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Notice-and-Comment Rulemaking in Comparative Perspective: Some Conceptual and Practical Implications

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Abstract
Public participation in administrative rulemaking is typically embodied in notice-and-comment procedures essentially mandating the publication of a proposed rule and an opportunity for the public to submit comments thereon prior to its adoption. This article presents a comparative analysis of the notice-and-comment regimes under the Philippine Administrative Code (PAC) and the United States' Administrative Procedure Act (APA). In stark contrast to the Philippine legal framework which renders compliance with the notice-and-comment procedure practically discretionary on the part of the agency, the APA prescribes the conduct of notice-and-comment as a general rule, and courts rigorously police agencies' compliance with the procedure. This article argues that the mandatory (or discretionary) nature of the notice-and-comment mechanism impinges on the efficacy of procedural challenges to administrative rules, the standard of judicial review applied to agency statutory interpretation, and the statutory creation of public norms. The article hopes to inspire a re-evaluation of the Philippine framework while providing valuable lessons to other jurisdictions with similar legal architectures.

It is now widely recognized that the legislature is ill-equipped to cope directly with the myriad problems demanding its attention and to provide efficacious, specific solutions to peculiar and sophisticated problems. Thus, in the modern administrative state, the delegation of legislative power has increasingly become the rule, and its non-delegation the exception. Reputed to possess practical reasoning and substantive expertise, administrative agencies have been given rulemaking powers, enabling them to implement the policy of the law and to provide for the most effective enforcement of its provisions. Agencies therefore have great potential to be catalysts of reform, as it is within their offices that rights are initially given flesh and made real.

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However, in the absence of legitimate restrictions, these agencies have also proved to be capable of abusive power. Administrative law scholars and practitioners have explored a range of solutions to prevent legislative delegation from 'running riot'[1] and to reduce the likelihood of 'regulatory capture'.[2] One such solution favours a more stringent judicial review of agency statutory interpretation, giving the courts broader powers to adjudicate on the legality of administrative operations. Another solution is for Congress to impose a clearance requirement, mandating the submission of draft implementing rules to a congressional oversight committee for comment prior to their issuance. It has also been suggested that Congress may provide agencies with copies of legislative committee reports as a 'signal'[3] to agency officials about how to exercise their rulemaking and enforcement discretion. Through these mechanisms, Congress can potentially influence agency conduct by resuming its role as an actual, involved decision-maker. In addition, as a complement to sunset laws that typically require congressional evaluation of legislative policies, reporting mechanisms that require agencies to inform Congress of major developments in, or proposed amendments to, existing laws have also been mandated. Aside from precluding ultra vires agency legislation, this collaboration may enhance both institutions' capacity for policy evaluation, as they are both forced to identify problems in the real world, including those caused by government policy, and to respond to them incrementally.

These control mechanisms obviously rely on the other branches of government – the judiciary and the legislature – to police agency rulemaking. But these mechanisms have their own limitations. For instance, overzealous judicial oversight could unduly tie the hands of agencies and prevent them from implementing timely and responsive solutions to pressing challenges. Congressional clearance and signalling may be unrealistic and impossible to apply in practice. In the first place, the operationalization of general legislative policies has been delegated to administrative agencies precisely because of their presumed substantive expertise and practical experience, which are lacking in the legislative body. To impose stringent congressional oversight mechanisms would thus defeat the purpose for which agencies were created. Modern regulations demand that agencies be granted a certain level of autonomy, so that they can fully and effectively fulfil their mandate while remaining within constitutional limits.

Finally, scholars have looked to public participation in administrative rulemaking as a unique way to tackle the problem of administrative discretion. Public participation consists of the right of the public to express their opinions and to provide feedback on proposed regulations. The right does not guarantee involvement in actual decision-making. Agencies are normally not obliged to adopt the views submitted by the public, but ideally, they should have the obligation to respond to these

1. *A.L.A. Schechter Poultry Corp v United States*, 295 U.S. 495, 553 (1935) (Cardozo J, concurring).
2. Regulatory capture refers to 'the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself': Daniel Carpenter & David A Moss, 'Introduction', in Daniel Carpenter & David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 13.
3. Robert A Katzmann, 'The American Legislative Process as a Signal' (1989) 9 Journal of Public Policy 287, 288, 292.

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views and provide reasons for adopting one view over another. In this sense, the right to public participation means more narrowly the 'right to consultation'.[4] It is typically embodied in notice-and-comment procedures which essentially mandate the publication of a proposed rule and an opportunity for the public to submit comments thereon prior to its adoption.

Susan Rose-Ackerman notes that the lack of a clear electoral connection between agencies and the public 'implies that legal constraints on executive rulemaking ought to further democratic accountability through broad consultation, transparency, and reason-giving that help to make government rulemaking processes accountable to the public.'[5] In this sense, notice-and-comment procedures would function primarily as a public check on administrative discretion. But other reasons have also been advanced to justify public participation. It has been suggested that the consultation process increases the quality of administrative decisions, as it allows agencies to gather a wider range of information and possible solutions.[6] Moreover, public participation is deemed to enhance democracy by increasing the public's confidence in the state's democratic institutions, and by strengthening the role of civil society.[7] When citizens feel that their interests are capably represented and treated as worthy of serious concern before decisions are made by unelected bureaucrats, agency rules will more likely be accepted as legitimate. By creating a space for legitimate clashes of interests and ideas, public consultations may even address the problem of regulatory capture.[8]

The purpose of this article is to examine how the right to public participation in administrative rulemaking has been implemented in two democratic jurisdictions – the Philippines and the United States – and to shed light on the legal implications and practical consequences of their differing statutory and judicial frameworks. In particular, the article presents a comparative analysis of the notice-and-comment regimes under the *Philippine Administrative Code* (PAC)[9] and the United States' *Administrative Procedure Act* (APA).[10] In stark contrast to the Philippine statutory and judicial framework, which renders compliance with the notice-and-comment procedure practically discretionary on the part of the agency, the APA prescribes the conduct of notice-and-comment as a general rule, and courts rigorously police agency compliance with the procedure. In a nutshell, notice-and-comment under the APA has three components: (i) publication of the proposed rule or its substance in the Federal Register; (ii) an opportunity for the public to submit written comments, with or without an oral presentation; and (iii) the publication of the final rule

4. Bojan Bugaric, 'Openness and Transparency in Public Administration: Challenges for Public Law' (2004) 22 Wisconsin International Law Journal 483, 502.
5. Susan Rose-Ackerman, 'Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy', in Susan Rose-Ackerman, Peter Lindseth & Blake Emerson (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2017) 254.
6. Bugaric (n 4) 503.
7. ibid.
8. Carpenter & Moss (n 2).
9. Executive Order No 292, s 1987.
10. 5 USC s 553.

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accompanied by a concise statement of its basis and purpose thirty days before it takes effect.[11] The process is said to be the most important example of the 'pluralist [conception] of participatory legitimacy'.[12] US courts have scrupulously ensured compliance with the notice-and-comment requirement,[13] giving effect to the procedure's two-fold purpose: 'to give the public an opportunity to participate in the rulemaking process' and to allow the agency 'to educate itself before establishing rules and procedures which have a substantial impact on those regulated'.[14] In the Philippines, although the right to public participation in administrative rulemaking is not novel, the existing statutory and judicial review framework has made its exercise less pervasive. On the one hand, the right is not actionable unless it can be traced to some explicit provision in the organic charter of the administrative agency or is specifically mandated by statute or regulation. On the other hand, longstanding judicial doctrine erroneously disregards the PAC provision requiring notice and hearing (and allowing notice-and-comment) in the issuance of certain types of administrative rules through quasi-legislative proceedings. Viewed in isolation, the Philippines' notice-and-comment regime does not appear to raise a lot of concerns; juxtaposed against the US framework where notice-and-comment rulemaking is relatively robust,[15] however, the limits of the former become more evident. The comparative analysis reveals that, under the Philippine framework, the efficacy of procedural challenges to administrative rules is more limited; it is hard to justify a more deferential standard of judicial review of agency statutory interpretation; and the statutory creation of public norms is impeded. It is worth noting that the choice of legal framework for public participation could be influenced by factors such as the state's legal system, maturity of democratic institutions, the size of the bureaucracy, availability of resources, ability of citizens to mobilize, etc. It is, however, beyond the scope of this article to go into a discussion of the reasons behind the two jurisdictions' divergent legal frameworks. Rather, this article focuses on the advantages and limitations of each framework. It is hoped that other jurisdictions could also draw lessons from the comparative analysis, taking into account the peculiarities of their own administrative legal systems.

This paper proceeds as follows: Part I describes the statutory and judicial review framework for public participation in administrative rulemaking in the Philippines. Part II examines this framework against the pertinent laws, doctrines, and theories in the US, and draws several implications from the comparative analysis. Part III concludes.

11. ibid.
12. Catherine Donnelly, 'Participation and Expertise: Judicial Attitudes in Comparative Perspective', in Susan Rose-Ackerman, Peter Lindseth & Blake Emerson (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2017) 371.
13. ibid 372.
14. *Texaco, Inc v Federal Power Commission*, 412 F 2d 740 (3d Cir 1969) 744.
15. Donnelly (n 12) 370.

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I. ADMINISTRATIVE RULEMAKING IN THE PHILIPPINES: AN OVERVIEW

A. *Statutory Framework*

Administrative rulemaking in the Philippines is governed by two statutory regimes. Under the first regime, which I shall call 'Specific Administrative Procedure', the procedure for the issuance of administrative rules is provided in a substantive law or in the charter creating the administrative agency. In the absence of such procedural requirements in the relevant statute, the generally prescribed procedure stipulated in the PAC, specifically Book VII entitled 'Administrative Procedure', applies.[16] I shall call this other regime 'General Administrative Procedure'. This distinction is important because, as will be shown below, the applicable regime determines the availability and efficacy of procedural challenges to administrative rules.

1. *Specific Administrative Procedure*

Organic laws creating administrative agencies typically contain the legislative grant of quasi-legislative or quasi-judicial powers, or both, to such agencies. The grant of quasi-legislative powers usually takes the form of an authorization to issue the law's implementing rules and regulations (IRR). The law itself may prescribe the procedural requirements for the issuance of the relevant IRRs, such as publication and consultation with another agency or a segment of the public. For example, *Republic Act 10667* or the *Philippine Competition Act of 2015* (PCA), which creates the Philippine Competition Commission, prescribes that the IRR must be issued within 180 days from the law coming into effect, subject to consultation with the Department of Justice-Office for Competition and concerned sector regulators.[17] If the law does not provide for the specific procedure, the general rules prescribed in the PAC apply.[18] For instance, *Republic Act 10173* or the *Data Privacy Act of 2012*, which created the National Privacy Commission, does not prescribe the procedure for the issuance of the Act's IRR apart from the requirement that it must be promulgated within ninety days from the law's effectivity.[19]

In certain cases, substantive statutes may require an existing agency or department in the Executive branch to promulgate the necessary IRR. A good example would be the highly controversial[20] *Republic Act 10354* or the *Responsible Parenthood and Reproductive Health Act of 2012*. The Act directs the Department of Health Secretary and the authorized representatives of several other agencies and executive departments to promulgate the law's IRR together with non-governmental organizations, faith-based organizations, people's organizations, women's organizations, and

16. Executive Order No 292, s 1987, Book VII, ch 2, s 9(1).
17. Republic Act 10667, s 50.
18. Executive Order No 292, s 1987, Book VII, ch 2, s 9(1).
19. Republic Act 10173, s 39.
20. Heated debates and rallies, both in favour of and against the bill, took place nationwide while the bill was pending in Congress. When the bill was finally passed into law, its constitutionality was challenged before the Supreme Court. See *Imbong v Ochoa*, GR No 204819, 8 April 2014, 732 Phil 1.

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young people's organizations.[21] The Act thus promotes a broader base of public participation in the drafting of the IRR. In contrast, *Republic Act 10175* or the *Cybercrime Prevention Act of 2012*, whose passage was also marred by controversy,[22] only requires inter-agency collaboration between the Information and Communications Technology Office under the Department of Science and Technology, the Department of Justice, and the Department of the Interior and Local Government in formulating the necessary IRR.[23]

There are two important things to note under this statutory regime. First, there is no uniform procedure for the issuance of IRRs. Prior consultations on proposed drafts of IRRs may or may not be required. If required, consultations may be either inter-agency only or include particular sectors or interest groups. Second, while the issuance of IRRs may be subject to certain prescribed procedures under an organic statute, the law is usually silent with respect to other forms of issuances establishing a rule, such as orders, resolutions, or circulars that the agency may subsequently promulgate. This means that, with respect to such other forms of issuances, the PAC applies. As will be discussed in the next section, under the General Administrative Procedure regime, public participation is essentially limited only to the issuance of rate-fixing rules, leaving a whole range of other issuances establishing a rule exempt from public input.

2. *General Administrative Procedure*

The present PAC is a comprehensive revision and updating of the country's *Revised Administrative Code* (the 1917 Code),[24] which dates back to when the Philippines was under American colonial rule. Under the 1917 Code, the prescribed procedure for rulemaking is quite straightforward. The authority to prescribe forms and to make regulations or general orders is vested in the Chief of the bureau, subject to the approval of the Department Head. Regulations and orders are required to be published in the Official Gazette or otherwise publicly promulgated to become effective. Formal approval or publication, however, is not required as regards circulars of information or internal instructions.[25] The 1917 Code does not require any form of public participation in administrative rulemaking. A 1965 study revealed that agency compliance with the publication requirement had not been consistent, and that public notice and public participation in administrative rulemaking was even less so, suggesting that rulemaking proceedings could be improved if agencies give public notice of proposed rulemaking and offer an opportunity for public participation.[26]

21. Republic Act 10354, s 26.
22. While the law received support for penalizing illegal acts done via the Internet which were not covered by the old laws, it generated opposition from certain sectors who feared that several of the law's provisions could potentially curtail freedom of expression and affect data security. The constitutionality of the law was challenged before the Supreme Court: *Disini v Secretary of Justice*, GR No 203335, 11 February 2014, 733 Phil 717.
23. Republic Act 10175, s 28.
24. Act No 2711.
25. ibid Book II, Title VI, ch 25, art I, s 551.
26. Cornelius J Peck, 'Administrative Law and the Public Law Environment of the Philippines' (1965) 40 Washington Law Review 403, 419, 446.

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Later efforts to integrate and recodify the provisions of the 1917 Code resulted in the *Revised Administrative Code of 1978* (the 1978 Code).[27] The 1978 Code was proposed mainly for the following reasons: (i) a substantial number of provisions in the existing 1917 Code had been either modified, repealed, or rendered obsolete by the *1973 Constitution of the Republic of the Philippines* (the 1973 Constitution) and many other laws and decrees; (ii) the government service had undergone several structural, functional, and procedural changes and innovations; and (iii) in order to update the 1917 Code and to incorporate, collate, and compile in a single consistent legal document all the changes and innovations emanating from the 1973 Constitution and the many scattered laws and decrees.[28] The 1978 Code, however, was never published and was later expressly repealed.[29] It is interesting to note that a short chapter in the 1978 Code addressed the subject of 'Administrative Issuances' and provided that they shall be in the form of circulars and orders.[30] Apart from the requirement that all administrative issuances of a general or permanent character shall be compiled, indexed, and published, there was no mention of any form of public participation in the making of such issuances.[31]

The PAC, which supersedes the 1917 Code, now governs the systems and procedures by which the organization and operation of the bureaucracy are to be based. It is a unified document that is meant to incorporate the major structural, functional, and procedural principles and rules of governance.[32] Book VII of the PAC entitled 'Administrative Procedure' prescribes several innovations from the 1917 Code. Among the salient provisions of Book VII are as follows.

(a) *Scope*: The procedure in Book VII is made applicable to all agencies, defined as:

> 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.[33]

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 are excluded from the application of Book VII.[34]

27. Presidential Decree No 1587, s 1978.
28. ibid, Whereas Clauses.
29. See Executive Order No 168, s 1987.
30. Presidential Decree No 1587, s 1978, Book IV, ch 11, s 212.
31. ibid s 215(2).
32. Executive Order No 292, s 1987, Third Whereas Clause.
33. Executive Order No 292, s 1987, Book VII, ch 1, ss 1, 2(1).
34. ibid s 1.

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(b) *Definition of rule and rulemaking:* A 'rule' is defined 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. The term includes memoranda or statements concerning the internal administration or management of an agency not affecting the rights of, or procedure available to, the public.[35]

On the other hand, 'rulemaking' 'means an agency process for the formulation, amendment, or repeal of a rule.'[36]

(c) *Filing and publication of rules*: The PAC requires every rule adopted by an agency to be filed with the University of the Philippines Law Center in three certified copies, and subsequently published in the Law Center's quarterly bulletin. A permanent register of all rules must be kept by the issuing agency and must be open to public inspection.[37] In addition to other rulemaking requirements provided by law and not inconsistent with the PAC, each rule becomes effective fifteen days from the date of filing 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 must take appropriate measures to make emergency rules known to persons who may be affected by them.[38] The Law Center must publish a quarterly bulletin setting forth the text of the rules filed with it during the preceding quarter and keep an up-to-date codification of all rules thus published and remaining in effect, except any rule whose publication would be unduly cumbersome, expensive, or otherwise inexpedient.[39] Nevertheless, copies of such rules must be made available on application to the agency which adopted it, and the bulletin must contain a notice stating the general subject matter of the omitted rule and that new copies thereof may be obtained.[40] Further, every rule establishing an offence, or defining an act which pursuant to law is punishable as a crime or subject to a penalty, must be published in full text.[41]

(d) *Public participation*: The PAC provides that 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.[42] With respect to administrative rules fixing rates, no rule or final order shall be valid unless the proposed rates have been published in a newspaper of general circulation at least two weeks before the first hearing.[43]

Unlike the 1917 Code, the present PAC injects an element of public participation in administrative rulemaking. However, the PAC makes a distinction between

35. ibid s 2(2).
36. ibid s 2(4).
37. ibid ch 2, s 3.
38. ibid s 4.
39. ibid ss 5, 6(1).
40. ibid s 6(1).
41. ibid s 6(2).
42. ibid s 9(1).
43. ibid s 9(2).

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administrative rules that fix rates and those that do not. In the case of rate-fixing rules, notice and hearing are required for validity. Otherwise, the agency shall publish notices and allow comment on the proposed rules only 'as far as practicable'. The imperative effect of the word 'shall' in the provision is effectively diluted by the phrase 'as far as practicable', making the conduct of notice-and-comment on proposed non-rate-fixing rules discretionary on the part of agencies. As will be shown in the next section, the force of the PAC's notice-and-comment provision is further weakened by the rather broad judicial doctrine that notice and hearing are not required in an agency's exercise of quasi-legislative power.

B. *Judicial Review Framework*

In 1989, that is, two years after the PAC came into effect, the Philippine Supreme Court issued a decision articulating the rule that became the applicable doctrine in legal challenges to administrative rules on procedural grounds. The case, *Philippine Communications Satellite Corporation v. Alcuaz*,[44] stemmed from a petition seeking to annul an order by the National Telecommunications Commission (NTC) which directed the provisional reduction of the rates that may be charged by the Philippine Communications Satellite Corporation (Philcomsat) for certain specified lines of its services by 15 per cent. Philcomsat alleged, among others, that the NTC order violated procedural due process for having been issued without prior notice and hearing. NTC countered that no hearing was required because the order was merely interlocutory, and that Philcomsat's input was not its only primary source of data and information. The Court resolved the case in favour of Philcomsat after finding that the assailed order was issued by the NTC in the exercise of its quasi-judicial function,[45] which necessitates the conduct of notice and hearing. What is important to note here is the Court's affirmation of the prevailing doctrine, prior to the PAC coming into effect, 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; but where a public administrative body acts in a judicial or quasi-judicial matter, and its acts are particular and immediate rather than general and prospective, the person whose rights or property may be affected by the action is entitled to notice and hearing.[46]

The right to a hearing simply means the right of the party interested or affected to present her own case and submit evidence in support thereof.[47] A formal, trial-type

44. GR No 84818, 18 December 1989, 180 SCRA 218.

45. Quasi-judicial power refers to 'the power of the administrative agency to determine questions of fact to which the legislative policy is to apply, in accordance with the standards laid down by the law itself. As it involves the exercise of discretion in determining the rights and liabilities of the parties, the proper exercise of quasi-judicial power requires the concurrence of two elements: *one*, jurisdiction which must be acquired by the administrative body and *two*, the observance of the requirements of due process, that is, the right to notice and hearing': *Alliance for the Family Foundation, Philippines, Inc v Garin,* GR No 217872, 26 April 2017, 809 Phil 897 (emphasis added).

46. See *Central Bank of the Philippines v Judge Cloribel,* GR No L-26971, 11 April 1972, 150-A Phil 86.

47. *Ang Tibay v Court of Industrial Relations*, GR No L-46496, 27 February 1940, 69 Phil 635.

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hearing is not necessary as long as the parties are given a fair and reasonable opportunity to explain their respective sides of the controversy and to present supporting evidence on which a fair decision can be based.[48] The right to notice and hearing in quasi-judicial proceedings is not only a statutory right but an essential component of the constitutional right to due process.[49] There is therefore no question that an administrative agency engaged in the exercise of its quasi-judicial function cannot validly dispense with the notice and hearing requirement.

However, the Supreme Court's categorical pronouncement that notice and hearing are *not* essential to the validity of an administrative action where the administrative body acts in the exercise of quasi-legislative functions patently disregards the provision in the PAC which *requires* notice and hearing in the issuance of rate-fixing rules,[50] regardless of whether they are meant to apply to numerous individuals in a certain industry (and thus partake of a legislative character), or to only one person or entity in a quasi-judicial proceeding. The PAC simply does not distinguish a rate-fixing rule issued through a quasi-legislative proceeding from one issued through a quasi-judicial proceeding. If there is any opposition to a rate-fixing rule, the PAC provides that the rules on contested cases shall be observed.[51] Moreover, the Court failed to make the necessary qualification that although 'notice and hearing', as it is traditionally understood to apply in quasi-judicial proceedings, is not essential when the administrative agency discharges its quasi-legislative functions, a variant of this process, that is, 'notice-and-comment' in administrative rulemaking, is recognized under the PAC. The effect of the doctrine is the perpetuation of the idea that no notice and hearing of *any kind* is essential in quasi-legislative proceedings.

Apart from the clear inconsistency of the doctrine with the text of the PAC, its wisdom has also been put into question. In a concurring opinion in the same case, then Associate Justice Hugo Gutierrez expressed his 'reservations' about the Supreme Court's 'continuing to abide by the dictum that in the exercise of quasi-legislative power, notice and hearing are not required', and called for a 're-examination' of the doctrine.[52] He wrote:

> Senators and Congressmen are directly elected by the people. Administrative officials are not. If the members of an administrative body are, as is so often the case, appointed not on the basis of competence and qualifications but out of political or personal considerations, it is not only the sense of personal responsibility to the electorate affected by legislation which is missing. The expertise and experience needed for the issuance of sound rules and regulations would also be sorely lacking.
>
> Congress never passes truly important legislation without holding public hearings. Yet, administrative officials who are not directly attuned to the public pulse see no need for hearings. They issue rules and circulars with far-reaching effects on our economy and our nation's future on the assumption that the head of an agency knows best what is good for the people. I believe that in the exercise of quasi-legislative powers,

48. *Perez v Philippine Telegraph and Telephone Company*, GR No 152048, 7 April 2009, 602 Phil 522.
49. *Ang Tibay* (n 47).
50. Executive Order No 292, s 1987, Book VII, ch 2, s 9(2).
51. ibid s 9(3).
52. *Philippine Communications Satellite Corporation* (n 44) (Gutierrez J, concurring).

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> administrative agencies, much, much more than Congress, should hold hearings and should be given guidelines as to when notices and hearings are essential even in quasilegislation.[53]

Justice Gutierrez's concurring opinion is striking because not only does it question the longstanding presumption of expertise on the part of administrative agencies, it also expressly acknowledges the issue of political accountability that arises when 'administrative officials who are not directly attuned to the public pulse see no need for hearings'.[54]

Nevertheless, the doctrine prevailed and remains the rule to date.[55] For instance, in the recent case of *Quezon City PTCA Federation, Inc. v. Department of Education*,[56] where the petitioners assailed a departmental order issued by the Secretary of Education on the ground of lack of public consultations, the Supreme Court reiterated that '[n]otice and hearing are not essential when an administrative agency acts pursuant to its rulemaking power.'[57] Notably, the assailed order is subject to the General Administrative Procedure regime because the statute granting rulemaking powers to the Secretary of Education does not require public consultations in the issuance of IRRs. Interestingly, the Court cited Book VII of the PAC, particularly the provision on public participation, but made no remark about how that provision could be read to deny a right to public consultations on the said order.[58]

In sum, there is no general right to public participation in administrative rulemaking in the Philippines. In the absence of a specific mandate in the organic charter of the administrative agency or another substantive statute or regulation, the conduct of public consultations pursuant to the PAC is entirely discretionary on the part of the agency. Moreover, the judicial doctrine that broadly limits notice and hearing to the exercise of quasi-judicial functions is inconsistent with the PAC's provision requiring notice and hearing in the issuance of rate-fixing rules, regardless of the nature of the proceeding. It also fails to articulate that the PAC, in fact, recognizes public participation in administrative rulemaking through what can be considered a variant of notice and hearing, that is, notice-and-comment.

II. COMPARATIVE ANALYSIS AND IMPLICATIONS

I now turn to a comparative analysis of the notice-and-comment regimes of the Philippines and the US. Comparing two jurisdictions with differing treatment of the notice-and-comment mechanism illuminates the larger implications of adopting one

53. ibid.
54. ibid.
55. See *Dagan v Philippine Racing Commission,* GR No 175220, 12 February 2009, 598 Phil 406: 'As a rule, the issuance of rules and regulations in the exercise of an administrative agency of its quasilegislative power does not require notice and hearing.'
56. *Quezon City PTCA Federation, Inc v Department of Education*, GR No 188720, 23 February 2016, 781 Phil 399.
57. ibid.
58. ibid.

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framework over another. In particular, I consider the impact of the applicable framework on (i) the efficacy of procedural challenges to administrative rules, (ii) the standard of judicial review applied to agency statutory interpretation, and (iii) the prospects for statutory creation of public norms.

A. *Procedural Challenge to Administrative Rules*

A comparison of the notice-and-comment procedures under the PAC and the APA reveals several salient differences. First, unlike the PAC, which generally provides that the agency shall 'publish or circulate notices of proposed rules'[59] without further delineation as to how the task is to be accomplished, the APA provides a more detailed requirement. It stipulates that the '[g]eneral notice of proposed rulemaking 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',[60] and that '[t]he notice shall include (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) a reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule or a description of the subjects and issues involved.'[61]

Second, the APA allows an exemption from the notice-and-comment procedure when the agency 'for good cause' finds it 'impracticable, unnecessary, or contrary to the public interest',[62] but further requires that the agency must incorporate the finding and a brief statement of reasons therefor in the rules issued.[63] 'Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'[64] are also exempt from notice-and-comment, unless required by law. In contrast, under the PAC, the agency is only required, 'as far as practicable', to 'publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.'[65] Interestingly, the definition of a 'rule' is so broad as to encompass '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' as well as 'memoranda or statements concerning the internal administration or management of an agency not affecting the rights of, or procedure available to, the public.'[66] The PAC is silent as to any exemption from notice-and-comment, but under settled jurisprudence, 'interpretative rules' are not subject to notice, hearing, and publication.[67] Nevertheless, because the default rule is that public consultations shall be conducted only 'as far as practicable',

59. Executive Order No 292, s 1987, Book VII, ch 2, s 9(1).
60. 5 USC s 553(b).
61. ibid s 553(b)(1)(2)(3).
62. ibid s 553(b)(3)(B).
63. ibid s 553(b)(3)(A).
64. ibid s 553(b)(3)(B).
65. Executive Order No 292, s 1987, Book VII, ch 2, s 9(1).
66. ibid ch 1, s 2(2).
67. *Republic v Drugmaker's Laboratories, Inc*, GR No 190837, 5 March 2014, 28 Phil 480.

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and the agency is not statutorily required to justify why no consultations were held, practically any rule, regardless of form, can be claimed to be 'exempt' from notice-and-comment.

Finally, the APA specifies how notice-and-comment shall be conducted:

> the agency shall give interested persons an opportunity to participate in the rulemaking 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.[68]

The practice of administrative reason-giving is an important feature of US administrative law.[69] In contrast, the PAC does not provide for the manner in which the public may 'submit their views', again leaving the relevant agency with ample room for discretion. More importantly, as there is no statutory requirement for agencies to incorporate in the rules a general statement of their basis and purpose, concomitantly, there is no actionable right to 'reasoned administration'.[70]

It is plain that, under the PAC, agencies are given a great deal of latitude with respect to the manner of complying with the prescribed notice-and-comment procedure. It is up to the agency to determine the content of the notice and the means by which interested parties can submit their views, that is, if the agency finds that public participation is 'practicable'. The absence of a requirement for the agency to justify why no public consultation was held renders compliance with the notice-and-comment provision voluntary in practice. Under these circumstances, it is very difficult to challenge an administrative rule under the PAC based on procedural defects. Thus, in the abovementioned case of *Quezon City PTCA Federation*,[71] the Court did not give credence to the petitioners' reliance on the PAC's public participation provision and instead applied the judicial doctrine that notice and hearing are not essential in administrative rulemaking. On the contrary, where the right to public participation proceeds from a statute other than the PAC, procedural challenges are more likely to succeed. For instance, in *Cagayan Sugar Milling Company v. Secretary of Labor and Employment*,[72] the Supreme Court held that in passing the assailed order without going through the process of public consultation and hearings, as required under the *Labor Code*,[73] the Regional Tripartite and Productivity Board deprived employers of due process because they were not given the opportunity to present their positions regarding the proposed wage increase.

Therefore, with respect to a wide range of rules subject to the PAC's General Administrative Procedure, the ability to bring a procedural suit is very limited. This means that those who oppose an administrative rule or regulation must find a

68. 5 USC s 553(c).
69. Jerry Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance' (2007) 76 The George Washington Law Review 99, 101.
70. ibid.
71. *Quezon City PTCA* (n 56).
72. GR No 128399, 15 January 1998, 284 SCRA 150.
73. Presidential Decree No 442 of 1974.

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substantive ground to question it before the courts and meet the difficult burden of showing 'grave abuse of discretion' on the part of the agency concerned. Otherwise, they can air their grievances before the political departments (eg, formally through letters and lobbying, or informally through public protests). Either option is less straightforward than a procedural suit.

In contrast, the APA has been more successfully used as a tool to assail the validity of regulations on procedural grounds. Courts have nullified administrative rules that dispensed with the notice-and-comment process without justifiable reason. For instance, in *Texaco, Inc. v. Federal Power Commission*,[74] the Third Circuit of the US Court of Appeals struck down an order issued by the Federal Power Commission requiring the petitioner to pay compounded interest, as the order had been promulgated without observing the notice-and-comment procedure under the APA. The Court held that since the order constitutes a substantive amendment of an existing regulation, notice should have been given and the petitioner should have had an opportunity to submit data, views, and arguments unless the Commission had good cause to find that the order falls within the exception, ie that notice and public procedure thereon are 'impracticable, unnecessary, or contrary to the public interest'. It is important to note here how strictly the Court scrutinized the Commission's contention that notice was 'unnecessary' under the circumstances. Rather than simply relying on the Commission's determination that notice-and-comment was 'unnecessary', the Court consulted existing jurisprudence as well as legislative and executive materials analyzing the term to arrive at the conclusion that the 'unnecessary' exception should be interpreted to apply to those rules classified as 'minor' or 'emergency' in character. Finding that the new rule cannot be labelled 'minor' because it would affect numerous companies and potentially involve large sums of money, the Court held that the order did not fall within the exception and was therefore invalid because the Commission did not have good cause for skipping the notice-and-comment procedure.

Texaco demonstrates how the exceptions to the notice-and-comment procedure are to be regarded as objective conditions, the existence of which is subject to judicial review, rather than subjective conditions whose determination is wholly left to the agency's discretion. Thus, agencies cannot simply dispense with the procedure and invoke the exceptions; they must convince the courts that the conditions for the application of the exceptions are present. Understandably, administrative rules issued without notice-and-comment are rendered vulnerable to procedural challenge.[75]

74. *Texaco* (n 14).

75. In the more recent case of *Texas v US*, 809 F 3d 134 (5th Cir 2015), twenty-six states sued to prevent the implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA) of the Department of Homeland and Security. The DAPA would provide legal protection for illegal immigrants who were parents of citizens or lawful permanent residents. The states argued, among others, that the DAPA is a substantive rule that violated the procedural requirements of the APA as it did not undergo the requisite notice-and-comment rulemaking. On the other hand, the US Government contended that the DAPA is exempt from notice-and-comment as a policy statement. The Court of Appeals for the Fifth Circuit held that the states had established a substantial likelihood of success on the merits of their procedural claim, upon finding that the DAPA meets the test of an agency rule that modifies substantive rights and interests subject to

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Moreover, owing to the APA's detailed formal and substantive requirements for the conduct of notice-and-comment, any procedural defect provides further litigation avenues. In *N.L.R.B. v. Wyman-Gordon Company*,[76] the US Supreme Court rejected the National Labor Relations Board's claim that it had the discretion to promulgate new rules in adjudicatory proceedings without complying with the formal requirements of the APA. The Court held that the Board cannot replace the statutory scheme under the APA with its own rulemaking procedure.[77]

Under the US administrative regime, *pro forma* compliance does not shield an administrative rule against procedural attack. As the notice-and-comment requirement is meant to provide for 'meaningful public participation in the rulemaking process,'[78] courts take the observance of the APA's prescribed requirements seriously. For instance, the opportunity to participate is deemed not to be meaningful unless it occurs reasonably close to the time in which the agency makes a decision.[79] Thus, courts not only determine whether the procedures have been complied with, but also whether compliance was in fact adequate.[80]

In *Reeder v. FCC*,[81] the adequacy of the agency's notice was put into question. In this case, the petitioners challenged the Federal Communications Commission's (FCC) adoption of special rules governing the consideration of counterproposals in the allocation of new FM channels pursuant to a single nationwide omnibus rulemaking exercise. The petitioners claimed that the FCC did not follow the APA's notice-and-comment requirements. The District of Columbia Circuit of the US Court of Appeals determined that the FCC had not provided adequate notice because the subject Notice neither mentioned the substitution policy nor alerted the petitioners to the fact that the FCC was adopting procedures that would permanently foreclose their upgrade plans. It also found that the FCC had not provided an adequate opportunity for comment as the subject Notice sought comment only on the proposed allotments, not on the rules governing the submission of counterproposals. The Court remanded the case for proper notice-and-comment rulemaking, observing that '[t]he very fact that the omnibus rulemaking proceeding affected such an enormous number of parties … highlights the importance of giving those parties adequate notice and an opportunity to comment before the rules go into place.'[82]

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notice-and-comment. This judgment was affirmed by the Supreme Court. See *Texas v US*, 136 S Ct 2271 (2016).

76. *N.L.R.B v Wyman-Gordon Company*, 394 US 759 (1969).
77. ibid.
78. *Idaho Farm Bureau Federation v Babbitt*, 58 F 3d 1392 (9th Cir 1995) 1404.
79. ibid.
80. While procedural defects in the conduct of the notice-and-comment procedure potentially provide a ground for judicial challenge against an administrative rule, the APA nevertheless requires courts to take 'due account' of harmless error. See *Idaho* (n 78) 1405: 'Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid … However, when equity demands, the regulation can be left in place while the agency follows the necessary procedures.'
81. *Reeder v FCC*, 865 F 2d 1298 (DC Cir 1989).
82. ibid 1305.

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It has been observed that the APA has proved useful for opponents of new federal policies under both Democratic and Republican administrations.[83] Cases have been brought which question the process by which an administrative rule was issued, not the policy underlying it. Because this kind of lawsuit does not require judges to wade into policy issues, it makes sense to challenge an agency action by simply identifying a procedural defect.[84] Under the Trump administration, the APA was dubbed the 'key weapon in the legal battle over the president's agenda', as critics resorted to the APA to stall the government's bid to undo Obama-era regulations.[85] For instance, federal judges have issued injunctions to halt the government's move to postpone a rule granting low-income families broader access to housing in wealthier neighbourhoods,[86] and to delay an environmental regulation requiring oil and gas companies to reduce methane leaks[87] for failure to comply with the APA's notice-and-comment procedure.

The takeaway from this comparative analysis is not so much that a notice-and-comment procedure such as that of the APA should be adopted to make it easier for unhappy constituents to oppose administrative rules they disagree with. Rather, the point is that, where the right to public participation in administrative rulemaking is mandated by law, the failure or refusal of agencies to give effect to such right should not be taken lightly. Where citizens have been denied the opportunity to have their say in the making of policy decisions that concern them, they should be able to judicially challenge such decisions on that basis. Compared to the APA regime, it appears that the right to public participation in administrative rulemaking in the Philippine framework is, whilst undoubtedly recognized, largely rendered meaningless.

B. *Standard of Judicial Review of Agency Statutory Interpretation*

In the Philippines, judicial review relevant to administrative agencies can pertain to two types of judicial determination. One is to determine whether the findings of fact of an administrative agency are supported by substantial evidence. The PAC requires that judicial review be made on the basis of the record taken as a whole, and provides that the findings of fact of the agency, when supported by substantial evidence, shall be final except when specifically provided otherwise by law.[88] Substantial evidence is defined in jurisprudence as relevant evidence that a reasonable mind might accept to support a conclusion.[89] This type of judicial review may not

83. Lorelei Laird, 'Political lawsuits bring the Administrative Procedure Act to the forefront' (ABA Journal, 5 Mar 2018) <http://www.abajournal.com/news/article/political_lawsuits_bring_the_administrative_procedure_act_to_the_forefront> accessed 23 Mar 2020.

84. ibid.

85. Suzy Khimm, 'Critics tap decades-old law to stall Trump bid to undo Obama regulations' (NBC News, 5 Mar 2018) <https://www.nbcnews.com/politics/white-house/critics-tap-decades-old-law-stall-trump-bid-undo-obama-n852091> accessed 23 Mar 2019.

86. See *Open Communities Alliance v Carson*, 286 F Supp 3d 148 (DDC 2017).

87. See *State v Bureau of Land Management*, 286 F Supp 3d 1054 (ND Cal 2018).

88. Executive Order No 292, s 1987, Book VII, ch 4, s 25(7).

89. *Ang Tibay* (n 47).

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always involve questions of statutory interpretation, but can be confined to purely evidentiary matters.[90]

The other type of judicial review, which is the focus of this paper, pertains to the judicial determination of the validity of an agency's interpretation of a statute. Questions of this nature may, in particular, arise from an agency's exercise of its delegated rulemaking powers. When the validity of an administrative rule is questioned on the ground that it is ultra vires, the court is called upon to determine the meaning of the statute that is sought to be implemented by the rule and whether the rule is within, and not beyond, the statute. The PAC does not provide guidance to the courts on how to assess an agency's interpretation. In practice, agency decisions are tested against the standard of 'grave abuse of discretion'[91] expressed in the courts' expanded power of judicial review[92] and implemented through the Rules of Court provisions on certiorari and prohibition.[93]

Judicial review of agency statutory interpretation is guided by the longstanding doctrine mandating judicial respect for administrative construction where warranted by the circumstances. For brevity, I shall refer to this doctrine as the 'judicial respect doctrine'. The doctrine, which appeared in a 1969 decision of the Philippine Supreme Court, *Asturias Sugar Central, Inc. v. Commissioner of Customs*, provides that administrative interpretation is entitled to 'consideration and the highest respect from the courts, and must be accorded appropriate weight'.[94] According to the Court:

> Only where the court of last resort has not previously interpreted the statute is the rule applicable that courts will give consideration to construction by administrative or executive departments of the state.[95]
>
> The formal or informal interpretation or practical construction of an ambiguous or uncertain statute or law by the executive department or other agency charged with its administration or enforcement is entitled to consideration and the highest respect from the courts, and must be accorded appropriate weight in determining the meaning of the law, especially when the construction or interpretation is long continued and uniform or is contemporaneous with the first workings of the statute, or when the enactment of the statute was suggested by such agency.[96]

The judicial respect doctrine is premised on agency expertise which, in turn, is determined by an evaluation of a variety of factors. As explained by the Court:

90. See *Ngei Multi-Purpose Cooperative Inc v Filipinas Palmoil Plantation Inc,* GR No 184950, 11 October 2012, 697 Phil 433.

91. 'The term "grave abuse of discretion" means such capricious or whimsical exercise of judgment which is equivalent to lack of jurisdiction. To justify judicial intervention, the abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or to 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 or hostility': *Unilever Philippines, Inc v Tan*, GR No 179367, 29 January 2014, 725 Phil 486.

92. 1987 Constitution of the Republic of the Philippines (1987 Constitution), art VIII, s 1.

93. 1997 Philippine Rules of Civil Procedure, r 65, ss 1, 2.

94. GR No L-19337, 30 September 1969, 140 Phil 20.

95. ibid, citing *Ahlers v Farmers Mut Ins Co*, 264 NW 894.

96. ibid, citing 2 Am Jur 2d 66–67.

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> In applying the doctrine or principle of respect for administrative or practical construction, the courts often refer to several factors which may be regarded as bases of the principle, as factors leading the courts to give the principle controlling weight in particular instances, or as independent rules in themselves. These factors are the respect due the governmental agencies charged with administration, their competence, expertness, experience, and informed judgment and the fact that they frequently are the drafters of the law they interpret; that the agency is the one on which the legislature must rely to advise it as to the practical working out of the statute, and practical application of the statute presents the agency with unique opportunity and experiences for discovering deficiencies, inaccuracies, or improvements in the statute.[97]

In *Asturias*,[98] the Supreme Court ruled in favour of the Customs Commissioner's interpretation, relying on the legislature's omission to reverse an administrative construction of the provision in question.[99] The Court reasoned that '[t]he correctness of the interpretation given a statute by the agency charged with administering its provision is indicated where it appears that Congress, with full knowledge of the agency's interpretation, has made significant additions to the statute without amending it to depart from the agency's view.'[100] Recognizing that the Bureau of Customs is the office charged with implementing and enforcing the provisions of the Tariff and Customs Code, the Court considered that the Bureau's construction of the Code should be given 'controlling weight'.[101] Similarly, in *Nestle Philippines, Inc. v. Court of Appeals*,[102] the Supreme Court upheld the Securities and Exchange Commission's interpretation of a provision in the Revised Securities Act owing to the fact that it is the agency mandated to implement the Act. In both *Asturias* and *Nestle*, the doctrine of judicial respect was applied by considering the agency's technical expertise on matters falling under its jurisdiction as a major factor in interpreting an ambiguous statute. In its own interpretation of the provision in question, the Court accorded the agency's interpretation controlling weight.[103]

A case-by-case analysis, however, would likely lead to a varied application of the doctrine. Less persuasive weight could be accorded to agency interpretation despite the presence of the same factors considered in *Asturias* and *Nestle*. For instance, in

97. ibid, citing 2 Am Jur 2d 69–70.

98. ibid.

99. ibid, citing 2 Am Jur 2d 70, fn 11, para 2.

100. ibid, citing 2 Am Jur 2d 70, fn 11, para 3. See also *Phil Sugar Central Agency v Collector of Customs,* GR No L-27761, 6 December 1927, 51 Phil 131. This case, which was decided during the American occupation of the Philippine Islands, heavily cites American authorities. It states, for example: 'In the case of *Kelly vs. Multnomah County* (18 Ore., 356, 359; 22 Pac., 1110), the Supreme Court of Oregon said: "In all cases where those persons whose duty it is to execute a law have uniformly given it a particularly construction, and that construction has been acquiesced in and acted upon for a long time, it is a contemporary exposition of the statute, which always commands the attention of the courts, and will be followed unless it clearly and manifestly appears to be wrong."'

101. *Asturias* (n 94).

102. GR No 86738, 13 November 1991, 203 SCRA 504.

103. See also *Energy Regulatory Board v Court of Appeals*, GR No 113079, 20 April 2001, 409 Phil 36; *Pest Management Association of the Philippines v Fertilizer and Pesticide Authority*, GR No 156041, 21 February 2007, 545 Phil 258; *GMA Network, Inc v National Telecommunications Commission*, GR No 196112, 26 February 2014, 728 Phil 192; *Eastern Telecommunications Philippines, Inc v International Communication Corp*, GR No 135992, 31 January 2006, 516 Phil 518.

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one of the highly controversial[104] budget cases under then-President Benigno Aquino III, the Supreme Court nullified the budget department's interpretation of the word 'savings' in the General Appropriations Act.[105] The Court disregarded the fact that the budget department itself had drafted the definition of 'savings' which was subsequently adopted by Congress. The definition was also a staple in the annual appropriations law, indicating embedded agency interpretive practice with which Congress had long acquiesced. Under these circumstances, the budget department's interpretation was arguably deserving of judicial respect. The doctrine of judicial respect could, therefore, lead the court to nullify an agency's reasonable interpretation of an ambiguous statute if it is contrary to the court's own interpretation. This is because, under the doctrine, courts are only obliged to accord 'appropriate weight' to an agency's interpretation. The weight accorded can be controlling, or less so, depending on whether the agency's interpretation also coincides with that of the court.

The judicial respect doctrine echoes that of *Skidmore v. Swift & Co.*,[106] a 1944 decision of the US Supreme Court.[107] As decided in *Skidmore*, the reviewing court is instructed to give the agency's interpretation 'weight' based on 'the thoroughness evident in [the agency's] 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.'[108] The judicial respect doctrine is similar to *Skidmore* in three respects. First, both are premised on agency expertise. *Skidmore* proceeds from the idea that interpretations and opinions of agencies, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts may properly resort for guidance.'[109] Second, both require the courts to examine several factors in determining whether the agency's reading of a statute is persuasive.[110] Under such a case-by-case analysis, much discretion is given to the courts in deciding how much 'weight' should be accorded to the agency's interpretation. Third, in the same way

104. The case involves the constitutionality of the government's Disbursement Acceleration Program (DAP), a mechanism invented by the Department of Budget and Management to pool together unspent funds and use them to accelerate other government projects without the approval of Congress. Rumours that the DAP funds were used by the administration to bribe legislators to impeach and oust the then Supreme Court Chief Justice Renato Corona triggered several petitions against the program before the high court.

105. See *Araullo v Aquino*, GR No 209287, 1 July 2014, 737 Phil 457.

106. 323 US 134 (1944).

107. The aforementioned Philippine case of *Asturias* in which the judicial respect doctrine was introduced cites *Skidmore* in one of its footnotes. See *Asturias* (n 94).

108. *Skidmore* (n 106) 140.

109. ibid.

110. See *Nat'l Muffler Dealers Ass'n, Inc v US*, 440 US 472 (1979) 477: 'In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.'

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that under the *Skidmore* approach an agency's interpretation may merit some deference whatever its form, judicial respect applies to all 'formal or informal interpretation or practical construction'.[111] Thus, regardless of the form in which an administrative rule is embodied, and whether a rule has undergone notice-and-comment, Philippine courts are bound to apply the judicial respect doctrine.

While the judicial respect doctrine remains the rule in the Philippines to this date, the US Supreme Court's administrative law jurisprudence has evolved since *Skidmore*.[112] In 1984, the Court in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*[113] pronounced a more deferential standard than that of *Skidmore*. The Supreme Court in *Chevron* held that a court's review of an agency's statutory interpretation proceeds in two steps. If the language of the statute is unambiguous, '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.'[114] But, if the statute is 'silent or ambiguous with respect to the specific issue', the agency's interpretation will be upheld if it is 'based on a permissible construction of the statute', even if it is not the construction that the court, using 'traditional tools of statutory construction', would adopt.[115] Put simply, under the *Chevron* approach, courts must defer to an agency's reasonable interpretation of an ambiguous statute, even if the court were to conclude that the agency's reading of the statute is not the best reading.[116]

Chevron thus introduced two significant changes. First, it eliminated the case-by-case analysis called for under *Skidmore*. Where the two elements are satisfied, *Chevron* requires courts to give controlling deference to the agency's interpretation. Second, *Chevron* deference is premised not merely on agency expertise but on the idea of political accountability.[117] The Court said:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are

111. See *Asturias* (n 94) citing 2 Am Jur 2d 66–67.

112. 'Under the Supreme Court's administrative law jurisprudence, there are now four different strands of deference. The courts are required to employ one of these four standards depending on the type of interpretation the agency invokes. The four strands are: the arbitrary-and-capricious standard, applicable to so-called legislative regulations; the *Chevron* standard, applicable to certain other types of agency interpretations; the *Skidmore* standard, applicable where the agency interpretation is subject to neither the arbitrary-and-capricious standard nor the *Chevron* standard; and the *Auer* standard, applicable where the agency's interpretation, as distinguished from the statute, is ambiguous': Jonathan Blattmachr, Mitchell Gans & Damien Rios, *The Circular 230 Deskbook* (Practising Law Institute 2018), 1-1, 1–2.

113. 467 US 837 (1984).

114. ibid.

115. ibid.

116. *Nat'l Cable & Telecomms Ass'n v Brand X Internet Servs*, 545 US 967 (2005).

117. Blattmachr, Gans & Rios (n 112) 1–4, 1–5.

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> not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'[118]

Because statutory interpretation is deemed the equivalent of law-making, the Court conceded that the function is better served by the politically accountable agencies rather than the courts. This emphasis on political accountability as the basis for judicial deference to agency interpretation has significant practical consequences. Under a theory of expertise, the weight accorded would depend on the consistency of the agency's interpretation, such that any inconsistency may weaken its claim to deference. On the other hand, a theory of political accountability makes it possible for agencies to change their positions about the meaning of a statute without undermining their claim to deference.[119] In *Chevron*, the Court said that '[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'[120] The idea is that agencies respond to (changing) public views and comments received through the notice-and-comment process. Thus, under a theory of political accountability, agencies have more flexibility to change their interpretations over time[121] provided they offer some reasoned explanation for changing their position.[122] Another important consequence of the shift to political accountability theory is that the contemporaneousness of a regulation as a factor for determining how much deference to give to the agency's interpretation becomes irrelevant. In *Smiley v. Citibank*,[123] the Court held that 'neither antiquity nor contemporaneity with the statute is a condition of validity',[124] and that deference is accorded to agencies under *Chevron*:

> not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.[125]

Chevron, however, does not apply to all forms of agency interpretation. The case of *United States v. Mead Corp*.[126] introduced a qualification: *Chevron* deference only applies 'when it appears that Congress delegated authority to the agency generally

118. *Chevron* (n 113) 866.
119. Blattmachr, Gans & Rios (n 112) 1–6.
120. *Chevron* (n 113) 863–864.
121. Blattmachr, Gans & Rios (n 112) 1–6.
122. *Nat'l Cable* (n 116).
123. 517 US 735 (1996).
124. ibid 740.
125. ibid 740–741. In contrast, the Philippine Supreme Court explained that judicial respect for administrative construction is warranted because agencies frequently are the drafters of the law they interpret, and the legislature normally relies on the agencies for advice as to the practical working out of statutes: *Asturias* (n 94). See also in particular n 97.
126. 533 US 218 (2001).

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to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority'.[127] Administrative action is deemed to have the force of law when it is subject to a 'formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force'.[128] In this regard, the APA notice-and-comment procedure is 'designed to assure due deliberation'.[129] Thus, the Court observed, an overwhelming number of cases applying *Chevron* deference involved rules subject to notice-and-comment rulemaking or formal adjudication.[130]

What could explain the evolution of the judicial review standard in the US and the apparent stagnation of its counterpart in the Philippines? This is not an odd question. Given the persuasive influence of American jurisprudence in the Philippine courts' understanding of many constitutional and legal issues[131] – in fact, the Philippine case that adopted the judicial respect standard cites a US case and the American Jurisprudence (Am. Jur.) encyclopaedia as authority[132] – it would not be surprising if the Philippine judiciary followed the same trajectory as US administrative law. But it did not. The judicial review standard applied by the Philippine Supreme Court to this day remains rooted solely in agency expertise.

The lack of a general right to notice-and-comment might explain this. In the Philippines, a theory of political accountability as the basis for a *Chevron*-like standard seems out of place given the missing link between the administrative agencies composed of unelected bureaucrats and the wider public. Recall the earlier remark by a former member of the Philippine Supreme Court: 'Congress never passes truly important legislation without holding public hearings. Yet, administrative officials who are not directly attuned to the public pulse see no need for hearings.'[133]

In contrast, in the US, notice-and-comment rulemaking may be considered the APA's 'most important reform'.[134] It should be acknowledged, however, that while *Skidmore* precedes the APA by two years, it took forty years after *Skidmore* for the US Supreme Court to articulate the doctrine in *Chevron*. Thus, even with notice-and-comment rulemaking already in place, the *Skidmore* doctrine prevailed for four decades. The link between *Chevron* deference and notice-and-comment

127. ibid 226–227.

128. ibid 230. The notice-and-comment procedure 'must be followed when an agency is exercising its legislative function in order that its rules have the force of law': *Texaco* (n 14) 744.

129. ibid. See also *Smiley* (n 123) 741.

130. The Court nevertheless added that the want of a formal procedure does not necessarily preclude the application of *Chevron*. In some cases, the Court found reasons for *Chevron* deference even when no administrative formality was required and none was afforded, eg *Nations Bank of NC, NA v Variable Annuity Life Ins Co*, 513 US 251 (1995).

131. See eg *Estrada v Escritor,* AM No P-02-1651, 4 August 2003, 455 Phil 411, on freedom of religion: 'Torcaso v. Watkins, an American Supreme Court decision, has persuasive weight'; *Chavez v Gonzales*, GR No 168338, 15 February 2008, 569 Phil 155, on freedom of expression: 'As early as the 1920s, the trend as reflected in Philippine and American decisions was to recognize the broadest scope and assure the widest latitude for this constitutional guarantee.'

132. See *Asturias* (n 94) citing *Ahlers v Farmers Mut Ins Co*, 264 NW 894 and 2 Am Jur 2d 66–70.

133. *Philippine Communications Satellite Corporation* (n 44).

134. Kathryn E Kovacs, 'Superstatute Theory and Administrative Common Law' (2015) 90 Indiana Law Journal 1207, 1232.

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rulemaking therefore appears tenuous. In fact, it took years after *Chevron* for the Court to explicitly require *Chevron* deference for administrative rules promulgated through notice-and-comment procedures. Nevertheless, an argument can be made that notice-and-comment played a role in the rethinking of the assumptions on which *Skidmore* was premised, and it at least added justification for the development of a more deferential doctrine which was finally articulated in *Chevron*.

C. *Statutory Creation of Public Norms*

Within US administrative law, agencies have proved to be 'an important situs for the expression and testing of public norms'.[135] William Eskridge and John Ferejohn's theory of 'super-statutes' points to the unique role played by agencies in the creation of laws that are able to 'penetrate public normative and institutional culture in a deep way'.[136] It highlights the importance of deliberation about the meaning of the law at the level of the implementing agency. According to the theory, a super-statute is:

> a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law —including an effect beyond the four corners of the statute.[137]

Super-statutes are normally passed following long periods of normative debate about important social or economic issues, and demonstrate their effectiveness as a solution, standard, or norm over time.[138] They prevail over ordinary laws in case of conflict and, more importantly, they 'can reshape constitutional understandings'.[139]

What is essential to emphasize for our purposes is that super-statutes are supposedly legitimated by public feedback that allows the entrenchment of statutory norms into our normative consciousness.[140] This is where a system of notice-and-comment rulemaking that allows for a dynamic public deliberation would prove crucial. As explained by Eskridge and Ferejohn, super-statutes are not solely established by the public attention they generated, or the length of time they were in place.[141] In addition to the substantive requirements that super-statutes must 'alter substantially the then-existing regulatory baselines with a new principle or policy' that '"sticks" in the public culture in a deep way', an important 'procedural marker' for super-statutes is that 'they are generated in a reflective and deliberative manner over a long period of time'.[142]

135. William Eskridge Jr & Kevin Schwartz, 'Chevron and Agency Norm-Entrepreneurship' (2006) 115 Yale Law Journal 2623, 2624.
136. William Eskridge Jr & John Ferejohn, 'Super-Statutes' (2001) 50 Duke Law Journal 1215, 1215.
137. ibid 1216.
138. ibid.
139. ibid.
140. ibid 1217.
141. ibid 1230.
142. ibid 1230–1231.

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A statute that meets these criteria is considered a super-statute that must be interpreted 'liberally and in a common law way'.[143] Thus, words are to be construed 'broadly and evolutively'.[144] Moreover, since agencies are the situs where a super-statute is developed most productively, deference to agency interpretation is deemed appropriate.[145] At this juncture, it is worth noting that the super-statute theory is consistent with the political accountability theory underlying *Chevron*, in the sense that both emphasize the importance of the deliberative process over the meaning of a statute as a justification for judicial deference to agency interpretation. In *Chevron*, the Court acknowledged that, as opposed to federal judges who have no constituency, politically accountable agencies are better suited for assessing the wisdom of policy choices and resolving the struggle between competing views of the public interest.[146] Indeed, '*Chevron* properly recognizes that executive agencies have an important role to play in developing public norms.'[147] In the same manner, super-statute theory considers as particularly compelling the contribution of legislators and agencies to the fundamental normative debate associated with constitutionalism, 'because of their greater connection to "We the People" than judges enjoy'.[148] As enforcers of statutes, agencies become the 'indispensable forum' through which foundational principles are deliberated on by experts and the public.[149]

This crucial link between public deliberation and judicial deference leads one to ask – can a statute nevertheless become a super-statute in the absence of public deliberation at the level of the implementing agency? Kathryn Kovacs argues that it can, citing the APA as an example. According to Kovacs, the APA 'bears all the hallmarks'[150] of a super-statute: it emerged from a long period of deliberation,[151] it altered regulatory baselines,[152] and it has passed the test of time.[153] However, unlike the 'typical' super-statute, the APA is not administered by a single agency. This means that courts, not agencies, are the primary interpreters of the APA. Consequently, since courts do not engage in the civic-republican style of deliberation espoused by Eskridge and Ferejohn's theory, Kovacs posits that the APA does not command the same dynamic and evolutive interpretation that a typical super-statute does. Rather, she proposes that courts must 'adhere more closely to the compromises encoded in the statute's text, paying particular attention to the context and history of each individual provision'.[154]

This line of reasoning leads one to wonder whether any existing Philippine legislation can be appropriately considered a 'typical' super-statute in the sense described by

143. ibid 1247.
144. ibid 1249.
145. ibid 1252.
146. *Chevron* (n 113) 866.
147. Eskridge & Schwartz (n 135) 2632.
148. Eskridge & Ferejohn (n 136) 1266.
149. Eskridge & Schwartz (n 135) 2624.
150. Kovacs (n 134) 1207.
151. ibid 1224.
152. ibid 1227.
153. ibid 1234.
154. ibid 1207.

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Eskridge and Ferejohn, given the missing element of active public deliberation at the level of the implementing agency. Since the super-statute theory is premised on a 'civic-republican model of deliberation that necessitates public involvement in legal change',[155] the paucity of feedback from public deliberation under the current system arguably stunts the potential of an ordinary statute to become a super-statute. As Eskridge and Ferejohn observe, '[t]he key to super-statutedom is acceptance in public culture', which can neither be mandated nor earned, but can only result from a process of trial-and-error.[156]

To explore this point, I discuss below a recent Philippine statute that implements a constitutional policy and embodies a widely accepted principle, but whose potential to become a super-statute may be hampered by the absence of the crucial element of a civic-republican type of public deliberation.

1. *Republic Act 10667 or the Philippine Competition Act of 2015*

The PCA is the Philippine version of the US *Sherman Anti-trust Act of 1890* (Sherman Act),[157] the 'classic super-statute'[158] that fits nicely into Eskridge and Ferejohn's theory. The 'great principle' embodied in the Sherman Act – free market competition – is considered to have already 'penetrated American law and society in a pervasive way'.[159] This is mainly attributed to the feedback loop enabled by the dialogue among judges, executive branch officials, lawyers, economists, and legislators, which allowed the statute to become deeply rooted in American public law.[160] As a result, the Sherman Act has been generally applied in a purposive and dynamic way;[161] has a colonizing effect on other statutes;[162] and has exercised a gravitational pull on constitutional law, as the US Supreme Court's theories articulated in Sherman Act-related cases became the foundational ideas on which the New Deal Court based its liberalization of the Commerce Clause.[163]

Can the PCA achieve the same status? I now turn briefly to the law's history, provisions, and public reception to assess its potential for super-statutedom.

(a) *Emerged from a long period of deliberation*: Prior to 2015, the Philippines did not have a comprehensive competition law. Provisions dealing with certain aspects of competition could be found in disparate legislation and were implemented by different governmental bodies.[164] During the Spanish occupation, monopolies and combinations in restraint of trade were penalized under the *Spanish Penal Code of 1870*.[165]

155. ibid 1210.
156. Eskridge & Ferejohn (n 136) 1230.
157. 1890 Sherman Anti-Trust Act.
158. Eskridge & Ferejohn (n 136) 1231.
159. ibid 1232.
160. ibid.
161. ibid 1234.
162. ibid 1235.
163. ibid 1236–1237.
164. Tristan Catindig, 'The ASEAN Competition Law Project: The Philippines Report' (31 Mar 2001) <https://www.jftc.go.jp/eacpf/02/philippines_r.pdf> accessed 23 Mar 2020.
165. ibid.

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Under American rule, the Penal Code was supplemented by *Act No. 3247 of 1925*, which was patterned after the US Sherman Act.[166] This was subsequently superseded by article 186 of the *Revised Penal Code*, which until 2015 was the law applicable to monopolies and combinations in restraint of trade.[167]

The law, however, had not been an effective deterrent against such anti-competitive practices, as evidenced by the lack of decided cases under the anti-trust provision.[168] Part of the reasons that contributed to ineffective enforcement was the absence of an independent competition body to implement the law.[169] Even after the anti-trust principle was constitutionalized,[170] there are only a few cases where the Supreme Court spoke on the subject of competition (although the constitutional provision has been successfully used to invalidate a law[171]). The lack of a comprehensive competition law resulted in weak competition, high market concentration in key sectors, and widespread collusion and bid rigging in government procurement, which explain the limited growth and productivity of the Philippine economy.[172] The need for a comprehensive competition law was eventually realized, but the first attempt by the Eighth Congress in the late 1980s to pass a competition law failed due to opposition from big businesses.[173] A similar move in the early 1990s suffered the same fate.[174] Following the 1998 elections, which brought in the 11th Congress, a number of bills dealing with different aspects of competition were filed (six at the House of Representatives and three at the Senate), but none went beyond first reading[175] or were reported out by the relevant committees.[176] The 15th Congress following the 2010 elections had shown more progress as the consolidated bill of the House and the Senate was able to reach its third reading. Yet again, the bill failed to pass into law before the Congress adjourned.[177]

166. ibid.
167. ibid.
168. ibid.
169. Mel Marquis, 'Competition Law in the Philippines: economic, legal, and institutional context' (2017) 6 Journal of Antitrust Enforcement 79, 98.
170. The 1973 and 1987 Constitutions similarly provide that the State shall regulate or prohibit monopolies when the public interest so requires and that no combinations in restraint of trade and unfair competition shall be allowed. See 1973 Constitution, art XIV, s 2, and 1987 Constitution, art XII, s 19.
171. See *Tatad v Secretary of the Department of Energy,* GR No 124360, 5 November 1997, 347 Phil 1, where the Supreme Court declared the Downstream Oil Industry Deregulation Act of 1996 unconstitutional for imposing substantial barriers to the entry of new players.
172. United Nations Conference on Trade and Development (UNCTAD), 'Voluntary Peer Review of Competition Law and Policy: Philippines Full Report' (2014), 5 <http://unctad.org/en/PublicationsLibrary/ditcclp2014d1_en.pdf> accessed 23 Mar 2020.
173. Marquis (n 169) 99.
174. UNCTAD (n 172) 6. The then President Fidel Ramos was reported to have repeatedly urged Congress to pass an antitrust law in line with his policy to liberalize the economy. See Rappler, '#AnimatED: Finally, an antitrust law' (Rappler, 15 Jun 2015) <https://www.rappler.com/views/animated/96355-antitrust-law-philippines> accessed 23 Mar 2019.
175. Bills must undergo three readings before passing into law: 1987 Constitution, art VI, s 26.
176. See Catindig (n 164).
177. UNCTAD (n 172) 6.

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A major impetus for the adoption of a comprehensive competition law came during the term of the 16th Congress (following the 2013 elections), when the formalization of the Association of Southeast Asian Nations (ASEAN) Economic Community generated some political will from both the Executive and the Legislature to pass the competition bill.[178] At that time, the Philippines was the only one of the five ASEAN founding members to have no comprehensive competition law. Finally, in 2015, Congress passed the PCA, which created the Philippine Competition Commission (PCC), the first agency charged with implementing the country's competition law and policy.

Thus, it took the Philippines twenty years to enact a comprehensive competition law. The PCA is a response to the call for a more effective competition regime, following significant empirical studies showing that anti-competitive practices had a detrimental impact on the economy. With prior competition bills having been consistently opposed by big businesses for decades, it took a confluence of factors – the political commitment of the then President Benigno Aquino III to promulgate a comprehensive competition law,[179] widespread support from the business and academic community and key members of the Legislature, and the Philippines' commitment under the ASEAN Economic Community Blueprint to adopt a competition policy – to pass the bill into law.[180] The PCA is thus a landmark legislation that, having emerged from a long period of deliberation, arguably meets the first requisite of a super-statute.

(b) *Altered regulatory baselines*: The PCA implements the constitutional provision mandating the State to 'regulate or prohibit monopolies when the public interest so requires' and operationalizes the constitutional prohibition against 'combinations in restraint of trade' and 'unfair competition'.[181] Despite the existence of the concepts of monopolies, combinations in restraint of trade, and unfair competition since the 1973 Constitution, it was the PCA that defined the contours of these concepts for the first time.

The PCA was hailed as an historic, game-changing legislation.[182] It is game-changing because, for the first time, mergers and acquisitions must now be notified to a competition authority and undergo a rigorous review for the purpose of determining whether they substantially lessen competition in the relevant market; some common practices of entities having market power which were previously not actionable can now be considered an abuse of dominance and thus illegal; and price-fixing and bid-rigging are now prohibited per se. Moreover, the PCA has created an independent competition body with broad powers that go beyond the typical subpoena and contempt powers common to quasi-judicial agencies, such as the power to issue injunctions and to require divestment, disgorgement of profits, or corporate

178. Marquis (n 169) 99.
179. UNCTAD (n 172) 6.
180. ibid.
181. 1987 Constitution, art XII, s 19.
182. Janina Lim, 'How the PCC is regulating a changing game' *Business World* (26 Jul 2018) <https://www.bworldonline.com/how-the-pcc-is-regulating-a-changing-game/> accessed 23 Mar 2020.

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reorganization. The PCC can also impose behavioural conditions on firms and structural remedies on transactions, in addition to hefty fines – powers that can be disruptive and intrusive and, if applied correctly, may have the potential to bring significant changes to the competition landscape. However, if abused, these powers might undermine fundamental private rights to contract, property, and privacy. The PCA likewise gives the PCC the power to conduct inspections of business premises, known in competition law parlance as a 'dawn raid'. While the law requires a court order prior to inspection, the quantum of evidence required to be met is arguably a lower threshold than that normally required for search and seizure in criminal cases.[183] Further, the PCA adopts the principle of competitive neutrality by subjecting State-owned enterprises to the same prohibition against acts and conduct that unduly restrain competition.[184] Complementing this provision is the power of the PCC to advocate pro-competitive policies of the government by reviewing economic and administrative regulations that may adversely affect relevant market competition, and by advising the Executive branch on the competitive implications of government actions, policies, and programmes.[185] This is an important innovation of the law which implements the *1987 Constitution of the Republic of the Philippines*' anti-trust mandate. The PCA has therefore altered the regulatory baselines by introducing new rules to govern the conduct and behaviour of individuals and entities, including the State. The PCA thus meets the second requisite of a super-statute.

(c) *Not yet entrenched*: It remains to be seen whether the principle of market competition will become entrenched in Philippine society. Significant business resistance to the new competition regime still exists.[186] Apart from consultation with the Department of Justice's Office for Competition and concerned sector regulators, the PCA does not prescribe public participation in the exercise of the PCC's rulemaking powers. The PCC may, of course, choose to conduct public consultations pursuant to the PAC whenever it deems practicable. In fact, the PCC did hold public consultations on its draft implementing rules as well as its merger and enforcement procedures.[187]

183. Republic Act 10667, s 12.

184. ibid s 3.

185. ibid s 12.

186. Within the first year of its operation, the PCC found itself in a legal battle against the country's telecommunications duopoly. The controversy arose from a multi-billion-peso transaction whereby the duopoly sought to evade, through court injunction, the PCC's review of its joint acquisition of a potential third player by invoking a technicality in the PCC's memorandum circular which allegedly exempted the transaction from review. The Court of Appeals, disregarding the PCC's interpretation of its own rules, issued an injunction preventing the PCC from performing its statutory mandate to prohibit or impose remedies on a potentially anticompetitive transaction. See Chrisee Dela Paz, 'PCC takes buyout battle with telcos to Supreme Court' (Rappler, 19 Apr 2017) <https://www.rappler.com/business/167331-philippine-competition-commission-supreme-court-review-san-miguel-telco-buyout-pldt-globe> accessed 23 Mar 2020. This decision did not sit well with the public and was largely seen as a serious setback in the government's push for more competition in the telecommunications market. See Chrisee Dela Paz, 'San Miguel's sale of telco business: Will consumers benefit?' (Rappler, 31 May 2016) <https://www.rappler.com/business/industries/172-telecommunications-media/134809-impact-pldt-globe-acquisition-smc> accessed 23 Mar 2020.

187. Philippine Competition Commission, 'PCC issues draft IRR for Competition Law; welcomes public comments' (Press release, Philippine Competition Commission, 10 May 2016) <https://phcc.gov.ph/press-releases/pcc-issues-draft-irr-competition-law-welcomes-public-comments/> accessed 23 Mar 2020.

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This is a good start. Given the novelty of the PCA, the lack of judicial standards on the interpretation of the law, and the concomitant intrusiveness of the PCC's powers, a feedback loop would be a good mechanism to check the PCC's potential abuse of its discretion. Public consultations will also address significant challenges to the PCC's mandate and help foster a strong competition culture. Unlike other regulatory agencies, the PCC relies in large part on the active support and cooperation of the public for the effective performance of its mandate.

Subject to continued public deliberation on the law, the PCA can potentially become a super-statute. Otherwise, it may just end up as a 'quasi-superstatute', that is, 'a statute that aspires but fails to become a superstatute through a failure of political and public entrenchment'.[188] Plainly, the Philippine framework does not create a conducive environment for the statutory creation of broader public norms that 'stick' in the public culture in a deep way.

III. CONCLUSION

Notice-and-comment in the US is said to be a reflection of the '"explicit embracing" of administrative decision-making as a "deliberative-constitutive" process, in which answers to complex socio-political disputes are best found through participatory processes, rather than through a search for objective, scientific data.'[189] William Eskridge and Kevin Schwartz call this process 'administrative norm-entrepreneurship', which they consider as 'potentially more democratically accountable than judicial value elaboration'.[190] US courts rigorously enforce agency compliance with the procedural requirements for notice-and-comment, such as the timing of the notice, the adequacy of the information given, and the factual and scientific basis of the proposed rule.[191] This is in sharp contrast with the situation in the Philippines as described above, where the default rule is that the conduct of notice-and-comment is left to the agency's discretion. Viewed in isolation, the Philippine case does not appear to pose many concerns; juxtaposed against the US framework, however, several conclusions can be drawn.

First, the efficacy of procedural challenges to administrative rules is more limited under the Philippine framework. Administrative agencies should ideally provide a more accessible forum for ordinary citizens to participate in the crafting of policies that will ultimately affect them. But when an agency, for no reason other than expediency, chooses to skip the notice-and-comment process, these citizens are deprived of a relatively more straightforward and less costly mechanism to ensure that policies taken are attuned to their needs. And because there is generally no actionable right to notice-and-comment, dissatisfied citizens are left with more complicated and

188. Erin Brown, 'Developing a Durable Right to Health Care' (2013) 14 Minnesota Journal of Law, Science & Technology 439.
189. Donnelly (n 12) 371.
190. Eskridge & Schwartz (n 135) 2626.
191. Donnelly (n 12) 372–373.

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often protracted options – a substantive challenge before the courts or recourse to the political departments.

Second, the case-by-case, *Skidmore*-style determination of the persuasiveness of the agency's reading of a statute may not always be appropriate. Such methodology may lead to the nullification of even reasonable agency interpretations. Yet, it is hard to justify – indeed, it may not even be desirable to adopt – a more deferential, *Chevron*-like standard of judicial review of agency statutory interpretation under the Philippine framework. In the absence of a strong notice-and-comment regime, a theory of political accountability as the basis for more deference to agency interpretation seems out of place because of the missing interaction between the agencies and the public – the rationale behind allowing agencies to change their positions over time as they purportedly respond to public input. Understandably, Philippine courts can only rely on a theory of agency expertise as justification for according weight to agency interpretation. However, as Rose-Ackerman has noted, 'even given a fairly clear mandate, experts may disagree on the best course of action' and 'those with technical knowledge cannot be sure that their judgments accord with public values and preferences'.[192]

Third, the Philippine framework inhibits the statutory creation of public norms. Without a robust notice-and-comment rulemaking process, there is less chance of generating public feedback as legislated norms evolve.[193] Super-statutes are therefore less likely to develop, depriving Philippine society of 'an increasingly important source', beyond judicial articulations of the Constitution, of fundamental rights and public values.[194]

Given the significance of these implications, Philippine judges and policymakers should start to seriously consider a re-examination of the prevailing framework. The Philippine Supreme Court should revisit its long-standing doctrine that limits public participation to administrative rulemaking conducted through quasi-judicial proceedings, and adopt a doctrine that is more consistent with the PAC. Congress should re-assess the default rule and, to prevent the abuse of agency discretion, consider requiring agencies to provide reasons for omitting the consultation process, subject to review by the courts. More importantly, agencies should start to appreciate their key role in the national discourse about fundamental values, and allow the public to meaningfully exercise their right to participate in the making of the rules that will ultimately affect them.

Certainly, there are attendant costs to enforcing a strong notice-and-comment regime. Making notice-and-comment mandatory inevitably means additional expenses for the agency, not to mention delays in issuing regulations. In a developing country such as the Philippines where resources are scarce, these are valid concerns. Moreover, where a strong culture of public participation is lacking, the consultation process might end up being dominated by a few interest groups, rendering the agency vulnerable to regulatory capture. Low levels of public confidence in democratic

192. Rose-Ackerman (n 5) 252.
193. Eskridge & Schwartz (n 135) 2623.
194. ibid 2624.

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institutions in general might also discourage people from participating. Important questions such as which segment of the public should be allowed to participate, at what stage and in what manner, as well as what type of rules should be submitted for consultations, also need to be resolved in order to make the consultations productive and more meaningful. Otherwise, notice-and comment would just be another layer of useless bureaucratic red tape. These issues have long been relegated to the backburner. But solutions to perceived difficulties cannot be found unless we start the conversation. Thus, despite the apparent practical drawbacks of a mandatory notice-and-comment regime, it is worthwhile for all stakeholders to think about what the Philippines could have been missing out, and whether the gains outweigh the costs. Hopefully, other jurisdictions with similar legal architectures that are grappling with similar issues can also find the lessons derived from this comparative analysis useful.

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