except the Banko Sentral ng Pilipinas, state universities and colleges, cooperatives, local water districts, economic zone authorities and research institutions.

[947] GCG MC Nos. 2012-05; 2012-06; 2012-07. See also See Cesar L. Villanueva, *The Role of the Governance Commission for GOCCs in Promoting Good Governance in GFIs* 2-5 (July 15, 2013) available at https://www.devbnkPhil..com/UserFiles/2%20The%20Role%20of%20the%20GCG%20in%20Promoting%20Good%20Governance%20in%20GFIs.pdf last accessed on April 4, 2016.

[948] EO 198 s. 2016.

[949] OP Memorandum Order No. 90 s. 2016.

[950] *See Villena v. Executive Secretary*, G.R.No. L-46570, April 21, 1939 citing *Runkle vs. US*, 122 US, 543 (1887); *US vs. Eliason*, 10 Law. Ed., 968 [1839]; *Jones vs. US*, 137 U. S., 202 [1890]; *Wolsey vs. Chapman*, 101 U. S., 755 [1880]; *Wilcox vs. Jackson*, 10 Law. Ed., 264. [1836] ("…under the presidential type of government which we have adopted and considering the departmental organization established and continued in force by paragraph 1, section 12, Article VII, of our Constitution, all executive and administrative organizations are adjuncts of the Executive Department, the heads of the various executive departments are assistants and agents of the Chief Executive, …")

[951] *See* Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1672 (1974-1975) citing Berle, *The Expansion of American Administrative Law*, 30 Harv. L. Rev. 430, 431 (1917); *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362, 394 (1894); Frank Goodnow, *The Principles of Administrative Law* 6-7 (1905); M. Vile, *Constitutionalism and the Separation of Powers* 277-80 (1967).

practical necessity for government to keep pace or be left behind,[952] and investing administrative agencies with specialized expertise[953] and broader abilities to wield not just powers that are executive in nature but a combination of all the other types of governmental powers, was a means to clearly advance the values of promptness, efficiency, and dispatch in the performance of public service.[954] The resulting devolution of an amalgam of governmental powers invariably allowed administrative agencies to go beyond the mere execution of the law, and venture into either the making of binding rules or the adjudication of controversies, or both.[955] Concerns have earlier been raised regarding this expansion of agency activities on the bases of the separation of powers doctrine, and the doctrines against the delegation of legislative and judicial powers,[956] as well as the traditional notion that administrative agencies were meant to exercise purely executive functions.[957] Philippine case law, however, has largely upheld statutory delegations in favor of administrative agencies,[958] and papered over these concerns by labeling the expanded agency activities as "quasi" legislative and "quasi" judicial in order to shoehorn them within the purview of executive power.[959] The merits of that approach aside,[960] case law

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[952] *See* Tanada & Carreon, *Political Laws of the Phils.* 486 (1962) citing 4 Am. Jur. 291-294. Solid Homes v. Payawal, G.R.No. 84811, August 29, 1989; See also Philippine Int'l Trading Corp. v. Angeles, G.R.No. 108461, October 21, 1996, 263 SCRA 421, 444-45.

[953] J. Landis, The Administrative Process, 10-16, 46-50 (1938).

[954] *See* Tanada & Carreon, *Political Laws of the Phils.* 489-490 (1962) citing John Dickinson, Administrative Justice and the Supremacy of Law, 14-15 (1927).

[955] The ability of administrative agencies to exercise not just the executive power, but also powers that are essentially legislative (rulemaking) and judicial (adjudication) in nature, has had a long history of controversy in the Philippines and the United States.

[956] The judicial responses to these concerns were not consistent. See Turner v. Williams, 194 U.S. 279 (1904); Monongahela Bridge Co. v. U.S., 216 U.S. 177 (1910); Zakonaite v. Wolf, 226 U.S. 272 (1912); Arver v. U.S., 245 U.S. 366 (1918); Crowell v. Benson, 285 U.S. 22 (1932); Shields v. Utah Idaho, 305 U.S. 177 (1938); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Northern Pipeline Const. Co. v. Marathon Pipe Line, Co., 458 U.S. 50 (1982) (Holding that the statutory grant of adjudicatory powers to a bankruptcy court unconstitutional because the bankruptcy court was an administrative agency and the law "vests all essential attributes of the judicial power" upon it. "Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." [citing James Madison, The Federalist No. 47, 300.]); Thomas v. Union Carbide, 473 U.S> 568 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Granfinanciera v. Nordberg, 492 U.S. 33 (1989).

[957] Id.

[958] See for example, Rabor v. CSC, G.R. No. 111812 May 31, 1995; Edu v. Ericta, 35 SCRA 481 (1970).

[959] Early Philippine cases show the courts' inclination for labeling agency rulemaking and adjudication as being "quasi," and then utilizing that label to shoehorn those functions within the executive power—all in an attempt to do away with arguments based on the doctrines of separation of powers and non-delegation, as well as on the undue usurpation of judicial powers. See Dole Philippines v. Esteva, G.R.No. 161115, November 30, 2006; CIR v. CA, 329 PHIL 987, 1018-1019 (1996).

[960] Hickman & Pierce, Jr., *Fed.Admin.Law* 14 (2014). ("Many judicial opinions addressing administrative law disputes have passages reasoning that a particular decisionmaking procedure or relationship with another institution is or is not permissible because the agency is performing a function that is "quasi-legislative" or "quasi-judicial." It is important to recognize that, while this analogical reasoning process may be quite useful

has moved further towards the direction of greater leniency in dealing with the administrative agencies and their exercise of discretion, particularly in rulemaking.[961] In view of its simplistic conception of agencies, the traditional model had become an enabler for justifying broader and broader statutory delegations in favor of administrative agencies as a recognized exception to the doctrine against the delegation of powers.[962] Statutorily created administrative agencies have since then multiplied, becoming avenues that allowed non-elected administrators and officials to exercise a combination of all the coercive powers of government despite not being constitutionally vested with authority to do so.[963]

The sole use of the traditional model, which rationalizes the delegation of authority upon agencies on the assumption that the latter are mere executive instruments or transmission belts, is already becoming inadequate for the current administrative state in the Philippines. With the breadth and depth of the governmental powers being delegated upon them,[964] administrative agencies are increasingly able to exercise even wider discretion in imposing the coercive powers of government, to the point of challenging, if not debunking, the traditional notion of agencies as mere agents derivatively exercising delegated powers through canalized banks.[965] The stark reality is that those canalized

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fro some purposes, in other cases it may be of limited utility and may produce bad reasoning and bad results.") For example, in the Philippines, the "quasi" designation that placed the administrative agencies' exercise of legislative and adjudicative powers within the rubric of executive authority, was further utilized in combination with the unitary executive theory and the presidential power of control in order to justify the Philippine President's exercise of essentially legislative and adjudicative powers, in addition to the executive power vested by the Philippine Constitution.

[961] Rabor v. COMELEC, 244 SCRA 614 (1995) (the Court held that in subordinate, delegated rulemaking by administrative agencies, all that may reasonably be demanded is a showing that administrative regulations are germane to the general purposes projected by the governing or enabling statute.); See also Rizal Empire Insurance Co. v. NLRC, 150 SCRA 565 (1987); Philippine Global Comm'n, Inc. v. Relova, 145 SCRA 385 (1986); Espanol v. Philippine Veterans Administration, 137 SCRA 314 (1985); Sierra Madre Trust v. Secretary of Agriculture and Natural Resources, 121 SCRA 384 (1983); Warren Manufacturing Workers' Union v. Bureau of Labor Relations, 159 SCRA 389 (1988); Atlas Consolidated Mining & Dev't Corp. v. Court of Appeals, 182 SCRA 166 (1990); Gonzalez v. Land Bank, 183 SCRA 520 (1990); Nestle Phil. v. Court of Appeals, 203 SCRA 504 (1991); Comm. of Internal Revenue v. Central Luzon Drug Corp., 456 SCRA 414 (2005) (Administrative rules and regulations or policies enacted by administrative bodies to interpret the law which they are entrusted to enforce, have the force of law, and are entitled to great weight and respect.); Bacobo v. Commission on Elections, 191 SCRA 576 (1990) (The best authority to interpret a rule is the source of the rule itself.); See also De Leon & De Leon, *Admin.Law: Text and Cases* 92 (2013).

[962] See for example, Rabor v. CSC, G.R. No. 111812 May 31, 1995; Edu v. Ericta, 35 SCRA 481 (1970).

[963] *See* Tanada & Carreon, *Political Laws of the Phils.* 487 (1962) (That risk is further amplified when viewed from the standpoint of the individual citizen where, in many instances, one body may make regulations affecting him, investigate him or otherwise see to it that he complies with the regulations, file a complaint against him, try him on the complaint, render judgment against him, and even defend any appeal from its judgment, on which appeal the findings of fact by the administrative body are generally conclusive.)

[964] See for example, Rabor v. CSC, G.R. No. 111812 May 31, 1995; Edu v. Ericta, 35 SCRA 481 (1970).

[965] *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935). (Justice Cardozo, dissenting op.); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). (Justice Cardozo, concurring op.); Viola v. Alunan III,

banks may have all but eroded, and that the coercive authority delegated in the first place by the people to Congress under the Constitution is increasingly being performed not through the instrumentality of that principal institution's own judgment, but through the intervening mind of unelected administrative bureaucrats.[966] The problem of agency discretion has become all the more acute in the Philippines where agencies have, through the decades, been legislatively bestowed with even broader discretion to undertake administrative actions that have the binding effect of law.[967] With the legislature's willingness to transfer even broader delegations of authority to administrative agencies,[968] it would be unwise to assume that there is a one-to-one correspondence between the traditional transmission belt theory of agencies as being mere executors and implementers of the law, and what is actually occurring on the ground. As regards rulemaking in particular, there are more and more instances occurring where administrative agencies are the ones effectively exercising the discretion that was in the first place constitutionally vested in Congress.[969] The reality is that the traditional "transmission belt" theory has already broken down in the face of these broader and more general legislative directives to the administrative agencies,[970] because that theory can only effectively handle problems of agency discretion for so long as the administrative power was kept within relatively narrow bounds and did not intrude seriously on vested private interests.[971] Realizing that the "transmission belt" theory is already unworkable under the current situation is a first step towards making the proper

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G.R.No. 115844, August 15, 1997; Gomez v. Palomar, G.R.No. L-23645, October 29, 1968 (Justice Fernando, concurring op.) N.B. For a historical perspective on the matter, see Chapter 2 of this work.

966 *See Abakada Guro Party List v. Ermita*, 469 SCRA 1, 115-116 (2005); BOCEA v. Teves, G.R.No. 181704, December 6, 2011. ("The principle of separation of powers ordains that each of the three great branches of government has exclusive cognizance of and is supreme in matters falling within its own constitutionally allocated sphere. Necessarily imbedded in this doctrine is the principle of non-delegation of powers, as expressed in the Latin maxim *potestas delegata non delegari potest,* which means what has been delegated, cannot be delegated. This doctrine is based on the ethical principle that such delegated power constitutes not only a right but a duty to be performed by the delegate through the instrumentality of his own judgment and not through the intervening mind of another.") N.B. It is apparent that the risk here is that "the tail may already be wagging the dog," with administrative agencies getting to exercise the greater part of the regulatory discretion already delegated by the people upon Congress under the Constitution.

967 See for example, Rabor v. CSC, G.R. No. 111812 May 31, 1995; Edu v. Ericta, 35 SCRA 481 (1970).

968 Stewart, *Reformation of Admin.Law,* 88 Harv. L. Rev., 1669, 1677 fn. 27, 1695-1696 (1974-1975). The factors responsible for this lack of specificity are (1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; (2) lack of legislative resources to clarify directives; (3) lack of legislative incentives to clarify directives; (4) legislator's desire to avoid resolution of controversial policy issues; (5) the inherent variability of experience; (6) the limitations of language.)

969 See Chapter 1.

970 Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1677 (1974-1975).

971 *Id.* (So long as administrative power was kept within relatively narrow bounds and did not intrude seriously on vested private interests, the problem of agency discretion could be papered over by applying plausible labels, such as "quasi-judicial" or "quasi-legislative," designed to assimilate agency powers to those exercised by traditional governmental organs. Citing R. Cushman, The Independent Regulatory Commissions 45-62, 66 [1941]).

adjustments and improvements in the Philippine system of public governance in order to cope with and address its recurring ailment—the problem of administrative discretion.[972]

Like its predecessor constitutions, The 1987 Philippine Constitution does not recognize in the government any inherent power over persons and property.[973] The principle thus remains that the government's ability to coercively wield administrative powers over persons and property finds its legitimacy based on the consent as manifested by the sovereign will of the people under the Constitution.[974] In that regard, the 1987 Philippine Constitution treats the principal repositories of governmental authority—the Congress, the President, and the Judiciary—with great care and detail,[975] but handles administrative agencies quite differently. Aside from establishing a few constitutional administrative agencies with specific powers and varying degrees of completion,[976] the 1987 Philippine Constitution does little more than allude to the existence of statutorily created administrative agencies under various scattered provisions that generally refer to "agencies," "departments," "bureaus," "offices," or "instrumentalities."[977] It is also largely silent and unclear as to whether statutorily-created administrative agencies are proscribed from undertaking activities that embrace the essence of all three aspects of governmental powers: executive, legislative, and judicial,[978] as may be provided by legislation.[979] This constitutional silence, however, cuts both ways in that while there is no clear constitutional proscription against administrative agencies wielding a combination of governmental authority, there is also by that same silence a clear absence of any direct constitutional grant of governmental

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[972] The United States has, since the New Deal era and its unprecedented expansion of the administrative agencies and their authority, already looked towards other theories and alternative responses to the problem of agency discretion. Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1677-1711 (1974-1975).

[973] *Id.* at 1672.

[974] Bernas, *1987 Philippine Constitution* 4 (2009); Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1672 (1974-1975).

[975] See Articles VI, VII, VIII, 1987 PHIL. Const.

[976] See for example, Art.IX & XI, 1987 PHIL. Const.

[977] See Secs. 13, 14, 22, 25(3), Art. VI; Sections 11, 12, 13, 15, 16, 17, 18, 20 Art. VII; Sections 1, 12, Art.VIII; Section 2, Art. IX(A); Section 2(1), 3, 7, Art. IX(B); Section 2(4), 4 Art. IX(C); Sections 2(1) & 4, Art. IX(D); Section 21, Art. X; Section 14, Art. X; Sections 12, 13(1, 2, 5), Art. XI; Section 9, 10, 15 Art. XII; Secs. 13, 16, 18(9), Art.XIII of the 1987 Philippine Constitution.

[978] Tanada & Carreon, *Political Laws of the Phils.* 486 (1962) citing 4 Am. Jur. 291-294.

[979] Some jurisdictions have adopted the simplistic view of papering over this administrative phenomenon by labeling them as subordinate "quasi" powers in order to skirt the separation of powers issue considering that administrative agencies are part of the executive branch of government. That view, however, has been criticized and pushed back. (See Pierce book) In the Philippines, this simplistic view was stretched beyond its limits to unduly lionize the President's executive authority by using the "quasi" designation of the administrative agency's exercise of essentially legislative and judicial power as a means to place them under the rubric of executive power.

authority upon them[980] that would at once provide legitimacy to their exercise thereof under the Philippine concept of a republican form of government.[981] The legitimacy concerns about the Philippine bureaucracy's ever broadening exercise of governmental authority without constitutional imprimatur thus persists under the current constitutional regime, and the continuing passage of even broader legislative delegations only serves to amplify the risk of the public suffering illegitimate and arbitrary governmental action.[982] The presence of that discretion on the part of agencies and the latter's ability to exercise it, makes for an environment in which the risk and frequency of injustice is at its greatest.[983]

Taken together, the 1987 Philippine Constitution and the 1987 RAC provide the administrative structures, principles, and procedures that seek to address the modern reality that administrative agencies are not purely executive in nature, and that they are effectively exercising not just executive but also legislative and adjudicatory powers within their respective jurisdictions and areas of expertise.[984] In view of their constitutional creation and endowment of powers and functions under the 1987 Constitution, independent constitutional agencies are generally not hampered by the doctrines on non-delegation, and separation of powers.[985] The 1987 RAC, on the other hand, establishes the types of administrative agencies and their respective administrative

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[980] Note, however, that there are exceptional cases wherein he Philippines, there are agencies that are created under the 1987 Philippine Constitution. See Delos Santos v. Commission on Audit, G.R. No. 198457, August 13, 2013; Belgica v. Executive Secretary, G.R. Nos. 208566, 208493 & 209251, November 19, 2013.

[981] Bernas, *1987 Philippine Constitution* 56-57 (2009 Ed.), citing James Madison, and 1Aruego, The Framing of the Philippine Constitution 132 (1936).

[982] See Tanada & Carreon, *Political Laws of the Phils.* 487 (1962). (That risk is further amplified when viewed from the standpoint of the individual citizen where, in many instances, one body may make regulations affecting him, investigate him or otherwise see to it that he complies with the regulations, file a complaint against him, try him on the complaint, render judgment against him, and even defend any appeal from its judgment, on which appeal the findings of fact by the administrative body are generally conclusive.)

[983] Davis, *Discretionary Justice* v (1979) ("I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.")

[984] This view follows the functionalist approach to the separation of powers issue. See Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Cal. L. Rev. 853, 857-60 (1990). ("In its simplest formulation, functionalism asks "whether the exercise of the contested function by one branch impermissibly intrudes into the core function or domain of another branch." In other words, the question of blending is treated as one of degree rather than, as with formalism, one of kind. A different strand of functionalism begins with the (correct) observation that "the constitutional text addresses the powers only of the elected members of Congress, of the President as an individual, and of the federal courts." The Constitution does not speak of "branches" as such, nor does it discuss the institutions of government subordinate to the three named heads of authority. The functionalist thus infers that Congress is free to allocate authority as it pleases among subordinate institutions (however formalists would characterize them), as long as the "overall character or quality" of the relationships between those the institutions and the named heads of government is consistent with the latters' performance of their core functions.")

[985] See Art.IX & XI, 1987 PHIL. Const.

relationships on the basis of how predominantly executive they are, and in accordance with the nature of the functions that they are performing.[986] Thus, traditional executive departments, bureaus, and offices[987] are subject to executive and departmental control and supervision[988] because of their primarily executive nature and function. Even then, departmental control over executive bureaus and offices is subject to legislative limitation with regard to specific functions that involve discretion, experienced judgment or expertise; and further subject only to administrative supervision if those functions are regulatory.[989] Regulatory agencies, on the other hand, are made independent of executive departmental control and are only subject to departmental administrative supervision,[990] because they are legislatively vested with jurisdiction to regulate or adjudicate matters affecting substantial rights and interest of private persons,[991] through either rulemaking or adjudication, or both, under the procedures prescribed by the 1987 RAC[992] in conjunction with their respective legislative charters and enabling statutes. Through the foregoing framework, the 1987 RAC reinforces the notion that statutorily created administrative agencies exercise governmental authority in a derivative manner, subordinate to those institutions upon which governmental power had been principally and primarily vested under the Constitution—the Congress, the President, and the Judiciary—and that their subordinate status in turn provides the necessary checks by which each of the three principal institutions of government can, within their respective sphere, avert the risk of tyranny attendant in the essential accumulation of all the powers—legislative, executive, and adjudicatory—in one and the same administrative entity.[993] After all, control and supervision over the entire administrative bureaucracy is not exclusive to the President.[994]

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[986] See Chapters 1-6, 8, Book IV, RAC (1987) on executive departments, bureaus and offices; Chapter 7-9, Book IV, RAC (1987) on GOCCs and Regulatory Agencies.
[987] Chap.1-6, Book IV, RAC (1987).
[988] Chap.8, Book IV, RAC (1987).
[989] §39 (b, c), Chap.8, in relation to Chap.9, Book IV, RAC (1987).
[990] §38(2), Chap.7, Book IV, EO 292 s.1987.
[991] §2(11), Introductory Provisions, RAC (1987).
[992] Book VII, RAC (1987).
[993] See James Madison, The Federalist Papers: No. 47, February 1, 1788. ("The accululation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.")
[994] See Kendall v. U.S., 37 US 524, 525-526 (1838) (The U.S. Supreme Court rejected the postmaster's argument that it control and supervision over his office resides only with the President. "It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power to control the legislation of Congress and paralyze the administration of justice.")

This chapter's foray into the various constitutional and statutory governmental actors under 1987 Philippine Constitution, the 1987 RAC, and the other relevant laws, thus shows the palpable transformation in the structure of the Philippine administrative state. Both the statutory existence of lateral relationships, and the notion of independence from executive and departmental control, suggest departures from the traditional notion of agencies being mere implementers and executors that are subordinate solely to executive and departmental control under a vertically integrated administrative structure for the executive branch of government. In recognition of the reality that administrative agencies are exercising not just executive functions, but also powers that are either essentially legislative or judicial in nature, the 1987 RAC has structured the administrative relationships in the government bureaucracy in a manner that generally excises executive and departmental control over non-executive functions allocated by law to a specific agency, so as to address the separation of powers concerns that may arise when another institution—in the guise of executive or departmental control—would directly exercise the functions allocated by law to a specific administrative agency in violation of either the legislative will, or the constitutional separation of powers principle, or both.

Having been issued in an environment of existing laws with broad legislative delegations, [995] the 1987 RAC couples its changes in the administrative structure, with the imposition—for the first time in Philippine history—of a set of baseline administrative procedures that are designed to foster the use of reasoned and reasonable agency-decision-making, and to curb the arbitrary and capricious exercise of coercive governmental powers. As a legislative effort to promote formal justice, [996] the Philippine law on administrative procedure aims to minimize, if not altogether eliminate, the risks attendant in having broad legislative delegations of authority in favor of administrative agencies. Aside from tempering the risk of agency arbitrariness, administrative procedures also provide an alternative lever that balances out the effects of the legislature's statutory grant of agency independence from executive control over the agency's exercise of functions that are essentially legislative or judicial in nature. Administrative procedures also provide the Philippine courts with statutory alternatives in order to structure the exercise of

[995] See for example, Rabor v. CSC, G.R. No. 111812 May 31, 1995; Edu v. Ericta, 35 SCRA 481 (1970).
[996] Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1698 (1974-1975) (…the ideal of formal justice: that government interference with important private interests be permitted only in accordance with rules known in advance and impartially applied.) Citing Franz L. Neumann, The Democratic and Authoritarian State 67 (1957) ("La liberté consiste a ne dependre que des lois"); Shaugnessy v. U.S., 345 U.S. 206, 217 (1953) (Black, J. Dissenting: Society is not free where "one person's liberty" depends "on the arbitrary will of another.")

administrative discretion, and to facilitate its exercise of the judicial power as a backstop for correcting abuses of agency discretion.[997]

As regards rulemaking, the provisions of Chapter 2, Book VII of the 1987 RAC which delineate the procedures for both rule formulation[998] and rule publication,[999] effectively disengages Philippine administrative law from its total reliance on the traditional transmission belt theory[1000] by expanding the traditional model under a general statutory rulemaking framework that institutionalizes public participation in the formulation of rules and regulations, thereby assuring the fair representation of all the interests affected by the agency's exercise of delegated legislative power delegated to agencies.[1001]

With the governmental actors and their respective places having been accounted for, and with the statutory institutionalization of the constitutional right to public participation in the area of rulemaking, the stage is set for Philippine administrative law, and Philippine administrative rulemaking in particular, to continue with its reformation towards a modern and more responsive public participation based model of administrative law.

The modern rulemaking framework shall be discussed in the next chapter.

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[997] See §1, Art. VIII, 1987 PHIL. Const.
[998] §9, Chap. 2, Book IV, RAC (1987).
[999] §3-8, Chap.2, Book IV, RAC (1987).
[1000] Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1676, 1711-1712 (1974-1975). (Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the "transmission belt" theory of administrative law…With the breakdown of both the "transmission belt" and "expertise" conceptualizations of the administrative process, administrative law theories that treat agencies as mere executors of legislative directives are no longer convincing. More recent attempts to impose limits on administrative policy choice through rulemaking or economic theory have accepted as inevitable a large degree of agency discretion arising from the inability of Congress…to fashion precise directives or posit unambiguous goals that will effectively determine concrete cases.")
[1001] *Id.*

CHAPTER FOUR
A MODERN RULEMAKING FRAMEWORK FOR THE PHILIPPINES

Chapter Four Outline:

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$4.2. Rules and Rulemaking
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§4.3. Rulemaking and Adjudication
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§4.6.3.1. Exemption from Notice and Comment
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§4.6.4. Legislative Rules entitled to High Level of Deference

§4.1. Chapter Abstract

Rulemaking in the course of administering statutes is one of the major powers that administrative agencies possess.[1002] Its importance in the Philippine administrative landscape is evident in its pervasive use as the preferred means of government action by the Philippine administrative bureaucracy.[1003] Towards the end of the 20th century, Philippine legal scholars have already considered rulemaking as the lifeblood of the administrative process.[1004] Rulemaking is also fast becoming the dominant choice[1005] by which administrative agencies seek to achieve their statutory goals and objectives. Agency rulemaking should thus be accorded the treatment and attention commensurate to its increasing importance in Philippine administrative law. At the moment, however, that is not the case.

Philippine academic writing and Philippine case law have so far focused primarily and heavily on the other major power delegated to administrative agencies—that of adjudication[1006] — and had given little attention to expounding upon agency rulemaking.[1007] Although the Philippine Supreme

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[1002] Kristin E. Hickman & Richard J. Pierce, Jr., *Federal Administrative Law: Cases and Materials* 417 (2014), hereinafter "Hickman & Pierce, Fed. Admin. Law."

[1003] *See* Arturo E. Balbastro, *Administrative Law and Administrative Procedure*, 68 Phil. L.J.124, 127 (1993), hereinafter "Balbastro, Admin.Law & Procedure." ("…the wide range of administrative activities calls for prescription of policy at practically all stages and phases. Rulemaking, therefore, is often a complement of almost every other activity. It lends aid to the performance of the adjudication function wherein procedural rules are needed. Supervision and regulation are ineffective without rules. Investigation and prosecution greatly depend upon policies and procedures to govern them. Indeed, rule-making is the lifeblood of the administrative process.").

[1004] *Id.*

[1005] *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947), hereinafter "Chenery II," (The Court enunciated that, as a general rule, the choice between utilizing rulemaking or adjudication "is one that lies primarily in the informed discretion of the administrative agency.")

[1006] As early as 1940, the Philippine Supreme Court spearheaded this focus on agency adjudication by declaring the seven (7) fundamental and essential requirements of due process in trials and investigations of an administrative character, most of which were largely drawn from U.S. case law. *See Ang Tibay v. Court of Industrial Relations*, G.R.No. L-46496, February 27, 1940 (en banc), hereinafter "*Ang Tibay*." N.B. *Ang Tibay* is one of many cases that exemplify the Philippine Supreme Court's authority to impose common law requirements that are anchored upon broad constitutional and/or statutory provisions. For another example, *see Republic of the Philippines v. Court of Appeals and Molina*, G.R.No. 108763, February 13, 1997 (The Court expounded upon the sparse language of Art.36, Philippine Family Code, on psychological incapacity as a ground for nullifying marriages by laying down eight (8) guidelines for interpreting and applying the statute).

[1007] As of 2013, two current Philippine textbooks did not discuss the nuances of agency rulemaking at length. (*See* De Leon & De Leon, *Admin.Law: Text and Cases*, consisting of a little less than 500 pages, of which roughly

Court has in recent years already invalidated agency rules that have not completely undergone the appropriate rulemaking procedures,[1008] it has yet to provide detailed and definitive judicial guidance on how administrative agencies can properly go about the rulemaking process in light of the broadly worded provisions of Chap.2, Book VII of the 1987 RAC of the Philippines (1987 RAC).[1009]

This dearth of academic and jurisprudential attention on rulemaking in Philippine administrative law is quite perplexing considering that agency adjudication and rulemaking are two sides of the same administrative coin. Both these powers constitute significant means by which administrative agencies get to act with the force of law against the public. More importantly, these powers enable administrative agencies to exercise discretion. It is that agency discretion, or more particularly the risk of its problematic exercise and abuse, that is the central concern of Philippine administrative law.[1010] Reigning in and curbing the excessive, unbridled, arbitrary, abusive, and capricious exercise of agency discretion is part and parcel of the bag of concerns that animated the promulgation of the 1987 Philippine Constitution[1011] and the relevant statutes.[1012]

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more than 1⁄2 has been devoted to administrative adjudication and roughly 2/10 to administrative rulemaking; *See also* C.Cruz, *Phil.Admin.Law* (2003)," consisting of a little more than 600 pages, of which almost 3⁄4 has been devoted to the appended reproduction of the 1987 RAC. Philippine scholars have given the topic of administrative rulemaking little attention. *See also* Balbastro, *Admin.Law and Procedure*, 68 Phil. L.J. at 127 (Professor Balbastro dedicated only a little more than half a page in discussing administrative rulemaking. In that article, Professor Balbastro also concluded that "one step in the right direction is the formulation and adoption of a uniform set of rules for administrative procedure." Although the 1987 RAC and its Book VII had already been in force at the time Professor Balbastro article was published in 1993, the journal article made no mention of it.)

[1008] *See Commissioner of Customs v. Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012, hereinafter "Hypermix Feeds Corp."

[1009] The absence of judicial guidance is particularly palpable regarding the rule formulation stage, i.e., notice-and-comment requirement. *See* VII(2) RAC §9 (1987). *N.B.* Philippine Supreme Court has already given judicial guidance on the requirement for final rule publication and its due process implications. *See Tanada v. Tuvera,* G.R.No. L-63915, December 29, 1986, 146 SCRA 446, hereinafter "Tanada II." ("Administrative rules and regulations must a also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation."); *Philippine Ass'n of Service Exporters, Inc. v. Torres*, G.R.No. 101279, August 6, 1992 (The Court held that even though the DOLE and POEA circulars on the processing and foreign deployment of Filipino domestic helpers were substantively permissible, they were nevertheless "legally invalid, defective, and unenforceable" because the agencies failed to comply with the rulemaking procedures set by the relevant statutes—particularly the statutory requirements for the publication phase of rulemaking.)

[1010] The problem of agency discretion is a central concern of administrative law even in the United States and other jurisdictions. *See* Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev. 1669 (1974-1975).

[1011] *See* Phil.Const. art.VIII, §1 (1987), providing for the judiciary's arbitrary and capricious review of the abusive exercise of discretion on the part of any branch or instrumentality of the Government.

[1012] *See* VII RAC (1987); cf. William R. Andersen, *Mastering Administrative Law* 26 (2009), hereinafter "Andersen, Mastering Admin. Law." ("Administrative law's functional response to this difficulty [referring to concerns about legitimacy, accountability, excessive political control, policing technical expertise] is a series of procedural requirements that seek to insure that rules are carefully thought out, based on sound factual

In line with this work's overall objective of modernizing rulemaking in Philippine administrative law, this chapter earnestly attempts to lay down the modern rulemaking framework in the Philippines, supplemented in its gaps and interstices with pertinent lessons derived from the administrative law in the United States. Accordingly, part of its goal is to flesh out the necessary steps and details of compliance that have so far been left largely unarticulated in the Philippine setting.

Considering that rulemaking is in its nascent stage of academic study in the Philippines, this chapter utilizes a rationalized approach by discussing the fundamental and basic building blocks of modern rulemaking in a manner that largely tracks the steps ordinarily taken by the courts when faced with problematic rulemaking scenarios. Accordingly, this chapter begins by discussing the basics of what rules are, what rulemaking is, and why rulemaking is advantageous not only to the administrative agency but also to the government as a whole and the persons and entities affected by it. The chapter then proceeds to discuss agency rulemaking vis-à-vis agency adjudication by pointing out the similarities and differences between these two major agency powers. The differences are then noted due to their importance in shedding light upon the threshold question of whether or not the agency action is rulemaking or adjudication, because of the varying requirements and principles that are respectively applicable to them.[1013]

The chapter then looks into the classification of agency rules on the basis of their nature as being either non-legislative or legislative. Non-legislative agency rules are first discussed in general. They are then categorized into different types, and their respective attributes and characteristics are explained. The subtle nuances between the different kinds of non-legislative rules, and what makes them non-legislative, are also examined.

Some types of non-legislative rules, such as Guidance Documents and Rules of Agency Procedure or Practice, are delved into in further detail due to their problematic nature. Administrative agencies often use agency procedures and practice, statements of policy, and interpretive rules to affect the behavior

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foundations and that those affected by a proposed rule have some meaningful opportunity to participate in its formulation.")

[1013] *See Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco Corp.*, G.R.No. 119761, August 29, 1996, hereinafter "Fortune Tobacco," Bellosillo, J., Separate Opinion. (Agreeing with the Court's invalidation of RMC 37-93 but arguing that RMC 37-93 was not a rule, but an exercise of the agency's administrative adjudicatory power.)

of people and entities within and outside the agency. Agencies have also used these types of non-legislative rules as convenient disguises for issuing rules that should have undergone the rulemaking process necessary for issuing legislative rules.[1014] The section on non-legislative rules also discusses the legality and propriety of Philippine case law[1015] that somehow characterized Guidance Documents as not being subject to the mandatory publication requirements.[1016] The section then ends with a discussion on the respect that courts accord to non-legislative rules, respect which rises and falls depending on such factors as the agency's use of its experience and expertise, the document's thoroughness and consistency, and the validity of the agency's reasoning, among others.[1017]

Legislative rules are discussed in their proper sense as subordinate legislation that have the binding force and effect of law. Not being a power inherent in administrative agencies, an agency can validly issue legislative rules only when Congress has by law expressly enabled it to issue rules on specific matters that have been statutorily placed in the agency's charge for regulation.[1018] In addition, the agency so enabled by law should likewise comply with both the substantive and procedural requirements imposed by the 1987 RAC, the enabling law, and other statutes of general and particular applicability. In terms of rulemaking procedures, the section clarifies the role of Chap.2, Book VII of the 1987 RAC in providing the basic default pattern for most administrative rulemaking,[1019] which other statutes or rules may hybridize via provisions that add procedural requirements on top of those required by

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[1014] *See* Andersen, *Mastering Admin.Law* 41-43. ("…if the agency's issuance has the "force of law" it is a legislative rule rather than a non-legislative rule, and, accordingly, [§553] notice and comment are required…Some courts have looked carefully at the language of the issuance and the conduct of the agency with respect to it to see if the agency purported or intended it to encapsulate a final and authoritative policy choice—a conclusion that would lead to its characterization as a legislative rule. The court might examine the title of the instrument or the prose surrounding it to look for…peremptory language of command…or by the absence of willingness to consider variations…If such a court believes the issuance reflects a finally decided policy choice, compliance with which was expected, the court will likely regard the rule as legislative. It will be invalid if not promulgated through notice and comment.")

[1015] *Misamis Oriental Ass'n of Coco Traders v. DOF Secretary*, G.R.No. 108524, November 10, 1994, 238 SCRA 63, hereinafter "Misamis Oriental Ass'n," citing Kenneth Culp Davis, *Administrative Law Treatise* 116 (1965) hereinafter "Davis, Admin.Law Treatise;" Tañada II, 146 SCRA 446 (1986); *Peralta v. CSC*, 211 SCRA 425 (1992); *Fortune Tobacco*, G.R.No. 119761, August 29, 1996.

[1016] Andersen, *Mastering Admin.Law* 41. ("Some non-legislative rules (interpretive rules and policy statements) are exempt from the notice and comment process…but remain subject to the APA's publication requirements…").

[1017] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), hereinafter "Skidmore."

[1018] *See* Andersen, *Mastering Admin.Law* 32 ("The first legal question to consider in evaluating the legality of agency rulemaking is, of course, the question of authority. Agencies have no inherent power, so every exercise of power by an agency must be supported by a statutory grant. If no statutory authority to make rules can be found, the agency cannot make rules.")

[1019] *Id.* at 33.

the 1987 RAC.[1020] The discussion then turns onto the types of rulemaking proceedings as distinguished mainly by the sort of "hearing" requirement prescribed by law, starting with "informal rulemaking" which entails notice-and-comment as generally prescribed by the 1987 RAC,[1021] then "formal rulemaking" which somewhat parallels the procedural requirements of administrative adjudication,[1022] and then "hybrid rulemaking" in which other statutes or rules have added procedural requirements to what would otherwise be required by the 1987 RAC.[1023] The section then outlines the requirements common to all these types of rulemaking, i.e., the notice of the proposed rulemaking; the rulemaking record, docket or file; the agency's reasoning; the publication of the final rule; and the waiting period for the rules' effectivity. The section then discusses the deferential framework utilized in deciding cases involving legislative rules, including the rationale behind it.[1024]

§4.2. Rules and Rulemaking

The 1987 RAC defines a "rule" as "any agency statement of general applicability that implements or interprets a law, fixes and describes the procedures in, or practice requirements of an agency, including its regulations;"[1025] and defines "rulemaking" as "an agency process for the formulation, amendment, or repeal of a rule."[1026] Taken together, both statutory definitions correspond to the notion of rulemaking as the development of standards of general applicability,[1027] involving as it does a generalized determination by the agency.[1028]

In assessing the agency's conduct of rulemaking, courts often use the legislature as the frame of reference.[1029] Rulemaking is thus considered as that part of the administrative process that resembles the legislature's enactment of

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[1020] *Id.* at 38.
[1021] *See* VII(2) RAC §9 (1987).
[1022] Formal rulemaking is triggered either via (a) the specific language of the enabling statute or (b) when there is "opposition" during the notice-and-comment or public participation process. *See* VII(2) RAC §9 (1987).
[1023] *See* Andersen, *Mastering Admin.Law* 38.
[1024] *Cf. Chevron v. NRDC*, 467 U.S. 837, 842-845 (1984), hereinafter "Chevron."
[1025] VII(1) RAC §2[2] (1987). The term also includes "memoranda or statements concerning the internal administration or management of an agency not affecting the rights of, or procedure available to, the public."
[1026] *Id.* at §2[4].
[1027] William T. Mayton, *The Legislative Resolution of the Rulemaking versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L.J. 103, 109 (1980), hereinafter "Mayton, Legislative Resolution."
[1028] Werhan, *Principles of Admini.Law* 174 (2014), *cf. Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 [1915], hereinafter "Bi-Metallic Investment").
[1029] See Werhan, *id.*

a statute,[1030] with the statutorily prescribed rulemaking procedures for agencies being generally contemplated as the functional equivalent of the legislative process prescribed for Congress by the Constitution. Thus, in the same manner that Congress is bound to follow the legislative process under the Constitution in order to validly pass legislation,[1031] so too must administrative agencies in the Philippines comply with the rulemaking procedures prescribed generally by Book VII of the 1987 RAC, and additionally by the particular enabling statute, in order to validly issue rules and regulations that are legislative in nature, and which in themselves have the binding force of law.[1032] Moreover, both constitutional and statutory provisions are controlling with respect to what rules may be promulgated by an administrative body, and what fields are subject to the latter's authority to regulate.[1033] In sum, the administrative rulemaking process requires administrative agencies to comply with both the substantive and procedural requirements of the Constitution, the statutes that

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[1030] *Balmaceda v. Corominas*, G.R.No. L-21971, September 5, 1975, hereinafter "Balmaceda," citing Davis, *Admin.Law Treatise*, 275, et.seq. (1958).

[1031] *See INS v. Chadha*, 462 U.S. 919 (1983), hereinafter "Chadha;" *Belgica v. Executive Secretary*, G.R.No. 208566, November 19, 2013 hereinafter "Belgica;" *Abakada Guro Party List v. Purisima,* 562 SCRA 251 (2008) hereinafter "Abakada Guro;" *Guingona v. Carague*, 273 Phil. 443, 460-461 (1991). N.B. In the Philippines, the congressional legislative process is generally prescribed in Phil.Const. art.VI, §26-27 (1987). The Philippine Constitution also requires the keeping of legislative records. *See* Phil.Const. art.VI §16(4). Other sections of the Philippine Constitution also provide additional procedural requirements for Congress with regard to specific matters. *See* for example Phil.Const. art.VI, §24. "All appropriations, revenue or tariffs bills, bills authorizing increase of public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments."

[1032] *See* Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32(2) Tulsa L.J. 185 (1996) hereinafter "Pierce, Jr., Rulemaking and the APA," ("We place a high value on efficiency, fairness, and accountability… Yet, we harbor a deep distrust of government and government officials. That distrust induced the Framers to create a government that consists of three independent branches, each with enough power to serve as an effective check on the exercise of the powers conferred on the other two branches. Our distrust is particularly apparent in the procedures required to enact a statute. A bill can become law only by navigating a tortuous course through both Houses of Congress and the President. It should come as no great surprise that our distrust of government also manifests itself in the context of agency rules and rulemaking. The most important category of agency rules, legislative rules, have effects that are functionally indistinguishable from those of statutes."); See also Kenneth Culp Davis & Richard J. Pierce, Jr., *1 Administrative Law Treatise* §6.5, §6.7 (3rd Ed. 1994), hereinafter "Davis & Pierce, Jr., Admin.Law Treatise."

[1033] *See Smart Communications v. National Telecommunications Comm'n (NTC)*, G.R.No. 151908, August 12, 2003, hereinafter "Smart Comm'n." ("The rules and regulations that administrative agencies promulgate, which are the product of a delegated legislative power to create new and additional legal provisions that have the effect of law, should be within the scope of the statutory authority granted by the legislature to the administrative agency. It is required that the regulation be germane to the objects and purposes of the law, and be not in contradiction to, but in conformity with, the standards prescribed by law. They must conform to and be consistent with the provisions of the enabling statute in order for such rule or regulation to be valid. Constitutional and statutory provisions control with respect to what rules and regulations may be promulgated by an administrative body, as well as with respect to what fields are subject to regulation by it. It may not make rules and regulations which are inconsistent with the provisions of the Constitution or a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute. In case of conflict between a statute and an administrative order, the former must prevail.")

are generally applicable to the administrative agency, and the particular statute that the agency is charged to administer.[1034]

§4.2.1. Advantages of Rulemaking

Modern agency rulemaking is one of the greatest inventions of modern government.[1035] Unlike courts of law, administrative agencies have the ability to make new law prospectively through the exercise of their substantive rulemaking powers.[1036] In both theory and in practice, the consensus is that rulemaking, as opposed to adjudication, is the superior forum for developing law and policy.[1037] Agencies therefore have less reason to rely upon ad hoc adjudication to formulate new standards of conduct with the framework of the statute being implemented.[1038] Accordingly, the agency's function of filling in statutory interstices should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.[1039] The following are among the notable advantages of modern rulemaking:

a. Higher quality of rules.—Rulemaking enhances the quality of agency policy decisions because it focuses on the broad effects of alternative rules and invites participation by all potentially affected groups and individuals.[1040] As such, it can be expected to yield higher quality rules than adjudication.[1041]

Modern rulemaking is synoptic.[1042] The agency conducting rulemaking is generally not limited in its ability to gather relevant information by utilizing the advice of staff experts, outside experts, or relevant studies.[1043] The agencies' mandatory publication or

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[1034] *Id.*

[1035] Davis, *Discretionary Justice* 65 (1979); Davis, *Admin.Law Treatise* §6:1 (1978); Mayton, *Legislative Resolution*, 1980 Duke L.J. 103 (1980).

[1036] *Chenery II*, 332 U.S. 194, 202 (1947).

[1037] Mayton, *Legislative Resolution*, 1980 Duke L.J. 103 (1980).

[1038] *Chenery II*, 332 U.S. 194, 202 (1947).

[1039] *Id.*

[1040] Pierce, Jr., *Rulemaking and the APA*, 32(2) Tulsa L.J. 189 (1996).

[1041] Richard J. Pierce, Jr. *Administrative Law Treatise* § 6.8 (5th ed. 2010), hereinafter "Pierce, Jr., Admin.Law Treatise," discussing '*The Many Advantages of Rules and Rulemaking*' cited in Hickman and Pierce, Jr., *Fed.Admin.Law* 424-425 (2014).

[1042] Colin Diver, *Policymaking Paradigms in Administrative Law* 95(2) Harv. L. Rev. 393, 406 (1981), hereinafter "Diver, Policymaking Paradigms."

[1043] Mayton, *Legislative Resolution*, 1980 Duke L.J. at 106 (1980); Werhan, *Principles of Admin.Law* 258 (In informal rulemaking proceedings, agency decision-makers are free to gather information from any source when formulating a rule.); *See also* Pierce, Jr., *Admin.Law Treatise* §6.8; Hickman and Pierce, Jr., *Fed.Admin.Law* 424-425 (2014). (Agency rulemaking is quite "unlike adjudication in which evidence, information, and inputs are limited and confined to those produced by a handful of litigants.")

circulation of notices of its proposed rules[1044] invites the public to submit relevant comments under the proper frame of reference,[1045] and exposes agency proposals to diverse public opinion and comment.[1046] The public's right to comment on agency rulemaking proposals, in turn, constitutes a particularly important component of the agency's reasoning process,[1047] because the comments together with the other relevant data gathered by the agency become part of the "administrative record" of the rulemaking proceeding, which contains everything that the agency shall rely upon and consider in formulating its final rule.[1048]

With all potentially affected members of the public being given the opportunity to participate as interested parties,[1049] the rulemaking process fosters broad-based participation that benefits the affected public, and at the same time educates the agencies.[1050] The agency is thus afforded the opportunity to assess whether the factual pattern it intends to rely on as a predicate for its rule is widely generalizable or entirely idiosyncratic.[1051] Rulemaking also provides an avenue to bring forward, thresh out, and address alternative fact patterns, alternative methods of shaping conduct, and practical problems in implementing alternative rules, among others.[1052]

b. Enhanced Political Accountability.—Rulemaking enhances the political accountability of agency policy making by providing the general public, the President, and members of Congress advance notice of an agency's intent to make major policy decisions and an opportunity to influence the policies ultimately chosen by the agency.[1053] Before an agency can make a binding policy decision

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[1044] *See* VII(2) RAC §9 (1987).

[1045]Pierce, Jr., *Admin.Law Treatise*, *id.*, Hickman and Pierce, Jr., *Fed.Admin.Law*, *id.*

[1046] *See Int'l Union v. Mine Safety & Health Adm'n*, 407 F.3d 1250, 1259 (DC Cir. 1978); Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3rd Cir. 2011); *A. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (DC Cir. 1994).

[1047] *Connecticut Light and Power*, 673 F.2d 525, 530 (DC Cir. 1982); Werhan, *Principles of Admin.Law* 257 (2014).

[1048] *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419– 20 (1971) hereinafter "Overton Park;" Werhan, *Principles of Admin.Law*, *id.* at 258.

[1049] *See* VII(2) RAC §9 (1987).

[1050] Mayton, *Legislative Resolution*, 1980 Duke L.J. 103 (1980); Pierce, Jr., *Admin.Law Treatise* §6.8 (2010); Hickman Pierce, Jr., *Fed.Admin.Law* 424-425 (2014).

[1051] Pierce, Jr., *Admin.Law Treatise*, *id.*; Hickman and Pierce, Jr., *Fed.Admin.Law, id.*

[1052] *Id.* (Interested parties have a natural incentive to include in their comments studies and affidavits of experts addressing such issues as (1) the frequency of occurrence of various factual patterns, (2) the likely efficacy of alternative rules in shaping conduct, (3) the cost of compliance with alternative rules, and (4) the practical problems inherent in implementing or enforcing alternative rules in varying factual contexts.)

[1053] Pierce, Jr., *Rulemaking and the APA*, 32(2) Tulsa L.J. 189 (1996).

through the rulemaking process, it must issue a public notice of its proposed rule.[1054] This notice of proposed rulemaking affords citizens who oppose or support the proposal the opportunity to alert the principal political branches of government—the President and members of Congress—to the existence of the agency proposal, and to express their views of the agency's proposal to those politically accountable officials.[1055] This, in turn, allows the President and Congress to express to the agency their views concerning the proposed policy decision and, through the process of executive and congressional oversight, to affect agency resolutions of policy disputes.[1056]

c. **Enhanced Legitimacy.—**Rulemaking provides the public with the proper avenue to participate and have a hand in formulating agency rules that may affect them. Direct public participation in the formulation of agency rules bridges the gap between the people as the ultimate source of governmental authority,[1057] and the administrative agency's exercise of that authority despite being twice removed from its source.[1058] The legitimacy of the final rule would, in theory, be enhanced because the public had participated in its formulation.[1059] The rulemaking process also fosters openness, accessibility, and amenability of the agency and its officials to the interested members of the public.[1060]

[1054] *See* VII(2) RAC §9 (1987). (The only statutory exception appears to be based on clear impracticability.)
[1055] Pierce, Jr., *Admin.Law Treatise* § 6.8 (2010); Hickman Pierce, Jr., *Fed.Admin.Law* 424-425 (2014).
[1056] *Id.; See also* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & Org. 243 (1987), hereinafter "McCubbins, Noll & Weingast, Admin.Procedures as Instruments of Pol.Control."
[1057] Phil.Const. art.II, §1 (1987).
[1058] Under the Philippine Constitution, governmental authority emanates from the people, *id.*, which vested it in the three great institutions of the President, *id.* at art.VII §1, Congress, *id.* at art.VI §1, and the Judiciary, *id.* at art.VIII §1, each of which is considered as the principal repository of the power respectively vested upon them. As a general proposition, the Philippine Constitution does not directly vest governmental authority to statutorily created administrative agencies. The latter can thus exercise governmental power only via further delegation from those institutions principally vested with it. Accordingly, the agencies' ability to wield governmental power is continuingly subject to attack and criticism under the social contract theory and the rule of *potestas delegata non potest delegari*, which prohibits the further delegation of what has already been delegated.
[1059] *See* David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking* 74 Fordham L. Rev. 81 (2005), hereinafter "Fontana, Reforming the APA." (The basic idea is that the more public participation in the promulgation of agency rule, the more deference that rule should receive when it is challenged in court.)
[1060] *See Sierra Club v. Costle*, 657 F.2d 298 (DC Cir.1981); Home Box Office v. FCC, 567 F.2d 9 (DC Cir.1977); *See also* Werhan, *Principles of Admin.Law* 269-270 (2014). N.B. Some cases have upheld the rule against *ex parte* communications in rulemaking proceedings that involve "resolution of conflicting private claims to a valuable privilege." *See Action for Children's Television v. FCC*, 564 F.2d 458, 474-77 (DC Cir. 1977) and *Sangamon Valley Television v. U.S.*, 269 F.2d 221, 224 (DC Cir. 1959).

d. Enhanced Efficiency.—Rulemaking complements almost every other agency activity.[1061] Rules enhance efficiency by simplifying and expediting agency enforcement efforts.[1062] Rulemaking also eliminates the need to engage in expensive and time-consuming adjudicatory hearings that re-litigate recurring issues[1063] or address issues of legislative fact.[1064] Rules created through rulemaking are also easier and less expensive to enforce and to implement than are "rules" announced in the course of adjudicating specific disputes.[1065]

e. Enhanced Fairness.—Rulemaking promotes fairness by allowing all potentially affected members of the public an opportunity to participate in the decision-making process that determines the rules that affect them.[1066] The codification and publication of standards promote the uniform application of the law,[1067] as well as provides clarity by giving affected parties clearer advance notice of permissible and impermissible conduct.[1068]

Rules also establish decisional standards that constrain the agency from abusing its discretion.[1069] Rules provide structure to the agency's exercise of discretion, and insures like treatment of similarly situated individuals and firms.[1070] Once issued, rules that have the force of law are as valid and binding to the agency that issued it as it is to the public.[1071] The issuing agency cannot waive or renounce its own legislative rules at its own convenience.[1072]

[1061] *See* Balbastro, *Admin.Law and Procedure*, 68 Phil. L.J.124, 127 (1993).
[1062] Pierce, Jr., *Rulemaking and the APA*, 32(2) Tulsa L.J. 188-189 (1996).
[1063] Pierce, Jr., *Admin.Law Treatise* §6.8 (2010); Hickman and Pierce, Jr., *Fed.Admin.Law* 424-425 (2014).
[1064] *Id.*
[1065] *Id.*
[1066] *Id.*; *See also* Pierce, Jr., *Rulemaking and the APA*, 32(2) Tulsa L.J. 189 (1996).
[1067] *Id.* (Rulemaking avoids the widely disparate temporal impact of "rules" announced and applied through adjudicatory decisionmaking. It reduces the incidence and magnitude of inter-decisional inconsistencies in implementing regulatory and benefit programs.); *see also* Mayton, *Legislative Resolution*, 1980 Duke L.J. 103. (1980), citing *Bernstein, The NLRB's Adjudication-Rule Making Dilemma under the Administrative Procedure Act*, 79 Yale L.J. 571 (1970); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 Harv.L.Rev. 385 (1964); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv.L.Rev. 921 (1965); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell.L.Rev.375, 376 (1974).
[1068] Pierce, Jr., *Admin.Law Treatise*, *id.*; Hickman and Pierce, Jr., *Fed.Admin.Law, id.*
[1069] Pierce, Jr., *Rulemaking and the APA* 32(2) Tulsa L.J. 189 (1996).
[1070] *Id.*
[1071] *See Bureau of Internal Revenue (BIR) v. Next Mobile*, G.R.No. 212825, January 21, 2016, p. 12, hereinafter "Next Mobile." (The Court chided the BIR for violating its own rules on waiver of prescriptive period to assess and collect taxes, holding that the BIR's negligent failure to stringently follow the requirements in the execution of

The foregoing advantages are directly tied to rulemaking process, and many of them are attainable only through the agency's proper observance of the rulemaking procedures provided in Book VII, 1987 RAC in conjunction with those provided in the enabling statute, and other applicable laws. The rulemaking process is also important because it provides the mechanism that addresses and adjusts the tension between the two competing values: that of advancing the values of efficiency, fairness, and accountability in the rules themselves,[1073] and that of addressing the deep distrust in the administrative agencies and officials that are the source of those rules.[1074] Accordingly, courts are particularly hesitant to excuse agencies from observing the statutory baseline of public participation in agency rulemaking,[1075] more so with the agency's compliance with the publication requirements.[1076]

§4.3. Rulemaking and Adjudication

Rulemaking and adjudication are the two means established by the 1987 RAC by which administrative agencies may act with "the force of law."[1077] As a

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waivers pursuant to its own legislative issuances [RMO 20-90 and RDAO 05-01] was tantamount to malice and bad faith, for which the officers responsible should be administratively held liable.)

[1072] *See Fortune Tobacco*, G.R.No. 119761, August 29, 1996 (Holding that, in issuing legislative rules and regulations, the BIR must comply with the notice-and-comment, and publication provisions of Chap.2, Book VII of the 1987 RAC, as well as its own RMC 10-86 on the Effectivity of Internal Revenue Rules and Regulations). *See also Balmaceda*, G.R.No. L-21971, September 5, 1975. ("We come next to petitioner-appellant's submission that respondent- appellee has infringed the Consolidated Rules and Regulations by importing non-essential goods in excess of the 10% limitation. … It is pleaded by respondent-appellee that the Consolidated Rules and Regulations are mere departmental rule of the Secretary of Commerce and Industry which it may conveniently waive or renounce. We disagree. A "rule (or a 'regulation' — a term used interchangeably with 'rule') is the product of rule making, and rule making is the part of the administrative process *that resembles* a legislature's enactment of a statute. In this jurisdiction, administrative authorities are vested with the power to promulgate rules and regulations to implement a given statute and to effectuate its policies and when promulgated, such administrative rules or regulations become laws. Controversy is not recorded that the Consolidated Rules and Regulations were promulgated by the then Secretary of Commerce and Industry, Pedro C. Hernaez in accordance with the express authority of §5, RA 1410 "to draft, promulgate and publish such rules and regulations as it may deem necessary" for the implementation of the Act. Withal, it cannot be lightly read that the said Consolidated Rules and Regulations are mere departmental rule, but rather do have the force and effect of a valid law which cannot be waived or renounced.")

[1073] Davis and Pierce, Jr., 1 *Admin.Law Treatise* §6.7 (1994).

[1074] Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463 (1992) hereinafter "Strauss, Rulemaking Continuum;" Pierce, Jr., Rulemaking and the APA, 32(2) Tulsa L.J. 185-186 (1996).

[1075] Werhan, *Principles of Admin.Law* 273-275 (2014); *New Jersey Dep't of Environmental Protection v. EPA*, 626 F. 2d 1038, 1046 (D.C.Cir. 1980); *Professionals and Patients for Customized Care v. Shalala,* 56 F. 3d 592, 595 (5th Cir. 1995). (Statutory exemptions from the public participation requirement have been "narrowly construed and only reluctantly countenanced."). *See also Fortune Tobacco*, G.R.No. 119761, August 29, 1996; *Misamis Oriental Ass'n,* 238 SCRA 63 (1994).

[1076] *See Tanada II*, 146 SCRA 446 (1986). ("Administrative rules and regulations must a also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation.")

[1077] *See* VII(2,3) RAC (1987) *cf.* Werhan, *Principles of Admin.Law* 175 (2014). (The APA established two means by which administrative agencies may act with "the force of law."); Hickman & Pierce, Jr., *Fed.Admin.Law* 277

means for setting policy, the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.[1078] Agencies can, in their discretion, formulate law and policy, which is to say rules, by adjudication as well as rulemaking.[1079]

Rulemaking and adjudication are thus similar in that both can be used by agencies to establish standards of conduct for those regulated,[1080] and create the necessary predicate for penalizing violators of those standards. [1081] Administrative agencies can make pronouncements that legally bind the public either by issuing legislative rules through the rulemaking process, or by announcing broad rules of conduct in the context of a particular adjudication and then later on applying them as binding precedent in subsequent cases.[1082] Rulemaking and adjudication are also similar in that both require the assembly of sufficient factual information to support wise policy judgments.[1083] In the same way that adjudicative facts are needed for agencies to properly adjudicate controversies,[1084] rulemaking requires the agency to gather legislative facts, i.e., general facts, that do not usually concern the immediate parties but are

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(2014). ("When government agencies act, they typically do so in one of two generalizable formats: rulemaking or adjudication.")

[1078] *Chenery II*, 332 U.S. 194, 203 (1947); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421.

[1079] *See* Mayton, *Legislative Resolution*, 1980 Duke L.J. 103 (1980); Fuchs, *Development and Diversification in Administrative Rulemaking*, 72 Nw. U.L.Rev. 83,89 (1977).

[1080] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 123 (5th Ed., 2012), hereinafter "Lubbers, Guide to Rulemaking."

[1081] *Id.*

[1082] NLRB *v. Wyman-Gordon Co.,* 394 U.S. 759 at 765—766 (1969), hereinafter "Wyman-Gordon." (Adjudicated cases may and do serve as vehicles for the formulation of agency policies, which are applied and announced therein, and such cases generally provide a guide to action that the agency may be expected to take in future cases.); *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294-295 (1974) (*Chenery II* and *Wyman-Gordon* "make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion…It is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues."); *Chenery II*, 332 U.S. 194, 202 (1947). (The choice to set agency rules via ad hoc adjudication exists because the administrative process should remain flexible and capable of dealing with many of the specialized problems which can arise, [citing the *Report of the Attorney General's Committee on Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess., p. 29, hereinafter "U.S. Attorney General's Committee Report on Administrative Procedure."]); Hickman and Pierce, Jr., *Fed.Admin.Law* 447 (2014) (*Chenery II* is discussed "because of its holding that an agency that has the power to issue rules through the rulemaking process has the discretion to use the traditional common law method of rulemaking instead, i.e., to announce broad rules of conduct in the course of resolving a particular adjudication and then to apply the rules as binding precedent in subsequent cases.").

[1083] Lubbers, *Guide to Rulemaking* 123 (2012); Werhan, *Principles of Admin.Law* 122 (2014); Davis, 1 *Admin.Law Treatise* § 7.02 at 413– 12 (1958).

[1084] Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, Michel E. Hertz, *Administrative Law and Regulatory Policy: Problems Text, and Cases* 505 (2011) hereinafter "Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy*;" Davis, 1 *Administrative Law Treatise* §7.02 (1959). ("Adjudicative facts are the facts about the parties and their activities, businesses, and properties.")

necessary to inform the agency in properly deciding questions of law, policy, and discretion.[1085]

§4.3.1. The Rulemaking-Adjudication Distinction

Notwithstanding the similarities between agency rulemaking and adjudication, determining whether a particular agency action falls under one or the other is a necessary threshold issue to any controversy involving administrative actions. This is evident in the case of *Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco Corp.*,[1086] in which one of the justices issued a separate opinion based on his findings that the Commissioner of Internal Revenue RMC 37-93 was not a rule as the majority had characterized it, but an administrative adjudication which implicates the constitutional due process of law in adjudicatory proceedings instead of the notice-and-comment rulemaking process.[1087] The major distinctions are discussed as follows:

One key to distinguishing rulemaking from adjudication relates to the distinct nature of the agency's decision-making.[1088] Rulemaking involves a generalized determination by the agency,[1089] while adjudication involves an individualized decision.[1090] Thus, as used in Book VII, 1987 RAC, a "rule" means "any agency statement of general applicability…"[1091]

They also differ in their respective effects upon individuals—in adjudication, each individual is exceptionally affected by the decision; while in rulemaking, the rule applies equally to all the persons or entities affected by it.[1092]

[1085] *Id.*

[1086] *See Fortune Tobacco*, G.R.No. 119761, August 29, 1996.

[1087] *Id.* (*See* Separate Opinion, Bellosillo, J., agreeing with the Court's invalidation of RMC 37-93 but arguing that RMC 37-93 was not a rule, but an exercise of the agency's administrative adjudicatory power.)

[1088] Werhan, *Principles of Admin.Law* 119-127, 174 (2014) (Discussing the *Londoner-Bi-Metallic* distinction between Rulemaking and Adjudication) *cf. Londoner v. City and County of Denver*, 210 U.S. 373 (1908) hereinafter "Londoner;" *Bi-Metallic Investment*, 239 U.S. 441 (1915) ("When agencies engage in rulemaking, they resemble a legislature by creating "a rule of conduct" governing a group of individuals; and when agencies adjudicate, they resemble a court by applying legal rules to an individual on "individual grounds.")

[1089] *Bi-Metallic Investment, id.* at 443. (An across the board increase in property valuation that applied equally to every property owner in the area was a general determination dealing only with the principle upon which all the assessments in the county had been laid.)

[1090] *Londoner,* 210 U.S. 373, 385 (1908). (The agency's duty of determining whether to levy, in what amount, and upon whom it would be levied, was held as adjudicatory in nature.)

[1091] *See* VII(1) RAC 2(2) (1987).

[1092] *See Bi-Metallic Investment*, 239 U.S. 441, 443 (1915); *Air Line Pilots Ass'n v. Quesada*, 276 F. 2d 892 (2nd Cir. 1960), cert. denied, 366 U.S. 962 (1961) hereinafter "Air Line Pilots Ass'n." N.B. Even though a "rule of conduct" applies equally to a group of persons, its effect on each person within the group depends on his or

Two other distinctions exist based on their present and future operation, and on the announcement of a general rule without reference to any particular case as opposed to the application or elaboration of a rule to fit a specific case.[1093] Prospectivity typically applies to rulemaking, while actions that are "judicial in kind" look to the past.[1094] What further distinguishes the agency's acts of legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity.[1095] A judicial act thus determines what the law is, and what the rights of the parties are, with reference to the transaction already had; while a legislative act prescribes what the law shall be in future cases arising under it.[1096]

The number of individuals affected is also another factor in the adjudication-rulemaking distinction.[1097] Adjudication ordinarily affects a relatively small number of persons,[1098] in which case the constitutional guarantee of procedural due process acts as an equalizer that helps balance power between an individual or a small number of individuals, and the government, because it gives the former a voice that the latter otherwise would not hear, or respond to, before acting to deprive her or him of liberty or property.[1099] Rulemaking, on the other hand, ordinarily involves a rule of conduct applicable to more than a few people[1100] whose numbers, and collective voting power, can be a potential political check or a source of political influence over the agency decision-makers.[1101] Limiting procedural due

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her circumstances. As seen in both *Bi-Metallic* and *Air Line Pilots Ass'n*, this alleged unfairness of a generally applicable rule does not give rise to a procedural due process claim. *See* Werhan, *Principles of Admin.Law* 123-124 (2014).

[1093] John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 21 fn. 36 (2003), hereinafter "Dickinson, Administrative Justice."

[1094] *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); Werhan, *Principles of Admin.Law* 175-176 (2014).

[1095] Dickinson, *Administrative Justice* 21 (2003).

[1096] *Id.* citing Blackstone, *Commentaries*, ed. Christian, i. 46; Cooley, *Constitutional Limitations* 131 (7th Ed.).

[1097] Werhan, *Principles of Admin.Law* 125-126 (2014). (Although the difference in numbers provided the *Bi-Metallic* Court powerful justifications for applying procedural due process requirements to adjudication and not to rulemaking, the number of people affected by an agency decision does not determine whether the administrative action is rulemaking or adjudication.)

[1098] *Londoner*, 210 U.S. 373, 385 (1908). (The agency's duty of determining whether to levy, in what amount, and upon whom it would be levied, was held as adjudicatory in nature.)

[1099] Werhan, *Principles of Admin.Law* 125 (2014).

[1100] *Bi-Metallic Investment*, 239 U.S. at 445– 46.

[1101] *Id. See, however,* Werhan, *Principles of Admin.Law* 127 (2014). (For many, the Court's assurance of a political check to control agency rulemaking provides cold comfort. After all, the people affected by federal regulation do not elect their rule-makers…Administrators, at best, are only indirectly accountable to the regulated public through the capacity of Congress and the President to oversee agency rulemaking).

process protections to individuals involved in agency adjudication reinforces those protections by husbanding this powerful constitutional resource for the type of government decision-making where it is most needed. [1102] Considerations of practicality also justify the distinction based on the number of individuals affected.[1103]

The number of persons affected, however, is not by itself determinative of whether a specific administrative action is either adjudicative or legislative in nature, and due regard should be given to the generalized nature of an agency's decision, as well as its general applicability.[1104]

§4.3.2. Due Process

When an agency adjudicates, it implicates the constitutional guarantee to procedural due process of law,[1105] the cardinal requirements of which admit of no exception under Philippine case law.[1106] This is functionally justified by the fact that the agency decision-maker in adjudicatory proceedings ordinarily cannot accurately find the facts of the case without giving the individual parties prior notice and opportunity to be heard. Due process is therefore indispensable for such proceedings since the parties know more about the facts concerning themselves and their activities than anyone else is likely to know.[1107]

In contrast, the constitutional safeguards of procedural due process for adjudicatory proceedings are not indispensable to the agency's conduct of rulemaking[1108] because legislative facts are general in nature.[1109] However, the

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[1102] Werhan, *Principles of Admin.Law, id.* at 125.

[1103] *Bi-Metallic Investment*, 239 U.S. at 445– 46. ("There must be a limit to individual argument in such matters if government is to go on…Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption."); *Minnesota Bd. for Community Colleges*, 465 U.S. at 285. ("Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard."); Werhan, *Principles of Admin. Law* 124-125 (2014).

[1104] Werhan, *Principles of Admin.Law, id.* (…it is the generalized nature of an agency's decision, and the general applicability of that decision, rather than the number of individuals actually affected, that govern the rulemaking-adjudication distinction, *citing Anaconda v. Ruckelshaus*, 482 F.2d 1301, 1306 [10th Cir. 1973]).

[1105] Werhan, *Principles of Admin.Law, id.* at 174 (2014); Londoner, 210 U.S. 373 (1908).

[1106] *See Ang Tibay,* G.R.No. L-46496, February 27, 1940. (The Philippine Supreme Court outlined the seven [7] cardinal requirements of due process in administrative adjudication proceedings.)

[1107] Davis, *Admin. Law Treatise* §7.02, 413-12 (1958); Werhan, *Principles of Admin. Law* 122 (2014). (An evidentiary hearing might have been necessary to make the individualized tax assessment at issue in Londoner. Because assessing the actual value of an individual's property might well have required evidence possessed only by the property owner, the owner's participation likely had been essential to a sound decision.)

[1108] *Bi-Metallic Investments*, 239 U.S. 441 (1915); *McMurtray v. Holladay*, 11 F.3d 499 (5ht Cir. 1993); *Interport Pilots Agency v. Sammis*, 14 F.3d 133 (2d Cir. 1994); *Minnesota Bd. For Community Colleges v. Knight*, 465 U.S. 271 (1984); Werhan, *Principles of Admin. Law* 122 (2014) ("Because the Constitution does not prescribe due process for legislative decision-making, the Court in Bi-Metallic seemed to reason, no such requirement should attach when

inapplicability of one constitutional right (that of procedural due process) does not mean that agency rulemaking is free from all limitations.[1110] This is particularly true in the Philippines where the right to effective and reasonable public participation at all levels of social, political, and economic decision-making has both statutory and constitutional dimensions.[1111]

Thus, even if the judicial-type procedures prescribed by procedural due process for agency adjudications do not fit the legislative-type decision-making that characterizes agency rulemaking, it does not necessarily follow that there is no process due in administrative rulemaking.[1112] The legislature can impose procedural rulemaking requirements for each individual agency via their respective particular enabling acts, as well as for all agencies in common via generally applicable statutes,[1113] such as Book VII of the 1987 RAC on administrative procedure.[1114] In such cases, the validity of the agency's rule and its conduct of rulemaking shall be measured in terms of its compliance and fealty to both the substantive and procedural requirements set by the applicable laws.[1115]

§4.3.3. Availability of Judicial Review

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agencies act like a legislature, that is, when they make rules. Judicial trials are designed for the adjudication of individual rights, and not for the more policy-oriented task of formulating legislative rules.") *N.B.* There are statutory exemptions to certain rulemaking requirements, i.e., the "impracticability' of prior notice and comment, *see* VII(2) RAC §9 (1987). In contrast, no exceptions are provided for the cardinal requirements of due process in administrative adjudicatory proceedings laid down in *Ang Tibay*, G.R.No. L-46496, February 27, 1940.

[1109] Breyer, Stewart, Sunstein, Vermeule and Hertz, *Admin. Law and Regulatory Policy* 505 (2011); Werhan, *Principles of Admin. Law*, *id.* at 122 (2014); Davis, 1 *Admin. Law Treatise* §7.02 (…procedural due process does not apply to administrative rulemaking because affording each affected party an evidentiary hearing often would not improve agency decision-making. Legislative facts are general in nature, and thus the affected parties "may often have little or nothing to contribute to [their] development.")

[1110] *See* Werhan, *Principles of Admin. Law* 126-127, citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). (Substantive due process "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'." *Daniels v. Williams*, 474 U.S. 327, 331 [1986]).

[1111] *See* Phil.Const. art.XIII, §16 (1987) *cf.* II(1) RAC §1(7) and VII(2) RAC §9 (1987).

[1112] *See Fortune Tobacco*, G.R.No. 119761, August 29, 1996; *Misamis Oriental Ass'n*, 238 SCRA 63 (1994); *See also* Werhan, *Principles of Admin.Law*, 126-127 (2d Ed.); Hans A. Linde, *Due Process of Lawmaking,* 55 Neb. L. Rev. 197, 235– 55 (1976).

[1113] *See* Werhan, *Principles of Admin. Law*, *id.* ("Congress is free to fill the constitutional void by enacting statutes imposing procedural requirements for agency rulemaking. And Congress has done so, in general statutes such as the Administrative Procedure Act, as well as in particular enabling acts.")

[1114] See VII(2) RAC (1987).

[1115] In a sense, it is the legislature that largely determines by statute how much process is due for particular rulemaking scenarios. Administrative rulemaking procedures mandated by statute have to be followed by the administrative agency otherwise its rule would be void. *See* Philippine Civil Code, art.5. Acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.

Distinguishing whether a particular administrative action constitutes rulemaking or adjudication is crucial in view of the judicial doctrines applicable when judicial review is sought against the administrative agency's action.

In the Philippines, cases involving the constitutionality or validity of agency rules are within the scope of the power of judicial review vested by the Constitution in the courts of law.[1116] Agency rules are thus subject to pre-enforcement judicial review,[1117] and may be the subject of an action for declaratory relief.[1118] The doctrines on exhaustion of administrative remedies, and on primary jurisdiction, both of which are applicable to agency adjudications,[1119] do not apply when the agency's act pertains to its rulemaking or quasi-legislative power.[1120] In terms of venue, controversies involving the validity or constitutionality of an agency rule or regulation can be filed with the Regional Trial Courts; [1121] while exclusive appellate jurisdiction over adjudicatory decisions made by quasi-judicial agencies belongs to the Court of Appeals.[1122]

§4.4. Classification of Rules: Legislative and Non-Legislative

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[1116] See Phil.Const. art.VIII, §1 and §5(2)(a) (1987); *Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012; Smart Comm'n, 456 Phil.. 145 (2003).

[1117] *See* Pierce, Jr., *Rulemaking and the APA*, 32(2) Tulsa L.J. 185, 191 citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-148 (1967); See also *Smart Comm'n*, *id.*

[1118] *See Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006.

[1119] *Association of Philippine Coconut Dessicators v. Philippine Coconut Authority*, G.R. No. 110526, 10 February 1998, 286 SCRA 109, 117; *See also Smart Comm'n, id.; Fabia v. Court of Appeals,* G.R. No. 132684, September 11, 2002.

[1120] *Smart Comm'n*, G.R. Nos. 152063 & 151908. August 12, 2003. (The Court remanded the case to the Regional Trial Court [RTC] for further proceedings, holding that the petitioners rightly filed the suit before the RTC to assail the constitutionality and validity of NTC Memorandum Circular No. 13-6-2000 and Memorandum dated October 6, 2000. The doctrines of exhaustion and primary jurisdiction were not applicable because both issuances were made in the exercise of the NTC's rulemaking power.)

[1121] *Id.* ("…[w]here what is assailed is the validity or constitutionality of a rule or regulation issued by the administrative agency in the performance of its quasi-legislative function, the regular courts have jurisdiction to pass upon the same. The determination of whether a specific rule or set of rules issued by an administrative agency contravenes the law or the constitution is within the jurisdiction of the regular courts. Indeed, the Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts. *Spouses Mirasol v. Court of Appeals*, 351 SCRA 44, 51 (2001). This is within the scope of judicial power, which includes the authority of the courts to determine in an appropriate action the validity of the acts of the political departments. *Santiago v. Guingona, Jr.*, 298 SCRA 756, 774 (1998). Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. Phil.Const. art.VIII, §1 [1987]); *See also Drilon v. Lim*, 235 SCRA 135 (1994).

[1122] *See* BP 129 §9; Phil.Rules of Court, Rule 43 §1; *National Water Resources Board (NWRB) v. A.L. Ang Network Inc.*, G.R.No. 186450, April 8, 2010 (BP 129 had rendered inoperative Art.89, PD 1067 and other prior laws that gave appellate jurisdiction over agency adjudications to the RTCs. BP 129's delineation of the jurisdiction of the Court of Appeals and the RTCs clearly provides "a homogeneous procedure for the review of adjudications of quasi-judicial entities to the Court of Appeals.")

Agency issuances that fall within the rulemaking side of the rulemaking-adjudication dichotomy are subject to further classification because not all administrative issuances are legally binding as law upon the regulated sector and the public, and not all executive issuances are considered as legislative interpretations of the law.[1123] Any discussion of rulemaking should thus begin by recognizing that there are different types of rules,[1124] the most basic of which is the distinction between legislative and non-legislative rules.[1125]

The United States APA expressly exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from the statutory requirements of public notice and comment.[1126] U.S. courts and commentators have long labeled rules that do not fall within the scope of the exemptions as legislative rules to distinguish them clearly from the exempt categories. [1127] Some courts alternatively refer to non-exempt rules as substantive rules instead of legislative rules, but courts and commentators generally treat the two terms as synonymous.[1128] Although the distinction primarily serves the purpose of ascertaining whether the promulgation of a rule must satisfy the procedural requirements for rulemaking, the rule's classification as either legislative or non-legislative may also alter the scope and availability of judicial review.[1129]

Philippine statutory law, on the other hand, has remained silent on the legislative vs. non-legislative distinction.[1130] Philippine courts, however, have sought to fill in the gap of this statutory silence via a strong judicial tendency towards adopting the same legislative vs. non-legislative distinction being made in the United States.

Prior to 1987, the Philippines did not have a general law on administrative rulemaking procedure. Philippine courts that faced issues involving agency issuances were mainly limited in their legal arsenal to the substantive aspects of the agency rules, i.e., that the rule should be (a)

[1123] *See Victorias Milling Co. v. SSC*, 114 Phil. 555 (1962) hereinafter "Victorias Milling;" *Nueno v. Angeles,* 76 Phil. 12 (1946). (Not all of the President's issuances as Chief Executive have the force and effect of law, and that issuances without binding effect were not legislative interpretations of the law.)
[1124] Hickman and Pierce, Jr., *Fed.Admin.Law* 417 (2014).
[1125] *See Fortune Tobacco*, G.R.No. 119761, August 29, 1996; *Misamis Oriental Ass'n*, 238 SCRA 63 (1994); Hickman and Pierce, Jr., *Fed.Admin.Law*, *id.*
[1126] 5 U.S.C §553(b)(A).
[1127] Hickman & Pierce, Jr., *Fed.Admin.Law* 417 (2014).
[1128] *Id.; see also See Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006.
[1129] *Id.*
[1130] *See* VII(2) RAC (1987).

reasonable,[1131] (b) within the scope of the statutory authority granted by the legislature,[1132] (c) germane to the objects and purposes of the law,[1133] (d) in conformity with the standards prescribed by law,[1134] (e) solely for purposes of carrying into effect the general provisions of the law.[1135] This substantive approach to reviewing agency rules, in turn, became increasingly difficult to apply as a check against excessive agency discretion due to the legislature's enactment of broader legislative delegations.[1136] Relevant pre-1987 Philippine cases have shown the courts' desire to use the distinction between the legislative and non-legislative agency rules as an additional or alternative approach to addressing agency discretion, only to end up struggling with the implications of that distinction in the absence of a general law on administrative rulemaking procedure.[1137] The passage of the 1987 RAC and its Book VII filled the statutory gap that had sorely existed for so long in Philippine administrative rulemaking. That law provided the sub-constitution for the Philippine administrative state—a legal, yet flexible, framework

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[1131] *Lupangco v. Court of Appeals,* G.R.No. 77372, April 29, 1988, hereinafter "Lupangco." (The Court invalidated Professional Regulation Commission [PRC] Resolution No. 105 prohibiting examinees from attending review classes and receiving review materials during three days immediately preceding PRC examination, on grounds of unreasonableness. "It is an aixiom in administrative law that administrative authorities should not act arbitrarily and capriciously in the issuance of rules and regulations. To be valid, such rules and regulations must be reasonable and fairly adapted to the end in view. If shown to bear no reasonable relation to the purposes for which they are authorized to be issued, then they must be held to be invalid. Gonzales, Administrative Law, Law on Public and Election Law, p.52 (1966). Resolution No. 105 is not only unreasonable and arbitrary, it also infringes on the examinees' right to liberty guaranteed by the Constitution.")

[1132] *People v. Maceren*, G.R.No. L-32166, October 18, 1977, hereinafter "Maceren." (The Court acquitted the defendant from charges of electro-fishing in violation of a fisheries regulation, and held the fisheries regulation invalid because electro-fishing was not expressly made punishable in the enabling statute); *Victorias Milling*, 114 Phil.. 555, 558 *citing* Davis, *Administrative Law* 194,197; *People v. Lim*, 108 Phil.. 1091 (1960).

[1133] *People v. Exconde*, 101 Phil.. 1125 (1957); *Calalang v. Williams*, 70 Phil.. 727 (1940); *Pangasinan Transp'n v. Public Service Commission*, 70 Phil. 221 (1940).

[1134] *Id.*

[1135] *U.S. v. Tupasi Molina*, 29 Phil.. 119 (1914).

[1136] *See for example, Rabor v. CSC*, G.R. No. 111812 May 31, 1995; *Edu v. Ericta*, 35 SCRA 481 (1970); cf. Chapter 2 & 3 of this work on the breakdown of the traditional transmission belt theory of administrative law in the Philippine setting; *cf.* Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1677 fn. 27, 1695-1696 (1974-1975). (The factors responsible for this lack of specificity are (1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; (2) lack of legislative resources to clarify directives; (3) lack of legislative incentives to clarify directives; (4) legislator's desire to avoid resolution of controversial policy issues; (5) the inherent variability of experience; (6) the limitations of language.)

[1137] *Interprovincial Autobus Co. v. Collector of Internal Revenue*, G.R.No. L-6741, January 31, 1956, hereinafter "Interprovincial Autobus." (The Court was ambivalent in its treatment of Finance Regulation No. 26 s. 1924, initially treating it as a non-legislative internal departmental rule and then later characterizing it as having the force and effect of law.); *Secretary of Finance v. Arca*, G.R.No. L-25924, April 18, 1969, hereinafter "Arca" (The Court held that the Finance Secretary's 1965 Memorandum to the Customs Commissioner directing the latter to observe the reappraised dutiable valuation of several types of listed remnants, had the force of law, while at the same time agreeing with the agency's assertion that the said memorandum was a mere guidance document); *Victorias Milling*, 114 Phil. 555 (1962). (The Court considered SSC Circular No. 22 as an interpretive rule because it did nothing more than update a previous rule to make it conform to the legislative amendments to the law being implemented, without adding anything new to the statute by way of additional duty or detail.); *Philippine Blooming Mills v. SSS*, 124 Phil.. 499 (1966), hereinafter "Philippine Blooming Mills."

governing virtually all the administrative agencies when they take actions affecting individual rights.[1138]

Chapter 2, Book VII of the 1987 RAC lays down the groundwork for structuring and rationalizing broad agency discretion in the conduct of agency rulemaking.[1139] Armed with this general statute, Philippine courts are now in the process of fine-tuning and clarifying the distinction between legislative and non-legislative rules, and its ramifications.[1140] The legislative versus non-legislative rule distinction in the Philippine setting still needs further development and refinement in terms of their respective principles, coverage, characteristics, and attributes. Proper account should also be taken of the different types of rulemaking processes for issuing both legislative and non-legislative rules, i.e., rules of agency organization, procedure, or practice, that are less controversial, and thus less likely to be the subject of judicial controversy.

The characteristics and distinctions between non-legislative and legislative rules are further discussed as follows:

§4.5. Non-Legislative Rules

Rules that are non-legislative lack the "force of law" and are not legally enforceable as against the public and the courts,[1141] although some of them may bind agency employees.[1142] They are not substantive because they neither create legally enforceable rights for, nor impose legal obligations on, the

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[1138] Werhan, *Principles of Admin.Law* 171-172 (2014).

[1139] *See* VII(2) RAC (1987) on Rules and Regulations. N.B. Procedural safeguards are typically used to justify or rationalize broad delegations of authority because procedures profoundly influence and can often determine the substantive outcomes of agency actions. Influencing agency procedures can likewise be an indirect but powerful way to influence agency outcomes.

[1140] *See Misamis Oriental Ass'n*, G.R.No. 108524, November 10, 1994; *Fortune Tobacco,* G.R.No. 119761, August 29, 1996.

[1141] Werhan, *Principles of Admin.Law* 276 (2014).

[1142] Hickman and Pierce, Jr., *Fed.Admin.Law* 417 (2014) *citing* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 876 (2001), hereinafter "Merrill & Hickman, Chevron's Domain"; Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 930 (1948), hereinafter "Davis, Admin.Rules;" John Fairlie, *Administrative Regulation*, 18 Mich. L.Rev. 181, 183-188 (1920), hereiafter "Fairlie, Admin.Regulation." ("…non-legislative rules may bind agency employees, but they are not legally enforceable against the public. Legal scholars have long claimed that all agencies have the inherent authority to issue non-legislative rules, derived from the power to execute the laws; the head of an agency must be able to coordinate the efforts of subordinate employees, and in so doing will establish policies and procedures to guide their actions, including issuing official interpretations of statutes.") N.B. The binding effect of non-legislative rules upon agency employees is derived not because the issuances have the force of law, but because of the superior-subordinate relationship and the organizational hierarchy that exists between the administrative agency and its employees.

members of the public.[1143] They give no real consequence more than what the law itself has already prescribed.[1144] They merely provide the means that facilitate or render less cumbersome the implementation of the law, and cannot substantially increase the burden of those governed.[1145]

The power to issue non-legislative rules is considered inherent in all administrative agencies because it is derived either from the executive power to implement laws,[1146]or as an incident to the proper internal administration of the agency as an organization, or both. The heads of agencies must be able to coordinate the efforts of their subordinate employees, and in so doing they can establish policies and procedures to guide their subordinates' actions, including the issuance of official interpretations of statutes.[1147]

§4.5.1. Kinds of Non-Legislative Rules

Unlike the power to issue legislative rules, an express congressional authorization is not required for agencies to issue non-legislative rules,[1148] and the power to issue them can be implied from the administrative agency's creation and existence. Nevertheless, the 1987 RAC generally recognizes the agencies' ability to issue non-legislative rules[1149] in a manner that roughly tracks the U.S. APA's listed exemptions.[1150]

Thus, Philippine administrative agencies can issue (a) "general statements of policy" by establishing policies and standards for the operation of

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[1143] *See Commissioner of Internal Revenue v. Michel J. Lhuiller Pawnshop*, G.R.No. 150947, July 15, 2003, hereinafter "M.J. Lhuiller Pawnshop."

[1144] *Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012.

[1145] *See Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006; *Fortune Tobacco*, 329 Phil. 987, 1007 (1996); *M.J.Lhuiller Pawnshop*, 453 Phil.1043, 1058 (2003).

[1146] Hickman & Pierce, Jr.*, Fed.Admin.Law* 417 (2014).

[1147] *Id.*; *See also* Merrill & Hickman, *Chevron's Domain*, 89 GEO L.J. 833, 876 (2001); Davis, *Admin. Rules*, 57 Yale L.J. 919 930 (1948); Fairlie, Admin.Regulation, 18 Mich.L.Rev. 181, 183-88 (1920).

[1148] Note that Congress may by law also impose substantive and procedural requirements for the issuance of non-legislative rules. After all, executive power is the execution and implementation of the law.

[1149] *See* IV(2) RAC §7 (1987) *cf.* 5 U.S.C. §553(b).

[1150] Under the U.S. APA, there are certain types of non-legislative rules that are exempted from undergoing prior notice-and-comment processes but are nevertheless required to be published, such as (a) those covered by good cause exemptions, (b) interpretative rules and statements of policy. 5 U.S.C. §553(d). The U.S. APA also establishes subject matter exemptions from both the notice-and-comment, and publication requirements, *see* 5 U.S.C. §553(a), *to wit*:

> §553. RULEMAKING
>
> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

the agency pursuant to approved programs of government;[1151] (b) "internal rules of agency organization, procedure, or practice" via administrative issuances that are necessary for the efficient administration of the offices under the agency,[1152] including those that delegate authority;[1153] and (c) "interpretive rules" through administrative issuances necessary for the proper execution of the laws that it administers.[1154]

Chap.2, Book VII of the 1987 RAC does not expressly provide a list analogous to that of the United States APA's listing of the various non-legislative rules that are exempt from the statutory rulemaking procedures.[1155] The Philippine courts made up for this statutory silence[1156] by comparing and contrasting legislative rules with specific types of non-legislative rules, such as "interpretative rules," [1157] "guidance documents," [1158] and "rules of procedure,"[1159] that are often subject of judicial controversy because they tend to alter or influence public conduct[1160] more than the other types of non-legislative rules.

Because non-legislative rules don't have the binding effect of law, Philippine cases that dealt with specific types of non-legislative rules have made sweeping statements that tend to impart an all-or-nothing quality to the relationship between all the statutorily-imposed agency rulemaking procedures, on the one hand, and the legislative vs. non-legislative rule distinction, on the other.[1161] It is not, however, accurate to state that the agency's issuance of non-

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[1151] IV(2) RAC §7(2) (1987). (…establish the policies and standards for the operation of the Department pursuant to the approved programs of government;"); *cf.* 5 U.S.C §553(b).

[1152] *Id.* at §7(4). (…Promulgate administrative issuances necessary for the efficient administration of the offices under the Secretary and for proper execution of the laws relative thereto.); *cf.* 5 U.S.C §553(b).

[1153] *Id.* at §7(8). (…Delegate authority to officers and employees under the Secretary's direction in accordance with this Code…)

[1154] *Id.* at §7(4) (…promulgate administrative issuances necessary for---the proper execution of the laws....); *cf.* 5 U.S.C. §553(b).

[1155] VII(2) RAC (1987) *cf.* 5 U.S.C. §553(b)(A).

[1156] *See* Philippine Civil Code, art.9. No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the law.

[1157] *See Misamis Oriental Ass'n*, G.R.No. 108524, November 10, 1994; *Fortune Tobacco*, G.R.No. 119761, August 29, 1996.

[1158] *See Arca*, G.R.No. L-25924, April 18, 1969.

[1159] *See Vda. De Pineda v. Pena*, G.R.No. L-57665, July 2, 1990. ("With these guidelines, Section 128 of the implementing rules invoked by public respondents as basis for their jurisdiction cannot be tainted with invalidity. First, it was issued by the Department Head pursuant to validly delegated rule-making powers. Second, it does not contravene the provisions of Pres. Decree No. 463, nor does it expand the coverage of the Decree. Section 128 merely prescribes a procedural rule to implement the general provisions of the enabling law. It does not amend or extend the provisions of the statute [*See Maceren*, 79 SCRA 450 [1977] citing *University of Santo Tomas v. Board of Tax Appeals*, 93 Phil. 376 [1953]."

[1160] *See* Werhan, *Principles of Admin.Law* 275-276 (2014).

[1161] *See for example*, *Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012. ("When an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance…"); *See also Tanada*

legislative rules are not at all subject to any and all of the procedural components of administrative rulemaking. As a matter of policy, administrative agencies are free to adopt, through regulation, more processes than is required of them by the law. Also, there are subtle nuances in both the different types of non-legislative rules, and the different phases, i.e., rule formulation[1162] and rule publication,[1163] in the administrative rulemaking process, that have to be taken into account in order to properly delineate those procedural components that are applicable notwithstanding the rules' non-legislative nature. Furthermore, a "bright line," all or nothing division may be prejudicial to either the public or the agency, particularly when dealing with certain types of non-legislative rules that are problematic or controversial, either because they exhibit some features that are characteristic of legislative rules or because of the fine line of distinction that exists between them and the latter.[1164]

With the foregoing considerations in mind, the different types of non-legislative rules are discussed as follows:

§4.5.1.1. Rules on Agency Organization

Rules on agency organization pertain to the agency's internal administration, and matters relating to agency management or personnel.[1165] These include agency issuances between superior and subordinate personnel within the agency, examples of which are the letters of instructions issued by administrative superiors concerning the rules or guidelines to be followed by their subordinates in the performance of their duties,[1166] the rules laid down by the head of the agency regarding the assignments or workload of his personnel or the wearing of uniforms,[1167] the rules allocating authority and assigning duties within an agency,[1168] and the like. In addition to being non-legislative, the internal nature of these rules provide the rationale for not applying the

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II, 146 SCRA 446 (1986). ("Interpretative regulations and those merely internal in nature, that is, regulating only the personnel of the administrative agency and not the public, need not be published. Neither is publication required of the so-called letters of instructions issued by administrative superiors concerning the rules or guidelines to be followed by their subordinates in the performance of their duties."); *Misamis Oriental Ass'n,* 238 SCRA 63 (1994); *Commissioner of Internal Revenue v. Court of Appeals*, 261 SCRA 236 (1996).

1162 VII(2) RAC §9 (1987).

1163 *Id.* at §3-8, 9(2) *cf.* Philippine Civil Code, art.2.

1164 Werhan, *Principles of Admin.Law* 287-288 (2014). ("The distinction between substance and procedure can be as elusive as the distinction between legislative rules and guidance documents.")

1165 *N.B.* In the United States, these are included in 5 U.S.C. §553(a)(2), which provide subject matter exemptions from all of the §553 rulemaking procedural requirements.

1166 *See Tañada II*, 146 SCRA 446 (1986).

1167 *Id.*

1168 Werhan, *Principles of Admin.Law* 287 (2014); Lubbers, *Guide to Rulemaking* 58-59 (2012).

statutory rulemaking requirements of public participation[1169] and publication[1170] upon them. Agencies are thus afforded the flexibility needed for organizing their internal operations.[1171]

Although it may be overbroad in some of its potential applications,[1172] the agency management exemption in the Philippine setting has been expressly limited by the case of *Tanada v. Tuvera*[1173] to those internal rules "regulating only the personnel of the administrative agency, and not the public."[1174] The clear import in *Tanada* is that rules should be fully published if they effectively regulate the members of the public, irrespective of whether those rules are likewise being issued for purposes of internal agency organization, management, or personnel. With that pronouncement, the Court sought to foreclose the possibility that agencies would use the agency management exemption as a subterfuge for secretly issuing rules that have the effect of regulating the public without the undergoing the relevant rulemaking procedures set by law.[1175]

§4.5.1.2. Rules of Agency Procedure or Practice

Rules of agency procedure and practice govern the conduct of agency activities and proceedings.[1176] As such, they are closely related with the rules on agency organization.[1177] They are non-legislative in the sense that they neither create nor alter substantive legal rights held by the public;[1178] nor do they extend the provisions of statutes.[1179] They merely regulate the form and action

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[1169] VII(2) RAC §9 (1987) *cf.* Werhan, *id.,* citing *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).
[1170] *See Tañada II*, 146 SCRA 446 (1986).
[1171] Werhan, *Principles of Admin.Law* 287-288 (2014).
[1172] Hickman & Pierce, Jr., *Fed.Admin.Law* 524 (2014).
[1173] *Tañada II*, 146 SCRA 446 (1986).
[1174] *Id.*
[1175] *N.B. Tañada II*, 146 SCRA 446 (1986), was issued at a time when statutory rulemaking procedures were limited to the rule publication phase. While *Tanada II* clearly requires the publication of rules on agency management and personnel that also result in regulating the public, it is not clear as to whether notice-and-comment or public participation is likewise required in the formulation phase of rules that are purely procedural in nature. If the rule also provides substantive matters that regulate the public then it would be legislative in nature, in which case it should be subjected as well to the notice-and-comment requirement.
[1176] Werhan, *Principles of Admin.Law* 287 (2014); Lubbers, *Guide to Rulemaking* 58-59 (2012).
[1177] 5 U.S.C. §553(b)(A) lumps "rules of agency organization, practice and procedure" under one category of rules that are generally exempt from its notice-and-comment requirement.
[1178] Werhan, *Principles of Admin.Law* 273, 287(2014); *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980); *see also James V. Hurson Associates, Inc. v. Glickman*, 229 F. 3d 277, 280 (DC Cir. 2000); For examples of constitutional grants of authority to promulgate rules of procedure in the Philippines, *see* Phil.Const. art.VIII §5(5); art.IX(A) §6; art.XI §13(8); art.XIII §18(2).
[1179] *Vda. De Pineda v. Pena*, G.R.No. L-57665, July 2, 1990 (The Court held that §128 of the implementing rules of PD 463, which provides that the Director, or Secretary in case of appeals, may "*motu proprio* look into the validity of mining claims," merely prescribes a procedural rule to implement the general provisions of the

of agency proceedings.[1180] As such, they are not subject to the notice-and-comment requirement for legislative rulemaking.[1181] They are also not subject to the statutory requirements for rule publication, provided that their regulatory effect is purely internal to the agency.[1182]

Rules of agency practice and procedure are not always purely internal in nature and effect. There are those that affect the public as well, such as the procedural rules that govern the processes that agencies follow when making decisions concerning substantive rights.[1183] In such cases, the rules of agency procedure effectively control how individuals assert their rights and protect their interests in administrative proceedings.[1184] Even though they neither create nor alter substantive rights and interests,[1185] these procedural rules carry the force of law and are binding on the agency as well as on members of the public who invoke the agency's decision-making processes.[1186] Their binding

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enabling law, and does not amend or extend the provisions of the statute, citing *Maceren*, 79 SCRA 450 (1977) and *University of Santo Tomas v. Board of Tax Appeals*, 93 Phil. 376 (1953).)

[1180] *National Whistleblower Center v. NRC*, 208 F. 3d 256, 262 (DC Cir. 2000). (The Nuclear Regulatory Commission's rule revision tightening its standards for ruling on 3rd party requests for extension of time to file contentions in motions to intervene in license-renewal proceedings was held to be a procedural rule exempt from notice-and-comment requirements.); *Pickus v. Board of Parole*, 507 F. 2d 1107, 1111, 1113 (D.C.Cir. 1974) (Parole Board's revised 'procedural' rules were held to be substantive, legislative rules that require notice-and-comment because it restricted the Board's decision-making discretion by establishing the criteria for the latter's substantive determination of whether or not to grant parole.); Chamber of Commerce, 174 F. 3d at 211– 12 (The agency directive providing for the inspection of each employer in selected industries unless the latter adopted an acceptable safety and health program was held to be a substantive, legislative rule that required notice-and-comment, rather than a procedural rule).

[1181] *N.B.* Agencies are free to adopt, via regulation, more processes than are required of it by law. Although it might not be efficient, the agency's use of more exhaustive processes—as a matter of sound policy—tends to ensure the correctness and accuracy of the agency's regulatory outputs, adds to the legitimacy and credibility of agency action, and makes the regulatory output more acceptable to the courts. *Cf. Pates v. COMELEC*, G.R.No. 184915, June 30, 2009 (The Court, in discussing its constitutional power to promulgate rules on practice and procedure, Phil.Const., art.VIII §5[5], stated its policy as follows: "[*A]s a rule*, rulemaking requires that we consult with our own constituencies, not necessarily with the parties directly affected in their individual cases, in order to ensure that the rule and the policy that it enunciates are the most reasonable that we can promulgate under the circumstances, taking into account the interests of everyone not the least of which are the constitutional parameters and guidelines for our actions.")

[1182] *See Tañada II*, 146 SCRA 446 (1986). *N.B. Tanada II* clearly requires the publication of internal agency rules that also result in regulating the public. However, because *Tanada II* was issued prior to the effectivity of the 1987 RAC, it is not clear on whether notice-and-comment or public participation is likewise required in the rule formulation phase.

[1183] Werhan, *Principles of Admin.Law* 273 (2014).

[1184] Werhan, *Principles of Admin.Law* 287-288 (2014); *See for example Melendres v. COMELEC*, G.R.No. 129958, November 25, 1999, 319 SCRA 262, 377 Phil.275, hereinafter "Melendres." (The Court held that §6, Rule 37 and §3, Rule 35, COMELEC Rules of Procedure on the payment of filing fees and the ten [10] day period [counted from the date of proclamation] within which to file an election protest were mandatory and jurisdictional. The petitioner lost whatever right he had to file the protes. Although the petitioner timely filed his petition, he failed to pay the filing fees within the same ten [10] day period.)

[1185] *Batterton v. Marshall*, 648 F.2d 694, 707 (DC Cir. 1980); *see also James V. Hurson Associates, Inc. v. Glickman*, 229 F. 3d 277, 280 (D.C.Cir. 2000).

[1186] Werhan, *Principles of Admin.Law* 287-288 (2014).

effect is also evident in that parties may lose substantive rights by failing to observe procedural rules.[1187] The 1987 Philippine Constitution also gives special attention to one specific category of these types of rules—the rules of procedure used by agencies in their quasi-judicial capacity—by specially placing them within the purview of the Philippine Supreme Court's rulemaking authority under §5[5], Article VIII.[1188] This unique power of the Philippine Supreme Court to disapprove the rules of procedure that administrative agencies may promulgate to govern their respective adjudication proceedings,[1189] is a constitutional affirmation of the Court's particular expertise when it comes to matters of procedure for all adjudicatory proceedings, irrespective of the body in which the specific adjudicatory power is vested by law.[1190] It is thus, highly unlikely that courts will give deference to agencies when it comes to the latter's interpretation of its own rules of procedure on agency adjudications. Accordingly, the Supreme Court has led the way in establishing the fundamental doctrines on the procedures for administrative adjudications from as far back as the 1940 case of *Ang Tibay v. CIR*.[1191] Also, under the *Tanada* formulation,[1192] procedural rules that are not confined to "regulating only the personnel of the administrative agency" but also the public, should be fully published.[1193] Thus, notwithstanding their non-legislative nature, these types of agency procedural rules are nevertheless

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[1187] *Id.*

[1188] Phil.Const., art.VIII, §5(5) vests the Philippine Supreme Court not only with the power to promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, but also the power to disapprove the rules of procedure of special courts and quasi-judicial bodies. Accordingly, the Philippine Supreme Court's authority regarding rules of procedure cannot be overridden by COMELEC or any other constitutional administrative agency. *See Aruelo v. Court of Appeals*, G.R.No. 107852, October 20, 1993; *Melendres*, 319 SCRA 262 (1999).

[1189] See Phil.Const., art.VIII, §5(5). It remains to be seen whether the Court's disapproval of agency rules of procedure for administrative adjudications should be made in the course of its adjudication of a particular case. In *Pates v. COMELEC*, G.R.No. 184915, June 30, 2009, the Court has characterized its art.VIII §5(5) powers as being legislative in nature. It would thus seem that the Supreme Court may also exercise its art.VIII §5(5) without waiting for a particular case or controversy.

[1190] *See Melendres*, G.R.No. 129958, November 25, 1999319 SCRA 262; *Sunlife v. Asuncion*, 170 SCRA 274 [1989]; *Gatchalian v. Court of Appeals*, 245 SCRA 208 [1995]; *Roquero v. COMELEC*, 289 SCRA 150 [1998]; *Calucag v. COMELEC*, 274 SCRA 405 [1997]; *Loyola v. COMELEC*, 270 SCRA 404 [1997] (All holding that, as a matter of procedure, the full payment of the filing fees within the reglementary period for filing an election protest are mandatory and jurisdictional nature.)

[1191] *Ang Tibay*, G.R.No. L-46496, February 27, 1940.

[1192] *Tañada II*, 146 SCRA 446 (1986).

[1193] *Tañada II*, 146 SCRA 446 (1986). ("….regulations… merely internal in nature…regulating only the personnel of the administrative agency and not the public, need not be published."). N.B. The publication requirement also applies when an agency adopts rules procedure and practice for its own legislative rulemaking process because it also affects the public. This is readily apparent in that even Congress, as the principal legislative institution, is statutorily mandated to duly publish their rules of procedure for conducting legislative inquiries in aid of legislation. See II(2) RAC §6 (1987).

subject to the rule publication requirement of the administrative rulemaking process.[1194]

While Philippine case law has cemented the publication requirements for rules of agency practice and procedure that are not purely internal to the agency because they have the effect of regulating the public,[1195] it is still not clear as to whether the notice-and-comment requirement should likewise apply to such rules despite their binding effect upon the public since they are still non-legislative because they do not create or alter substantive legal rights,[1196] or make or extend the law.[1197] In that regard, perhaps some guidance can be drawn—at least as to the procedural rules for adjudicatory proceedings—from the case of *Pates v. COMELEC*[1198] in which the Supreme Court, discussing its own power to promulgate rules of procedure under §5[5], Art. VIII of the 1987 Philippine Constitution, declared not as a matter of law, but of policy, that—

> To state the obvious, any amendment of this provision [§3, Rule 64, Rules of Court] is an exercise in the power of this Court to promulgate rules on practice and procedure as provided by Section 5(5), Article VIII of the Constitution. Our rulemaking, as every lawyer should know, is different from our adjudicatory function. Rulemaking is an act of legislation, directly assigned to us by the Constitution, that requires the formulation of policies rather than the determination of the legal rights and obligations of litigants before us. *As a rule*, rulemaking requires that we consult with our own constituencies, not necessarily with the parties directly affected in their individual cases, in order to ensure that the rule and the policy that it enunciates are the most reasonable that we can promulgate under the circumstances, taking into account the interests of everyone not the least of which are the constitutional parameters and guidelines for our actions. We point

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1194 *Id.*

1195 *Tañada II*, 146 SCRA 446 (1986).

1196 Werhan, *Principles of Admin.Law* 273, 287(2014); *Batterton v. Marshall*, 648 F.2d 694, 707 (DC Cir. 1980); *see also James V. Hurson Associates, Inc. v. Glickman*, 229 F. 3d 277, 280 (DC Cir. 2000); For examples of constitutional grants of authority to promulgate rules of procedure in the Philippines, *see* Phil. Const., art.VIII §5(5); art.IX(A) §6; art.XI §13(8); art.XIII §18(2).

1197 *Vda. De Pineda v. Pena*, G.R.No. L-57665, July 2, 1990 *citing Maceren*, 79 SCRA 450 (1977) and *University of Santo Tomas v. Board of Tax Appeals*, 93 Phil. 376 (1953).

1198 *Pates v. COMELEC,* G.R.No. 184915, June 30, 2009 (The Court, in discussing its constitutional power to promulgate rules on practice and procedure, Phil.Const. art.VIII §5[5], stated its policy as follows: "[*A]s a rule*, rulemaking requires that we consult with our own constituencies, not necessarily with the parties directly affected in their individual cases, in order to ensure that the rule and the policy that it enunciates are the most reasonable that we can promulgate under the circumstances, taking into account the interests of everyone not the least of which are the constitutional parameters and guidelines for our actions.")

these out as our adjudicatory powers should not be confused with our rulemaking prerogative.

In *Pates*, the Philippine Supreme Court viewed the notice-and-comment procedure as an important step to adopt—not as a matter of law, but of sound policy—in its own rulemaking process for rules on practice and procedure.[1199] In the United States, reviewing courts are generally reluctant to impose notice-and-comment requirements upon an agency's procedural rules just because they affect the parties in administrative proceedings.[1200]

Another matter to consider is that procedural rules are particularly controversial because of the difficulty in distinguishing substance from procedure.[1201] To be sure, administrative agencies cannot under the guise of issuing procedural rules, promulgate substantive rules without the notice-and-comment requirements for legislative rulemaking.[1202] Nonetheless, even a purely procedural rule can affect the substance outcome of an agency proceeding.[1203] Parties adversely affected by an agency's procedural rule often argue that it is actually a substantive rule that is invalid for not undergoing notice-and-comment.[1204] Courts, in turn, have endeavored to come up with workable standards to ascertain whether nominally "procedural" rules are actually substantive rules that require prior notice-and-comment.[1205] These standards include determining whether the agency's rules "encode a substantive value judgment,"[1206] whether it "severely restricts substantive rights,"[1207] and

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[1199] Phil.Const., art.VIII §5(5).

[1200] *James V. Hurson Associates v. Glickman*, 229 F. 3d 277 at 281 (DC Cir.2000) ("An otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties."); Werhan, *Principles of Admin.Law*, 288 (2014).

[1201] *See* Werhan, *Principles of Admin.Law*, *id.* at 287. ("…the distinction between substance and procedure can be as elusive as the distinction between legislative rules and guidance documents.")

[1202] VII(2) RAC §9 (1987).

[1203] *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (DC Cir. 1999) (Holding that the OSHA's directive on the Comparative Compliance Program should have undergone notice-and-comment because the rule had a substantive element to the extent that participation in the program requires more than mere adherence to existing laws.)

[1204] Manning G. Warren III, *Notice Requirements in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules*, 29 Admin. L.Rev. 367 (1976).

[1205] *See* Breyer, Stewart, Sunstein, Vermeule, Hertz, *Admin.Law and Regulatory Policy* 595 (2011), discussing *Air Transport Ass'n of America v. Department of Transportation*, 900 F. 2d 369, 375– 78 (DC Cir. 1990) hereinafter "ATAA", vacated as moot, 498 U.S. 1077 (1991).

[1206] *Public Citizen v. Dep't of State*, 276 F.3d 634 (DC Cir. 2002) (The "value judgments" referred to by the Court do not include judgments about what mechanics and processes are most efficient because to do so would threaten to swallow the procedural exception to notice-and-comment.); *ATAA, id.* at 375– 78; *See JEM Broadcasting Co., Inc. v. FCC*, 22 F. 3d 320, 328 (DC Cir. 1994) (Notice-and-comment is required if the 'procedural' rule 'encodes a substantive value judgment'); *See also American Hospital Ass'n v. Bowen*, 834 F. 2d 1037, 1047 (DC Cir. 1987); *See* Breyer, Stewart, Sunstein, Vermeule, Hertz, *Admin.Law and Regulatory Policy* 595-598 (2011).

whether it "substantially alter the rights or interests of the regulated parties;"[1208] or whether the rule "has a substantive element that requires parties to do more than merely comply with existing laws."[1209] Rules that are "procedural" by name but whose contents are found to be substantive and legislative in nature are subject to invalidation if they did not undergo the statutory rulemaking procedures for legislative rules.[1210]

§4.5.1.3. Guidance Documents

Guidance documents[1211] generally consist of interpretive rules or opinions, and policy statements.[1212] They come in a variety of forms and have different titles, i.e., "guidances," "guidelines," "memoranda," "manuals," "policy letters," "press releases," "staff instructions," "bulletins" and the like.[1213] They consist of opinions and statements of policy by administrative agencies that merely interpret pre-existing laws. They are non-legislative because they lack the force of law, and are not legally binding upon the public, the agency, or the courts.[1214] They are valid only to the extent that they correctly construe the law, because in such instances, it is the statute, and not the rule, to which the people must conform.[1215] They give no real consequence more than what the law itself has already prescribed,[1216] and are designed merely to provide guidelines to the law that the administrative agency is in charge of enforcing.[1217] Accordingly, they are also subject to the same

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[1207] *See National Whistleblower Center v. NRC*, 208 F. 3d 256, 262 (DC Cir. 2000); *Lamoille Valley Railroad Co. v. ICC*, 711 F. 2d 295, 328 [DC Cir. 1983]) ('Procedural' rules that "foreclose effective opportunity to make one's case on the merits" must observe the notice-and-comment process); Werhan, *Principles of Admin.Law,* 288 (2014).

[1208] *ATAA*, 900 F. 2d at 375– 78 (D.C.Cir. 1990), vacated as moot, 498 U.S. 1077 (1991). (The Aviation Authority's rules establishing a formal adjudication scheme for civil penalty proceedings were not procedural but substantive rules that require notice-and-comment because they "substantially affected civil penalty defendants' right to avail themselves of an administrative adjudication."); Werhan, *Principles of Admin. Law* 296 (2014).

[1209] *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (DC Cir. 1999).

[1210] *See* VII(2) RAC (1987).

[1211] *See Arca*, G.R.No. L-25924, April 18, 1969, (The agency skirted the rulemaking requirements by claiming that the Finance Secretary's 1965 Memorandum to the Customs Commissioner directing the latter to observe the reappraised dutiable valuation of several types of listed remnants was a mere guidance document.)

[1212] cf. 5 U.S.C. §553(b)(A).

[1213] Werhan, *Principles of Admin.Law* 277, 282 (2d Ed 2014); *see* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like— Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1359– 63 (1992), hereinafter "Anthony, Interpretive Rules."

[1214] Werhan, *Principles of Admin.Law, id.* at. 276.

[1215] 1 Am. Jur. 2d 893; *See also* De Leon & De Leon, *Admin. Law: Text/Cases* 92 (2013).

[1216] *See Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006; *Fortune Tobacco,* 329 Phil. 987, 1007 (1996).

[1217] *Misamis Oriental Ass'n*, 238 SCRA 63, 69 (1994); *Southwing Heavy Industries, id.*

substantive limits imposed upon, as well as provided by, the statutes or rules that they purport to interpret.

Their non-legislative nature also provides the rationale for the inapplicability of the rulemaking requirements of notice-and-comment, and the waiting period for effectivity.[1218] There is, however, some divergence of doctrines as to whether that nature also dispenses with the publication requirement. These are discussed as follows:

§4.5.1.3.1. General Statements of Policy.—General policy statements refer to those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary function."[1219] They provide mere guidelines for the exercise of the agency's decision-making discretion in particular cases.[1220] They do not bind the agency but leave agency decision-makers free to exercise their informed discretion in subsequent individual cases.[1221] A statement of policy is non-legislative when it leaves the agency genuinely "free to exercise discretion" when deciding future adjudications.[1222] Agency officials may use policy statements to guide their future actions, but they may not "apply or rely" on the policy statement "as law."[1223] It is the absence of legal effect that frees agencies to issue policy statements without the benefit of public participation; it is also the reason why agencies cannot rely on them as binding issuances in future cases.[1224]

[1218] 1 Am. Jur. 2d 893; *See also* De Leon & De Leon, *Admin. Law: Text/Cases* 92 (2013).

[1219] *Madaluna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir.1987) (Holding that the INS "Operating Instruction" was a general statement of policy "to the extent that its directive merely provides guidance to agency officials in exercising their discretionary power while preserving their flexibility and their opportunity to make individualized determinations."). See also *U.S. Attorney General's Manual* p. 30, available at http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf last accessed on March 15, 2016; Werhan, *Principles of Admin.Law*, *id.* at 277.

[1220] *Pacific Gas & Electric*, 506 F. 2d 33, 41 (D.C. Cir. 1974).

[1221] *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (DC Cir. 1999); *Pacific Gas & Electric*, *id.* at 38; *National Mining Ass'n v. Department of Labor*, 589 F. 3d 1368, 1371 (11th Cir. 2009); *Ryder Truck Lines, Inc. v. United States*, 716 F. 2d 1369, 1377 (11th Cir. 1983). (The difference between an agency legislative rule and a general policy statement depends upon whether the issuance establishes a "binding norm."). *Molycorp, Inc. v. EPA*, 197 F. 3d 543, 545 (D.C.Cir. 1999) (The distinction rests with the determination that the agency issuance has the fundamental characteristic of a regulation, i.e., that it has the force of law.").

[1222] *American Bus Ass'n*, 627 F. 2d at 529; *see also National Mining Ass'n*, 589 F. 3d at 1371; *Ryder Truck Lines*, 716 F. 2d at 1377. (" The key inquiry … is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case.…"); *Syncor International Corp.*, 127 F. 3d at 94 (The agency issuing the policy statement generally retains the discretion to change its position in any specific case); Werhan, *Principles of Admin.Law,* 278 (2014); Anthony, *Interpretive Rules*, 41 Duke L.J. at 1359– 63 (1992).

[1223] *Pacific Gas & Electric*, 506 F. 2d at 38; *see Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration*, 847 F. 2d 1168, 1174– 75 (5th Cir. 1988); Werhan, *Principles of Admin.Law, id.*

[1224] Werhan, *Principles of Admin.Law*, *id.* at 278 (2014).

Agencies cannot camouflage legislative rules by promulgating them as policy statements, and then later on treating them as binding statements to be simply interpreted and applied to the facts in an administrative adjudication.[1225] Courts have set aside—for being invalid legislative rules—agency issuances that were paraded by the agency as "policy statements" because there were indications that the issuance was binding, either on the issuance's face, or as actually applied by the agency.[1226] An agency using its policy statement in its decision-making cannot rely on the policy as its sole basis for judgment, there must be also supporting evidence and sound rationale.[1227]

§4.5.1.3.2. Interpretive rules.—Also known as interpretative rules, interpretive rules or statements are those issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.[1228] They merely interpret (a) the statutes and/or (b) the legislative rules that are legally binding.[1229] They do not carry the force and effect of law, and as such, are not binding upon the public. Agencies typically have many, many more interpretative rules than legislative rules. An agency usually uses the legislative rulemaking process to make its most important or substantive rules, and then issues large numbers of interpretative rules to clarify and to particularize the substance set forth in its legislative rules.[1230]

The Philippine Supreme Court has made distinctions between "interpretative rules" and legislative rules in several cases. In the 1994 case of *Misamis Oriental Ass'n of Coco Traders v. Secretary of Finance*,[1231] the Court upheld Revenue Memorandum Circular (RMC) No. 47-91 which implemented VAT Ruling 190-90, classifying copra in accordance with §103(a) of the National Internal Revenue Code (NIRC) as an agricultural non-food item that is VAT exempt only insofar as the sale made by the primary producer or the owner of

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[1225] *Pacific Gas & Electric,* 506 F. 2d at 41; *See United States Telephone Ass'n v. FCC,* 28 F. 3d 1232, 1235 (DC Cir. 1994); Werhan, *Principles of Admin.Law, id.* at 280. (The *Pacific Gas & Electric* approach to distinguishing between nonlegislative policy statements and legislative rules is subject to the criticism that the court's reliance on the title and text of an agency statement, together with administrative officials' professed intent in issuing a statement, opens space (and provides incentive) for agencies to mischaracterize the binding force of their statements in order to avoid the statutory obligations of notice and comment. It tempts agencies, in other words, to camouflage their rules as policy statements.)

[1226] *See General Electric v. EPA*, 290 F.3d 377, 383 (DC Cir. 2002); *Hudson v. FAA*, 192 F.3d 1034-35 (DC Cir. 1999).

[1227] *Center for Auto Safety v. NHTSA*, 452 F. 3d 798, 807 (D.C.Cir. 2006).

[1228] *U.S. Attorney General's Manual*, p. 30, available at http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf last accessed on March 15, 2016; *See also Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995); Werhan, *Principles of Admin.Law 282* (2014).

[1229] Hickman & Pierce, Jr., *Fed.Admin.Law* 542 (2014).

[1230] *Id.*

[1231] *Misamis Oriental Ass'n*, 238 SCRA 63 (1994).

the land where it was produced. The petitioners, who were engaged in trading copra, assailed RMC 47-91 and VAT Ruling 190-90 on due process grounds for having been issued without prior hearing because the issuance had the effect of denying them an exemption previously enjoyed when copra was considered an agricultural food product that was VAT exempt at all stages of production and distribution pursuant to §103(b), NIRC. Finding that copra was obviously not food intended for human consumption and thus covered under §103(a), NIRC, the Court characterized RMC 47-91 and VAT Ruling 190-90 as interpretative rules that simply corrected a previous erroneous interpretation of the law.[1232] The Court disposed of the petitioner's due process claim by distinguishing between legislative rules and interpretative rules, to wit:[1233]

> There is a distinction in administrative law between legislative rules and interpretative rules.[1234] There would be force in petitioner's argument if the circular in question were in the nature of a legislative rule. But it is not. It is a mere interpretative rule.
> The reason for this distinction is that a legislative rule is in the nature of subordinate legislation, designed to implement a primary legislation by providing the details thereof. In the same way that laws must have the benefit of public hearing, it is generally required that before a legislative rule is adopted there must be hearing. In this connection, the Administrative Code of 1987 provides:
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> > *Public Participation*. — (1) [sic] If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.
> > (2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.

[1232] *Id.* ("In the case at bar, we find no reason for holding that respondent Commissioner erred in not considering copra as an "agricultural food product" within the meaning of § 103(b) of the NIRC. As the Solicitor General contends, "copra *per se* is not food, that is, it is not intended for human consumption. Simply stated, nobody eats copra for food." That previous Commissioners considered it so, is not reason for holding that the present interpretation is wrong. The Commissioner of Internal Revenue is not bound by the ruling of his predecessors. To the contrary, the overruling of decisions is inherent in the interpretation of laws.")
[1233] *Id.* at 69.
[1234] *Id.* citing *Victorias Milling,* 114 Phil. 555 (1962); *Phil.ippine Blooming Mills*, 124 Phil. 499 (1966).

> (3) In case of opposition, the rules on contested cases shall be observed.[1235]
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> In addition such rule must be published.[1236] On the other hand, interpretative rules are designed to provide guidelines to the law which the administrative agency is in charge of enforcing.
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> Accordingly, in considering a legislative rule a court is free to make three inquiries: (i) whether the rule is within the delegated authority of the administrative agency; (ii) whether it is reasonable; and (iii) whether it was issued pursuant to proper procedure. But the court is not free to substitute its judgment as to the desirability or wisdom of the rule for the legislative body, by its delegation of administrative judgment, has committed those questions to administrative judgments and not to judicial judgments. In the case of an interpretative rule, the inquiry is not into the validity but into the correctness or propriety of the rule. As a matter of power a court, when confronted with an interpretative rule, is free to (i) give the force of law to the rule; (ii) go to the opposite extreme and substitute its judgment; or (iii) give some intermediate degree of authoritative weight to the interpretative rule.[1237]

§4.5.1.3.3. Publication of Guidance Documents, Interpretive Rules and Agency Statements of Policy.—Chap.2, Book VII, 1987 RAC is silent as to whether interpretive rules or policy statements need to be published. Even then, Philippine case law has held that interpretative rules need not be published.[1238] In *Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco Corp.*,[1239] the Court expressed that it was "understandable" that the applicability of interpretive rules "needs nothing further than its bare issuance" because "it gives no real consequence more than what the law itself has already prescribed."[1240] The Philippine doctrine that dispensed with publication as regards guidance documents is also evident in the earlier 1962 case of *Victorias*

[1235] *Misamis Oriental Ass'n, id.* citing VII(2) RAC §9 (1987).
[1236] *Id.* citing *Tañada II*, 146 SCRA 446 (1986); *Victorias Milling Co.*, 114 Phil. 555 (1962).
[1237] *Id.* citing Davis, *Administrative Law* 116 (1965).
[1238] *Tañada II* 146 SCRA 446 (1986); *Peralta v. CSC*, 211 SCRA 425 (1992).
[1239] *Fortune Tobacco Corp.*, G.R.No. 119761, August 29, 1996, citing *Misamis Oriental Ass'n*, G.R.No. 108524, November 10, 1994, 238 SCRA 63
[1240] *Id.*

Milling Co. v. Social Security Commission,[1241] where the Court validated SSC Circular No. 22, which changed the agency's previous definition of the term "compensation" under Circular No. 7, by excluding overtime pay and bonus in the computation of the employers' and employees' respective monthly premium contributions,[1242] despite the agency's non-compliance with the statutorily prescribed rulemaking and publication procedures. The Court read Circular No. 22 as an agency measure that merely corrected its previously circularized definition of "compensation" that had been rendered obsolete by the subsequent legislative amendment.[1243] In finding that the circular is an interpretive rule, Court found it significant that it added nothing new to the statute by way of additional duty or detail.[1244]

The logic behind the Philippine Supreme Court's pronouncements are readily discernible. The trans-substantive, generally applicable laws on the publication of administrative issuances—§4, Chap.2, Book VII, 1987 RAC and Article 2 of the Civil Code—mandate the publication of "laws" and "rules" for their effectivity. Guidance documents, interpretive rules, and agency statements of policy are not "laws"[1245] because they lack the binding force of law, and they do not create, alter or modify substantive rights.[1246] The absence of these two legislative features also differentiates them from non-legislative rules of agency practice and procedure that have to be published if they have the effect of regulating the public.[1247] The merits of that logical argument aside, a

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[1241] *Victorias Milling Co.*, 114 Phil. 555 (1962). (There can be no doubt that there is a distinction between an administrative rule or regulation and an administrative interpretation of a law whose enforcement is entrusted to an administrative body. When an administrative agency promulgates rules and regulations, it "makes" a new law with the force and effect of a valid law, while when it renders an opinion or gives a statement of policy, it merely interprets a pre-existing law (citing Parker, *Administrative Law* 197; Davis, *Administrative Law* 194). Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this sense, it has been said that rules and regulations are the product of a delegated power to create new or additional legal provisions that have the effect of law. (Davis, *Admin.Law* 194.) A rule is binding on the courts so long as the procedure fixed for its promulgation is followed and its scope is within the statutory authority granted by the legislature, even if the courts are not in agreement with the policy stated therein or its innate wisdom (Davis, op. cit., 195-197). On the other hand, administrative interpretation of the law is at best merely advisory, for it is the courts that finally determine what the law means.)

[1242] *Victorias Milling Co., id.*

[1243] *Id.*

[1244] *Id.*

[1245] *Id.*

[1246] *See Arca*, G.R.No. L-25924, April 18, 1969, (The agency skirted the rulemaking requirements by claiming that the Finance Secretary's 1965 Memorandum to the Customs Commissioner directing the latter to observe the reappraised dutiable valuation of several types of listed remnants was a mere guidance document.); *cf.* Werhan, *Principles of Admin.Law*, 277, 282 (2014).

[1247] *Tañada II*, 146 SCRA 446 (1986).

compelling argument for revisiting the Philippine doctrine may be made based on the reasonableness and fairness—to both the public and the agency—for requiring the guidance documents to be published across-the-board. Though guidance documents, interpretive rules, and statements of policy are theoretically not binding, it is readily observable from the plethora of cases in which parties have assailed guidance documents for being invalid legislative rules, that guidance documents can and do have some impact or effect on the behavior of the public,[1248] in which it case it would be but fair and just that the public be effectively notified of them.[1249] Interpretive rules may also sometimes function as precedents, in a limited sense.[1250] Also, like those types of agency rules of practice and procedure that require publication,[1251] guidance documents are often not purely internal in terms of their impact and effect.[1252]

The impact or effect that guidance documents have on the regulated public is also compounded further by the difficulty in finding that fine line of distinction between guidance documents and legislative rules.[1253] In the 1996 case of *Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco*[1254] at issue was the validity of Revenue Memorandum Circular (RMC) No. 37-93 which reclassified certain cigarette brands being manufactured by the petitioner Fortune Tobacco as locally manufactured cigarettes bearing foreign brands that were subject to 55% Ad Valorem Tax. Although the provisions of RMC 37-93 were in accordance with a newly enacted law, R.A. 7654, that amended §142(c) of the NIRC, the Bureau of Internal Revenue (BIR) had issued RMC 37-93 even before R.A. 7654 went into force and effect. The BIR also omitted the public participation and publication requirements under Chap.2, Book VII, 1987 RAC, and instead merely sent photocopies of RMC 37-93 to the

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1248 *See* Anthony, *Interpretive Rules*, 41 Duke L.J. 1311, 1359– 63 (1992).

1249 *Id.*

1250 *See United States v. Mead*, 533 U.S. 218, 232 (2001), hereinafter "Mead," citing Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1472-1473 (1992).

1251 *See Tañada II*, 146 SCRA 446.

1252 *Id.*

1253 *See American Mining Congress v. Mine Safety and Health Adm'n*, 995 F.2d 1106 (DC Cir. 1993). (The distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt has been aptly described as "enshrouded in considerable smog." *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561,1565 (DC Cir. 1984); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (DC Cir. 1987) (calling the line between interpretive and legislative rules "fuzzy"); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (DC Cir. 1987) (quoting authorities describing the present distinction between legislative rules OT-1/-1 and policy statements as "tenuous," "blurred" and "baffling"); *see* Hickman & Pierce, Jr., *Fed.Admin.Law* 543 (2014) (Although the Supreme Court has often referred to particular regulations as legislative or interpretative, the Court has never articulated a clear standard for distinguishing between the two categories. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) hereinafter "Chrysler Corp.," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).); Werhan, *Principles of Admin.Law* 287 (2014) (The distinction between substance and procedure can be as elusive as the distinction between legislative rules and guidance documents.)

1254 *Fortune Tobacco*, G.R.No. 119761, August 29, 1996.

petitioner via fax and ordinary mail. With RMC 37-93 as its basis, the BIR then assessed the petitioner an ad valorem tax deficiency of more than PhP 9.5 Million.

The Petitioner successfully questioned the deficiency assessment via petition for review to the Court of Tax Appeals (CTA), prompting the BIR to elevate the case via petition for review to the Court of Appeals (CA). After the CA affirmed the CTA's decision, the BIR elevated the matter to the Supreme Court claiming that RMC 37-93 was a mere interpretative ruling that can become effective without prior need for notice, hearing, and publication. The Court ruled—

> Petitioner stresses [on] the wide and ample authority of the BIR in the issuance of rulings for the effective implementation of the provisions of the National Internal Revenue Code. Let it be made clear that such authority of the Commissioner is not here doubted. Like any other government agency, however, the CIR may not disregard legal requirements or applicable principles in the exercise of its quasi-legislative powers.
>
> x x x
>
> A reading of RMC 37-93, particularly considering the circumstances under which it has been issued, convinces us that the circular cannot be viewed simply as a corrective measure (revoking in the process the previous holdings of past Commissioners) or merely as construing Section 142(c)(1) of the NIRC, as amended, but has, in fact and most importantly, been made in order to place "Hope Luxury," "Premium More" and "Champion" within the classification of locally manufactured cigarettes bearing foreign brands and to thereby have them covered by RA 7654. Specifically, the new law would have its amendatory provisions applied to locally manufactured cigarettes which *at the time of its effectivity* were not so classified as bearing foreign brands. Prior to the issuance of the questioned circular, "Hope Luxury," "Premium More," and "Champion" cigarettes were in the category of locally manufactured cigarettes *not* bearing foreign brand subject to 45% *ad valorem* tax. Hence, without RMC 37-93, the enactment of RA 7654, would have had no new tax rate consequence on private respondent's products. Evidently, in order to place "Hope Luxury," "Premium More," and

> "Champion" cigarettes within the scope of the amendatory law and subject them to an increased tax rate, the now disputed RMC 37-93 had to be issued. In so doing, the BIR not simply interpreted the law; verily, it legislated under its quasi-legislative authority. The due observance of the requirements of notice, of hearing, and of publication should not have been then ignored… Nothing on record could tell us that it was either impossible or impracticable for the BIR to observe and comply with the above requirements before giving effect to its questioned circular.

In *Fortune Tobacco,* the Court invalidated the BIR RMC 37-93 due to the agency's failure to conduct prior public participation, and to publish the final rule, on the basis of its finding that the agency had issued a legislative rule in the guise of an interpretive rule.

Philippine case law that dispensed with the publication requirements for interpretive rules, statements of policy, and guidance documents are at odds with the prevailing law in the United States under which those agency issuances are nevertheless required to undergo publication,[1255] even though they are not subject to the notice-and-comment process,[1256] and the 30-day waiting period between the rule's publication and effectivity.[1257] Across the board publication of guidance documents, as is the law in the United States,[1258] makes good, practical and just sense. It prevents the agency from committing potentially serious errors and triggering severe "secrecy" concerns[1259] by precluding agency discretion on whether or not to publish agency issuances that fall within the difficult gray area of the legislative rule versus interpretive rule distinction. At the same time, it would also effectively address potential fairness and due process concerns by ensuring that the public is duly informed of any and all agency issuances that could possibly regulate or otherwise impact or alter their behavior, and afford them the proper and timely opportunity to get political or judicial redress. It is further submitted that Philippine statutory law is not entirely silent on the matter, and the publication of guidance documents could at the very least be made in the Official Gazette,[1260] guidance documents being

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[1255] *Id.*

[1256] 5 U.S.C. §553(b)(A).

[1257] *Id.* at §553(d)(2).

[1258] 5 U.S.C. §553(d)(2).

[1259] *See Tañada II*, 146 SCRA 446 (1986).

[1260] *See* I(6) RAC §24 (1987) on the contents of the Official Gazette for possible statutory support for the publication of guidance documents, to wit:

> SECTION 24. Contents.—There shall be published in the Official Gazette all legislative acts and resolutions of a public nature; all executive and administrative issuances of general application; decisions or abstracts of decisions of the Supreme Court and the Court of Appeals, or other courts of

included in "all executive and administrative issuances of general application."[1261]

§4.5.1.4. Guidance Documents are generally entitled to Respect, but not Deference

The non-binding nature of agency guidance documents generally correlates with the level of respect that courts accord to them. Under Philippine case law, when an administrative or executive agency renders an opinion or issues a statement of policy, it merely interprets a pre-existing law. As such, they are received by the courts with much respect but not finality.[1262] Philippine case law further instructs that the inquiry on agency guidance documents goes into their correctness or propriety.[1263] Philippine case law also provided a glimpse of the court's level of deference for interpretive rules by saying that such as "administrative interpretation of the law" were at best merely advisory.[1264] Accordingly, Philippine courts accord very little deference to guidance documents, and the spectrum of alternative choices that the courts can freely make regarding those types of agency issuances range widely—Philippine courts may substitute their judgment for that of the agency, give the documents some intermediate degree of authoritative weight, or to give them binding effect.[1265]

The United States Supreme Court, on the other hand, has articulated in *Skidmore v. Swift*,[1266] the level of respect (*Skidmore* respect) that is typically accorded to non-legislative agency issuances, to wit:

> We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the

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similar rank, as may be deemed by the said courts of sufficient importance to be so published; such documents or classes of documents as may be required so to be published by law; and such documents or classes of documents as the President shall determine from time to time to have general application or which he may authorize so to be published.

The publication of any law, resolution or other official documents in the Official Gazette shall be prima facie evidence of its authority.

[1261] Id.; *see Tanada I*, G.R.No. L-63915, April 24, 1985.

[1262] *Espanol v. Phil.ippine Veterans Adm'n*, 137 SCRA 314 (1985) *cf.* presumption of legality; *Melendres*, 319 SCRA 262.

[1263] *Misamis Oriental Ass'n*, G.R.No. 108524, November 10, 1994, citing Davis, *Admin.Law* 116 (1965).

[1264] *See Victorias Milling*, 114 Phil. 555 (1962); *see also Teoxon v. Board of Administrators*, G.R.No. L-25619, June 30, 1970; *Peralta v. CSC*, 211 SCRA 425 (1992); *Tañada II*, 146 SCRA 446 (1986).

[1265] *Misamis Oriental Ass'n*, G.R.No. 108524, November 10, 1994, citing Davis, *Admin.Law* 116 (1965). *N.B.* The 1965 formulation for treating interpretive rules in the source cited by the Philippine Supreme Court has since been modified by the U.S. Courts.

[1266] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), hereinafter "Skidmore."

> courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. **The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control**.[1267] (Emphasis supplied)

As earlier stated, the *Mead*[1268] clarified the applicability of the *Skidmore* framework of respect for agency actions that do not qualify for *Chevron* deference.[1269] These issuances typically consist of non-legislative rules—such as guidance documents, interpretive rules, and agency statements of policy—that do not carry the force of law, having been issued via really informal processes that did not involve notice-and-comment. In utilizing the *Skidmore* framework for really informal agency issuances, it seems that, in the absence of a clear congressional intent to delegate upon the agency the specific interpretive authority over the statute,[1270] courts will give weight to the agency interpretation by considering the agency's expertise and experience, in conjunction with the document's (a) thoroughness in its consideration, (b) the validity of its reasoning, (c) its consistency with earlier and later pronouncements, and (d) all those factors which give it power to persuade, if lacking power to control.[1271]

As earlier indicated, the foregoing framework generally applies with respect to the agency issuances of guidance documents that reflect its understanding or interpretation of the statute it seeks to implement.[1272] A subset of guidance documents refers to those issuances where the agency

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[1267] *Id.* at 140.

[1268] *Mead*, 533 U.S. 218 (2001) (Holding that Customs Ruling Letters were not entitled to *Chevron* deference because they are not subject to the legal requirements of notice-and-comment and do not carry the force of law. The Court upheld the letters using the *Skidmore* framework of respect.)

[1269] *Chevron v. NRDC*, 467 U.S. 837, 842-845 (1984), hereinafter "Chevron."

[1270] *See Mead*, 533 U.S. at 229-231. ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. See, *e. g.,* EEOC v. *Arabian American Oil Co.,* 499 U. S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to "`promulgate rules or regulations'," quoting *General Elec. Co.* v. *Gilbert,* 429 U. S. 125, 141 [1976]). *See also Christensen* v. *Harris County,* 529 U. S. 576, 596-597 (2000) (Breyer, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable").)

[1271] *Skidmore*, 323 U.S. 134, 140 (1944).

[1272] *City Government of Makati v. Civil Service Commission,* 426 Phil.631, 646-649; *Eastern Telecommunications Philippines, Inc. v. International Communication Corp.*, G.R.No. 135992, January 31, 2006, hereinafter "Eastern Telecomm'n".

interprets its own rules and regulation, to which the courts, by way of exception, have taken a more deferential approach.

§4.5.1.4.1. Agency Interpretations of Its Own Rules and Regulations

Philippine courts have accorded greater weight to an agency's interpretation of its own rules as opposed to the latter's understanding or interpretation of the statute it seeks to implement,[1273] the rationale being that the government agency which possesses the necessary rulemaking power to implement its statutory objective is in the best position to interpret its own rules, regulations and guidelines in line with its special and technical expertise over the activities entrusted to it for regulation.[1274] Great respect is given to the interpretation by administrative agencies of their own rules, unless there is error of law, abuse of power, lack of jurisdiction, or grave abuse of discretion clearly conflicting with the letter and spirit of the law.[1275] The interpretation of an agency of its own rules should be given more weight than the interpretation by that agency of the law it is merely tasked to administer.[1276] The interpretation given to a rule or regulation by those charged with its execution is entitled to the greatest weight by the Court construing such rule or regulation, and such interpretation will be followed unless it appears to be clearly unreasonable or arbitrary.[1277]

In the United States, agency interpretations of their own legislative rules and regulations are generally controlling, unless plainly erroneous or inconsistent with the regulation,[1278] or when there is reason to suspect that the interpretation "does not reflect the agency's fair and considered judgment on the matter."[1279]

[1273] *Id.*

[1274] *Eastern Telecomm'n, id.*

[1275] *Eastern Telecomm'n, id.*; *Melendres*, 377 Phil. 275.

[1276] *Bagatsing v. Committee on Privatization*, G.R.No. 112399 & 115994, July 14, 1995; *Eastern Telecomm'n, id.*

[1277] *Geukeko v. Araneta,* G.R.No. L-10182, December 24, 1957, en banc, citing 42 Am. Jur. 431; *Eastern Telecomm'n, id.*

[1278] *See Auer v. Robbins*, 519 U.S. 452 (1997), hereinafter "Auer;" *Bowles v. Seminole Rock*, 325 U.S. 410 (1945), hereinafter "Seminole Rock;" Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); *See also Decker v. Northwest Environmental Defense Center*, 568 U.S.___ (2012). ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"); N.B. This deferential framework is also known in the U.S. as the *Auer* or *Seminole Rock* Deference. The Philippine counterpart can be deduced from *Eastern Telecommunications Philippines v. International Communication Corp.*, G.R.No. 135992, January 31, 2006 (The interpretation of an agency of its own rules should be given more weight than the interpretation by that agency of the law it is merely tasked to administer.)

[1279] *Auer, id.* at 462; *Christopher v. Smithkline Beecham Corp.,* 567 U.S.___(2012).

The court's practice of deferring to an agency's interpretation of its own ambiguous regulations is problematic in that it creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit.[1280] It encourages the agency to enact vague rules that give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.[1281] Thus, while a high level of deference is ordinarily employed regarding an agency's interpretation of its own legislative regulations, that deference does not apply when the agency issues legislative rules that merely paraphrase, duplicate, or "parrot" the enabling statute's provisions, and then subsequently promulgates guidance documents on the basis thereof.[1282] Deference is also inappropriate when the agency interpretation of its own rules would undermine the principle that agencies should provide regulated parties "fair warning of the conduct prohibited or required by the regulation,"[1283] or if it would result in an "unfair surprise" to the affected persons.[1284] Guidance documents also cannot substitute or replace legislative rules as a means to fill in the substantive details of the statute.[1285] The law prescribes the legislative rulemaking process for the agency to make its most important or substantive rules, and interpretive rules are meant only to clarify and particularize the substance set forth in its legislative rules.[1286]

§4.6. Legislative Rules

Legislative rules,[1287] also known as substantive rules,[1288] are rules or regulations issued by an administrative agency in its legislative capacity[1289] that carry the same legally binding effect upon the public as statutes.[1290] Legislative

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[1280] *Christopher v. Smithkline Beecham Corp.,* 567 U.S.___(2012).

[1281] *Talk America Inc. v. Michigan Bell Telephone Co.*, 564 U.S.___ (2011) (Scalia, J., concurring) (slip op., at 3); *See also Christopher v. Smithkline Beecham Corp., id.*; *Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum.L.Rev. 612 (1996); Stephenson & Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash.L.Rev. 1461-1462 (2011).

[1282] *See Gonzales v. Oregon*, 546 U.S. 243 (2006), hereinafter "Gonzales;" *General Electric Company v. EPA*, 290 F. 3d 377 (2002).

[1283] *Christopher v. Smithkline Beecham Corp.,* 567 U.S.___(2012) citing *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (CADC 1986).

[1284] *Christopher v. Smithkline Beecham, id.* citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-171 (2007); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 158 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

[1285] *Gonzales*, 546 U.S. 243.

[1286] Hickman & Pierce, Jr., *Fed.Admin.Law* 542 (2014).

[1287] Also known as "legislative rules," "substantive rules," or the power of subordinate legislation.

[1288] Hickman & Pierce, Jr., *Fed.Admin.Law* 417 (2014).

[1289] *See* C. Cruz, *Philippine Admin.Law* 37-39 (2003).

[1290] *Commissioner of Internal Revenue v. Court of Appeals*, 261 SCRA 236 (1996); *Chrysler Corp.*, 441 U.S. 281, 301-02 (1979).

rules are issuances that enforce and implement an enabling statute,[1291] or otherwise fill in the details left open by latter.[1292] If valid, they create legally enforceable rights for or impose legal obligations on members of the public.[1293] They establish a standard of public conduct that carries the force of law,[1294] thereby serving the same function as a statute.[1295] They are the rules and regulations that Philippine law recognizes as having the force and effect of law, and partaking the nature of a statute, when validly issued by administrative or executive officers in accordance with and as authorized by law.[1296] Once validly issued, a legislative rule cannot be altered by the agency without observing the statutory rulemaking procedures for legislative rules.[1297]

§4.6.1. Requirements for issuing Legislative Rules

Administrative agencies do not have the inherent authority to issue legislative rules since that power is not intrinsically executive but legislative in nature. The underlying rationale for this is that the agency's power of subordinate legislation[1298] is but a mere derivative of the legislative power principally vested by the Constitution upon the legislature.[1299] The ability of an administrative agency to issue binding legislative rules is necessarily limited to,

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[1291] *See Tanada II*, 146 SCRA 446 (1986). ("Administrative rules and regulations must a also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation.")

[1292] *Id.* (The Court provided as an example that "[T]he circulars issued by the Monetary Board must be published if they are meant not merely to interpret but to "fill in the details" of the Central Bank Act which that body is supposed to enforce.")

[1293] *See M.J. Lhuiller*, G.R.No. 150947, July 15, 2003 ("RMO No. 15-91 and RMC No. 43-91 cannot be viewed simply as implementing rules or corrective measures revoking in the process the previous rulings of past Commissioners. Specifically, they would have been amendatory provisions applicable to pawnshops. Without these disputed CIR issuances, pawnshops would not be liable to pay the 5% percentage tax, considering that they were not specifically included in Section 116 of the NIRC of 1977, as amended. In so doing, the CIR did not simply interpret the law. The due observance of the requirements of notice, hearing, and publication should not have been ignored.")

[1294] Werhan, *Principles of Admin. Law* 274 (2d Ed 2014); *See also Professionals and Patients for Customized Care v. Shalala*, 56 F. 3d 592, 596 (5th Cir. 1995); *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F. 2d 33, 38 (DC Cir. 1974); *U.S. Attorney General's Manual* 30.

[1295] *Balmaceda*, G.R.No. L-21971, September 5, 1975 (Administrative rules and regulations validly promulgated by administrative authorities vested with the power to promulgate rules to implement a given statute and to effectuate its policies become laws.); *Macailing v. Andrada*, 31 SCRA 139 (1970); Werhan, *id.*

[1296] *National Federation of Labor v. Laguesma*, G.R.No. 123426, March 10, 1999 [Fn.22 citing *Victorias Milling*, 114 Phil..555 (1962)]).

[1297] *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F. 2d 227, 234 (D.C.Cir. 1992); *Chrysler Corp.*, 441 U.S. at 301– 02; *U.S v. Nixon*, 418 U.S. 683, 695– 96 (1974). N.B. Similar to 5 U.S.C. §551(5), the provisions of VII(1) RAC §2(4) (1987) also include as part of "rulemaking" the agency process for the "amendment" or "repeal" of a rule.

[1298] *Commissioner of Internal Revenue v. Court of Appeals*, 261 SCRA 236 (1996); *See also* C.Cruz, *Philippine Admin.Law* 40 (2003) (discussing supplementary or subordinate legislation); *Cruz v. Youngberg*, 56 Phil. 234 (discussing contingent rules).

[1299] *See* Phil.Const., art.VI §1.

and by, the particular enabling statute for which Congress intended to utilize the agency's services and technical expertise.[1300]

To be valid, legislative rules must comply with the following requisites: (1) Its promulgation must be authorized by the legislature; (2) It must be promulgated in accordance with the prescribed procedure; (3) It must be within the scope of the authority given by the legislature; and (4) It must be reasonable.[1301] Legislative rules can thus only be issued pursuant to a specific and valid delegation of legislative authority,[1302] and the administrative agency's exercise thereof is dependent upon the terms and conditions—both substantive and procedural—of the principal-agent relationship set by the legislature under the relevant statutes.

§4.6.1.1. The Enabling Statute & Its Express Delegation of Legislative Rulemaking Authority

In view of the legally binding nature of legislative rules, agencies may issue such rules only if Congress has authorized them to do so.[1303] Philippine case law thus provides that the first inquiry to be made when considering a legislative rule is whether the rule is within the delegated authority of the administrative body.[1304] Express congressional authorization is necessary before an administrative agency can promulgate legislative rules;[1305] and the agency's ability to wield it, in turn, is predicated upon the presence of a specific primary legislation that the agency is particularly tasked to implement by filling in the necessary legislative details.[1306] Most enabling statutes that authorize agencies to implement them are relatively clear in either granting or not granting a particular agency or agencies the power to issue legislative rules,[1307]

1300 *Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942); *Skidmore*, 323 U.S. 134, 137 (1944).

1301 *See Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006.

1302 Hickman & Pierce, Jr., *Fed.Admin.Law*, 417 (2014) citing *Chrysler Corp.*, 441 U.S. 281, 301-02 (1979); *See also* De Leon & De Leon, Jr., *Admin.Law:Text/Cases* 90-91 (2013) (The two identifying characteristics of a legislative rule are (a) that the statute has delegated power to the agency to adopt the rule, and (b) that the same statute provides that the rule shall, if within the delegated power, have authoritative force.)

1303 Werhan, *Principles of Admin.Law* 274 (2014); *Syncor International Corp. v. Shalala*, 127 F. 3d 90, 95 (DC Cir. 1997); *see U.S. Attorney General's Manual* 30. A general grant of rulemaking authority in an enabling act typically satisfies courts that an agency possesses the power to issue legislative rules. *National Petroleum Refiners Ass'n v. FTC*, 482 F. 2d 672, cert. denied, 415 U.S. 951 (1974); *National Ass'n of Pharmaceutical Mfrs. v. FDA*, 637 F. 2d 877 (2d Cir. 1981).

1304 *Misamis Oriental Ass'n*, 238 SCRA 63 (1994).

1305 Hickman & Pierce, Jr., *Fed.Admin.Law* 417 (2014) citing *Chrysler Corp.*, 441 U.S. 281, 301-02 (1979).

1306 *See M.J.Lhuiller*, G.R.No. 150947, July 15, 2003.

1307 Hickman & Pierce, Jr., *Fed.Admin.Law* 418 (2014). *See also, National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir.), cert. denied, 415 U.S. 951 (1974)

and a generally worded grant of rulemaking authority in the enabling statute itself is typically satisfactory.[1308]

§4.6.1.2. Terms of the Statutory Delegation: Procedural and Substantive Requirements of Rulemaking

The presence of an express congressional grant of rulemaking authority, by itself, does not necessarily mean that the administrative agency could freely issue legally binding agency rules or regulations.[1309] There is still that further need for the agency to comply with the procedural and substantive standards, conditions, and requirements set forth by law.[1310]

Agency rules are invalid if they fail to comply with the law's substantive and procedural rulemaking requirements. For example, in *Commissioner of Customs v. Hypermix Feeds Corp.,*[1311] at issue was Customs Memorandum Order (CMO) No. 27-2003 that classified and imposed tariffs for food grade (3%) and feed grade (7%) wheat according to factors based on an exclusive list of importers/consignees, countries of origin, and ports of discharge. Anticipating that the rule would be used on its pending wheat importations, Hypermix Feeds filed a petition for declaratory relief before the Regional Trial Court (RTC) alleging that CMO 27-2003 was issued without the Customs Commissioner complying with the public participation, prior notice, and publication requirements of Chap.2, Book VII, 1987 RAC. After the RTC and the Court of Appeals ruled for Hypermix Feeds, the Customs Commissioner elevated the matter to the Supreme Court.

[1308] *Mayo Foundation v. United States*, 131 S.Ct. 704, 713-14 (2011) (The language of congressional delegation of legislative rulemaking authority may be either general or specific.) *See also National Petroleum Refiners Ass'n*, *id.*; *National Ass'n of Pharmaceutical Mfrs. v. FDA*, 637 F. 2d 877 (2d Cir. 1981).

[1309] *See Philippine Ass'n of Service Exporters, Inc. v. Torres*, G.R.No. 101279, August 6, 1992 (Though the circulars issued by the DOLE and POEA on the processing and foreign deployment of Filipino domestic helpers were substantively valid legislative rules issued as an exercise of the administrative and policing power to the agencies under the Labor Code, the Court nevertheless held that the circulars were "legally invalid, defective, and unenforceable" because the agencies failed to comply with the rulemaking procedures set by the relevant statutes—particularly the statutory requirements for the publication phase of rulemaking. "Nevertheless, they are legally invalid, defective and unenforceable for lack of power publication and filing in the Office of the National Administrative Register as required in Article 2 of the Civil Code, Article 5 of the Labor Code and Sections 3(1) and 4, Chapter 2, Book VII of the Administrative Code of 1987.")

[1310] *See Victorias Milling*, 114 Phil. 555, G.R.No. L-16704, March 17, 1962. (Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partake of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often times left to the administrative agency entrusted with its enforcement. In this sense, it has been said that rules and regulations are the product of a delegated power to create new or additional legal provisions that have the effect of law.)

[1311] *Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012.

The Philippine Supreme Court found CMO 27-2003 to be a legislative rule because it affected the substantive rights of Hypermix Feeds by imposing new tariff percentages on the latter's wheat importation, and struck it down for failure to comply with the public participation and publication requirements under §3 and §9, Chap.2, Book VII of the 1987 RAC. In discussing the public participation requirement in the formulation of agency rules,[1312] the *Hypermix* Court imparted the following statements that had some due process flavor[1313]—

> When an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed. When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law.[1314]

The Court thereafter stressed the need for the agency to comply with the requirements for rule publication, and emphatically concluded its rulemaking discussion by reiterating the seminal case of *Tanada v. Tuvera*[1315] and its judicial jab at the secrecy by which the martial law era executive had been making legislation—

> Perhaps at no time since the establishment of the Philippine Republic has the publication of laws taken so vital significance that at this time when the people have bestowed upon the President a power heretofore enjoyed solely by the legislature. While the people are kept abreast by the mass media of the debates and deliberations in the *Batasan Pambansa* and for the diligent ones, ready access to the legislative records no such publicity accompanies the law-making process of the President.

[1312] VII(2) RAC §9 (1987).

[1313] Although constitutional due process is inapplicable in the rule formulation phase, the procedures established by the legislature are controlling, *see Bi-Metallic Investment*, 239 U.S. 441 (1915), in which cases the statutory procedures can be viewed as the legislature's way of either giving form to, or providing a surrogate for, the relevant constitutional principle.

[1314] *Id.* citing *M.J. Lhuiller*, 453 Phil.1043 (2003).

[1315] *Tanada I*, 220 Phil.. 422 (1985).

> Thus, without publication, the people have no means of knowing what presidential decrees have actually been promulgated, much less a definite way of informing themselves of the specific contents and texts of such decrees. (Emphasis supplied)[1316]

In addition to striking down CMO 27-2003 due to the agency's failure to follow statutory rulemaking procedures, the *Hypermix* Court also found the agency rule substantively invalid for violating the Constitution's equal protection clause,[1317] and for being beyond the ambit of the Customs Commissioner's authority[1318] because CMO 27-2003 did away with the Tariff and Customs Code mandate for customs officer to first examine and assess imported articles prior to their classification and tariff imposition.[1319]

§4.6.1.2.1. Substantive Requirements for Rulemaking

On the substantive aspect, agency rules should be within the scope of the statutory authority granted by the legislature,[1320] germane to the objects and purposes of the law,[1321] in conformity with the standards prescribed by law,[1322]

[1316] *Id.*

[1317] *Id.* citing *Phil.ippine Rural Electric Cooperatives Association, Inc. v. DILG*, 451 Phil.. 683 (2003). (The equal protection clause means that no person or class of persons shall be deprived of the same protection of laws enjoyed by other persons or other classes in the same place in like circumstances. Thus, the guarantee of the equal protection of laws is not violated if there is a reasonable classification. For a classification to be reasonable, it must be shown that (1) it rests on substantial distinctions; (2) it is germane to the purpose of the law; (3) it is not limited to existing conditions only; and (4) it applies equally to all members of the same class. Unfortunately, CMO 27-2003 does not meet these requirements.")

[1318] *See Acebedo Optical Company, Inc. v. Court of Appeals*, 385 Phil. 956, 978. (Holding that the City Mayor's impositions were ultra vires or beyond the ambit of his authority. "Ultra vires acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect.")

[1319] *Id.* ("The provision mandates that the customs officer must first assess and determine the classification of the imported article before tariff may be imposed. Unfortunately, CMO 23-2007 has already classified the article even before the customs officer had the chance to examine it. In effect, petitioner Commissioner of Customs diminished the powers granted by the Tariff and Customs Code with regard to wheat importation when it no longer required the customs officers prior examination and assessment of the proper classification of the wheat…It is well-settled that rules and regulations, which are the product of a delegated power to create new and additional legal provisions that have the effect of law, should be within the scope of the statutory authority granted by the legislature to the administrative agency. It is required that the regulation be germane to the objects and purposes of the law; and that it be not in contradiction to, but in conformity with, the standards prescribed by law. *Romulo, Mabanta, Buenaventura, Sayoc & De los Angeles v. Home Development Mutual Fund*, 389 Phil.. 296 (2000).)"

[1320] *Maceren*, G.R.No. L-32166, October 18, 1977. (The Court acquitted the defendant from charges of electro-fishing in violation of a fisheries regulation, and held the fisheries regulation invalid because electro-fishing was not expressly made punishable in the enabling statute); *Victorias Milling*, 114 Phil.. 555, 558 citing Davis, *Administrative Law* 194,197; *People v. Lim*, 108 Phil. 1091 (1960); *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971), hereinafter "Overton Park;" *Schilling v. Rogers*, 363 U.S. 666, 676-677 (1960).

[1321] *People v. Exconde,* 101 Phil. 1125 (1957); *Calalang v. Williams*, 70 Phil. 727 (1940); *Pangasinan Transp'n v. Public Service Commission*, 70 Phil. 221 (1940), hereinafter "Pangasinan Transp'n."

[1322] *Id.*

and solely for purposes of carrying into effect the general provisions of the law.[1323] A further inquiry that Philippine courts make in assessing the validity of an agency rule is whether it is reasonable,[1324] otherwise it maybe held unconstitutional for being arbitrary and capricious.[1325] The agency's rules and its conduct of rulemaking should also be compliant with the provisions and principles of the Constitution.[1326] For example, in much the same way that Congress is prohibited from delegating to private entities the governmental authority delegated or vested upon it by the people under the Constitution,[1327] so too are government agencies prohibited from delegating to private entities the governmental authority delegated upon them via statute.[1328]

[1323] *U.S. v. Tupasi Molina*, 29 Phil.. 119 (1914).

[1324] *Lupangco,* G.R.No. 77372, April 29, 1988 (The Court invalidated Professional Regulation Commission [PRC] Resolution No. 105 prohibiting examinees from attending review classes and receiving review materials during three days immediately preceding PRC examination, on grounds of unreasonableness. "It is an aixiom in administrative law that administrative authorities should not act arbitrarily and capriciously in the issuance of rules and regulations. To be valid, such rules and regulations must be reasonable and fairly adapted to the end in view. If shown to bear no reasonable relation to the purposes for which they are authorized to be issued, then they must be held to be invalid. Gonzales, *Administrative Law, Law on Public and Election Law* 52 (1966). Resolution No. 105 is not only unreasonable and arbitrary, it also infringes on the examinees' right to liberty guaranteed by the Constitution."); *see Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006; *Dela Cruz v. Paras*, 208 Phil. 490-499-500 (1983); *Lucena Grand Central Terminal v. JAC Liner*, 452 SCRA 174 (2005).

[1325] *See* Phil.Const., art.VIII §1.

[1326] *Phil.ippine Rural Electric Cooperatives Association, Inc. v. DILG*, 451 Phil.. 683 (2003); *Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012.

[1327] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 537 (1935) ("A delegation of its legislative authority to trade or industrial associations, empowering them to enact laws for the rehabilitation and expansion of their trades or industries, would be utterly inconsistent with the constitutional prerogatives and duties of Congress."); For the non-delegation doctrine as it applies to further delegations to government agencies, *see Qua Chee Gan v. The Deportation Board*, G.R.No. L-10280, September 30, 1963; *Dalamal v. Deportation Board*, G.R.No. L-16812, October 31, 1963, *citing* 2 Am. Jur. 2d. 52. ("It is a general principle of law, expressed in the maxim "delegatus non potest delegare," that a delegated power may not be further delegated by the person to whom such power is delegated, and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution either express or necessarily implied.").

[1328] *See Kilusang Mayo Uno Labor Center v. Garcia, Jr.*, 239 SCRA 386 (1994). ("The authority given by the LTFRB to the provincial bus operators to set a fare range over and above the authorized existing fare is illegal and invalid as it is tantamount to an undue delegation of legislative authority. *Potestas delegate non delegari potest.* What has been delegated cannot be delegated. This doctrine is based on the ethical principle that such a delegated power constitutes not only a right but a duty to be performed by the delegate through the instrumentality of his own judgment and not through the intervening mind of another. A further delegation of such power would indeed constitute a negation of the duty in violation of the trust reposed in the delegate mandated to discharge it directly. The policy of allowing the provincial bus operators to change and increase their fares at will would result not only to a chaotic situation but to an anarchic state of affairs. This would leave the riding public at the mercy of transport operators who may increase fares every hour, every day, every month or every year, whenever it pleases them or whenever they deem it "necessary" to do so.") N.B. The prohibition applies with all the more force upon administrative agencies considering that the Congressional delegations of power upon administrative agencies have historically been subjected to objections on constitutional non-delegation grounds. See Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

Although the substantive requirements for rulemaking have been robustly developed throughout the years in the Philippine setting, they have been rendered somewhat difficult to apply in view of the legislature's continued passage of broadly worded enabling laws.[1329] Early pre-1987 Philippine case law on how to approach agency actions also provided little comfort as agency discretion ran rampant with no statutory set of general rulemaking procedures to structure and reign in agency decision-making. With the advent of the 1987 RAC and its Book VII on Administrative Procedure, Philippine courts can now consider these substantive requirements in tandem with the legislative rulemaking procedures, in order to arrive at a more effective and structured approach to dealing with the agency's interpretation of the statute it administers.

§4.6.1.2.2.Procedural Requirements for Rulemaking

Philippine case law provides that another inquiry should be made—whether the legislative rule was issued pursuant to proper procedure[1330]—because the validity and binding effect of a legislative rule is further dependent upon the agency's due compliance with the statutory procedures fixed for its promulgation. [1331] Procedural safeguards are, in large part, used by the legislature as substitutes for addressing the non-delegation concerns resulting from broad delegations of legislative authority. Procedure can also profoundly influence, and often determine, the substantive outcomes of rules and regulations. Accordingly, the agency's power to make rules that affect substantial individual rights and obligations carries with it the responsibility to employ procedures that conform to the law.[1332] The rulemaking procedures established by statutes are therefore controlling, and courts generally hold agencies to properly observing the statutory rulemaking procedures.[1333]

[1329] *See Victorias Milling*, 114 Phil. 555 (1962); *See also Teoxon v. Board of Administrators*, G.R.No. L-25619, June 30, 1970; *Rabor v. CSC*, G.R. No. 111812 May 31, 1995; *Edu v. Ericta*, 35 SCRA 481 (1970); *cf.* Chapters 2 & 3 of this work on the breakdown of the traditional transmission belt theory of administrative law in the Philippine setting. *See* Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev., 1669, 1677 fn. 27, 1695-1696 (1974-1975). The factors responsible for this lack of specificity are (1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; (2) lack of legislative resources to clarify directives; (3) lack of legislative incentives to clarify directives; (4) legislator's desire to avoid resolution of controversial policy issues; (5) the inherent variability of experience; (6) the limitations of language.) *N.B.* Broader statutory delegations of authority have also resulted in fewer substantive statutory standards to apply.

[1330] *Misamis Oriental Ass'n*, 238 SCRA 63 (1994); *M.J.Lhuiller*, 453 Phil. 1043 (2003).

[1331] *See Victorias Milling*, 114 Phil. 555, G.R.No. L-16704, March 17, 1962.

[1332] *Morton v. Ruiz*, 415 U.S. 199 (1973).

[1333] *See* Mayton, *Legislative Resolution*, 1980 Duke L.J. 103, 105 [Fn.12] (1980) citing *Bi-Metallic Investment*, 239 U.S. 441(1915).

In line with its place as the unified piece of legislation meant to incorporate the major structural, functional, and procedural rules of governance in the Philippines,[1334] and the Court's repeated general reference to its provisions on agency rulemaking,[1335] the 1987 RAC—particularly its Chap.2, Book VII on Rules and Regulations—plays a central role in Philippine administrative law by providing the basic default pattern for most administrative rulemaking.[1336] As such, it gives form to the constitutional rights to effective and reasonable public participation,[1337] and due process.[1338] It may be viewed as a "quasi-constitutional statute" because it lays the groundwork for agency legal processes, and contains many general and open-ended questions that may be fleshed out through judicial interpretation and practice.

Aside from the 1987 RAC, there are other laws, which may either be trans-substantive in nature[1339] or specific to the grant of rulemaking authority to a particular agency as embodied in the latter's organic statute or enabling law,[1340] that may provide procedures in addition to those prescribed by the 1987 RAC. Administrative agencies are also free to adopt more elaborate procedures on top of those prescribed by the 1987 RAC and other statutes.[1341] The agency's voluntary use of additional procedures may also add further to the credibility and legitimacy of its actions, and makes the rulemaking outcome more acceptable to the courts.[1342] The overall idea is that the statute's imposition, or the agency's adoption, of further procedures in addition to those provided in Chap.2, Book VII, would make the agency's rulemaking process more exhaustive, and therefore more likely to result in better and more accurate agency decisions on the final rule and its contents. The nuances of the rulemaking process are discussed below.

§4.6.2. The Rulemaking Process in the Philippines

1334 *See* 3rd & 4th Whereas Clauses, RAC (1987).
1335 *Fortune Tobacco*, 329 Phil. 987, 1007 (1996) and *M.J. Lhuiller*, 453 Phil. 1043, 1058 (2003).
1336 *See* Andersen, *Mastering Administrative Law* 33 (2009).
1337 Phil.Const., art.XIII §16 (1987).
1338 *Id.* at art.III §1.
1339 For example, see Phil.Civil Code, art.2, as amended by EO 200 s. 1987.
1340 Enabling laws often provide additional procedures that the agency should likewise employ in the conduct of rulemaking.
1341 For example, see *Fortune Tobacco*, 261 SCRA 236 (1996). (The Court invalidated the Internal Revenue Commissioner's RMC 37-93 because it failed to comply with VII(2) RAC §9, and the agency's own circular on the Effectivity of Internal Revenue Rules and Regulations, see RMC 10-86.); See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 544 (1978) (Agencies are free to fashion their own rules of procedure.')
1342 N.B. An agency that has issued its rules providing for additional rulemaking procedures, cannot freely discard the procedures already adopted. *See Fortune Tobacco*, *id.*

In recent years, the Philippine Supreme Court has invalidated agency rules that did not undergo the appropriate rulemaking procedures.[1343] The Court, however, has yet to provide definitive judicial guidance on how administrative agencies should properly go about the rulemaking process in such a way that would satisfy the trans-substantive provisions of the 1987 RAC and the agency's enabling statute.[1344]

The lack of judicial guidance on the matter presents some difficulty for the administrative agencies and the regulated public because the provisions of Chap.2, Book VII of the 1987 RAC are concededly broad enough to cause ambiguity and confusion in their proper application. The following table comparisons of the pertinent procedural rulemaking provisions of Chapter 2, Book VII, 1987 RAC, and their counterparts in the U.S. Administrative Procedure Act[1345] indicate the situation, *to wit*:

Figure 4.A. Rule Formulation

Philippines	**United States of America**
VII(2) 1987 §9 (1987) **SEC.9.** Public Participation.— (**1)** If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule. **(2)** In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the	**5 U.S.C. §553(b).** **(b)**General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include— **(1)** a statement of the time, place, and nature of public rule making proceedings; **(2)** reference to the legal authority under which the rule is proposed; and **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply— **(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

[1343] *See Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012; *Fortune Tobacco,* G.R.No. 119761, August 29, 1996; *Fortune Tobacco*, 261 SCRA 236 (1996).
[1344] The absence of judicial guidance is particularly palpable regarding the rule formulation stage, i.e., notice-and-comment requirement. *See* VII(2) RAC §9 (1987).
[1345] 5 U.S.C. §553.

first hearing thereon. **(3)** In case of opposition, the rules on contested cases shall be observed.	**(B)** when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. **5 U.S.C. §553(c).** **(c)** After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Figure 4.B. Rule Publication and Effectivity

Philippines	United States of America
VII(2) RAC §3-7 **SECTION 3.** Filing.— **(1)** Every agency shall file with the University of the Philippines Law Center three (3) certified copies of every rule adopted by it. Rules in force on the date of effectivity of this Code which are not filed within three (3) months from that date shall not thereafter be the basis of any sanction against any party or persons. **(2)** The records officer of the agency, or his equivalent functionary, shall carry out the requirements of this section under pain of disciplinary action. **(3)** A permanent register of all rules shall be	**5 U.S.C. §553(d)** **(d)**The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except— **(1)** a substantive rule which grants or recognizes an exemption or relieves a restriction; **(2)** interpretative rules and statements of policy; or **(3)** as otherwise provided by the agency for good cause found and published with the

kept by the issuing agency and shall be open to public inspection.	rule.
SECTION 4. Effectivity.—In addition to other rule-making requirements provided by law not inconsistent with this Book, each rule shall become effective fifteen (15) days from the date of filing as above provided unless a different date is fixed by law, or specified in the rule in cases of imminent danger to public health, safety and welfare, the existence of which must be expressed in a statement accompanying the rule. The agency shall take appropriate measures to make emergency rules known to persons who may be affected by them.	**5 U.S.C. §553(a)(1)** **(a)**Each agency shall make available to the public information as follows: **(1)**Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— **(A)** descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions; **(B)** statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; **(C)** rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; **(D)** substantive rules of
SECTION 5. Publication and Recording.—The University of the Philippines Law Center shall: (1) Publish a quarterly bulletin setting forth the text of rules filed with it during the preceding quarter; and (2) Keep an up-to-date codification of all rules thus published and remaining in effect, together with a complete index and appropriate tables.	
SECTION 6. Omission of Some Rules.—(1) The University of the Philippines Law Center may omit from the bulletin or the codification any rule if its publication would be unduly cumbersome, expensive or otherwise inexpedient, but copies of that rule shall be made available on application to the agency which adopted it, and the bulletin shall contain a notice stating the general subject matter of the omitted rule and new copies thereof may be obtained. (2) Every rule establishing an offense or defining an act which, pursuant to law is	

punishable as a crime or subject to a penalty shall in all cases be published in full text. **SECTION 7.** Distribution of Bulletin and Codified Rules.—The University of the Philippines Law Center shall furnish one (1) free copy each of every issue of the bulletin and of the codified rules or supplements to the Office of the President, Congress, all appellate courts and the National Library. The bulletin and the codified rules shall be made available free of charge to such public officers or agencies as the Congress may select, and to other persons at a price sufficient to cover publication and mailing or distribution costs.	general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and **(E)** each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

A comparison of the laws in Figures A and B above indicates that there are some areas in Chapter 2, Book VII, 1987 RAC that are not as detailed as those of the U.S. APA,[1346] with the lack of statutory detail being particularly palpable at the rule formulation stage.[1347] For example, §9, Chap.2, Book VII, by itself, does not provide where and in what manner the agency should "publish or circulate" its "notices of proposed rules."[1348] It does not state in

[1346] *N.B.* Minor differences, such as the statutes' specific reference to each country's respective official publication and pertinent government institution, have little bearing on the comparison.
[1347] See Figure A above.
[1348] VII(2) RAC §9 (1987) *cf.* 5 U.S.C. §553(b).

detail what the "notices of proposed rules" should contain.[1349] It is also silent regarding its applicability to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[1350] It categorically commands agencies to "afford interested parties the opportunity to submit their views prior to the adoption of any rule,"[1351] without expressly indicating what the agency should do with those submissions.[1352] Though somewhat problematic, the existence of these and other statutory gaps in Chapter 2, Book VII, 1987 RAC, are not insuperable.[1353]

Notwithstanding the differences in their respective phraseologies, both sets of administrative rulemaking procedures in Figures 4.A and 4.B clearly provide for (a) notice, (b) hearing, and (c) publication of legislative rules, as mandatory requirements for administrative rulemaking.[1354] With the requirements of notice, hearing, and publication constituting the foundational backbone shared in common by the administrative rulemaking processes for both jurisdictions, the potential for mining American precedents for lessons and principles to fill in the gaps of the Philippine statutory law, and consequently modernizing agency rulemaking in the Philippines, is concretely realizable.

In the Philippines, statutory silence, insufficiency and ambiguity do not hinder the judiciary from rendering judgment, and their judicial decisions applying or interpreting the laws or the Constitution form part of the Philippine legal system.[1355] In interpreting and applying vague or ambiguous statutory provisions, they are guided by the presumption that the law was issued so that right and justice shall prevail.[1356] Accordingly, the Philippine Supreme Court has in many instances utilized its common law authority for purposes of developing and advancing Philippine administrative law.[1357]

[1349] VII(2) RAC §9 (1987) *cf.* 5 U.S.C. §553(b)(1-3).

[1350] VII(2) RAC §9 (1987) *cf.* 5 U.S.C. §553(b)(A). *N.B.* Notwithstanding this statutory silence, the Philippine Supreme Court has exempted these issuances based on the distinction between legislative and non-legislative rules. *See Fortune Tobacco*, 261 SCRA 236 (1996); *Peralta v. Civil Service Commission*, 211 SCRA 425 (1992); *Interprovincial Autobus*, G.R.No. L-6741, January 31, 1956; *Arca*, G.R.No. L-25924, April 18, 1969; *Victorias Milling*, 114 Phil. 555 (1962); *Philippine Blooming Mills*, 124 Phil.. 499 (1966).

[1351] VII(2) RAC §9 (1987).

[1352] VII(2) RAC §9 (1987) *cf.* 5 U.S.C. §553(c).

[1353] See Philippine Civil Code, art.8-9.

[1354] *See* Figure A & B above; *M.J.Lhuiller*, 453 Phil. 1043 (2003). ("The due observance of the requirements of notice, hearing, and publication should not have been ignored.")

[1355] See Philippine Civil Code, art.8-9.

[1356] *Id.* at art.10.

[1357] *Ang Tibay, G.R.No. L-46496, February 27, 1940*. (The Court expounded upon the much broader provisions of the due process clause in order to delineate the seven (7) cardinal requirements for administrative adjudication proceedings.*) N.B.* The due process clause is reproduced in the 1987 Philippine Constitution. *See* Phil.Cons., art.III §1.

Philippine cases have also indicated a clear willingness to adopt the beneficial rulemaking principles and concepts developed in other jurisdictions for purposes of addressing the absence or silence of relevant Philippine statutes,[1358] as exemplified when the Court declared that full publication is indispensably required for the validity of final rules,[1359] and when it distinguished between legislative rules and interpretive rules despite the statutes' silence on the matter.[1360]

Some areas upon which Chapter 2, Book VII is silent are also readily addressed by reference to the other provisions of the 1987 RAC,[1361] the Philippine Civil Code,[1362] and the Philippine Constitution.[1363] For example, during the rule formulation stage, §9(1), Chap.2, Book VII requires administrative agencies to, "as far as practicable, publish or circulate notices of proposed rules," without indicating where and under what circumstances would publication be sufficient.[1364] A review of the entire 1987 RAC, however, shows that §24, Chap.6, Book I mandates the publication in the Official Gazette of, among others, "such documents or classes of documents as may be required so to be published by law."[1365] Thus, under the 1987 RAC, the agency

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[1358] *See Victorias Milling*, G.R.No. L-16704, March 17, 1962; *Maceren*, G.R.No. L-32166, October 18, 1977; *Teoxon v. Board of Administrators*, G.R.No. L-25619, June 30, 1970; *Balmaceda*, G.R.No. L-21971, September 5, 1975 citing Davis, *Admin. Law Treatise* 275 (1958); *Misamis Oriental Ass'n*, G.R.No. 108524, November 10, 1994, citing Davis, *Administrative Law* 116 (1965); *People v. Lim*, 108 Phil. 1091 (1960).

[1359] *See Tanada II,* G.R.No. L-63915, December 29, 1986, 146 SCRA 446. ("Administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant also to a valid delegation."); *Philippine Ass'n of Service Exporters, Inc. v. Torres*, G.R.No. 101279, August 6, 1992 (The Court held that even though the DOLE and POEA circulars on the processing and foreign deployment of Filipino domestic helpers were substantively permissible, they were nevertheless "legally invalid, defective, and unenforceable" because the agencies failed to comply with the rulemaking procedures set by the relevant statutes—particularly the statutory requirements for the publication phase of rulemaking.)

[1360] *See Fortune Tobacco*, 261 SCRA 236 (1996); *Peralta v. Civil Service Commission*, 211 SCRA 425 (1992); *Interprovincial Autobus*, G.R.No. L-6741, January 31, 1956; *Arca*, G.R.No. L-25924, April 18, 1969; *Victorias Milling Co.*, 114 Phil 555, G.R.No. L-16704, March 17, 1962; *Philippine Blooming Mills*, 124 Phil. 499 (1966).

[1361] *See for example*, I(6) RAC §24 (1987) in relation to VII(2) RAC §9 on where to publish the notice of proposed rulemaking. Other statutory cross-references are discussed in this work.

[1362] *See Tanada I*, G.R.No. L-63915, April 24, 1985 and *Tanada II*, 146 SCRA 446 (1986) *cf.* Phil.Civil Code, art.2, as amended by Executive Order No. 200 s. 1987, supplementing the 1917 Administrative Code's publication provisions. Courts have since cited *Tanada I & II* as Philippine landmark cases on constitutional due process of law.

Art.2. Laws shall take effect after fifteen days following the completion of their publication either in the Official Gazette or in a newspaper of general circulation in the Philippines, unless it is otherwise provided.

[1363] *See for example*, VII(2) RAC §9 as a statutory implementation of the right to reasonable public participation at all levels of social, political, and economic decision-making, Phil.Const., art.XIII §16. Other statutory cross-references are discussed in this work. Likewise, the requirement for the agency to articulate its reasons for adopting the final rule is also a function of the scope of judicial review, *see Nova Scotia Food, id.*; *see also Chamber of Commerce v. SEC*, 443 F.3d 890 (DC Cir. 2006); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (DC Cir. 1978), which, in the Philippines, is part of the judicial power vested by the Philippine Constitution. Phil.Const., art.VIII §1.

[1364] VII(2) RAC §9(1) (1987).

[1365] I(6) RAC §24 (1987).

should, at the very least, publish its notice of proposed rulemaking in the Official Gazette.[1366] As for the need to consider the views submitted prior to adopting any rule, agencies are obviously mandated to engage in the "process of reasoned decision-making" when formulating the rule,[1367] otherwise its actions would be arbitrary and capricious.[1368] The agency also has to demonstrate its performance of that process of reasoned decision-making so that its final rule would survive judicial review by the courts.[1369] As for the rule publication phase, the Philippine Supreme Court in *Republic of the Philippines v. Express Telecommunications Co.* already held that the agency's mere filing of its rules with the U.P. Law Center, and the latter's publication thereof in the National Administrative Register, as provided in §3, Chap.2, Book VII, 1987 RAC were inadequate for purposes of making the rule valid and effective,[1370] and declared that the agency should also comply with Article 2, Philippine Civil Code.[1371] Incidentally, §24, Chap.6, Book I of the 1987 RAC also requires the publication in the Official Gazette of "all legislative acts and resolutions of a public nature" and "all executive and administrative issuances of general application."[1372]

Aside from the foregoing considerations, many of the details that are explicitly provided in the U.S. APA, but are absent in Chap.2, Book VII of 1987 RAC, can be traced as being logical consequences of, indispensably correlated with, or otherwise necessary to, the adequate performance of any or all of the three (3) foregoing common procedural requirements. They also interrelate in the service of the same process values of enhancing the quality of rules, ensuring fairness of administrative regulation, and promoting "reasoned decision-making" by the agencies when formulating legislative rules.[1373] Thus, for example, the notices of proposed rulemaking—both as regards the methods of their circulation, and their contents—should be adequate enough to enable interested parties to offer "meaningful and informed" comment on the proposal;[1374] otherwise, their "opportunity to submit views"[1375] would be

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[1366] VII(2) RAC §9 cf. I(6) RAC §24 (1987).
[1367] *Connecticut Light and Power v. NRC*, 673 F.2d 525, 528 (DC Cir. 1982); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).
[1368] See Phil.Const., art.VIII §1, §5 (1987).
[1369] *Connecticut Light and Power*, 673 F.2d at 528; *Nova Scotia Food Products*, 568 F.2d at 252*; N.B.* The power of judicial review in the Philippine context is constitutional in nature. *Id.*
[1370] *See Republic of the Philippines v. Express Telecommunications Co., G.R.No. 147096, January 15, 2002*; *See Tanada I*, G.R.No. L-63915, April 24, 1985 and *Tanada II*, 146 SCRA 446 (1986) *cf.* Phil.Civil Code, art.2, as amended by Executive Order No. 200 s. 1987, supplementing the 1917 Administrative Code's publication provisions.
[1371] See Philippine Civil Code, art.2, as amended by EO 200 s. 1987.
[1372] I(6) RAC §24. (1987).
[1373] *See* Werhan, *Principles of Admin.Law* 236-237.
[1374] AMA v. Reno, 57 F.3d 1129, 1132-33 (DC Cir. 1995); *Florida Power & Light Co. v. United States,* 846 F.2d 765, 771 (DC Cir. 1988); *Forester v. Consumer Product Safety Commission,* 559 F.2d 774, 787 (DC Cir. 1977) (The

negated.[1376] The submission of "views," in turn, necessarily results in the agency's creation of an administrative rulemaking file, docket or record[1377] in which all the inputs, information and data are gathered and compiled.[1378] The "submission of views prior to the adoption of the final rule" presupposes the existence of the agency's duty and obligation to consider the relevant matters presented in the rulemaking proceeding[1379] as part of its "process of reasoned decision-making"[1380] before issuing the final rule.

Considering that rulemaking is fast becoming the activity of choice for pursuing the agency's regulatory agenda,[1381] both the administrative bureaucracy and the regulated public could benefit greatly from having guidance regarding the rulemaking process. The following sections of this work attempt to shed light in that regard.

§4.6.2.1. Types of Proceedings for Rulemaking

When an administrative rule goes beyond merely providing for the means that can facilitate or render less cumbersome the implementation of the law and substantially increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard and, thereafter, to be duly informed, before the issuance is given the force and effect of law.[1382] In M*isamis Oriental Association of Coco Traders, Inc.*, *vs. Department of Finance Secretary*,[1383] and *Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco*,[1384] the Philippine Supreme Court declared, "a legislative rule is in the nature of subordinate legislation, designed to implement a primary

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notice of proposed rulemaking must afford interested persons "a reasonable opportunity to participate in the rulemaking process;" Werhan, *id.*

[1375] VII(2) RAC §9 (1987).

[1376] VII(2) RAC §9 (1987) *cf.* 5 U.S.C. §553(c).

[1377] *N.B.* The contents of the administrative file, docket or record generated as a result of the rulemaking process differ, dependent on the type of proceedings required by law, i.e., informal, formal, etc. Thus, in informal notice-and-comment rulemaking, everything on which the agency relies on in formulating its final rule becomes part of the administrative rulemaking file, docket or record. In contrast, the contents of the administrative record generated during formal proceedings are largely limited to those submitted by the parties to the proceedings. *See* Werhan, *Principles of Admin.Law* 237.

[1378] VII(2) RAC §9 (1987) *cf.* 5 U.S.C. §553(c).

[1379] *Id.; see also* Werhan, *Principles of Admin.Law* 258.

[1380] *Connecticut Light and Power*, 673 F.2d at 528; *Nova Scotia Food Products*, 568 F.2d at 252.

[1381] *See Chenery II*, 332 U.S. 194, 202-203 (1947) (As a general rule, the choice between utilizing rulemaking or adjudication "is one that lies primarily in the informed discretion of the administrative agency.")

[1382] *See Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006, citing *Fortune Tobacco*, 329 Phil. 987, 1007 (1996) and *M.J. Lhuiller*, 453 Phil. 1043, 1058 (2003).

[1383] *Misamis Oriental Ass'n*, 238 SCRA 63 (1994).

[1384] *Fortune Tobacco*, G.R.No. 119761, August 29, 1996, *citing Misamis Oriental Ass'n, id.; See also M.J. Lhuiller*, 453 Phil. 1043 (2003).

legislation by providing the details thereof. In the same way that laws must have the benefit of public hearing, it is generally required that before a legislative rule is adopted there must be hearing," referring in general, to the provisions of §9, Chap.2, Book VII of the 1987 RAC on public participation.[1385]

The mandatory nature of public participation pursuant to §9, Chap.2, Book VII, 1987 RAC, in turn, is evident not only from the obligatory language employed, but also because it is a clear statutory implementation of the people's fundamental right to effective and reasonable public participation at all levels of social, political, and economic decision-making.[1386] The core idea of having administrative rulemaking procedures is that parties should be allowed to participate in the formulation of important policies that affect them.[1387] Hearings and public participations, however, can take many forms. The term "hearing" also does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decision-maker.[1388] To which sort of hearings was the Court referring?

By itself, the 1987 RAC establishes two (2) sets of rulemaking procedures for the agency's issuance of legislative rules—formal and informal—both of which follow the same three (3) step rulemaking process of notice, hearing, and publication,[1389] but are distinguishable as regards the middle step—that of hearing. In informal rulemaking, the hearing requirement consists of affording interested parties the opportunity to submit their views prior to the adoption of any rule,[1390] while the hearing requirement in formal rulemaking entails more elaborate trial-type proceedings that are akin to the administrative adjudicatory process.[1391] Aside from the foregoing, there is a third type of rulemaking that exists when the basic rulemaking processes under the 1987 RAC is hybridized by other statutes, such as the specific enabling statute and such other trans-substantive statutes, which provide additional procedural requirements on top of those required by §9, Chap.2, Book VII of the 1987 RAC.[1392]

[1385] *Id.*

[1386] Phil.Const., art.XIII §16. N.B. The constitutional right to effective and reasonable public participation is also statutorily recognized as a basic guiding principle of the 1987 RAC. See II(1) RAC §1[7].

[1387] *Cf. See* Andersen, *Mastering Admin.Law* 43.

[1388] *See United States v. Florida East Coast Railway*, 410 U.S. 224, 240-241 (1973), hereinafter "Florida East Coast."

[1389] *M.J.Lhuiller*, 453 Phil. 1043 (2003). ("The due observance of the requirements of notice, hearing, and publication should not have been ignored.")

[1390] See VII(2) RAC §9(1).

[1391] See VII(2) RAC §9(3) (1987).

[1392] *Cf. See* Andersen, *Mastering Admin.Law* 38.

Accordingly, in legislative rulemaking, there are typically three (3) types of rulemaking processes—Informal, Formal, and Hybrid Rulemaking—all of which are distinguished primarily by the extensiveness of the hearing requirements prescribed by the relevant statutes. The different types of legislative rulemaking are discussed as follows:

§4.6.2.1.1. Informal Rulemaking

§9(1), Chap.2, Book VII, 1987 RAC, which states: "(1) If not otherwise required by law, an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule," sets the informal "notice-and-comment" rulemaking process as the basic procedural floor for public participation in agency rulemaking,[1393] and provides room for the imposition of additional or more elaborate public participation processes as may be triggered by the terms of the 1987 RAC itself, or by the enabling laws and relevant statutes.[1394]

The phrase, *"[I]f not otherwise required by law,"*[1395] adopts the view that subsequent statutes may not be held to supersede or modify the notice-and-comment requirement under §9(1), except to the extent that the subsequent statute does so expressly in clear and unequivocal language.[1396] This considered view of that phrase is further bolstered by the general mandate for all statutorily-created administrative agencies[1397] to undertake the informal "notice-and-comment" process *"as far as practicable,"*[1398] which means that agencies desiring to formulate legally binding rules should utilize the informal

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[1393] *N.B.* This view is also consonant with the effect of the U.S. APA on other laws and subsequent statutes. *See* 5 U.S.C. §559.

[1394] The specific language of the enabling statute may provide additional or more elaborate procedures on top of those required by VII(2) RAC §9(1), which may include formal processes. *See* VII(2) RAC §9(1&3) (1987). If the enabling statute provides for its own hearing requirements, it is deemed suppletory to that of §9(1) and vice-versa, unless the enabling statute "requires otherwise" by expressly and clearly stating that §9(1) does not apply to the agency rulemaking under its provisions. *N.B.* Administrative agencies may of course voluntarily adopt more elaborate procedures than those required by law.

[1395] VII(2) RAC §9(1) (1987).

[1396] This view is also consonant with the effect of the U.S. APA on other laws and subsequent statutes. *See* 5 U.S.C. §559. Thus, VII(2) RAC §9(1) (1987) and the other statutes should be harmonized and considered as suppletory to each other in terms of providing for public participation, unless the particular statute "requires otherwise" by expressly stating in no uncertain terms that §9(1) does not apply to the agency rulemaking under its provisions.

[1397] *See* VII(1) RAC §1 in rel. §291) For the coverage of Book VII RAC.

[1398] VII(2) RAC §9[1] (1987).

rulemaking to the extent[1399] that that process can be used, done or accomplished.[1400] As such, §9(1), Chap.2, Book VII lays down the informal rulemaking process as the default procedural floor or base for the hearing and public participation requirement for agency rulemaking across the Philippine administrative bureaucracy. It provides the uniform, baseline procedure as a platform for the emergence of administrative rulemaking as a dominant regulatory tool in Philippine administrative law.[1401] Being trans-substantive nature, the provisions of Chap.2, Book VII are applicable in those instances where the enabling law's provisions appear to provide the agency with naked rulemaking authority.[1402] This is exemplified in the case of *Hypermix*[1403] in which the Court invalidated the Commissioner of Customs' Memorandum Order No. 27-2003 on the tariff classification of wheat, issued pursuant to the provisions of Tariff and Customs Code, because it was a legislative rule that should have undergone the informal notice-and-comment, and publication requirements under §3 and §9, Chap.2, Book VII of the 1987 RAC.[1404]

At the heart of the informal rulemaking process in §9(1) is the exchange between the agency and interested members of the public who are afforded "the opportunity to submit their views" prior to the adoption of any rule,[1405] the objectives of which include enhancing the quality of administrative regulation by increasing the flow of information between the public and the agency, and ensuring the fairness of administrative regulation by allowing interested persons to protect their interests by participating in the rulemaking

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[1399] For the ordinary meaning of the phrase, "as far as," as being equivalent to the phrase, "to the extent or degree," see http://www.oxforddictionaries.com/us/definition/american_english/as-far-as and http://www.merriam-webster.com/dictionary/as%20far%20as last accessed on April 28, 2016.

[1400] For the ordinary meaning of "practicable," see http://www.merriam-webster.com/dictionary/practicable and http://www.oxforddictionaries.com/us/definition/american_english/practicable last accessed on April 28, 2016.

[1401] This is evident in the Philippine Supreme Court's disposition of rulemaking cases based on the agency's non-compliance of VII(2) RAC §9. *See Misamis Oriental Ass'n*, 238 SCRA 63 (1994) and *Fortune Tobacco*, G.R.No. 119761, August 29, 1996. *N.B.* This essentially tracks the development of informal rulemaking as the uniform, baseline procedure governing the issuance of agency rules with the force of law in the United States. *See* Werhan, *Principles of Admin.Law* 235.

[1402] For example, *see* The Philippine Data Privacy Act, R.A. 10173, Chap.IX §39, to wit.

> SEC. 39. *Implementing Rules and Regulations (IRR).* – Within ninety (90) days from the effectivity of this Act, the Commission shall promulgate the rules and regulations to effectively implement the provisions of this Act.

[1403] *See also Hypermix Feeds Corp.*, G.R.No. 179579, February 1, 2012. ("Considering that the questioned regulation would affect the substantive rights of respondent…, it therefore follows that petitioners should have applied the pertinent provisions of Book VII, Chapter 2 of the 1987 RAC." [referring to §3 & 9, Chap.2, Book VII 1987 RAC]).

[1404] *Id.*

[1405] VII(2) RAC §9, *cf. Werhan, Id. at 236-237.*

process.[1406] The exchange of information, in turn, necessarily results in the creation of a legislative rulemaking file or docket that would contain the information, data and other inputs that the agency should consider prior to adopting its final rule.

Much like the informal notice-and-comment rulemaking process in the United States,[1407] the informal procedure in §9, Chap.2., Book VII prescribes a good government legislative model for agency rulemaking, which is concededly more expedient than the more elaborate procedures used in formal rulemaking.[1408]

§4.6.2.1.2. Formal Rulemaking

Formal rulemaking follows the judicial model for agency rulemaking.[1409] Although formal rulemaking essentially retains its nature as a legislative process, it requires agencies to undertake more elaborate trial-type procedures analogous to those used in adjudicatory-type proceedings wherein all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.[1410]

In the Philippines, formal rulemaking is triggered (a) when an "opposition" during the public participation process,[1411] or (b) when explicitly required by the agency's enabling statute.[1412]

When so triggered by "opposition" during the public participation process, the agency is mandated to apply the rules on contested cases pursuant to Chap.3, Book VII, 1987 RAC on Adjudication.[1413] In contested cases, all parties are entitled to the service of notice at least five (5) days before the date of the hearing.[1414] During the hearing, the parties are given the opportunity to present their evidence and arguments on all issues,[1415] in accordance with the

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[1406] *Werhan, id.; see* also Cooley R. Howarth, Jr., *Informal Agency Rulemaking and the Courts: A Theory for Procedural Review,* 61 Wash.U.L.Q. 891, 896-906 (1984).
[1407] See 5 U.S.C. §553.
[1408] *See* Werhan, *Principles of Admin.Law* 236.
[1409] *Id.* at 237.
[1410] *See ICC v. Louisville & Nashville R.Co.*, 227 U.S. 88, 93 (1913); *Florida East Coast Railway*, 410 U.S. at 236-237.
[1411] *Id.* at §9(3). N.B. In the United States, §the statutory trigger for formal rulemaking procedures
[1412] *See* VII(2) RAC §9(1) (1987).
[1413] See VII(2) RAC §9(3) (1987) in relation to VII(3) thereof. N.B. The 1987 RAC is silent as to what would make an "opposition" sufficiently adequate to trigger the use of the formal rulemaking process.
[1414] VII(3) RAC §11 (1987).
[1415] *Id.*

Rules of Evidence for contested cases.[1416] The parties also have the right to cross-examine the witnesses presented against them, and to submit evidence in rebuttal.[1417] The agency, for its part, is given the power to issue subpoenas in order to compel the attendance of witnesses and the production of books, papers, documents and other pertinent data, upon the request of any party upon a showing of general relevance.[1418] The agency can encourage amicable settlement, compromise or arbitration;[1419] and may dispose of the proceedings either by decision,[1420] or by stipulation, agreed settlement or default.[1421] The agency is also required to keep an official record of the proceedings, the contents of which are subject to judicial-type constraints[1422] that are not typically applicable to the administrative rulemaking record, file or docket produced in the other types of rulemaking.

§9(1), Chap.2, Book VII also recognizes that the enabling statute may explicitly require the agency to use the formal rulemaking procedures.[1423] However, it did not unequivocally provide for the statutory language that the enabling statute must explicitly contain in order to trigger the formal rulemaking process. That, in turn, makes it difficult to determine the applicability of formal rulemaking procedures in those instances where there is no "opposition."[1424]

Enabling statutes have invariably mandated agencies to conduct "hearings" when issuing particular rules.[1425] As previously discussed, the term "hearing" does not necessarily embrace the rights to cross-examination and oral arguments that obtain in formal rulemaking.[1426] In the United States, the Supreme Court in *United States v. Florida East Coast Railway*[1427] stated that the enabling statute's use of the term "hearing," by itself, is not sufficient to trigger the use of formal rulemaking procedures under the U.S. APA. Rather, the enabling statute should employ the terms "on the record" and "after hearing," or other statutory language having the same meaning, in order to trigger the use

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[1416] *Id.* at §12.
[1417] *Id.* at §12(3).
[1418] *Id.* at §13.
[1419] *Id.* at §10.
[1420] *Id.* at §14.
[1421] *Id.* at §11(2).
[1422] *Id.* at §11(3), §12-13.
[1423] *See* VII(2) RAC §9(1) (1987).
[1424] *See Id.* at §9(3).
[1425] *See* for example R.A. 9136, §43(b)(ii), empowering the Philippine Energy Regulatory Commission (ERC) to promulgate the National Grid Code and Distribution Code, which shall, among others, impose a universal charge on all electricity end-users to be determined "after due notice and public hearings."
[1426] *See United States v. Florida East Coast Railway*, 410 U.S. 224, 240-241 (1973), hereinafter "Florida East Coast."
[1427] *Id.*

of formal adjudicatory-type procedures for the agency's conduct of rulemaking.[1428] The extent to which *Florida East Coast* may be applied in the Philippines, however, remains to be seen considering that the specific language to which it refers—"on the record after opportunity for an agency hearing"—is lifted from the express provisions of the U.S. APA itself.[1429] Nonetheless, *Florida East Coast*'s strict construction of the U.S. APA and the enabling statute is indicative of the judicial view that the use of formal adjudicatory-type procedures is not the recognized norm in agency rulemaking, and that the formal rulemaking process applies only when the enabling statute requires it in clear and unequivocal language.[1430]

§4.6.2.1.3. Hybrid Rulemaking

As earlier discussed, Chap.2, Book VII applies absent an express and categorical statement in the enabling law that precludes or modifies its applicability. The requirements of public participation under §9(1) are generally mandated for all agency rulemakings in view of Chap.2, Book VII's trans-substantive character, and its applicability is precluded or modified only if not otherwise required by the enabling law.[1431] This statutory feature, in turn, readily allows the hybridization of the agency rulemaking process. Hybrid rulemaking results when the provisions of Chapter 2, Book VII, 1987 RAC are applied in conjunction with the specific enabling statute, and such other trans-substantive statutes that prescribe other procedural requirements.[1432] Thus, when it comes to statutory rulemaking procedures, administrative agencies cannot just rely solely on the provisions of their organic or enabling statute; they also have to consider the existence of Chap.2, Book VII, 1987 RAC, and other applicable trans-substantive statutes.

It would be problematic for the agency to rely solely on the enabling statutes for purposes of determining the applicable rulemaking procedures.

[1428] *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *Florida East Coast Railway*, 410 U.S. at 234-237.

[1429] *See* 5 U.S.C.§553(c).

[1430] For examples of statutes that categorically prescribe formal rulemaking procedures, *see* Phil. Tariff and Customs Code §401, the Omnibus Investment Code, art. 7, and RA 8800, §5 and 9, on the administrative procedures for issuing rules on quantitative restrictions and banning the importation of products into the Philippines. N.B. These statutes are discussed in *Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006.

[1431] *See* VII(2) RAC §9(1).

[1432] The case of *Philippine Ass'n of Service Exporters, Inc. v. Torres*, G.R.No. 101279, August 6, 1992, provides a clear example of statutory hybridization on the rule publication requirement. In that case, the Court invalidated the legislative rules issued by the DOLE and POEA on the foreign deployment of Filipino domestic workers because the agency did not comply with the publication requirements for rulemaking as required by the Phil.Civil Code, art.2; the Labor Code, art.5; and VII(2) RAC §3[1] and §4 (1987).

First of all, that would open their rules to the possibility of judicial invalidation. Secondly, organic statutes and enabling laws are typically silent on specific rulemaking procedures. Some enabling statutes vaguely require agencies to "consult" with its stakeholders in promulgating the statute's implementing rules and regulations,[1433] while others vaguely provide for both "public hearings" and "consultations,"[1434] without altogether providing the agency with the necessary detailed steps on how to properly go about complying with the "public hearing" or "consultation" requirement. The trans-substantive provisions of Chap.2, Book VII, 1987 supply those details.

The term "consultation" is similar to the public participation requirement in §9, Chap.2, Book VII, 1987 RAC, in that they both have, as a central feature, the "exchange of information and opinions"[1435] about the proposed rule "in order to reach a better understanding of it or to make a decision."[1436] Consultations, however, typically involve the further conduct of meetings for the abovementioned purposes.[1437] On the other hand, the use of the term "hearings" in the enabling statute's delegation of rulemaking authority has been held to trigger the informal notice-and-comment rulemaking process[1438] similar to that prescribed under §9, Chap.2, Book VII, 1987 RAC. Thus, if the agency's enabling law mandates the use of "hearings," "consultations," and other similar procedures for agency rulemaking, those processes should applied in harmonious conjunction with the procedural requirements of Chap.2, Book VII, 1987 RAC, in order to avoid judicial invalidation for failure to comply with the rulemaking procedures prescribed by all the relevant statutes.[1439]

The Philippine rulemaking framework that sets §9(1), Chap.2, Book VII, 1987 RAC as its baseline for the public participation requirement also works

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[1433] *See* for example, R.A. 9136 §77, *to wit:* SEC. 77. Implementing Rules and Regulations. – The DOE shall, in consultation with relevant government agencies, the electric power industry participants, non-government organization and end-users, promulgate the Implementing Rules and Regulation (IRR) of the Act within six (6) months from the effectivity of this Act, subject to the approval by the Power Commission.

[1434] See "Comprehensive Firearms and Ammunition Regulation Act", RA 10591, §44.

> SEC. 44. *Implementing Rules and Regulations.* – Within one hundred twenty (120) days from the effectivity of this Act, the Chief of the PNP, after public hearings and consultation with concerned sectors of society shall formulate the necessary rules and regulations for the effective implementation of this Act to be published in at least two (2) national newspapers of general circulation.

[1435] *See* Werhan, *Principles of Admin.Law* 236.

[1436] See definition of "consultation," *Cambridge Dictionary*, available at http://dictionary.cambridge.org/us/dictionary/english/consultation, last accessed on July 20, 2016, *cf.* Werhan, *id.*

[1437] *Cambridge Dictionary definition, id.*

[1438] *See Florida East Coast*, 410 U.S. 224 (1973).

[1439] Cf. *Philippine Ass'n of Service Exporters, Inc. v. Torres*, G.R.No. 101279, August 6, 1992.

well in situations where the enabling or organic statute provides for more elaborate processes for rulemaking. For example, the Philippine Omnibus Investment Code empowers the Board of Investments (BOI) to formulate and implement rationalization programs for certain industries whose operations may result in impeding economic growth.[1440] The BOI may also partially or totally restrict the importation of equipment, raw materials, or finished products involved in the rationalization program, subject to the prior approval of the Philippine President.[1441] Absent clear statutory language that precludes §9(1), Chap.2, Book VII, 1987 RAC, the added procedural safeguard of requiring prior presidential approval should not be read in isolation as freeing the BOI from the 1987 RAC's public participation requirement, and allowing it to conduct its rulemaking in secret for purposes of determining whether to impose partial or total restriction on the covered imports.

Another example that provides for a more elaborate, hybridized formal-type procedures is §401(b) of the Philippine Tariff and Customs Code (TCC), [1442] which establishes a three-tier process involving the Tariff Commission, the National Economic Development Authority (NEDA), and the Philippine President as regards the imposition of additional import duties exceeding ten (10%) ad valorem. At bottom, the TCC requires the Tariff Commission to hear the views and recommendations of any concerned government office, agency, or instrumentality; and to hold public hearings where interested parties are afforded reasonable opportunity to be present, produce evidence, and to be heard. Within thirty (30) days after terminating its public hearings, Tariff Commission then submits its findings and recommendations to the NEDA, which in turn, will articulate its recommendations, and then submits them to the President for approval.[1443]

§4.6.2.2. Requirements Common to All Types of Legislative Rulemaking

All types of legislative rulemaking have in common the general requirements that there be (a) notice of the proposed rulemaking, (b) hearing, and (c) publication of the final legislative rules,[1444] as their foundational backbone. The following sections discuss the details necessary for their proper compliance.

[1440] EO 226 s. 1987, art.7(12).
[1441] Id.
[1442] Phil. Tariff and Customs Code §401.
[1443] Id.
[1444] *See* Figure A & B above; *M.J.Lhuiller*, 453 Phil. 1043 (2003). ("The due observance of the requirements of notice, hearing, and publication should not have been ignored.")

§4.6.2.2.1. Notice of the Proposed Rulemaking

In the Philippines, the agency's publication and circulation of the notices of their proposed rules (NPR)[1445] is an all-important step towards making the constitutional and statutory right to public participation both effective and reasonable,[1446] and reviewing courts have interpreted the NPR requirements in light of the functions that it is supposed to serve in the rulemaking process.[1447]

Requiring agencies to publish NPRs enable the public to offer "meaningful and informed comment" on the agency's proposal.[1448] The agency's own findings and assumptions in support of its proposal are then subjected to public scrutiny,[1449] and the agency's proposal would benefit from diverse public comments.[1450] Proper NPRs also advance the values of fairness and democratic participation[1451] thereby making any resulting final rule more acceptable to the public. The NPR is also the first step towards facilitating judicial review because it invites all interested persons to submit their views and evidence supporting their positions for inclusion in the administrative rulemaking record, docket or file.[1452]

The public's right to comment and submit their views on agency rulemaking proposals is a particularly important component of the agency's reasoning process.[1453] The opportunity for comment must therefore be a meaningful opportunity.[1454] The effective and meaningful participation of the public in rulemaking, in turn, depends largely upon the contents of the NPRs, as well as the methods by which they are published or circulated. Both the

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[1445] See §9, Chap.2, Book VII, 1987 RAC, also known as "Notice of Proposed Rulemaking."
[1446] Phil.Const., Art.XIII, §16; II(1) RAC §1(7) in rel. VII(2) RAC §9 (1987); *See Prometheus Radio Project v. FCC*, 652 F. 3d 431, 449 (3d Cir. 2011) (" To assess whether the public was fairly apprised of a new rule, a reviewing court asks 'whether the purposes of notice and comment have been adequately served.' ") (*quoting Am. Water Works Ass'n v. EPA*, 40 F. 3d 1266, 1274 (D.C.Cir. 1994)); Werhan, *Principles of Admin.Law* 246 (2014).
[1447]Werhan, *id.*
[1448] See VII(2) RAC §9 (1987) *cf.* APA § 553(b)); Werhan, *id.* at 237.
[1449] Weyerhaeuser Co. v. Costle, 590 F. 2d 1011, 1031 (D.C.Cir. 1978); see Chocolate Manufacturers Ass'n v. Block, 755 F. 2d 1098, 1103 (4th Cir. 1985). Werhan, *Principles of Admin.Law* 246 (2d Ed. 2014).
[1450] See, e.g., International Union, United Mine Workers of America v. Mine Safety & Health Administration, 407 F. 3d 1250, 1259 (D.C.Cir. 2005); Prometheus Radio Project, 652 F. 3d at 449 (quoting International Union). Werhan, *Principles of Admin.Law* 246 (2014).
[1451] See, e.g., Prometheus Radio Project, 652 F. 3d at 449; International Union, 407 F. 3d 1250. Werhan, *Principles of Admin.Law* 246 (2d Ed. 2014).
[1452] Werhan, *Principles of Admin.Law,* 246, citing Prometheus Radio Project, 652 F. 3d at 449; International Union, 407 F. 3d 1250; Marathon Oil Co. v. EPA, 564 F. 2d 1253, 1271 n. 54 (9th Cir. 1977).
[1453] *Connecticut Light & Power Co.*, 673 F. 2d at 528; Werhan, *id.* at 257.
[1454] *Prometheus Radio Project*, 652 F. 3d at 450 (*citing Rural Cellular Ass'n v. FCC*, 588 F. 3d 1095, 1101 (D.C.Cir. 2009)). Werhan, *id.*

NPR's content and method of circulation need to be adequate enough to afford interested parties "a reasonable opportunity to participate in the rulemaking process."[1455] Indeed, NPRs should be sufficiently informative to assure interested persons an opportunity to intelligently participate in the rulemaking process.[1456] Otherwise, their "opportunity to submit views,"[1457] and their constitutional right "to effective and reasonable participation at all levels of social, political, and economic decision-making," would be abridged.[1458] The contents and method of circulation are discussed as follows:

> **Methods of NPR Circulation.—**The baseline procedure under §9(1), Chap.2, Book VII requires administrative agencies to, "as far as practicable, publish or circulate notices of proposed rules."[1459] In that connection, §24, Chap.6, Book I of the same Code mandates the publication in the Official Gazette of, among others, "such documents or classes of documents as may be required so to be published by law."[1460] The 1987 RAC thus requires that the agency should publish its NPR in the Official Gazette.[1461]
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> The Philippine Official Gazette has traditionally been available in print.[1462] Now, it is also available in electronic format via its website, www.gov.ph. The Official Gazette website also provides an official directory of the Philippine government that includes all the contact details and links to the websites of the government offices, including the executive agencies at the departmental level.[1463] In terms of agency rulemaking, the Official Gazette has the potential, in terms of its statutory mandate and resources as the official repository of laws, resolutions and other official documents of the Philippine government,[1464] of performing the functions equivalent to that of the Federal Register in the United States.[1465] In addition, the Official

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[1455] *AMA v. Reno*, 57 F.3d 1129, 1132-33 (DC Cir. 1995); *Florida Power & Light Co. v. United States,* 846 F.2d 765, 771 (DC Cir. 1988); *Forester v. Consumer Product Safety Commission,* 559 F.2d 774, 787 (DC Cir. 1977) (The notice of proposed rulemaking must afford interested persons "a reasonable opportunity to participate in the rulemaking process;" Werhan, *id.*

[1456] Werhan, *id.* citing *U.S. Attorney General's Manual* 30 available at http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf last accessed on April 28, 2016

[1457] VII(2) RAC §9 (1987).

[1458] Phil.Cons., art.XIII §16.

[1459] VII(2) RAC §9(1) (1987).

[1460] I(6) RAC §24 (1987).

[1461] VII(2) RAC §9 cf. I(6) RAC §24 (1987).

[1462] Id. at I(6) RAC.

[1463] http://www.gov.ph/directory/ last accessed on July 20, 2016.

[1464] See I(6) RAC.

[1465] See https://www.federalregister.gov/ last accessed on July 20, 2016.

Gazette's alternative availability online and in electronic format clearly renders the publication and circulation of notices of agency rule proposals all the more effective, widespread, expedient, and accessible.[1466]

Contents of the NPR.—Many of the NPR's basic contents are matters borne out of both logic, and common sense. This likely explains why §9(1), Chap.2, Book VII, 1987 RAC had been silent on the details of the NPR, leaving it up to the Philippine courts to fix and adjust its details in light of the objectives of affording the public the "opportunity to submit views,"[1467] and assuring their constitutional right "to effective and reasonable participation."[1468] Aside from logic and common sense, the Philippine bureaucracy should be guided by past practices—the government has, since its inception, already been sending notices on a plethora of regulatory matters to both individuals and the public alike; the Philippine Rules of Court have many examples of what notices should contain;[1469] and the Philippine courts have already determined some cases in which the notices were either adequate or inadequate for purposes of achieving the objectives for which they were issued. The details of the NPR can also be referenced from the laws on administrative procedure of the United States,[1470] considering that the NPR is one of the requirements common to the rulemaking processes in both jurisdictions.

Like all other notices from the government, statements as to the scheduled times and places of the rulemaking proceedings, the nature of the proceedings, including the necessary contact details of the agency issuing the same, are of course to be expected among the more basic contents of the NPR.[1471] The reference to the legal authority relied upon by the administrative agency for its proposed rules[1472] is also to be expected because the agency's authority to issue legally binding rules is only co-extensive with the express grant of governmental authority given

[1466] See www.gov.ph last accessed on May 5, 2016.
[1467] VII(2) RAC §9 (1987).
[1468] Phil.Cons., art.XIII §16.
[1469] *See for example,* Phil. Rules of Court, Rule 13 (Filing and Service of Pleadings, Judgments, and Other Papers); and Rule14 (Summons).
[1470] 5 U.S.C.
[1471] *Cf.* 5 U.S.C. §553(b)(1); For other cross-reference examples, *see also* Phil. Rules of Court, Rule 13 (Filing and Service of Pleadings, Judgments, and Other Papers); Rule14 (Summons).
[1472] *Cf.* 5 U.S.C. §553(b)(2)

by Congress in the particular enabling statute.[1473] The agency's power of subordinate legislation[1474] is but a mere derivative of the legislative power principally vested by the Constitution upon the legislature.[1475] The agency's statement of its legal authority in the NPR notifies the public of the agency's authority to act on its rule proposal, and invites the public to comment on whether the agency does have the statutory rulemaking authority it purports to wield.

The statement as to the terms or substance of the proposed rule, or a description of the subjects and issues involved in the proposal,[1476] is significant because of its profound effect upon the exchange of views, data and information between the agency and the public, which is very heart of the rulemaking process.[1477] Without these statements, the agency's NPR will not enable the public to offer "meaningful and informed comment"[1478] because the proposed rules; the agency's relevant studies, assumptions, findings, reports and factual information in support thereof;[1479] as well as whatever issues may be involved in the rulemaking, would be secreted away from public scrutiny.[1480] Agency NPRs that do not provide for these statements would stifle the principles of fairness and democratic participation.[1481] These statements also provide the anchor by which courts can determine whether the agency's final rule is a logical outgrowth of the agency's proposal,[1482] or

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[1473] *See Executive Secretary v. Southwing Heavy Industries*, G.R.No. 164171-72, 168741, February 20, 2006; *Kirschbaum v. Walling*, 316 U.S. 517, 523 (1942); *Skidmore*, 323 U.S. 134, 137 (1944).

[1474] *Commissioner of Internal Revenue v. Court of Appeals*, 261 SCRA 236 (1996); *See also* C.Cruz, *Philippine Admin.Law* 40 (2003) (discussing supplementary or subordinate legislation); *Cruz v. Youngberg*, 56 Phil. 234 (discussing contingent rules).

[1475] *See* Phil.Const., art.VI §1.

[1476] *Cf.* 5 U.S.C. §553(b)(3)

[1477] Werhan, *Principles of Admin.Law* 236.

[1478] See VII(2) RAC §9 (1987) *cf.* APA § 553(b)); Werhan, *id.* at 237, 246; See, e.g., International Union, United Mine Workers of America v. Mine Safety & Health Administration, 407 F. 3d 1250, 1259 (D.C.Cir. 2005); Prometheus Radio Project, 652 F. 3d at 449 (quoting International Union).

[1479] *Nova Scotia Food*, 568 F. 2d 240, 251– 52 (2d Cir. 1977); *Chamber of Commerce v. SEC*, 443 F. 3d 890, 899 (D.C.Cir. 2006) (" Among the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies [in its rulemaking]."). Agencies typically describe some of the information underlying a rulemaking proposal in the NPRM, and include the remainder in the public docket of the rulemaking proceeding. Cornelious Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* 64 (1994); *See also* Werhan, *id.* at 254, 296.

[1480] Weyerhaeuser Co. v. Costle, 590 F. 2d 1011, 1031 (D.C.Cir. 1978); see Chocolate Manufacturers Ass'n v. Block, 755 F. 2d 1098, 1103 (4th Cir. 1985). Werhan, *Principles of Admin.Law*, 246 (2d Ed. 2014).

[1481] See, e.g., Prometheus Radio Project, 652 F. 3d at 449; International Union, 407 F. 3d 1250. Werhan, *id.* N.B. The risks are further amplified when the proposal involves voluminous provisions and supporting data.

[1482] See *Long Island Care v. Coke, 551 U.S. 158, 174 (2007)*
CSX Transportation, Inc. v. Surface Transportation Board, 584 F. 3d 1076, 1081 (D.C.Cir. 2009) (The final rule is the logical outgrowth of the proposed rule "if interested parties should have anticipated' that the change was possible."); *South Terminal,* 504 F. 2d at 658– 59; *Natural Resources Defense Council v. EPA*, 863 F. 2d 1420, 1429

whether the agency's modifications are too far removed from its proposal that further public comment would be warranted.[1483]

As a matter of policy, administrative agencies should, in addition to publication in the Official Gazette, also utilize the agency's own premises, their respective official websites, as well as newspapers of general circulation, for purposes of ensuring that their NPRs are properly disseminated to the public at large. To date, at least one agency in the Philippines has taken the initial step towards utilizing the Official Gazette for publishing its NPR in accordance with the 1987 RAC. On June 20, 2016, the National Privacy Commission (NPC), a newly created regulatory agency under Republic Act (RA) No. 10173, known as the "Data Privacy Act of 2012," has published its draft Implementing Rules and Regulations (IRR) on RA 10173 on the Official Gazette website.[1484] The NPC also used online news publications to disseminate its draft IRR, the email address to which the public may send their comments—info@privacy.gov.ph, as well as the schedules and venues of at least two (2) public consultations that it will be holding on the draft IRR.[1485] Interestingly enough, members of both the public and private sector have supported the public participation process by sponsoring the venues for the public hearings, and by assisting the NPC in raising awareness on data privacy issues.[1486] While the contents of the NPC's NPR on its draft IRR as seen on the Official Gazette would need further refinement in terms of adequacy,[1487] the public's positive reception of the government agency's act of opening its draft IRR to public comment is quite promising as an indication of things to come.

In all, an agency NPR that is sufficiently adequate in terms of its content and dissemination is an essential precursor to achieving the law's objective of ensuring the people's constitutional right to reasonable and effective public

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(9th Cir. 1988); *Natural Resources Defense Council v. EPA,* 279 F. 3d 1180, 1186 (9th Cir. 2002) (Changes contained in the final rule are a logical outgrowth of an agency's proposal if interested members of the public "reasonably could have anticipated" the change.); *Taylor Diving & Salvage Co. v. Dept. of Labor,* 599 F. 2d 622, 626 (5th Cir. 1979); *See also* Werhan, *id.* at 248-254, re: *"Logical Outgrowth Rule."*

[1483] See Natural Resources Defense Council, Inc. v. EPA, 863 F. 2d 1420, 1429 (9th Cir. 1988); Connecticut Light & Power Co. v. NRC, 673 F. 2d 525, 533 (D.C.Cir. 1982).

[1484] See http://www.gov.ph/2016/06/20/irr-data-privacy-act-2012/ last accessed July 20, 2016.

[1485] *See* Roy Canivel, *Consultations Set for IRR on Data Privacy Law*, June 27, 2016, Business World Online, available at http://www.bworldonline.com/content.php?id=129556 last accessed on June 30, 2016; *see also* Michael Bueza, *Public Consultations on Data Privacy Act draft IRR set*, June 22, 2016 article on Rappler, available at http://www.rappler.com/technology/news/137303-public-consultation-data-privacy-act-draft-irr last accessed on June 30, 2016.

[1486] *Id.*

[1487] A review of the posting on the Official Gazette, however, shows that the NPC only made a bare posting of its draft IRR, nothing more. See http://www.gov.ph/2016/06/20/irr-data-privacy-act-2012/ last accessed July 20, 2016.

participation in agency rulemaking.[1488] It invites the public to participate in the rulemaking process in a manner that enables the public to comment effectively, meaningfully, and intelligently on the proposal,[1489] thereby paving the way for the exchange of relevant data and information on the agency's proposal. The information and data so produced by the hearing or public participation process necessarily results in the creation of the administrative rulemaking record, docket or file.[1490]

§4.6.2.2.2. The Administrative Rulemaking Record, Docket, or File

As previously discussed, agency proceedings for legislative rulemaking—whether formal, informal, or hybridized—generally require the conduct of "hearings."[1491] The exchange between the agency and the public by virtue of these hearings, in turn, necessarily generates a body of material documents, views, comments, transcripts, and statements in various forms declaring agency expertise or policy that is called the administrative rulemaking file, docket, or record,[1492] which provides a reference to how the agency came up with its final rule.[1493]

This administrative rulemaking file, docket or record also constitutes the body of material upon which the court is obligated to test the actions of the administrative agency for arbitrariness.[1494] As such, it enables the courts to effectively exercise their power of judicial review under the Philippine

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[1488] Phil.Const., Art.XIII, §16; II(1) RAC §1(7) in rel. VII(2) RAC §9 (1987).

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[1490] Werhan, *Principles of Admin.Law,* 246, citing Prometheus Radio Project, 652 F. 3d at 449; International Union, 407 F. 3d 1250; Marathon Oil Co. v. EPA, 564 F. 2d 1253, 1271 n. 54 (9th Cir. 1977).

[1491] *See* Figure A & B above; *M.J.Lhuiller*, 453 Phil. 1043 (2003). ("The due observance of the requirements of notice, hearing, and publication should not have been ignored.")

[1492] Andersen, *Mastering Admin.Law* 51. (Perhaps from force of habit, judges tended to label that "body of material" a rulemaking "record" though more careful labeling sometimes calls it a rulemaking "docket" or a rulemaking "file." However named, while it is not an exclusive record in the judicial sense, the statute requires that the material must be considered.)

[1493] *See Tanada I*, G.R.No. L-63915, April 24, 1985. (The Court lamented how the pre-1987 executive lawmaking process during the martial law era lacked any supporting record that was equivalent or analogous to the legislative records generated by the Batasan Pambansa [Congress] in the course of the legislative debates and deliberations on proposed legislation.). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (DC Cir. 1977), cert. denied, 434 U.S. 829 (1977), hereinafter "Home Box Office." (Implicit in the agency's decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further implicates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised.); cf. U.S. APA Legislative History, United States H.R. Rep. No. 1980, 79th Congress, 2d Sess. 259 (1946) (The agency must keep a record of, and analyze and consider, all relevant matters presented prior to the issuance of rules.)

[1494] *See Home Box Office Inc. v. FCC*, 567 F.2d 9 (DC Cir. 1977).

Constitution[1495] by providing evidence of the agency's use of the rulemaking process, and the latter's serious consideration of the matters presented thereat.[1496] Agencies are thus required to support their decisions on the basis of a contemporaneous administrative record produced during the rulemaking process.[1497] Reviewing courts have clearly signaled that they do not favor "post hoc rationalizations" or factual information and arguments made by agencies only after the rule has been judicially challenged,[1498] because the judicial review of the agency's action should be made in light of the full administrative record that was before the agency official at the time the latter made his or her decision.[1499] In that regard, the administrative agency, whose rulemaking is subject to judicial review, is in the best position to produce the full administrative rulemaking file, docket or record; and reviewing courts have allowed discovery based on legitimate concerns that the administrative record so produced by the agency is incomplete.[1500]

The contents of the administrative rulemaking file, docket or record have some variations depending on the type of agency's rulemaking proceedings.[1501] Thus, while the formal rulemaking process produces a focused and well-defined administrative record akin to the evidentiary record produced in adjudicatory-type proceedings,[1502] the informal rulemaking process is less restrictive.[1503] Although the 1987 RAC does not directly provide for the

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1495 *See* Phil.Const., art.VIII §1, §5(2)(a).

1496 *See* Andersen, *Mastering Admin.Law*, Chap.6.

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1498 *See Overton Park*, 401 U.S. at 419; Andersen, *Mastering Admin.Law* 52. (The safest practice for a rulemaking agency is to compile a record that is full enough to support any arguments that may be needed on review since courts have clearly signaled that they do not favor "post hoc rationalizations"—i.e., factual information and arguments appearing only after a rule has been challenged. Courts tend to be suspicious of such material because of doubts about its objectivity or because of a sense that material of this importance should have been available to the public for comment and adversarial testing.)

1499 *Overton, id.* at 420; Andersen, *id.*

1500 *See* Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 341– 43, 339-350. *N.B.* The agency may assert governmental privileges, and other privileges available to any litigant. *See* Werhan, *Principles of Admin.Law* 351.

1501 *N.B.* The contents of the administrative file, docket or record generated as a result of the rulemaking process differ, depending on the type of proceedings required by law, i.e., informal, formal, etc. Thus, in informal notice-and-comment rulemaking, everything on which the agency relies on in formulating its final rule becomes part of the administrative rulemaking file, docket or record. In contrast, the contents of the administrative record generated during formal proceedings are largely limited to those submitted by the parties to the proceedings. *See* Werhan, *Principles of Admin.Law* 237.

1502 *See* VII(2) RAC §9(3) (1987), in relation to the pertinent sections of VII(3) RAC on Contested Cases; cf. Werhan, *id.* at 349-350. ("…an agency conducting a formal proceeding should base its decision exclusively on an evidentiary record generated by the proceeding.")

1503 *See* William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 61 (1975). Werhan, *id.* at 351. *N.B.* Both the 1987 RAC and the U.S. APA are the same in that they do not require agency decisions in informal rulemaking to be based on a "focused and defined record."

contents of the administrative record in informal rulemaking,[1504] it is derived from the statutory need for public participation and the submission of "views," and its function as a necessary instrument for making judicial review effective.[1505] Consequently, cases have uniformly required that the rulemaking file, docket or record should include all submissions by interested persons and parties during the rulemaking proceeding, and all other materials that agency decision-makers and staff actually considered in making their decision, unless that material is privileged.[1506] The administrative rulemaking record, docket or file should contain not just all the rulemaking notices and all written comments submitted, but also all the written factual material that were substantially relied upon or seriously considered by the agency,[1507] including the agency's relevant studies, assumptions, findings, reports and factual information in support of its proposed and final rule.[1508] The quality of agency rulemaking is therefore improved immensely because the administrative file, docket or record generated by the rulemaking process fosters rational and informed rulemaking.[1509]

§4.6.2.2.3. Agency Reasoning

In the Philippines, the right to public participation in rulemaking requires that the public be given the opportunity to submit their views "prior to the adoption of any rule."[1510] Its objective is to encourage administrators to adjust the final rule in response to the infusion of new information and different perspectives on their proposal.[1511] There is on the part of the agency, the duty and obligation to consider the relevant matters presented in the rulemaking proceeding before arriving at its final rule.[1512] The administrative agency is mandated to engage in the "process of reasoned decision-making" when formulating its rules,[1513] otherwise its actions would be arbitrary and

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[1504] *Id.*; *See* VII(2) RAC §9 (1987) cf. 5 U.S.C. §553.
[1505] Phil.Const., art.VIII §1, §5(2)(a); *see Home Box Office Inc. v. FCC*, 567 F.2d 9 (DC Cir. 1977).
[1506] Werhan, *Principles of Admin.Law* 351.
[1507] Andersen, *Mastering Admin. Law* 51.
[1508] Agencies typically describe some of the information underlying a rulemaking proposal in the NPRM, and include the remainder in the public docket of the rulemaking proceeding. Cornelious Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* 64 (1994); *See also* Werhan, *Principles of Admin. Law* 254, 296; *Nova Scotia Food*, 568 F. 2d 240, 251– 52 (2d Cir. 1977); *Chamber of Commerce v. SEC*, 443 F. 3d 890, 899 (D.C.Cir. 2006) (" Among the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies [in its rulemaking].").
[1509] *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1031 (D.C.Cir. 1978); *see Chocolate Manufacturers Ass'n v. Block*, 755 F. 2d 1098, 1103 (4th Cir. 1985). Werhan, *Principles of Admin.Law* 246 (2d Ed. 2014).
[1510] See VII(2) RAC §9.
[1511] *See* Werhan, *Principles of Admin.Law* 237; cf. 5 USC §553(c).
[1512] *Id.; see also* Werhan, *Principles of Admin.Law* 258.
[1513] *Connecticut Light and Power v. NRC*, 673 F.2d 525, 528 (DC Cir. 1982); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

capricious.[1514] Furthermore, because reviewing courts are not diviners of agency reasoning, the agency has to demonstrate that it had engaged itself in that process of reasoned decision-making so that its final rule would survive judicial review.[1515]

The administrative agency's process of reasoned decision-making is articulated in written statements contemporaneously issued with the final rule.[1516] In the Philippines, the agency's written statements typically include nothing more than the agency's assertion of its legal authority, a naked invocation of the statutory delegation of rulemaking power, or the agency's restatement of the statutory language used in the legislative delegation.[1517] These, however, do not by themselves make the rule's written statement adequate. They also do not provide sufficient justification for the agency's exercise of the power to make legally binding rules and regulations—even assuming that power had indeed been delegated, the agency can still exercise it in an arbitrary and capricious manner. It is not just the agency's bare legal authority but its due consideration of the views, comments, data and other information gathered during the rulemaking process, as well as the agency's findings thereon in light of its specialized expertise and knowledge in the specific area of regulation, that collectively provide the impetus for the agency's issuance of legally binding rules and regulations.[1518]

Cursory explanations of an agency's key rulemaking decisions will not do.[1519] Although an exhaustive and detailed account of every aspect of the rulemaking proceedings is not required in these written statements, the level of detail varies according to the nature of the rule and the content of the public comments.[1520] Reviewing courts, however, expect these statements to, at the very least, indicate the major issues of policy that were raised in the rulemaking

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[1514] *See* Phil.Const., art.VIII §1, §5 (1987).

[1515] *Connecticut Light and Power*, 673 F.2d at 528; *Nova Scotia Food Products*, 568 F.2d at 252*; N.B.* The power of judicial review in the Philippine context is constitutional in nature. *Id.*

[1516] In the Philippines, these written statements are ordinarily included in the "prefatory statements," "explanatory notes," or "whereas clauses" of the agency rules. In the United States, these statements are referred to as the "statement of basis and purpose." *See* 5 USC §553(c).

[1517] For example, *see* the 1st to 3rd Whereas Clauses of the IRR for R.A. 10591, the Prefatory Clause of the IRR for RA 10175, the Prefatory Clause of RA 9165, among others. N.B. Administrative agencies have carried this practice over from the pre-1987 era where rulemaking procedures were largely absent. *See* Chaps 2 and 3 of this work.

[1518] N.B. The agency's existence, after all, is justified by the legislature's need for its special expertise and know-how on the area to be regulated. *See* Chapter 3 of this work.

[1519] *See, e.g., Independent U.S. Tanker Owners*, 809 F. 2d at 852; *National Welfare Rights Org. v. Mathews*, 533 F. 2d 637, 649 (D.C.Cir. 1976); cited in Werhan, *Principles of Admin.Law* 262, 296.

[1520] *Reytblatt v. NRC*, 105 F.3d 715, 722 (DC Cir. 1997)

proceedings, and explain why the agency responded to these issues as it did, particularly in light of the statutory objectives that the rule must serve.[1521]

In keeping with the rational process, the agency is not at liberty to just leave unanswered the vital questions, raised by the public's submission of views and comments, which are of cogent materiality.[1522] The agency must therefore respond in a "reasoned manner" to those assertions in the views and comments, which, if true, would have required the agency to change the rule.[1523] The written statement should also provide the agency's justification regarding their rejection of significant regulatory alternatives to the rules they adopt,[1524] as well as provide a "reasoned explanation" of the agency's regulatory choices sufficient to assure the reviewing court that the final rule was neither arbitrary nor capricious.[1525] Moreover, when an agency bases its rulemaking decision on the existence of certain determinable facts, the written statement must articulate and justify sufficient factual findings from evidence in the administrative file, docket or record.[1526] In situations where the agency invokes applicable exemptions from the requirements for rulemaking, the legal basis for the alleged exemption and its factual existence must also be expressed by the agency in the written statement accompanying final rule.[1527]

The agency statements accompanying the final rules serve to verify that the administrative rule-makers actually considered the public's comments, thereby also facilitating the judicial review of the agency's rulemaking to ensure that it was the product of reasoned rather than arbitrary decision-making.[1528] Furthermore, the agency's written statement provides a helpful guide for those who interpret and apply administrative rules.[1529]

§4.6.2.2.4. Publication

[1521] *See Independent U.S. Tanker Owners*, 809 F.2d at 852; Werhan, *Principles of Admin.Law* 261.

[1522] *See Nova Scotia Food Products*, 568 F. 2d at 252; *see also PPL Wallingford Energy LLC v. FERC*, 419 F. 3d 1194, 1199 (D.C.Cir. 2005) (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F. 3d 289, 299 (D.C.Cir. 2001)) (" Unless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned."). Werhan, *id.* at 261-262, 296.

[1523] Werhan, *id. citing Reytblatt id.* (DC Cir. 1997) and *American Mining Congress v. EPA*, 907 F.2d 1179, 1188 (DC Cir. 1990).

[1524] Nova Scotia Food Products, *id.*; *see Independent U.S. Tanker Owners*, 809 F. 2d at 854; Werhan, *id.*

[1525] *See* Phil.Const., art.VIII §1, §5 (1987); *Nova Scotia Food Products*, *id.;* Werhan, *id.*

[1526] See Werhan, *id.* at 261-262, 296 *citing Industrial Union Dep't, AFL– CIO v. Hodgson*, 499 F. 2d 467, 475– 76 (D.C.Cir. 1974).

[1527] For example, *see* VII(2) RAC §4 (1987) on the exemptions from the mandatory 15-day waiting period for effectivity after rule publication, in cases of imminent danger to public health, safety and welfare. The existence of the grounds for exemption must be expressed in a statement accompanying the rule.

[1528] Werhan, *id.* at 237.

[1529] *See U.S. Attorney General's Manual,* 32.

After the agency has finished the rule formulation phase and has finalized its legislative rule, it has to comply with the statutory publication requirements. In that regard, Philippine courts have extensively discussed the need to publish the agency's rules as an indispensable requirement of constitutional due process and the Rule of Law.[1530] The publication requirement gives substance and meaning to the constitutional right of the people to be informed on matters of public concern.[1531] It is meant to give the general public adequate notice of the various issuances that are to regulate their actions and conduct as citizens.[1532] The objective of the publication requirement is to allay due process concerns by ensuring the widest circulation of the rule among the public.[1533]

In the Philippines, the publication phase of rulemaking involves several statutory steps to be complied with so that agency rules would be valid, effective, and legally binding. Administrative agencies have to strictly and fully comply with these mandatory steps because of their constitutional implications.[1534] First, Article 2 of the Philippine Civil Code generally mandates that all laws, including agency rules that have the force of law, must be published in full either in the Official Gazette or in a newspaper of general circulation in the Philippines,[1535] as a condition *sine qua non* before rules or regulations can take effect.[1536] Second, §24, Chap.6, Title I of the 1987 RAC also mandates the publication in the Official Gazette of "all legislative acts and resolutions of a public nature" and "all executive and administrative issuances of general application."[1537] It would thus appear that the agency's publication of

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[1530] *See Republic of the Philippines v. Express Telecommunications Co., G.R.No. 147096, January 15, 2002* (The Court held that the agency's compliance §3, Chap.2, Book VII, 1987 RAC was inadequate for purposes of making the rule valid and effective, and declared that the agency should also comply with Article 2, Philippine Civil Code.); *See Tanada I*, G.R.No. L-63915, April 24, 1985 and *Tanada II*, 146 SCRA 446 (1986) *cf.* Phil.Civil Code, art.2, as amended by Executive Order No. 200 s. 1987, supplementing the 1917 Administrative Code's publication provisions; *Philippine International Trading Corp. v. Angeles*, 263 SCRA 421, 446-447 (1996).

[1531] *See Tanada I*, G.R.No. L-63915, April 24, 1985 (Discussing the Commonwealth Act No. 638, §1 [the prior statute from which I(6) RAC §24 (1987) was lifted], the Court declared that the statutory requirement for publication in the Official Gazette imposes an imperative duty which must be enforced "if the Constitutional right of the people to be informed on matters of public concern is to be given substance and reality.")

[1532] *Id.*

[1533] *Cf. Tanada I*, *id.*; *Tanada II*, 146 SCRA 446 (1986).

[1534] *See Republic of the Philippines v. Express Telecommunications Co., G.R.No. 147096, January 15, 2002; Tanada I & II, id.*; *Philippine International Trading Corp. v. Angeles*, 263 SCRA 421, 446-447 (1996).

[1535] See Phil.Civil Code, art.2, as amended by EO 200 s. 1987.

[1536] *Id.*; *Philippine International Trading Corp. v. Angeles*, 263 SCRA 421, 446-447 (1996).

[1537] I(6) RAC §24. (1987); *see Tanada I, id.*; N.B. The mandatory requirement for filing with the Official Gazette is in line with the latter's role as the official repository of all laws, rules and regulations of the Philippine government. The importance of ensuring the completeness of the Official Gazette as a repository of government documents is highlighted by its function of providing a single comprehensive source upon which

its rules in a newspaper of general circulation would not by itself be adequate, as compared to the publication in the Official Gazette. On the other hand, the agency's choice to utilize only the Official Gazette as its medium for rule publication would run counter to the judicial exhortations made in *Tanada II* regarding the propriety of using newspapers of general circulation for rule dissemination.[1538] Third, Chap.2, Book VII of the 1987 RAC requires statutorily-created administrative agencies to file three (3) certified copies of every rule adopted by them with the University of the Philippines (U.P.) Law Center,[1539] so that the latter can publish the rules in its bulletin called the National Administrative Register,[1540] copies of which are then distributed to the Office of the President, Congress, all the appellate courts, the National Library, and other public offices or agencies selected by Congress; and made available to the public at cost.[1541] Although the agency's failure to file the requisite number of certified copies with the U.P. Law Center will prevent the rule from taking effect,[1542] its compliance with the filing requirement would not by itself be sufficient for making the rule effective[1543] because the agency still has to observe §24, Chap.6, Title I of the 1987 RAC, and Art.2 of the Philippine Civil Code.[1544] Fourth, enabling laws may provide other publication requirements specific to the agency's exercise of delegated rulemaking authority, in which case those requirements are to be complied with by the agency in addition to those required by the Philippine Civil Code and the 1987 RAC.[1545]

§4.6.2.2.5. Waiting Period for Effectivity

After the rules are fully published as required by the Philippine Civil Code, the 1987 RAC, and other applicable laws, there is typically a waiting period before the agency's legislative rule takes effect. As a default rule, the Philippine Civil Code generally provides a 15-day waiting period commencing from the date of full publication of the rule.[1546] The 1987 RAC also provides a 15-day waiting period from the date of the agency's filing of the requisite

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all members of the public and private sector may use as a reference for any particular law, rule, regulation, or government document.

[1538] *Tanada II*, 146 SCRA 446 (1986)

[1539] VII(2) RAC §3(1), §4.

[1540] *Id.* at §5.

[1541] *Id.* at §6-7.

[1542] *Id.* at §4.

[1543] *See Philippine International Trading Corp. v. Angeles*, 263 SCRA 421, 446-447 (1996).

[1544] See *Id.*

[1545] *N.B.* Provisions for additional procedures in the enabling law often are indicative of the Congressional estimation of such factors as the prospective rules' importance, pervasiveness, and impact upon the regulated public.

[1546] *See* Phil.Civil Code, art.2, as amended by EO 200 s. 1987.

number of certified copies of its rule with the U.P. Law Center.[1547] Congress may also, by law, provide for a shorter or longer waiting period[1548] for so long as the period so provided is reasonable.[1549]

These waiting periods afford the affected members of the public with reasonable time to prepare for complying with any new legal obligation.[1550] They also provide time for the public to possibly alert the Congress and the President about the impact of the agency rules' impending effectivity, thereby affording the latter the opportunity to take appropriate action thereon as they deem necessary.[1551]

§4.6.3. Statutory Exemptions from Rulemaking Requirements

Modern rulemaking generally requires administrative agencies desiring to issue rules to undergo fundamental stages that include, among others, the publication of the notice of proposed rulemaking, affording interested entities to submit their views and comments on the proposal, the publication of the final rule, and the waiting period before the rule can take effect.[1552] Some of these requirements are essential in the sense that Congress cannot, by law, dispense with, or provide exemptions for, the agency's compliance with them because of their constitutional moorings. For example, legislation cannot do away with the requirement of full publication of final rules because the publication of laws strikes at the heart of fairness and due process.[1553] Full publication of legislative rules is indispensable in every case,[1554] because it is the

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[1547] VII(2) RAC §3(1), §4.
[1548] *Id.*; For example, in the United States, the *Small Business Regulatory Enforcement Fairness Act*, 5 U.S.C. §§801-808, imposes a longer waiting period of 60 legislative days for rules with major economic impact.
[1549] *Tanada II*, 146 SCRA 446 (1986).
[1550] *Cf. U.S. Attorney General's Manual* at 36 (quoting congressional reports); *see Rowell v. Andrus*, 631 F. 2d 699, 702 n. 2 (10th Cir. 1980); Werhan, *Principles of Admin. Law* 260, 296; United States v. Gavrilovic, 551 F. 2d 1099, 1105 (8th Cir. 1977); see Riverbend Farms, Inc. v. Madigan, 958 F. 2d 1479, 1485– 86 (9th Cir. 1992).
[1551] Both these political institutions have several means to effectively influence agency conduct. For example, the Philippine President exercises both control and supervision over executive departments, bureaus and offices. Phil.Const., art.VII, §17 (1987). Congress may also conduct inquiries in aid of legislation. *Id.* at art.VI, §21. In the United States, there are statutes that provide a streamlined special legislative process that Congress may utilize in overriding an agency rule. *See*, for example, *Small Business Regulatory Enforcement Fairness Act* §2.3[c].
[1552] See VII(2) RAC §3-9 (1987) cf. 5 U.S.C. §553.
[1553] *Tanada II*, 146 SCRA 446 (1986). ("… we have come to the conclusion and so hold, that the clause "unless it is otherwise provided" refers to the date of effectivity and not to the requirement of publication itself, which cannot in any event be omitted. This clause does not mean that the legislature may make the law effective immediately upon approval, or on any other date, without its previous publication. Publication is indispensable in every case, but the legislature may in its discretion provide that the usual fifteen-day period shall be shortened or extended… We agree that publication must be in full or it is no publication at all since its purpose is to inform the public of the contents of the laws."); *See* Werhan, *Principles of Admin.Law* 289-290 (2014). (Publication is still required for legislative rules even if they fall within the APA's good cause exemptions.)
[1554] *Id.*

means by which the general public has adequate notice of the rules that shall regulate their actions and conducts as citizens.[1555] Legislation also cannot dispense with the need for the agency to provide, together with its final rule, a contemporaneous explanation of its rationale and the factual basis for its rulemaking decision because the agency's articulation thereof is necessary for the court's meaningful exercise of its power of judicial review over the agency's conduct.[1556] The indispensable nature of these requirements holds particularly true in the Philippines where due process of law, and the court's power of judicial review over arbitrary and capricious agency actions, both have constitutional stature.[1557]

On the other hand, there are other rulemaking requirements upon which the legislature may statutorily provide exemptions based on good cause. For example, statutory exemptions exist under the laws of the Philippines and the United States with regard to the requirements of public participation,[1558] and the waiting periods applicable before the final rule can take effect.[1559] Statutory exemptions for these requirements exist in view of the legislative recognition that there may be countervailing considerations that outweigh the policies

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[1555] *Id., see also Tanada I*, G.R.No. L-63915, April 24, 1985. ("The clear object…is to give the general public adequate notice of the various laws which are to regulate their actions and conduct as citizens. Without such notice and publication, there would be no basis for the application of the maxim "ignorantia legis non excusat." It would be the height of injustice to punish or otherwise burden a citizen for the transgression of a law of which he had no notice whatsoever, not even a constructive one.")

[1556] *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-43 (1983), hereinafter "State Farm." (The Court elaborated the process that agencies must follow to avoid a finding of arbitrariness or capriciousness.); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (DC Cir. 1968); *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962) ("[t]he courts may not accept the agency's post hoc rationalizations for agency action."); *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 626-627 (1986) (""Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action…Our recognition of Congress's need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision even though we show respect for the agency's judgment in both."); *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852-854 (DC Cir. 1987) (The Court vacated the agency rule and found that the DOT had acted arbitrarily and capriciously because the rule did not contain an adequate explanation of how the rule served the statutory objectives and how it was consistent with the agency's authority under the statute.) *N.B.* While the power of judicial review over agency rulemaking in the United States is largely statutory, the power of judicial review in the Philippine setting is clearly constitutional. Phil.Const., art.VIII, §1, §5. The power of judicial review in the Philippine setting therefore cannot be diminished by legislation.

[1557] *See* Phil.Const., art.III §1; art.VIII §1, §5(2)(a).

[1558] *See* VII(2) RAC §9(1) (1987) *cf.* 5 U.S.C. §553(b)(3)(B).

[1559] *See* VII(2) RAC §4 (1987) and Phil. Civil Code, art.2, as amended, *cf.* 5 U.S.C. §553(d)(3); See Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* 13-14, Congressional Research Service (CRS) Report for Congress 7-5700, May 1, 2013, www.crs.gov R43056, hereinafter "Carey: Counting Regulations."

promoted by these formal requirements.[1560] The existence of these exemptions as grounds for departing from procedural formalism is justified by a sense of procedural equity in meritorious circumstances.[1561] The exemptions from rulemaking procedures, however, are narrowly construed and only reluctantly countenanced.[1562] Thus, the agency claiming to be exempted from the relevant rulemaking requirements must invoke and articulate its supporting reasons for the good cause exemption provided by statute, and its use of the exemption is subject to judicial review.[1563]

The good cause exemptions are discussed as follows:

§4.6.3.1. Exemption from Public Participation

In modern rulemaking, public participation via prior notice and opportunity to comment and submit views during the rule formulation phase is the general norm and is considered axiomatic.[1564] Exemptions may be provided by statute,[1565] but reviewing courts have been hesitant to excuse agencies from observing that statutory baseline of public participation in agency rulemaking.[1566]

In the United States, the U.S. APA exempts legislative rules from prior notice-and-comment when the agency for "good cause" finds that notice-and-comment is "impracticable," "unnecessary," or "contrary to the public interest."[1567] The Philippine counterpart of this statutory good cause exemption from the public participation requirement is found in the 1987 RAC.[1568]

[1560] See Carey, *Counting Regulations, id.*; *see Jean v. Nelson*, 711 F.2d 1455, 1481 (11th Cir. 1983), modified on rehearing, 727 F.2d 957 (11th Cir, en banc), affirmed, 472 U.S. 486 (1985); *Guardian Federal Savings and Loan Ass'n v. Federal Savings and Loan Insurance Corp*., 589 F.2d 658, 663 (D.C. Cir. 1978).

[1561] Carey, *Counting Regulations, id.* at 14 (Excessive formalism leads to unfairness, while good judgment and well-exercised discretion promote fairness.); Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 Duke L.J. 163, 167-80; Aman, *Administrative Equity: An Analysis of Exceptions*, 1982 Duke L.J. 277-280.

[1562] Werhan, *Principles of Admin.Law* 274; *New Jersey Dep't of Environmental Protection v. EPA*, 626 F. 2d 1038, 1046 (D.C.Cir. 1980); *see Professionals and Patients for Customized Care v. Shalala*, 56 F. 3d 592, 595 (5th Cir. 1995).

[1563] *Id.*; See also *Todd Garvey and Daniel Shedd, A Brief Overview of Rulemaking and Judicial Review*, CRS Report for Congress www.crs.gov R41546, hereinafter "Garvey & Shedd, Brief Overview of Rulemaking."

[1564] Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359, 369 (1972); *Fund for Animals v. Frizzell*, 530 F.2d 982, 990 (DC Cir. 1975); *Bell Lines v. U.S*., 263 F. Supp. 40, 46 (S.D.W. Va. 1967) (APA requirements are fundamental to due process…administrative decisions shall include public participation.); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements under the Administrative Procedure Act*, 3 Admin. L.J. 317 (1989-1990), hereinafter "Lavilla, Good Cause Exemption."

[1565] See VII(2) RAC §9(1) (1987) *cf.* 5 U.S.C. 553.

[1566] Werhan, *Principles of Admin.Law* 274; *New Jersey Dep't of Environmental Protection v. EPA*, 626 F. 2d 1038, 1046 (D.C.Cir. 1980); *see Professionals and Patients for Customized Care v. Shalala*, 56 F. 3d 592, 595 (5th Cir. 1995).

[1567] 5 U.S.C. §553(b)(B).

[1568] VII (2) RAC §9[1] (1987).

Philippine statutory law, however, is peculiar in that it provides only one basis for administrative agencies to claim the good cause exemption from the otherwise mandatory nature of the public participation requirement—that of "practicability."[1569] §9, Chapter 2, Book VII of the 1987 RAC provides:

> **SECTION 9.** Public Participation.—(1) If not otherwise required by law, an **agency shall, as far as practicable**, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule. xxx. (Emphasis supplied)

The above provision mandates agencies to undergo public participation to the extent that it can be done[1570] in formulating legally binding rules, which is in line with the statute's role of providing the means to implement the fundamental right to effective and reasonable public participation.[1571] By way of exception, administrative agencies need not undergo prior public participation if the process is "impracticable." The agency, however, cannot just bypass the notice-and-comment rulemaking process by simply invoking its impracticability without articulating its supporting reasons, for that would be arbitrary.[1572] An administrative agency may thus forego the notice-and-comment process for its rulemaking only if it provides a statement of findings, reasons and justifications supporting its invocation of "impracticability" as a good cause exemption.[1573]

[1569] *Id.*

[1570] For the ordinary meaning of the phrase, "as far as," as being equivalent to the phrase, "to the extent or degree," see http://www.oxforddictionaries.com/us/definition/american_english/as-far-as and http://www.merriam-webster.com/dictionary/as%20far%20as last accessed on April 28, 2016; For the ordinary meaning of "practicable," see http://www.merriam-webster.com/dictionary/practicable and http://www.oxforddictionaries.com/us/definition/american_english/practicable last accessed on April 28, 2016.

[1571] Phil.Const., art.XIII §16. The constitutional right to effective and reasonable public participation is also statutorily recognized as a basic guiding principle of the 1987 RAC. II(1) RAC §1[7] (1987). N.B. The general need for public participation in the Philippines is also evident in that it is one of the statutory avenues for triggering formal proceedings in case of opposition. VII(2) RAC §9(3).

[1572] Administrative agencies have to state the findings and reasons supporting their actions, such as the invocation of the good cause exemptions for their legislative rulemaking activity, in order to prevent their actions from being stricken down by the courts via arbitrary and capricious judicial review. *N.B.* In the Philippines, the power of judicial review, and the arbitrary and capricious standard of review, are constitutional in nature. *See* Phil.Const., art.VIII §1, §4, §5(2)(a). *Cf. Overton Park*, 401 U.S. 402, 415 (1971) (The presumption of regularity to which administrative agencies are entitled to "does not shield their actions from a thorough, probing, in-depth review."); *see also* Carey, *Counting Regulations* 13-14,Congressional Research Service (CRS) Report for Congress 7-5700, May 1, 2013, www.crs.gov R43056; Garvey & Shedd, *Brief Overview of Rulemaking*, CRS Report for Congress www.crs.gov R41546.

[1573] *See* Lavilla, *Good Cause Exemption*, *3 Admin. L.J. 317 (1989-1990); See Tennessee Gas Pipeline Co. v. FERC*, 969 F. 2d 1141, 1145 (D.C.Cir. 1992); *see also North Carolina Growers' Ass'n v. United Farm Workers*, 702 F. 3d 755, 766 (4th Cir. 2012), hereinafter "North Carolina Growers' Ass'n." ("Although we do not impose a rigid requirement that an agency must explicitly invoke the good cause exception, the contemporaneous agency

As a good cause exemption, "impracticability" exists if following the notice-and-comment requirement of legislative rulemaking would impede an agency's "due and timely execution of its functions;"[1574] or if the agency cannot both follow the notice-and-comment requirement and execute its statutory duties.[1575] Impracticability occurs when the agency's statutory obligations to administer its enabling legislation require it to act more quickly than the notice-and-comment process would allow.[1576] This good cause exemption would apply, for example, if the agency determines that the new rules were needed 'to address threats posing a possible imminent hazard to aircraft, persons, and property,' or were 'of life-saving importance to mine workers in the event of a mine explosion,' or were necessary to 'stave off any imminent threat to the environment or safety or national security.'[1577] Strict congressional or judicial deadlines, however, are not by themselves sufficient for purposes of invoking impracticability as a good cause exemption,[1578] especially if the deadline affords the agency adequate time to go through the notice-and-comment process.[1579] Administrative agencies also cannot abuse the impracticability exemption by procrastinating until just before the deadline and then claiming that there was insufficient time to undergo the notice-and-comment process.[1580]

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record must manifest plainly the agency's reliance on the exception in its decision to depart from the required notice and comment procedures."). N.B. This norm is recognized and articulated well in the United States where administrative agencies invoking good cause exemptions from the APA's notice-and-comment rulemaking procedures are required to "incorporate their findings and a brief statement of reasons therefor" in the rules issued. See §553(b)(B) and (d)(3) of the U.S. APA. In the Philippines, statements of this nature are often included in the prefatory or whereas clauses of the agency rules and regulations.

[1574] *U.S. Attorney General's Manual* 30 available at http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf last accessed on April 28, 2016; *see also North Carolina Growers' Ass'n*, *id.* (Public participation may be found to be impracticable when the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings.); Werhan, *Principles of Admin.Law* 296 (2014).

[1575] *Riverbend Farms v. Madigan*, 958 F. 2d 1479, 1484-85 (9th Cir. 1992); *Levesque v. Block*, 723 F. 2d 175, 184 (1st Cir. 1983), hereinafter "Levessque;" *see United States Steel Corp. v. EPA*, 605 F. 2d 283, 287 (7th Cir. 1979), hereinafter "U.S.Steel Corp."; Werhan, *id.* at 291.

[1576] Werhan, *id.*

[1577] *U. S. Attorney General's Manual 30-31* available at http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf last accessed on April 28, 2016; *North Carolina Growers' Ass'n*, 702 F.3d at 766; *Mack Trucks v. EPA*, 682 F.3d 87, 93 (DC Cir. 2012); Werhan, *id.*

[1578] *See Petry v. Block*, 737 F. 2d 1193, 1203 (DC Cir. 1984); *Levesque,* 723 F.2d at 184; *US Steel Corp.,* 595 F.2d at 213; For cases in which the court allowed the exemption based on strict deadlines coupled with other factors, *see Methodist Hospital of Sacramento v. Shalala*, 38 F. 3d 1225, 1236– 37 (DC Cir. 1994). *See* Werhan, *Principles of Admin.Law* 296 (2014).

[1579] *See American Federation of Government Employees v. Block*, 655 F. 2d 1153, 1158 (DC Cir. 1981); *New Jersey v. EPA*, 626 F. 2d 1038, 1047 (DC Cir. 1980); Werhan, *id.* at 292 (2014).

[1580] *See Council of Southern Mountains, Inc. v. Donovan*, 653 F. 2d 573, 581 (DC Cir. 1981); *National Ass'n of Farmworkers Organizations v. Marshall*, 628 F. 2d 604, 622 (DC Cir. 1980).

Another option for administrative agencies is to issue rules on an interim basis. Impracticability, however, must in the first place exist and the agency has to articulate its basis for invoking it as a valid cause for exemption and for deciding to issue the interim rules. While it is a significant factor in the court's analysis of the impracticability exemption, the issuance of rules on an interim basis does not by itself exempt legislative rules from the notice-and-comment requirement.[1581] Thus, aside from articulating its basis for invoking the impracticability exemption, the agency should issue an express statement that its rule is being issued on an interim basis, and that the rules will be replaced with permanent rules after undergoing the public participation requirement for rulemaking.[1582]

§4.6.3.2. Exemption from the Waiting Period for Effectivity

As earlier discussed, both the 1987 RAC and the Philippine Civil Code provide for their respective 15-day periods—one counted from the filing of the requisite number of certified true copies of the agency rule with the U.P. Law Center, and the other from the full publication of the agency rules either in the Official Gazette or in a newspaper of general circulation in the Philippines—as default waiting periods before the rules become effective.[1583] The legislature, however, may in its discretion statutorily provide for exemptions wherein the agency may shorten or lengthen the usual 15-day waiting period.[1584]

§4, Chap.2, Book VII of the 1987 RAC authorizes administrative agencies to specify in their legislative rules a different date of effectivity, but only "in cases of imminent danger to public health, safety and welfare."[1585] The administrative agency invoking any of these exemptions is required by law to express—in the statement accompanying the legislative rule—the existence of the imminent danger to public health, safety and welfare being relied upon by it.[1586] As in the case of statutes,[1587] the shortened waiting period that the agency

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[1581] *American Federation of Government Employees, id. at 1157– 58; Mack Trucks, Inc., id. at 94* (Issuance of interim rule is not by itself sufficient to justify the good cause exemption); *Tennessee Gas*, *id.*; Mid-Tex Electric, *id.* (While the interim status of a challenged rule is a significant factor in the good cause analysis, it is not by itself a good cause to exempt the rule from notice-and-comment).

[1582] *American Federation of Government Employees*, 655 F. 2d at 1158; *Mack Trucks v. EPA*, 682 F. 3d 87, 94 (DC Cir. 2012); *Tennessee Gas v. FERC*, 969 F. 2d 1141, 1144– 45, hereinafter "Tennessee Gas"; *Mid-Tex Electric Cooperative, Inc. v. FERC*, 822 F. 2d 1123, 1132 (DC Cir. 1987), hereinafter "Mid-Tex Electric."

[1583] See §4.6.2.2.5 of this work (Waiting Period for Effectivity).

[1584] *Tanada II*, 146 SCRA 446 (1986) *cf.* Werhan, *id.* citing *Gavrilovic*, *id.*; *see Riverbend Farms*, *id.*

[1585] VII(2) RAC §4 (1987).

[1586] *Id. N.B.* The agency's duty to express the grounds for exemption entails much more than the agency's mere parroting of the statutory language for exemption, because the written statement is meant to justify the agency's invocation of the statutory exemption by explaining the facts and other factors that led the agency to conclude that the exemption applies to the specific rulemaking, thereby facilitating judicial review over the agency's

provides in its legislative rule must be reasonable, so as not to offend due process.[1588] Moreover, the agency shall take appropriate measures to make emergency rules known to persons who may be affected by them.[1589]

§4.6.4. Legislative Rules entitled to High Level of Deference

Philippine Courts have held that legislative rules are entitled to great weight and respect because they have the force of law,[1590] but have yet to articulate a rationalized and uniform framework (i) to determine whether the agency had issued its rules in such a manner, and under such conditions, that unquestionably vested it with the force of law; and (ii) to structure the process of judicial reasoning in a way that fosters fairness, consistency, and predictability.

In the United States, the Supreme Court in *Chevron U.S.A. v. National Resources Defense Council, Inc. (NRDC)*[1591] has rationalized the judicial approach to administrative agency actions by establishing a two-step deferential framework known popularly as "Chevron deference." In *Chevron*, the U.S. Congress amended the Clean Air Act (CAA) in 1977 to mandate the States that have not attained National Ambient Air Quality Standards (NAAQS) to establish a

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exercise of discretion in digressing from the generally applicable waiting periods provided by law. *See* §4.6.2.2.3 of this work on "Agency Reasoning" for the discussion on the written statement requirement for agency rulemaking. *Cf.* 5 U.S.C. §553(d)(3). *See United States v. Gavrilovic*, 551 F. 2d 1099, 1105 (8th Cir. 1977), hereinafter "Gavrilovic;" *Riverbend Farms, Inc. v. Madigan*, 958 F. 2d 1479, 1485– 86 (9th Cir. 1992) hereinafter "Riverbend Farms;" Werhan, *Principles of Admin.Law* 290 (2014). ("To bypass the 30-day waiting period, reviewing courts expect agencies generally "to balance the necessity for immediate implementation" of a rule against the fairness of providing affected members of the public sufficient time to bring themselves into compliance with the new rule.")

[1587] *Tanada II, id. (*"After a careful study of this provision (Phil.Civil Code, art.2)… we…so hold, that the clause "unless it is otherwise provided" refers to the date of effectivity and not to the requirement of publication itself, which cannot in any event be omitted. This clause does not mean that the legislature may make the law effective immediately upon approval, or on any other date, without its previous publication…Publication is indispensable in every case, but the legislature may in its discretion provide that the usual fifteen-day period shall be shortened or extended…It is not correct to say that under the disputed clause publication may be dispensed with altogether. The reason is that such omission would offend due process insofar as it would deny the public knowledge of the laws that are supposed to govern the legislature could validly provide that a law e effective immediately upon its approval notwithstanding the lack of publication (or after an unreasonably short period after publication), it is not unlikely that persons not aware of it would be prejudiced as a result and they would be so not because of a failure to comply with but simply because they did not know of its existence…")

[1588] *Id.*

[1589] *Id.*

[1590] *Rizal Empire Insurance Co. v. NLRC*, 150 SCRA 565 (1987); *Philippine Global Communications v. Relova*, 145 SCRA 385 (1986); *Sierra Madre Trust v. Secretary of Agriculture*, 121 SCRA 384 (1983); *Warren Mftg Worker's Union v. Bureau of Labor Relations*, 159 SCRA 389 (1988); *Atlas Consolidated Mining & Dev't Corp. v. Court of Appeals*, 182 SCRA 166 (1990); *Gonzales v. Land Bank of the Philippines*, 183 SCRA 520 (1990); *Nestle Phil. v. Court of Appeals,* 203 SCRA 504 (1991); *Commissioner of Internal Revenue v. Central Luzon Drug Corp.*, 456 SCRA 414 (2005); *Commissioner of Customs v. Phil.. Acetylene Co.*, 39 SCRA 70 (1970)*; Sunga v. COMELEC*, 288 SCRA 76 (1998)

[1591] *Chevron*, 467 U.S. 837, 842-845 (1984).

permit program to regulate new or modified major "stationary sources" of air pollution pursuant to stringent conditions. As the implementing agency under the CAA, the Environmental Protection Agency (EPA) issued a regulation allowing a non-attaining State to adopt a plant-wide definition of the term "stationary source" pursuant to a "bubble" concept in which an existing plant with several pollution-emitting devices may install or modify its equipment for as long as the alteration will not increase the plant's total emissions.

Prior to that regulation, the EPA had already formulated two different definitions of "stationary source" for the various programs it was implementing. It had defined "stationary source" on a per "building, structure, facility or installation" level for its the New Source Performance Standards (NSPS) program, and it had also used the plant-wide or "bubble" definition with regard to the NSPS for the non-ferrous smelting industry. Finding that Congress had not explicitly defined what constitutes a "stationary source" in the CAA, the D.C. Circuit Court of Appeals set aside the EPA regulations employing the "bubble concept" for being inappropriate for programs that were meant to improve air quality. In reversing the DC Circuit, the U.S. Supreme Court found that, since there was no clear congressional intent on the meaning of "stationary source" in the statute or its legislative history, the EPA's "bubble" definition was a reasonable interpretation that reflects the policy choice that Congress has delegated to the EPA.[1592] To arrive at its decision, the Court established a two-step process, *to wit*:

> When a court reviews an **agency's construction of the statute which it administers**, it is confronted with two questions. **First, always, is the question whether Congress has directly spoken to the precise question at issue.** If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[1593] **If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own**

[1592] *Id.* at 864-866.

[1593] *Id.* at 843, fn.9. ("The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. *See, e.g., FEC v. Democratic Senatorial Campaign Committee,* 454 U. S. 27, 454 U. S. 32 (1981); *SEC v. Sloan,* 436 U. S. 103, 436 U. S. 117-118 (1978); *FMC v. Seatrain Lines, Inc.,* 411 U. S. 726, 411 U. S. 745-746 (1973); *Volkswagenwerk v. FMC,* 390 U. S. 261, 390 U. S. 272 (1968); *NLRB v. Brown,* 380 U. S. 278, 380 U. S. 291 (1965); *FTC v. Colgate-Palmolive Co.,* 380 U. S. 374, 380 U. S. 385 (1965); *Social Security Board v. Nierotko,* 327 U. S. 358, 327 U. S. 369 (1946); *Burnet v. Chicago Portrait Co.,* 285 U. S. 1, 285 U. S. 16 (1932); *Webster v. Luther,* 163 U. S. 331, 163 U. S. 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect.")

construction on the statute,[1594] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[1595]

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[1596] If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[1597] Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[1598]

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,[1599] and the principle of deference to administrative interpretations "has been

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[1594] *Id.* fn.10 (*See generally* R. Pound, The Spirit of the Common Law 174-175 (1921).)

[1595] *Id.* fn.11 (The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. at 454 U. S. 39; *Zenith Radio Corp. v. United States,* 437 U. S. 443, 437 U. S. 450 (1978); *Train v. Natural Resources Defense Council, Inc.,* 421 U. S. 60, 421 U. S. 75 (1975); *Udall v. Tallman,* 380 U. S. 1, 380 U. S. 16 (1965); *Unemployment Compensation Comm'n v. Aragon,* 329 U. S. 143, 329 U. S. 153 (1946); *McLaren v. Fleischer,* 256 U. S. 477, 256 U. S. 480-481 (1921).)

[1596] *Morton v. Ruiz,* 415 U. S. 199, 415 U. S. 231 (1974).

[1597] *Chevron*, 467 U.S. at 844, fn. 12 (*See, e.g., United States v. Morton, ante* at 467 U. S. 834; *Schweiker v. Gray Panthers,* 453 U. S. 34, 453 U. S. 44 (1981); *Batterton v. Francis,* 432 U. S. 416, 432 U. S. 424-426 (1977); *American Telephone & Telegraph Co. v. United States,* 299 U. S. 232, 299 U. S. 235-237(1936).)

[1598] *Id.* fn.13 (*E.g., INS v. Jong Ha Wang,* 450 U. S. 139, 450 U. S. 144 (1981); *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. at 421 U. S. 87.)

[1599] *Id.* fn.14 (*Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., ante* at 467 U. S. 389; *Blum. v. Bacon,* 457 U. S. 132, 457 U. S. 141 (1982); *Union Electric Co. v. EPA,* 427 U. S. 246, 427 U. S. 256 (1976); *Investment Company Institute v. Camp,* 401 U. S. 617, 401 U. S. 626-627 (1971); *Unemployment Compensation Comm'n v. Aragon,* 329 U.S. at 329 U. S. 153-154; *NLRB v. Hearst Publications, Inc.,* 322 U. S. 111, 322 U. S. 131 (1944); *McLaren v. Fleischer,* 256 U.S. at 256 U. S. 480-481; *Webster v. Luther,* 163 U.S. at 163 U. S. 342; *Brown v. United States,* 113 U. S. 568, 113 U. S. 570-571 (1885); *United States v. Moore,* 95 U. S. 760, 95 U. S. 763 (1878); *Edwards' Lessee v. Darby,* 12 Wheat. 206, 25 U. S. 210 (1827).)

> consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[1600] ". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[1601]

The applicability of Chevron's deferential approach was clarified in *United States v. Mead.*[1602] In *Mead*, the Court declared that an express congressional authorization in the enabling statute, for the agency to engage in the process of legislative rulemaking—and thereby act with the force of law—is a very good indicator of delegation meriting *Chevron* deference,[1603] because it shows that Congress intended to delegate specific interpretive authority over the enabling law's ambiguous provisions to the agency,[1604] and also because "it is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[1605]

[1600] *Id.* at 844. (*Citing, e.g., National Broadcasting Co. v. United States,* 319 U. S. 190; *Labor Board v. Hearst Publications, Inc.,* 322 U. S. 111; *Republic Aviation Corp. v. Labor Board,* 324 U. S. 793; *Securities & Exchange Comm'n v. Chenery Corp.,* 332 U. S. 194; *Labor Board v. Seven-Up Bottling Co.,* 344 U. S. 344.")

[1601] *Id.* at 845 (citing *United States v. Shimer,* 367 U. S. 374, 367 U. S. 382, 383 (1961). *Accord, Capital Cities Cable, Inc. v. Crisp, ante* at 467 U. S. 699-700.)

[1602] *Mead*, 533 U.S. 218 (2001) (Holding that Customs Ruling Letters were not entitled to *Chevron* deference because they are not subject to the legal requirements of notice-and-comment and do not carry the force of law.)

[1603] *Mead, id.* at 229.

[1604] *See Mead, id.* at 229-231. ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. See, *e. g.,* *EEOC* v. *Arabian American Oil Co.,* 499 U. S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to "`promulgate rules or regulations' " (quoting *General Elec. Co.* v. *Gilbert,* 429 U. S. 125, 141 230*230 (1976))); see also *Christensen* v. *Harris County,* 529 U. S. 576, 596-597 (2000) (Breyer, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable").)

[1605] *Mead, id.* at 230, citing Merrill & Hickman, *Chevron`s Domain*, 89 Geo. L. J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority") and *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 741 (1996) (APA notice-and-comment are designed to assure due deliberation.)

Mead effectively provided the crucial prior step necessary for the court to determine whether it should apply *Chevron*'s highly deferential two-step process. In sum, *Chevron* deference applies to the agency's interpretation of the ambiguous statutory provisions if (a) the ambiguous statute is a law that the agency is particularly tasked to implement; (b) the said statute contains a clear or express congressional authorization for the agency to act with the force of law, by engaging in the process of rulemaking or adjudication; and (c) the agency has acted pursuant to that authority or delegation in arriving at its interpretation of the statute.[1606] In terms of rulemaking, *Mead* highlights the importance of finding, in the particular enabling statute that the agency is tasked to administer, a valid delegation of legislative rulemaking authority, which authority the agency exercises in accordance with the statutory rulemaking procedures in order to validly issue an agency rule that carries the effect of law. *Chevron* deference finds basis in that the filling of statutory gaps involves difficult policy choices that the implementing agency is better equipped to make than the courts.[1607] It is emphasized, however, that agencies are given *Chevron* deference only when they are interpreting a statute that they are specifically charged with carrying out.[1608] They are not accorded that *Chevron* deference with regard to statutes that they do not administer.[1609]

It would thus seem that a connection exists between agency actions that have the binding force of law, such as legislative rules, on the one hand, and the level of deference that the judiciary accords to the agency's interpretation of the ambiguous statutes, as contained in that particular agency action. Although not a hard-and-fast, bright-line approach,[1610] U.S. courts have generally applied *Chevron*'s highly deferential approach when reviewing legislative rules that are the product of notice-and-comment rulemaking.[1611] *Mead* also clarified the

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1606 *Mead, id.*. at 227-231.

1607 *Chevron*, 467 U.S. at 980.

1608 *Id.* at 864.

1609 *See Dominion Energy Brayton Point v. Johnson*, 443 F.3d 12 (1st Cir. 2006) (Court accorded Chevron deference to the EPA's reasonable interpretation of the Clean Water Act's "public hearing" language.)

1610 *Mead,* 533 U.S. at 230, 231. (…as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded, see, *e. g., NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.,* 513 U. S. 251, 256-257, 263 (1995)).

1611 *Mead, id.* at 230 ("Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. Fn. 12. For rulemaking cases, see, *e. g., Shalala* v. *Illinois Council on Long Term Care, Inc.,* 529 U. S. 1, 20-21 (2000); *United States* v. *Haggar Apparel Co.,* 526 U. S. 380 (1999); *AT&T Corp.* v. *Iowa Utilities Bd.,* 525 U. S. 366 (1999); *Atlantic Mut. Ins. Co.* v. *Commissioner,* 523 U. S. 382 (1998); *Regions Hospital* v. *Shalala,* 522 U. S. 448 (1998); *United States* v. *O'Hagan,* 521 U. S. 642 (1997); *Smiley* v. *Citibank (South Dakota), N. A.,* 517 U. S. 735 (1996); *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.,* 515 U. S. 687 (1995); *ICC* v. *Transcon Lines,* 513 U. S. 138 (1995); *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology,* 511 U. S. 700 (1994); *Good Samaritan Hospital* v. *Shalala, supra; American Hospital Assn.* v. *NLRB,*

application of another approach prescribing not deference but respect, previously enunciated in *Skidmore v. Swift*,[1612] for non-legislative rules, such as guidance documents, interpretive rules, and policy statements that are typically products of really informal processes.[1613]

499 U. S. 606 (1991); *Sullivan* v. *Everhart,* 494 U. S. 83 (1990); *Sullivan* v. *Zebley,* 493 U. S. 521 (1990); *Massachusetts* v. *Morash,* 490 U. S. 107 (1989); *K mart Corp.* v. *Cartier, Inc.,* 486 U. S. 281 (1988); *Atkins* v. *Rivera,* 477 U. S. 154 (1986); *United States* v. *Fulton,* 475 U. S. 657 (1986); *United States* v. *Riverside Bayview Homes, Inc.,* 474 U. S. 121 (1985).)

[1612] *Skidmore*, 323 U.S. 134 (1944).

[1613] *Mead*, 533 U.S. at 235 citing *Skidmore*, 323 U.S. 134, 140 (1944) ("There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case…").

CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS

At its present state, rulemaking on the ground in the Philippines is problematic.[1614] This is evident in the contemporary examples indicated in **Chapter 1** of this work. The situation is also chronic and widespread in the Philippine bureaucracy, resulting in substandard public service and the irretrievable loss of valuable government resources. Quite telling about the examples in Chapter 1 is that both the agency and the affected members of public seem oblivious to the mandatory public participation requirements[1615] that are essential in the formulation of agency rules that carry force of law.[1616]

At the procedural level, public participation is not the practiced norm in agency rulemaking.[1617] Philippine agencies rarely publish or circulate notices of their proposed rule, much less invite the public's submission of their views on them, unless unequivocally required by the enabling statute itself.[1618] Aside from being in violation of both the 1987 RAC[1619] and the 1987 Philippine Constitution,[1620] the prevalent agency practice of foregoing public participation in rule formulation deprives the Philippine administrative bureaucracy of almost all the beneficial effects of modern rulemaking.[1621]

[1614] N.B. During the author's previous years in public service for the Philippine government as a Director at the Office of the President, a consultant of the Department of Environment and Natural Resources (DENR), a public prosecutor at the National Prosecution Service (NPS), and as an Assistant Secretary at the Department of Justice, he came across and formulated numerous agency issuances both within the departments and agencies where he worked for directly, and for committees, boards, commissions, and authorities in which he participated as the representative of his department or agency. The observations and conclusions he now states here are informed as well by those years experience in government service, and by his academic and scholarly endeavors as a graduate student at Berkeley Law School.

[1615] §9, Chap.2, Book VII, 1987 RAC.

[1616] The entire rulemaking platform is provided in Chap.2, Book VII, 1987 RAC. Cf. Werhan, *Principles of Admin.Law* 236 (2014) (Discussing that the Administrative Procedure Act's informal notice-and-comment rulemaking procedure "provided a platform for the emergence of administrative rulemaking as a dominant regulatory tool by both legitimizing and regularizing agency rulemaking processes…. Congress finally created a uniform, baseline procedure governing the issuance of agency rules with the force of law. The heart of the informal rulemaking process…is a written exchange between the agency and interested members of the public. The agency publishes a "notice of proposed rule making" and invites written comments from the public… The agency re-evaluates its proposal in light of the comments it receives and then publishes the final rule, together with "a concise general statement of [its] basis and purpose."")

[1617] See Chapter 2. (This follows the pre-1987 rulemaking setup where general rulemaking procedures mainly consist of the rule publication phase.)

[1618] See Chapter 1. ("The objections revolve around the following: the administrative agency formulated and finalized its rules on its own and without public participation; or the agency did not provide sufficient notice of the proposed rule to the affected sectors; or having notified them, were not receptive of what they had to say; or having notified and received their comments, did not duly consider their views even though they might be significant.")

[1619] §9, Chap.2, Book VII in relation to §1(7), Chap.1, Book II, 1987 RAC.

[1620] §15, Art.XIII, 1987 PHIL. Const. cf. §9, Chap.2, Book VII in relation to §1(7), Chap.1, Book II, 1987 RAC.

[1621] See Chapter 4(II) of this work on Advantages of Rulemaking.

Without the public participation and the administrative record necessarily produced by it,[1622] Philippine agencies can hardly be expected to yield legislative rules that are comprehensive, well-reasoned, accurate, and of optimal quality. The fundamental values of transparency and political accountability are also lost at the rule formulation stage. Instead of being forthright, agencies are practically formulating binding rules in secret, thereby minimizing if not altogether eliminating the possibility of presidential, congressional, or judicial intervention, at least until after the rule has been finalized and published.

The intervention by either of the principal political institutions of the President or Congress after the rule has been published often comes too late in the day. As shown in the Balikbayan fiasco in Chapter 1, the ruling administration's political capital had already been lost by the time the President and the Senate intervened, because a full-blown political "fire" had already broken loose in the Philippine Customs Bureau. Public participation at the rule formulation stage gives off the "smoke" that can alert the principal political institutions of government to incipient "fires," giving them ample opportunity to take preventive measures early on before any politically damaging action is done by the agency.[1623] Intervention by the judicial branch is often costly to both the affected public and the agency in terms of the time and resources to be spent. Fairness is also compromised because the affected members of the public are deprived of any opportunity to participate in the process of determining the rules that affect them.[1624]

As for whatever benefits may be attendant in the expediency of churning out legislative rules without prior notice-and comment public participation, they are far outweighed by the real risks of the rules' inaccuracy due to the

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[1622] *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (The court set aside the FDA safety regulations for smoking fish. The court found that the FDA did not produce the contemporaneous administrative record for its rule; When the FDA suppressed the opportunity for 'meaningful comment' because it did not notify all interested persons of the scientific research on which it relied as basis for the rule, it is the same as rejecting comment altogether; The extent of the administrative record required for judicial review of informal [notice-and-comment] rulemaking is largely a function of the scope of judicial review. Even when the standard of judicial review is whether the promulgation of the rule was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'…judicial review must nevertheless be based on the 'whole record;' The Court found "no articulate balancing sufficient to make the procedure followed less than arbitrary."); *See also Chamber of Commerce v. SEC*, 443 F.3d 890 (DC Cir. 2006); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (DC Cir. 1978).

[1623] N.B. The proper opportunity to take preventive measures is always preferred over post-incident damage control and mitigation.

[1624] Richard J. Pierce, Jr., *The Many Advantages of Rules and Rulemaking, Administrative Law Treatise* § 6.8 (5th ed. 2010); Hickman & Pierce, Jr., *Fed.Admin.Law* 424-425 (2014).

rulemaking process's failure to generate, in a comprehensive manner, the entire plethora of legislative data and factors needed to formulate a reasonable and well-reasoned legislative rule. The absence of public participation in rule formulation also deprives the agency of a good means to check on the affected public's "temperature," and to assess the public acceptability and potential political repercussions of its proposed rule. Expediency itself is also negated when the agency is either forced to recall its rules, or otherwise suspend the rule's implementation, and go back to the drawing board. By then the agency will already have wasted resources in coming up with the original rule, in addition to incurring the costs of re-conducting rulemaking proceedings, as well as suffering the public backlash and negative public perception on the agency's performance. In all these, the public bears the brunt because the damaging effects of a hastily issued inaccurate rule would, in most instances, already have been visited upon them.

Also, without prior notice and submission of meaningful views from the public,[1625] there would be no legislative record to speak of.[1626] The function of procedural safeguards is to enlighten and shape the agency's exercise of its discretion by ensuring input of evidence and views by interested persons,[1627] as well as to provide a contemporaneous administrative record for judicial review.[1628] Without any legislative record for the agency's rule, the judiciary's power of arbitrary and capricious review loses its effectiveness as a means to curb excessive agency discretion. [1629] Thus, despite judicial review's

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[1625] See §9, Chap.2, Book VII, 1987 RAC.

[1626] The legislative record is produced as a necessary result of the public participation requirements of informal notice-and-comment rulemaking. It also exists as an evidentiary record in formal (adjudication-style) rulemaking. *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (The Court set aside the FDA safety regulations for smoking fish. The court found that the FDA did not produce the contemporaneous administrative record for its rule. When the FDA suppressed the opportunity for 'meaningful comment' because it did not notify all interested persons of the scientific research on which it relied as basis for the rule, the Court found it as being the same as rejecting comment altogether. The extent of the administrative record required for judicial review of informal [notice-and-comment] rulemaking is largely a function of the scope of judicial review. Even when the standard of judicial review is whether the promulgation of the rule was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'…judicial review must nevertheless be based on the 'whole record." The Court found "no articulate balancing sufficient to make the procedure followed less than arbitrary."); *See also Chamber of Commerce v. SEC*, 443 F.3d 890 (DC Cir. 2006); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (DC Cir. 1978).

[1627]See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 551-552 (2011).

[1628] Id.; *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977).

[1629] See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 551-552 (2011) ("Further, recall that at the same time agencies were shifting to rulemaking (beginning in the late 1960s), public distrust of agency performance was increasing, and courts were developing a "hard look" approach to review of agency discretion. Hard look review is impossible without an evidentiary record, for it requires the court to closely examine the agency's findings, reasoning, and decisions in light of the evidentiary facts and analysis generated by the agency and outside parties. The agencies' increasing use of rulemaking thus threatened to

constitutional stature in Philippine law,[1630] the Philippine courts are relegated to the exercise of judicial divining into the possible reasons and justifications for the agency rules and regulations, overextending the presumption of regularity in the agency's functions,[1631] or otherwise rely on the agency's offer of post hoc rationalizations for the first time on judicial review.[1632] Also, the issued rules themselves provide no clue as to the whether the agency undertook the public participation requirement, whether there were any significant concerns raised during the rule formulation phase, or whether significant concerns have been addressed or at the very least considered by the agency.[1633] Existing regulations also provide on their face, nothing more than mere naked assertions of prior consultations, and that the rules were being issued pursuant to the statutory mandate.[1634]

The agency rulemaking scenarios in Chapter 1 of this work provide clear examples of existing agency rulemaking paradigm at the ground level. The scenarios betray shades of resignation on the part of the affected people or their organizations, and a co-related notion of entitlement on the part of the Philippine administrative bureaucracy, about the idea that agencies are free to directly affect the people, their lives, and their businesses through the issuance of legally binding rules and regulations, for as long as those rules are published,

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make an "end run" around developing efforts by litigants and courts to impose tighter controls on agency discretion.")

1630 See §1, 4(2), 5(2)(a), Art. VIII, 1987 PHIL. Const.

1631 *See Republic v. Drugmakers Laboratories*, G.R.No. 190837, March 5, 2014 (Considering that neither party contested the validity of its issuance, the Court deems that AO 67, s. 1989 complied with the requirements of prior hearing, notice, and publication pursuant to the presumption of regularity accorded to the government in the exercise of its official duties. See Section 3(m), Rule 131 of the Rules of Court.); *See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 420 (1971) (Presumption of regularity does not shield agency action from "a thorough, probing, in-depth review"; Basis for review should be the full administrative record before the agency at the time of its action). N.B. Overton Park is not a rulemaking case, U.S. circuit courts have taken it as a cue, and has been subsequently cited in various cases involving informal notice-and-comment rulemaking.)

1632 *See SEC v. Chenery*, 318 U.S. 80 (1942) (Chenery I) (The Court refused to consider the SEC's assertion of expertise to justify its administrative action because the assertion constitutes a post hoc rationalization offered for the first time on judicial review, and was not part of the contemporaneous agency record supporting the agency's initial decision.); *See also* Michael Asmow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches* 4, available at http://law.stanford.edu/wp-content/uploads/2015/08/Asimow-and-Dotan-Open-and-Closed-Judicial-Review-of-Agency-Action.pdf last accessed on April 28, 2016, (Consideration by the courts of post-hoc rationalizations for agency actions would be inconsistent with the SEC's statutory responsibility [of making the initial decision] and would make the court rather than the agency the instrument of policy articulation.)

1633 For examples of various implementing rules and regulations which do not provide such particulars, see http://www.gov.ph/section/laws/republic-acts/implementing-rules-and-regulations/

1634 These agency assertions are often indicated in the 'Whereas Clauses" of the rules and regulations. *See* IRR of RA 10591, available at http://www.gov.ph/2013/12/07/implementing-rules-and-regulations-of-republic-act-no-10591/ last accessed on April 19, 2015; For another example, see Department of Energy Circular No. 2014-09-0017, re: Amending the Rules and Regulations Implementing the National Electrification Act of 2003, available at http://www.doe.gov.ph/doe_files/pdf/Issuances/DC/DC2014-09-0017.pdf last accessed on April 19, 2015.

without even so much as articulating any reasonable and well-supported bases for those rules other than the fact of their issuance and the agency's bare "say so" assertion of legal authority or re-statement of the agency's enabling statute. They are also indicative of the rulemaking paradigm currently existing in the Philippines under which the agency's publication of its final rule is perceived as "the" decisive act that makes its legislative rules valid, binding and effective. While the existing paradigm does have its enduring value as a palpable instrument of due process developed in response to the public outrage on the injustice wrought by "secret" laws, rules and regulations during the martial law regime,[1635] it is high time for that paradigm's further development and change.

In order to develop and move the existing paradigm forward and make it more relevant and responsive to the modern era, it was necessary, as a preliminary matter, for this work to look at the past.[1636] **Chapter 2** of this work delved into the history of Philippine administrative law and rulemaking, and found its moorings in the system of government and public laws that were put in place during the American occupation of the Philippine islands (1898 to 1946).[1637] That finding is very significant because it establishes a common ground between the Philippines and the United States in the area of administrative law, and provides a clear justification for the Philippines' receptiveness when it comes to adopting relevant doctrines and principles from American public law, particularly in those problematic areas in which Philippine statutes are silent, insufficient, or ambiguous.[1638] This observation finds specific confirmation in the area of agency rulemaking, as shown by the various Philippine case laws discussed subsequently in Chapter 4 of this work.[1639] Chapter 2 also reveals how the current paradigm for Philippine rulemaking had been carried over from the pre-1987 era of Philippine administrative law characterized by the lack of a trans-substantive law on administrative

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[1635] *See Tanada I & II*, 136 SCRA 27 (1985) affirmed, 146 SCRA 446 (1986).

[1636] See Jose Rizal's famous Philippine quotation "Ang hindi marunong lumingon sa pinanggalingan ay hindi makakarating sa paroroonan." (He/she who does not look back at his/her past will never get to where he/she wants to go.") cited in the President Jose P. Laurel's speech at the Dulaang Metropolitan during the 83rd Birth Anniversary of Dr. Jose Rizal, June 19, 1944, available at http://malacanang.gov.ph/5495-talumpati-ng-kanyang-kadakilaan-jose-p-laurel-pangulo-ng-republika-ng-pilipinas-sa-dulaang-metropolitan-nang-ipagdiwang-ang-ika-83-taong-kapanganakan-ni-dr-jose-rizal-maynila-sa-ganap-na-ika-9/ last accessed on April 28, 2016.

[1637] See Chapter 2 of this work. The statutory framework of Philippine administrative law had in fact been governed by Act No. 2711 from 1917 to 1987.

[1638] See Chapter 4 of this work. *Interprovincial Autobus Co. v. Collector of Internal Revenue*, G.R.No. L-6741, January 31, 1956; *Secretary of Finance v. Arca*, G.R.No. L-25924, April 18, 1969; *Victorias Milling Co. v. SSC*, 114 Phil 555, G.R.No. L-16704, March 17, 1962; *Philippine Blooming Mills v. SSS*, 124 Phil. 499 (1966).

[1639] *See Victorias Milling v. SSC*, G.R.No. L-16704, March 17, 1962; *People v. Maceren*, G.R.No. L-32166, October 18, 1977; *Teoxon v. Board of Administrators*, G.R.No. L-25619, June 30, 1970; *Balmaceda v. Corominas*, G.R.No. L-21971, September 5, 1975 citing Davis, *Administrative Law Treatise* 275, et.seq. (1958); M*isamis Oriental Ass'n of Coco Traders v. DOF Secretary*, G.R.No. 108524, November 10, 1994, citing Davis, *Administrative Law* 116 (1965); *People v. Lim*, 108 Phil. 1091 (1960).

rulemaking procedure, save only for the publication requirement of the final rule.

Without any general statute providing for public participation during the rule formulation stage, the need for publishing final rules took a central role in the development of pre-1987 Philippine rulemaking. Prior to the adoption of the 1987 Philippine Constitution and the 1987 RAC, and especially during the preceding martial law era, Philippine administrative agencies had free reign over their respective rulemaking processes. The only perceived requirement for agency rulemaking at that time was rule publication, but even that was effectively suppressed by the agencies until 1985.[1640] Broader statutory delegations of subordinate legislation at the substantive level were also passed and, without the corresponding check by way of trans-substantive statutory rulemaking procedures, administrative agencies were able to formulate and impose their rules on their own and in secret. During martial law, with the President himself was able to make laws secretly and under emergency powers. With the administrative agencies continuing in their practice of secret rulemaking, public frustration mounted and eventually boiled over, resulting in the 1987 People Power Revolution.[1641] By 1986, the publication of statutes, rules, and regulations took the limelight in Philippine public law with the Philippine Supreme Court issuing its landmark decisions in *Tanada v. Tuvera*,[1642] cementing the need for publication as an indispensable requirement of constitutional due process.[1643]

Tanada was a monumental decision, and its impact was felt throughout the Philippine administrative bureaucracy. Having been promulgated pre-1987, *Tanada* had established rule publication as the dominant, if not the sole, procedural norm for validly issuing rules and regulations that had the force of law. As correlated with the existing rulemaking scenarios in Chapter 1, however, it appears that the *Tanada* decision had somehow overshadowed the subsequent passage of the 1987 RAC, as agencies and the public continued to labor under the misconception that rule publication continues to be the sole norm in Philippine rulemaking.

[1640] See Chap.2 of this work. N.B. Rule publication as a requirement for rulemaking also had a shaky development, and was cemented by the Supreme Court as part of due process only in 1985 and 1986. *See Tanada I & II,* 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).

[1641] See Chap.2 of this work.

[1642] *Tanada I & II,* 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).

[1643] *Id.*

The existing paradigm in Philippine rulemaking is also being nurtured by the Philippines' continued adherence to the traditional model of administrative law that views administrative agencies as mere instrumentalities or "transmission belts" of the legislative will,[1644] pursuant to which the Philippines adopted—and to this day applies—the United State's 1935 formulation of the non-delegation doctrine.[1645] That model, however, had increasingly become less and less effective because it has been rendered somewhat inaccurate and rather outdated by the legislature's passage of broader and broader legislative delegations that come precariously close to surrendering its legislative role as the primary policy maker to the agencies. Despite using the non-delegation doctrine, Philippine courts have already allowed broader legislative delegations under such vague notions as public interest,[1646] but stopped short of providing itself with alternative levers to effectively check agency discretion. As a result, many of the agencies in the Philippine administrative bureaucracy are right now effectively exercising legislative discretion on their own, and not as mere automatons of the legislative will.[1647] The historical development of administrative law in the Philippines is in stark contrast to that of the United States, which has undergone—and continues to undergo—reformation in terms of its model of administrative law, in a continuing effort to address the continuing problem of excessive agency discretion.[1648] The U.S. Courts had early on acknowledged the inevitability of broad legislative delegations to administrative agencies by adopting a liberal non-delegation doctrine that merely required an "intelligible principle" in the statute,[1649] but looked towards other alternative measures, such as administrative procedures, in order to manage and address the risks of excessive agency discretion. The United States is thus able to cope with the problem of agency discretion through 1946 APA. In terms of agency discretion in administrative rulemaking, §553 of the APA provided the platform of statutory rulemaking procedures from which the U.S.

[1644] *See* Chapter 2 of this work; Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev. 1676 (1974-1975).

[1645] *See Pelaez v. Auditor General,* G.R.No. L-23825, December 24, 1965; *Adiong v. COMELEC*, G.R.No. 103956, March 31, 1992; *Abakada Guro Party List v. Purisima*, G.R.No. 166715, August 14, 2008; *Panama Refining v. Ryan*, 293 U.S. 388 (1935); *ALA Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[1646] *See Municipality of Cardona v. Municipality of Binangonan*, 36 Phil. 547 [1917]); *Rubi v. Provincial Board*, 39 Phil. 660 [1919]); "public interest" (*People* vs. *Fernandez and Trinidad*, G. R. No. 45655, June 15, 1938; *People v. Rosenthal*, 68 Phil. 328 [1939], citing *New York Central Securities Corporation* vs. *U.S.A.*, 287 U.S. 12, 24, 25 and *ALA Schechter Poultry, id.* at 540; *International Hardwood v. Pangil Federation of Labor*, 17 Phil. 602 [1940]; *Edu v. Ericta*, 35 SCRA 481 (1970)

[1647] *See* Stewart, *Reformation of Admin.Law*, 88 Harv. L. Rev. 1676 (1974-1975). ("Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the "transmission belt" theory of administrative law. Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials, major questions of social and economic policy are determined by officials who are not formally accountable to the electorate, and both the checking and validating functions of the traditional model are impaired.")

[1648] Id.

[1649] *See J.W. Hampton v. United States*, 276 U.S. 394 (1928); *Mistretta v. U.S.*, 488 U.S. 361 (1989).

courts were able to develop a robust and effective agency rulemaking framework. On the other hand, the pre-1987 Philippine judiciary did not have much in terms of alternative statutory levers for balancing out the emasculating effects of liberalizing the non-delegation doctrine because the Philippines had no APA analogue at the time. However, after the Philippine revolution, and with the passage of the 1987 Philippine Constitution, as well as the 1987 RAC and its Book VII on administrative procedure, the Philippine judiciary is now primed to undertake the same or similar path of reformation in Philippine administrative law.

Rulemaking, as a subset of administrative law, is no different from many other areas of law in that gaps often do exist between what is being practiced on the ground and what is on the statute books.[1650] The extent of the discrepancy between law and practice, in turn, may well be attributed to a number of causes, from something as simple as the lag between the statute's passage and its implementation, to something as complex as needing the proper empirical information to ground legal theory and pivot it to face reality.[1651] There is also the learning curve to contend with, which is heavily dependent on the relevant experiences of both the government and the public in dealing with the statute. For example, it took the United States 10 years to gather, synthesize, and deliberate upon the necessary data and information from the federal bureaucracy in order to finalize and enact its APA in 1946.[1652] Although the American federal administrative had been extensively using rulemaking as its dominant regulatory tool,[1653] it was only in the 1970s that the APA's informal rulemaking procedures began getting judicial attention as an effective means to achieve the administrative law objectives of transparency, rule of law, and reasoned implementation of statutory mandates.[1654] In that same vein, Philippine administrative law had struggled with the absence of a general

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1650 *See* Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 Stan. L. Rev. 247, 260 (2010) (The work presents the authors' initial findings on their empirical research into corporate privacy practices on the ground as an effort to bridge the "inexplicable lack of engagement" between U.S. Privacy Law as discussed on the books, and the emerging U.S. privacy framework at ground level.); *See also*, Daniel A. Farber and Anne Joseph O-Connell, *The Lost World of Administrative Law*, 92 Tex.L.Rev. 1137 (2014) (The work points out the mismatch between administrative law as developed by the courts and in governing statutes, on the one hand, and the realities of the modern administrative state, on the other.)

1651 *See* Bamberger & Mulligan, *id.*

1652 Pub.L.79-404, 60 Stat.237 (June 11, 1946). Shepard, George, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*. 90 Nw. U. L. Rev. 1557 (1996). (Characterizing the APA as a landmark legislation characterized as striking a legislative balance that expresses that nation's decision to permit extensive government but avoiding dictatorship and central planning.)

1653 Werhan, *Principles of Admin.Law* 236 (2d Ed. 2014).

1654 Farber and O-Connell, *The Lost World of Administrative Law*, 92 Tex.L.Rev. 1137 (2014) (The work points out the mismatch between administrative law as developed by the courts and in governing statutes, on the one hand, and the realities of the modern administrative state, on the other.)

statute on administrative procedure for the greater part of the 20th century,[1655] and until the passage of the 1987 RAC and its Book VII on Administrative Procedure. Considering that it has been 19 years since the momentous changes instituted by the 1987 Philippine Constitution and the 1987 RAC in the Philippine administrative landscape, Philippine administrative rulemaking is now ripe for modernization and development in order to make it comparable to the rulemaking framework of the United States and other well-developed nations.

After looking at Philippine administrative law's historical past, Chapter 2 of this work transitioned towards discussing the significant post-1987 reforms in the Philippine rulemaking milieu and tied them with the underlying reasons and motivations that led to the reforms under the 1987 Philippine Constitution and the 1987 RAC. The constitutional and statutory right to public participation, and its procedural implementation in the area of agency rulemaking, [1656] was motivated by the desire to restore democracy in government, and to empower the people under a democratic society by fostering their involvement in the conduct of government affairs that affect them.[1657] The procedural reforms in both the stages of rule formulation and rule publication were prompted by the values of transparency and due notice of government affairs. The Philippine Supreme Court had lamented about the executive's ability to formulate and impose binding rules in secret, as well as the lack of any supporting administrative record in the executive's law-making process under martial law;[1658] and the Court clarified that those same underlying concerns applied equally as well, if not more so, with regard to pre-1987 agency rulemaking.[1659] The *Tanada* Court summed up the objective well, by providing that the Philippines should have "an open society with all acts of the government subject to public scrutiny" and "available always to public cognizance."[1660]

Chapter 3 of this work discusses the place of administrative agencies and administrative rulemaking in the Philippines. Traversing definitional matters on what constitutes an administrative agency, Chapter 3 examines the

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[1655] Note that the judiciary with its early landmark ruling in *Ang Tibay v. CIR,* G.R.No. 46496, February 27, 1940, was able to partially bridge that statutory gap on the side of administrative adjudication. It was not able to effectively address, in that same manner, the statutory absence on the rulemaking side.

[1656] The constitutional right to public participation under §16, Art. XIII, 1987 PHIL. Const. is echoed as well in §1(7), Chap.1, Book II, 1987 RAC, and procedurally implemented in agency rulemaking under §9, Chap.2, Book VII, 1987 RAC.

[1657] See Chap.2 of this work.

[1658] *See Tanada I*, 136 SCRA 27 (1985).

[1659] *Tanada II*, 146 SCRA 446 (1986).

[1660] *Id.*

administrative hierarchy in the Philippine setting, determines the interconnection between constitutional law and administrative law, and clarifies where the former ends and where the latter begins. In the course of doing so, issues of legitimacy were found to exist as regards the administrative agencies' ability to affect public behavior despite not being directly vested with governmental authority under the Constitution.

The naked delegation of governmental authority by the institution of government principally vested with that authority is constitutionally impermissible.[1661] However, congressional delegations of authority for administrative agencies to make binding law via legislative rules have become indispensable due to the increasing complexity of modern society.[1662] Even though the delegation of governmental authority to agencies has been rendered permissible by the realities of modern life, still the Congressional act of further delegating what has already been delegated under the Constitution—compounded by the sub-delegates being administrative agencies run by unelected agency officials—severely attenuates both the legitimacy and acceptability of the behavior forcing mechanism of the government to the public,[1663] because the public has no direct constitutional contract with the administrative agencies and the agency official has no direct mandate from the people. Accordingly, the sub-delegation to administrative agencies necessarily presupposes some degree of limitation by the principal of the delegate's ability to act, for otherwise the delegation would be impermissibly naked and utterly illegitimate. The statutory limitations on the delegated authority, in turn, serve the function of mending the precarious legitimacy of the administrative agency's exercise of governmental authority that had been weakened by the legislature's initial act of delegation. These legitimizing statutory limitations can be either substantive or procedural, or both, and they can be viewed as levers for reigning in and controlling agency discretion. The legislature maximizes control over agency discretion by imposing both substantive and procedural limitations in the relevant laws. However, due to its limited resources, and the inflexibility of its processes, Congress often lacks the expertise or capacity necessary to determine the substantive limitations on the technical or other specialized matters that it is passing over administrative agencies. In those

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[1661] This doctrine is based on the ethical principle that such delegated power constitutes not only a right but a duty to be performed by the delegate through the instrumentality of his own judgment and not through the intervening mind of another. *Abakada Guro Party List v. Ermita*, 469 SCRA 1, 115-116 (2005); *BOCEA v. Teves*, G.R.No. 181704, December 6, 2011; *See also ALA Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[1662] *PITC v. Angeles*, 331 Phil. 723 (1996); *West Tower Condominium Corp. v. First Philippine Industrial Corp.*, G.R.No. 194239, June 16, 2015.

[1663] *Delegata potestas non potest delegari*, or no delegated powers can be further delegated. *U.S. v. Banks*, 104 U.S. 728 (1881); *See also Dalamal v. Deportation Board*, G.R.No. L-16812, October 31, 1963.

instances, Congress would have no other option but to issue broad legislative delegations under enabling laws that offer little in terms of substantive limits. Letting go of the substantive limitation lever, by itself, pushes the legislative delegation to the brink of illegitimacy because it exacerbates the risk of excessive agency discretion.[1664] Among the ways by which the legislature can make up for this inevitable let-go of substantive limits is to switch its levers by bulking up the statutory procedures for the agency's exercise of its broad authority.[1665] Because procedure affects substance,[1666] the imposition of procedural safeguards upon the agency should bolster the legitimacy of the legislative delegation, and the agency's due compliance with the statutory procedures at the very least rationalizes the latter's exercise of broad agency discretion. Viewed in that light, statutory procedures are therefore as, if not more, important than the substantive limitations for the agency's exercise of legislative rulemaking.

Chapter 3 also elucidates on the Philippine administrative setting because the 1987 Philippine Constitution had instituted several administrative agencies at the constitutional level. The existence of these agencies challenges the notion of the principal-agency relationship between the three principal repositories of governmental authority on the one hand, and administrative agencies on the other. Many of them are independent, and even constitutionally vested with their own rulemaking authority. These special agencies are vested with constitutional attributes and particularly enumerated powers, duties and functions, albeit with varying degrees of constitutional creation and independence.[1667] Thus, there are specialized entities called "Constitutional Commissions," with dedicated constitutional functions covering the vital areas of "Elections", "Audit", "Civil Service", and "Human Rights". There are also specially named agencies, such as the "Office of the Ombudsman," which serves as the government watchdog for the prosecution of graft and corruption cases. The Constitution also mandates the legislative creation of independent agencies, such as the central monetary authority, which is currently the "Bangko Sentral ng Pilipinas" (BSP); and the independent

[1664] See Chapters 2 & 3 of this work. This can be generally observed in Chapter 2's account of how legislative delegations in the Philippines were increasingly becoming broader, and how public frustration mounted in view of the government's ability to make and impose laws and rules without much constraint. The same observation can be made with regard to legislative delegations of authority to administrative agencies during the New Deal era.

[1665] See Chapters 2 & 3 of this work. The U.S. Congress passed the APA in 1946 as a response to the growing concern over administrative agencies wielding too much power and discretion unchecked. The Philippine experience is roughly analogous, except that it took more than ¾ of a century and a public revolution for the Philippine general law on administrative procedure to come into being.

[1666] cf. Werhan, *Principles of Admin.Law* 287 (2014).

[1667] See Art. IX, XI, XII, XIII, 1987 PHIL. Const.

economic planning agency, which is currently the "National Economic Development Authority" (NEDA). The Constitution also mentions other statutory-level agencies in recognition of their importance. For example, the "Armed Forces of the Philippines" (AFP) is mentioned as the "protector of the people," in view of its relevance to the People Power Revolution that restored Philippine democracy.

Identifying and detailing each and every one of the constitutional-level administrative agencies is indispensable for purposes of completing the Philippine rulemaking picture. Certain constitutional bodies have been placed outside the scope and coverage of the Philippine general law on administrative procedure.[1668] Accordingly, they are not subject to the same informal (notice-and-comment) rulemaking procedures that are typically applicable to statutory-level administrative agencies.[1669] However, because they perform vital and often controversial functions, they find themselves as parties to litigations that end up as part of Philippine jurisprudence on administrative law,[1670] and court reporters are teeming with case law involving these constitutional institutions.[1671] With these agencies being outside the scope of Book VII, 1987 RAC, Philippine courts treat them based on the rulemaking limitations that are particularly applicable to them under the Constitution, and their relevant enabling laws—which limitation primarily consists of the rule publication requirement and its allied due process concern.[1672] There is therefore a very real risk that the entire body of case law involving the rules and regulations issued by these constitutional agencies are misconceived as typical models for the Philippine rulemaking framework.[1673]

[1668] §1 in rel. §2(1), Chap.1, Book VII, 1987 RAC.
[1669] §9, Chap.2, Book VII, 1987 RAC.
[1670] *See* for example, *Caballero v. COMELEC*, G.R.No. 209835, September 22, 2015; *Diocese of Bacolod v. COMELEC*, G.R.No. 205728, January 21, 2015; *Nepomuceno v. COMELEC*, G.R.No. L-60601, December 29, 1983; *Macasaet v. COA*, G.R.No. 83748, May 12, 1989; *Funa v. MECO & COA*, G.R.No. 193462, February 4, 2014; *Veloso v. COA*, G.R.No. 193677, September 6, 2011; *CSC v. De Dios*, G.R.No. 203536, February 4, 2015.
[1671] *Id.*
[1672] Philippine Civil Code, art.2; *See Tanada I&II*, 136 SCRA 27 (1985), affirmed, 146 SCRA 446 (1986).
[1673] Al-Amanah Islamic Investment Bank of the Phils, v. Civil Service Commission, 207 SCRA 801 (1992); Conte v. Commission on Audit, 76 SCAD 16, 264 SCRA 19 (1996); Bacobo v. Commission on Elections, 191 SCRA 576 (1990); Toledo v. Civil Service Commission, 202 SCRA 507 (1991); Sunga v. Commission on Elections, 92 SCAD 809,288 SCRA 76 (1998); Darville Maritime Co., Inc. v. Commission on Audit, 175 SCRA 701 (1987); Rabor v. Civil Service Commission, 61 SCAD 569,243 SCRA 614 (1995); Cena v. Civil Service Commission, 211 SCRA 179 (1992); Peralta vs. Civil Service Commission, 212 SCRA 425 (1992); Recabo, Jr. v. Commission on Elections, 107 SCAD 890,308 SCRA 793 (1999); Mendoza; Sanchez v. Commission on Elections (193 SCRA 317 [1991].), Sanchez v. Civil Service Commission, 53 SCAD 50, 233 SCRA 657 (1994); Romualdez v. Civil Service Commission (197 SCRA 168 [1991]; Philippine International Trading Corporation v. Commission on Audit, 108 SCAD 103, 309 SCRA 177 (1999).

Chapter 3 likewise looks into the administrative agencies at the sub-constitutional or statutory level. After discussing the statutory framework for the Philippine administrative bureaucracy and the interplay between the 1987 RAC and the various enabling laws, agency charters, and specific legislative delegations of authority, the chapter undertakes a top-to-bottom approach of the different statutory-level administrative agencies and their respective relationships with each other. Statutorily created administrative agencies in the Philippines generally fall within two broad categories, depending on the different types of administrative relationships provided by the 1987 RAC. These categories are: (a) Traditional Executive Branch Agencies, and (b) Independent Agencies. Independent agencies, in turn, are sub-categorized into (i) Regulatory Agencies, [1674] and (ii) Attached Agencies,[1675] based on the type of administrative relationship that they have with department to which they are connected, or its equivalent.[1676] The 1987 RAC also accounts for the existence of Government Owned and Controlled Corporations (GOCCs). The classifications and sub-classifications of the different types of administrative agencies, however, are not mutually exclusive, and each agency's particular characteristic and classification also depends on its charter or enabling statute. These broad types of agencies are differentiated in terms of the level of independence and autonomy that the agencies enjoy in the exercise of their respective functions. Interestingly enough, the administrative relationships set by the 1987 RAC correlate well with the varying degrees in which the executive and administrative nature predominates within each class of agencies.[1677] They also correspond with the different levels of institutional independence provided by law for agencies falling within each respective class.[1678] Thus, traditional Executive Branch Agencies consist of the Departments and the units, bureaus, and offices that are under their respective departmental supervision and control. Regulatory agencies are generally subject to one of several types of supervision, but not control.

Chapter 4 of this work delves into modern rulemaking in general by primarily using the 1987 RAC and pertinent Philippine case law, and filling in the gaps with the relevant American case law and authorities. While there

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[1674] §38(2), Chap.7, Book IV, RAC (1987).
[1675] §38(2a), Chap.7, Book IV, RAC (1987).
[1676]See §38(2,3), Chap.7, Book IV, RAC (1987).
[1677] Manalang See functionalist approach to the agency's exercise of governmental authority. Cf. Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Cal. L. Rev. 853, 857-60 (1990). ("The functionalist thus infers that Congress is free to allocate authority as it pleases among subordinate institutions (however formalists would characterize them), as long as the "overall character or quality" of the relationships between those the institutions and the named heads of government is consistent with the latters' performance of their core functions.")
[1678] See Chap.7, 8, 9, Book IV, RAC (1987).

exists some discrepancies between the two jurisdictions, this work finds that the discrepancies are not of paramount significance as to render them irreconcilable.

Philippine case law generally indicates a clear willingness on the part of the Philippine courts to adopt American rulemaking principles and concepts in order to address the absence or silence of relevant Philippine statutes.[1679] For example, the Philippine Supreme Court in the 1956 case of *Interprovincial Autobus Co. v. Collector of Internal Revenue*[1680] drew on American sources in order to adopt and apply the legislative versus non-legislative rule distinction to validate Finance Regulation No. 26 s. 1924, despite the fact that the Philippines did not at the time have a general statute on administrative rulemaking procedure much less one that was analogous to §553, U.S. APA and its statutory treatment of specific non-legislative rules.[1681] The Court again utilized that same approach in several other cases.[1682] Also, in *Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco*,[1683] the members of the Philippine Supreme Court utilized the relevant U.S. case law and authorities on the rulemaking-adjudication distinction, as well as the legislative versus non-legislative, in arriving at the Court's decision. In *Republic of the Philippines v. Drugmakers Laboratories*,[1684] the Court drew on both Philippine and American

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[1679] See Victorias Milling v. SSC, G.R.No. L-16704, March 17, 1962; People v. Maceren, G.R.No. L-32166, October 18, 1977; Teoxon v. Board of Administrators, G.R.No. L-25619, June 30, 1970; Balmaceda v. Corominas, G.R.No. L-21971, September 5, 1975 citing Davis Administrative Law Treatise, 1958 Ed., p. 275, et seq.; Misamis Oriental Ass'n of Coco Traders v. DOF Secretary, G.R.No. 108524, November 10, 1994, citing K. DAVIS, Administrative Law 116 (1965); People v. Lim, 108 Phil. 1091 (1960).

[1680] Interprovincial Autobus Co. v. Collector of Internal Revenue, G.R.No. L-6741, January 31, 1956.

[1681] See Chapter 4 of this work.

[1682] Secretary of Finance v. Arca, G.R.No. L-25924, April 18, 1969; Victorias Milling Co. v. SSC, 114 Phil 555, G.R.No. L-16704, March 17, 1962; Philippine Blooming Mills v. SSS, 124 Phil. 499 (1966).

[1683] See Commissioner of Internal Revenue v. Court of Appeals and Fortune Tobacco, G.R.No. 119761, August 29, 1996 (Holding that, in issuing legislative rules and regulations, the BIR must comply with the notice-and-comment, and publication provisions of Chap.2, Book VII, RAC (1987), as well as its own RMC 10-86 on the Effectivity of Internal Revenue Rules and Regulations); Balmaceda v. Corominas, G.R.No. L-21971, September 5, 1975. ("We come next to petitioner-appellant's submission that respondent- appellee has infringed the Consolidated Rules and Regulations by importing non-essential goods in excess of the 10% limitation. … It is pleaded by respondent-appellee that the Consolidated Rules and Regulations are mere departmental rule of the Secretary of Commerce and Industry which it may conveniently waive or renounce. We disagree. A "rule (or a 'regulation' — a term used interchangeably with 'rule') is the product of rule making, and rule making is the part of the administrative process *that resembles* a legislature's enactment of a statute. In this jurisdiction, administrative authorities are vested with the power to promulgate rules and regulations to implement a given statute and to effectuate its policies and when promulgated, such administrative rules or regulations become laws. Controversy is not recorded that the Consolidated Rules and Regulations were promulgated by the then Secretary of Commerce and Industry, Pedro C. Hernaez in accordance with the express authority of Section 5 of Republic Act No. 1410 "to draft, promulgate and publish such rules and regulations as it may deem necessary" for the implementation of the Act. Withal, it cannot be lightly read that the said Consolidated Rules and Regulations are mere departmental rule, but rather do have the force and effect of a valid law which cannot be waived or renounced.")

[1684] Republic v. Drugmakers Laboratories, G.R.No. 190837, March 5, 2014.

case precedents to articulate and apply the legislative vs. non-legislative rule distinction to the Food and Drug Authority (FDA)'s issuance of Administrative Order No. 67 s. 1989, and Circular Nos. 1 and 8, s. 1987.[1685] Accordingly, there are sufficient ties and commonalities between the systems of administrative law and rulemaking in Philippines and the United States to support this work's approach of modernizing rulemaking in Philippine administrative law by drawing lessons from the United States.

Finally, taken as a whole, this work shows that the existing rulemaking paradigm in Philippine administrative law—as exemplified by the rulemaking fiascos in Chapter 1—is clearly problematic, and the problem appears to stem from the Philippine system's continuing reliance on pre-1987 administrative processes and notions that have already become antiquated, or otherwise rendered outdated by the recent statutory and case law developments in modern administrative law. The 1987 Philippine Constitution has instituted sweeping institutional changes that infused due process and democratic principles back into the Philippine government. The 1987 RAC has, for the most part, provided the general statutory groundwork for modernizing rulemaking in Philippine administrative law. The provisions of the 1987 RAC, however, need clarification and refinement if it is to be a tool for good governance within the Philippine bureaucracy, and as an effective statutory implementation of the constitutional right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making.[1686]

As an attempt towards that direction, and with the objective of setting a concrete path towards realizing the potentials of modern rulemaking in the Philippines, this work sets forth the following matters, all of which are recommended for due consideration and adoption in the Philippines:

First, the post-1987 rulemaking process is not all about *Tanada v. Tuvera*,[1687] and its mandatory imposition of the rule publication requirement.[1688] Although rule publication remains important and indispensable, it is merely one of the various and equally important changes in the administrative structures and procedures instituted by both the 1987 Constitution and the 1987 RAC.[1689] *Tanada* itself recognized that legislative rulemaking has at least two phases or

[1685] Id.
[1686] See Phil.Const., art.VIII §16 (1987).
[1687] See Tanada v. Tuvera, 136 SCRA 27 (1985), and Tanada v. Tuvera, 146 SCRA 446 (1986).
[1688] See Tanada v. Tuvera, 136 SCRA 27 (1985), and Tanada v. Tuvera, 146 SCRA 446 (1986).
[1689] See cf. 4th Whereas Clause, 1987 RAC.

stages: *Rule Formulation* and *Rule Publication*, both of which had been largely kept in the dark by the Philippine government prior to 1987, more so during martial law. The *Tanada* decisions, however, could only address the "darkness" with regard to rule publication because they were promulgated in 1985 and 1986, and the statutory procedures for public participation in agency rule formulation had not yet been put in place.[1690]

Second, the constitutional implications of the post-1987 rulemaking framework are not limited solely to constitutional due process of law[1691] as triggered by the need for full publication of legislative rules.[1692] Among the relevant peculiarities that differentiate the 1987 Philippine Constitution from the previous Philippine constitutions, and from the United States Constitution, is that it devotes an entire Article XIII to "Social Justice and Human Rights." Among the human rights expressly guaranteed by that Article XIII is the constitutional right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making.[1693] This constitutional right to public participation[1694] is statutorily implemented in the area of agency rulemaking by Chap.2, Book VII of the 1987 RAC under which an informal notice-and-comment rulemaking process is mandated for all administrative agencies across the bureaucracy. [1695] Accordingly, the 1987 Constitution and the 1987 RAC's provisions on the right to public participation operate to effectively and emphatically[1696] preclude Philippine agencies from relying on the pre-1987 notion that agency rule formulation was an essentially legislative process that the agency may undertake on its own without constitutional implications,[1697] in order to keep their rule formulation in the dark and out of the public eye.

1690 The 1987 RAC was promulgated after See Tanada v. Tuvera, 136 SCRA 27 (1985), and Tanada v. Tuvera, 146 SCRA 446 (1986).

1691 See §1, Art.III, 1987 PHIL. Const.

1692 See Tanada v. Tuvera, 136 SCRA 27 (1985), and Tanada v. Tuvera, 146 SCRA 446 (1986).

1693 The constitutional right to public participation under §16, Art. XIII, 1987 PHIL. Const. is echoed as well in §1(7), Chap.1, Book II, 1987 RAC.

1694 Id.

1695 §9, Chap.2, Book VII, 1987 RAC.

1696 N.B. Although the statutory provisions would have sufficed to make the right to public participation in rulemaking mandatory, its elevation to the constitutional level serves to highlight its importance as a fundamental and basic right.

1697 Although the United States Constitution does not have a counterpart constitutional provision for the right to public participation, notice-and-comment rulemaking procedures are nevertheless mandatory for all federal agencies pursuant to the U.S. APA. See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 551-552 (2011) (Discussing how early courts had analogized judicial review of agency regulations to that of statutes, citing Assigned Car Cases, 274 U.S. 564 [1927], and how the courts eventually discarded that notion in favor of developing a "hard look" approach to reviewing agency discretion under which judicial review necessarily required an agency record of rulemaking so that "courts could examine the

Third, the post-1987 rulemaking framework provides for two significant "prongs" to comprehensively cover and shed public light to the two phases or stages of legislative rulemaking that had in the past been kept in the dark. Thus, for the agency rule formulation phase, both the 1987 Philippine Constitution and the 1987 RAC prescribe the constitutional and statutory right to public participation, [1698] and the procedural provisions for its implementation;[1699] and for the rule publication phase, the *Tanada* cases,[1700] the 1987 Philippine Constitution, the 1987 RAC, and the Philippine Civil Code prescribe the publication in full[1701] either in the Official Gazette or newspaper of general circulation in the Philippines[1702] and the filing of requisite certified copies with the University of the Philippines Law Center[1703] as a requirement of constitutional due process. [1704] The above two-pronged approach to the informal (notice-and-comment) rulemaking process of the 1987 RAC constitutes the statutory floor or base for all legislative rulemaking by the Philippine administrative agencies. It is also the procedural rock or foundation [1705] from which Congress can build and mandate additional procedural safeguards that are specific to the enabling statutes, such as making the process more formal or closer to adjudication type proceedings.[1706] The

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agency's findings, reasoning and decisions in light of the evidentiary facts and analysis generated by the agency and outside parties.")

[1698] The constitutional right to public participation under §16, Art. XIII, 1987 PHIL. Const. is echoed as well in §1(7), Chap.1, Book II, 1987 RAC.

[1699] The constitutional right to public participation under §16, Art. XIII, 1987 PHIL. Const. is echoed as well in §1(7), Chap.1, Book II, 1987 RAC, and procedurally implemented in agency rulemaking under §9, Chap.2, Book VII, 1987 RAC.

[1700] See Tanada v. Tuvera, 136 SCRA 27 (1985), and Tanada v. Tuvera, 146 SCRA 446 (1986).

[1701] See Tanada v. Tuvera, 136 SCRA 27 (1985), and Tanada v. Tuvera, 146 SCRA 446 (1986).

[1702] Art.2, Philippine Civil Code, as amended by EO 200 s. 1987.

[1703] §3-4, Chap.2, Book VII, 1987 RAC.

[1704] §1, Art.III, 1987 PHIL. Const.

[1705] See §9, Chap.2, Book VII, 1987 RAC, under which public participation is required for all agencies, "if not otherwise required by law." The general trans-substantive applicability of public participation as a base requirement for all agency rulemaking is evident in the statute itself. If Congress truly intended to do away with it as regards to a particular legislative delegation to the agency, the enabling act must expressly or unequivocally state that public participation, §9(1), Book VII RAC, is not required. It is doubtful, however, if Congress can statutorily do away with the requirement altogether in view of its constitutional anchor. §16, Art.XIII, 1987 PHIL. Const. Also cf. Werhan, *Principles of Admin.Law* 236 (2d 2014 Ed.) (In § 553, Congress finally created a uniform, baseline procedure governing the issuance of agency rules with the force of law. The heart of the informal rulemaking process of § 553 is a written exchange between the agency and interested members of the public.)

[1706] See for example, §23, §43(b)(ii), §43(i), §43 (last par.), §73 R.A. 9136, known as the Electric Power Industry Reform Act of 2001; See also §44, Art.VI, R.A. 10591, known as the "Comprehensive Firearms and Ammunition Regulation Act."

N.B. §9(3), Chap.2, Book VII, 1987 RAC itself provides for "opposition" as a statutory trigger for applying Book VII's rules on contested cases. §9(2) thereof also provides specific requirements for the publication of notices regarding the fixing of rates.

agency can likewise voluntarily undertake such additional procedures on top of them, as it deems fit.

Fourth, the legislative rule's validity and binding effect does not hinge solely on rule publication. The procedural prongs outlined above must be satisfied by the agency during the formulation and publication stages of its legislative rulemaking in order for the final rule to validly carry the binding force and effect of law.[1707] Public participation in the rule formulation stage constitutes the heart of the modern rulemaking process.[1708] Both prongs, done together, constitute the statutory procedural lever imposed by Congress to bolster the legitimacy of the agency's exercise of delegated legislative power.

Fifth, the agency's publication and circulation of the notices of the proposed rules (NPR)[1709] should be done in a manner that makes the constitutional and statutory right to public participation both effective and reasonable.[1710] Accordingly, the required publication or circulation of the aforesaid notices shall be made in the Official Gazette pursuant to §9(1), Chap.2, Book VII[1711] in relation to §24, Chap.6, Book I of the 1987 RAC.[1712] The publication and circulation of notices of rule proposals is rendered all the more effective and expedient in view of the Official Gazette's alternative availability online and in electronic format.[1713] In addition thereto, administrative agencies may also utilize their own websites for purposes of ensuring the widest circulation of the notices of proposed rules. Proper NPR improves the quality of agency rulemaking by fostering rational and informed rulemaking[1714] because it exposes agency proposals to diverse public

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[1707] See Chap.4 of this work.

[1708] Werhan, *Principles of Admin.Law* 236 (2014).

[1709] See §9, Chap.2, Book VII, 1987 RAC, also known as "Notice of Proposed Rulemaking."

[1710] §16, Art. XIII, 1987 PHIL. Const.; §1(7), Chap.1, Book II in rel. §9, Chap.2, Book VII, 1987 RAC; See Prometheus Radio Project v. FCC, 652 F. 3d 431, 449 (3d Cir. 2011) (" To assess whether the public was fairly apprised of a new rule, a reviewing court asks 'whether the purposes of notice and comment have been adequately served.' ") (quoting Am. Water Works Ass'n v. EPA, 40 F. 3d 1266, 1274 (D.C.Cir. 1994)); Werhan, *Principles of Admin.Law* 246 (2014).

[1711] §9(1), Chap.2, Book VII, 1987 provides: "**SECTION 9.** Public Participation.—(1)…, an agency shall…publish or circulate notices of proposed rules…",

[1712] §24, Chap.6, Book I, 1987 RAC provides: "Section 24. Contents.—There shall be published in the Official Gazette… such documents or classes of documents as may be required so to be published by law;…"; N.B. This is in line with the parallelism between the Philippines government's use of the Official Gazette and the United States government's use of the Federal Register. See §553, U.S. APA.

[1713] Seee www.gov.ph last accessed on May 5, 2016.

[1714] Weyerhaeuser Co. v. Costle, 590 F. 2d 1011, 1031 (D.C.Cir. 1978); see Chocolate Manufacturers Ass'n v. Block, 755 F. 2d 1098, 1103 (4th Cir. 1985). Werhan, *Principles of Admin.Law* 246 (2014).

comments,[1715] and subjects the agency's findings and assumptions to public scrutiny. [1716] It also advances the values of fairness and democratic participation[1717] thereby making any resulting final rule more acceptable to the public. The NPR is also the first step towards facilitating judicial review because it invites all interested persons to submit their views and evidence supporting their positions for inclusion in the administrative record.[1718]

Sixth, the opportunity afforded by the agency for the interested public to submit their views must be meaningful,[1719] so that the agency can be said to have taken account of all the relevant factors in its formulation of the final rule.[1720] Accordingly, the NPR should be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process.[1721] It should include the data being relied upon by the agency for its proposed rule so that the public's submission of views could be addressed to that data.[1722]

Seventh, the right of public participation in rulemaking, and its requirement of prior notice and affording interested persons the opportunity to submit their views,[1723] should necessarily result in the creation of the agency's legislative record for that proposed rule.[1724] As a procedural safeguard that

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[1715] See, e.g., International Union, United Mine Workers of America v. Mine Safety & Health Administration, 407 F. 3d 1250, 1259 (D.C.Cir. 2005); Prometheus Radio Project, 652 F. 3d at 449 (quoting International Union). Werhan, *Principles of Admin.Law* 246 (2014).

[1716] *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1031 (D.C.Cir. 1978); *see Chocolate Manufacturers Ass'n v. Block*, 755 F. 2d 1098, 1103 (4th Cir. 1985). Werhan, *Principles of Admin.Law* 246 (2014).

[1717] See, e.g., Prometheus Radio Project, 652 F. 3d at 449; International Union, 407 F. 3d 1250. Werhan, *id.*

[1718] Werhan, *id.,* citing *see, e.g., Prometheus Radio Project*, 652 F. 3d at 449; *International Union*, 407 F. 3d 1250; *Marathon Oil Co. v. EPA*, 564 F. 2d 1253, 1271 n. 54 (9th Cir. 1977).

[1719] *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977); See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 552-553 (2011).

[1720] See Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 415 (1971); See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 552-553 (2011).

[1721] Attorney General's Manual on the Administrative Procedure Act 30 (1947), reprinted in WILLIAM F. FUNK, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 39– 176 (4th ed. 2008).

[1722] See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 552-553 (2011).

[1723] See §9, Chap.2, Book VII, 1987 RAC.

[1724] The legislative record is produced as a necessary result of the public participation requirements of informal notice-and-comment rulemaking. It also exists as an evidentiary record in formal (adjudication-style) rulemaking. See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) (The Court set aside the FDA safety regulations for smoking fish. The court found that the FDA did not produce the contemporaneous administrative record for its rule. When the FDA suppressed the opportunity for 'meaningful comment' because it did not notify all interested persons of the scientific research on which it relied as basis for the rule, the Court found it as being the same as rejecting comment altogether. The extent of the administrative record required for judicial review of informal [notice-and-comment] rulemaking is largely a function of the scope of judicial review. Even when the standard of judicial review is whether the promulgation of the rule was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'…judicial

legitimizes the legislature's delegation of government authority upon the agency, public participation serves to enlighten and shape the agency's exercise of its discretion by ensuring input of evidence and views by interested persons.[1725] The contemporaneous administrative record generated through informal notice-and-comment proceedings is also a necessary predicate for the agency to successfully hurdle arbitrary and capricious judicial review.[1726] The agency's production of a contemporaneous administrative record during the rulemaking process is rendered all the more paramount in view constitutional stature of arbitrary and capricious review in Philippine law,[1727] because Philippine courts can require its production by the agency as a necessary predicate to judicial review.

Eighth, the prefatory statements, or the preambular or whereas clauses, in the agency's legislative rules are not empty or nominal requirements;[1728] and neither is it proper to use them merely for cursory matters.[1729] They are rather better and more appropriately utilized for the agency's articulation of its reasons for the legislative rule; its response to the evidentiary, analytical, and policy criticisms of the rule; and its explanation of the materials that support the final rule.[1730] Because Congress did not purport to transfer its legislative power to the unbounded discretion of the administrative agency,[1731] the latter does not have the quite the benefit of obscurantism reserved to Congress.[1732] Rules are after all required to be reasonable[1733] and supported by good

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review must nevertheless be based on the 'whole record." The Court found "no articulate balancing sufficient to make the procedure followed less than arbitrary."); See also Chamber of Commerce v. SEC, 443 F.3d 890 (DC Cir. 2006); Kern County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006); Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (DC Cir. 1978).

[1725]See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 551-552 (2011).

[1726] Id.; See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy, id.* ("Further, recall that at the same time agencies were shifting to rulemaking (beginning in the late 1960s), public distrust of agency performance was increasing, and courts were developing a "hard look" approach to review of agency discretion. Hard look review is impossible without an evidentiary record, for it requires the court to closely examine the agency's findings, reasoning, and decisions in light of the evidentiary facts and analysis generated by the agency and outside parties. The agencies' increasing use of rulemaking thus threatened to make an "end run" around developing efforts by litigants and courts to impose tighter controls on agency discretion.")

[1727] See §1, 4(2), 5(2)(a), Art. VIII, 1987 PHIL. Const.

[1728] See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); *See* Breyer, *id.*

[1729] *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977); Breyer, *id.* at 552-553 (2011).

[1730] See Breyer, *id.* at 551-552 (2011); See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977).

[1731] FCC v. RCA Comm'n, 346 U.S. 86, 90 (1953).

[1732] See United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); See Breyer, Stewart, Sunstein, Verrmeule and Hertz, *Admin.Law and Regulatory Policy* 552-553 (2011).

[1733] Lupangco v. Court of Appeals, G.R.No. 77372, April 29, 1988 (Court invalidated Professional Regulation Commission [PRC] Resolution No. 105 prohibiting examinees from attending review classes and receiving review materials during three days immediately preceding PRC examination, on grounds of unreasonableness. "It is an aixiom in administrative law that administrative authorities should not act arbitrarily and capriciously in

reasons.[1734] It is not in keeping with the rational process to leave vital questions generated during the public participation completely unanswered.[1735]

- END -

the issuance of rules and regulations. To be valid, such rules and regulations must be reasonable and fairly adapted to the end in view. If shown to bear no reasonable relation to the purposes for which they are authorized to be issued, then they must be held to be invalid. Gonzales, Administrative Law, Law on Public and Election Law, p.52 (1966). Resolution No. 105 is not only unreasonable and arbitrary, it also infringes on the examinees' right to liberty guaranteed by the Constitution.")

[1734] De Leon & De Leon, *Admin.Law: Text and Cases* 112 (2001) ("The requirement of reasonableness of an administrative regulation means no more and no less than that the regulation must be based upon reasonable ground, that is, must be supported by good reasons.")

[1735] *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977).