ISAE v. Quisumbing: Drawing Lines Where There Are None

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I. INTRODUCTION

The First Division[1] of the Supreme Court, in *International School Alliance of Educators v. Hon. Leonardo A. Quisumbing, in his capacity as the Secretary of Labor and Employment, et al.*,[2] reversed the orders of public respondents insofar as "they uphold the practice of respondent [International School of Manila, Inc.] of according foreign-hires higher salaries than local-hires."[3]

In brief, the Collective Bargaining Agreement (CBA) between the International School of Manila, Inc. (ISM) and petitioner labor-union (ISAE) stipulated that so-called "foreign-hires" would be paid salaries higher than the "local-hires." The Supreme Court struck down this provision of the CBA, mainly on the strength of the principle of "equal pay for equal work."

The author submits that the Court should have stopped there.

Unfortunately, the Court's opinion proceeded to dabble in international law and other provisions of municipal law. This comment analyzes the Court's reliance on what the decision tried to pass-off as authority, which, however, to the author's mind, are not self-executory. The author asserts that I focus and reasoning were far from sharp and lays out the questions which logically arise therefrom.

Truth be told, the author had occasion to represent private respondent in *ISAE*. Thus, in this comment, the author shall not engage in advocacy, but shall attempt an academic, dispassionate scrutiny of the subject at hand.

II. THE FACTS OF THE CASE

Private respondent ISM, pursuant to Presidential Decree No. 732[4], is a domestic educational institution established primarily for dependents of foreign diplomatic personnel and other temporary residents. The decree[5] authorized the School to:

> [E]mploy its own teaching and management personnel selected by it either locally or abroad, from Philippine or other nationalities, *such personnel being exempt from otherwise applicable laws and regulations attending their employment, except laws that have been or will be enacted for the protection of employees.*[6]

ISM's faculty was classified into two: (1) foreign-hires; and (2) local-hires. The School employed four tests to determine whether a faculty member would be classified as a foreign-hire or a local hire:

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1. The First Division is composed of Chief Justice Davide and Justices Kapunan, Puno, Pardo, and Ynares-Santiago.
2. 333 SCRA 13 (2000).
3. Justice Kapunan was the *ponente* with Justices Puno and Pardo concurring. Chief Justice Davide and Justice Ynares-Santiago were on leave.
4. Authorizing International School, Inc. to Donate Its Real Properties to the Government Of The Republic of the Philippines and Granting it Certain Rights, Presidential Decree No. 732 (1975).
5. Authorizing International School Inc. to Donate its Real Properties to the Government of the Republic of the Philippines and Granting it Certain Rights, P.D. 732.
6. *Id.* § 2(c) (emphasis supplied).

a. What is one's domicile?

b. Where is one's home economy?

c. To which country does one owe economic allegiance?

d. Was the individual hired abroad specifically to work in the School and was the School responsible for bringing that individual to the Philippines?

As the Court noted, "[s]hould the answer to any of these queries point to the Philippines, the faculty member [was] classified as a local hire; otherwise, he or she [was] deemed a foreign-hire."[7]

The distinction between the classes of faculty members translated into two pecuniary differences in favor of foreign-hires: first, a 25% salary differential; and second, benefits such as housing, transportation, shipping costs, taxes, and home leave travel allowance. The School justified these on two "significant economic disadvantages" foreign-hires had to endure, namely: (a) the "dislocation factor;" and (b) limited tenure/employment with a fixed term, *viz*:

> A foreign-hire would necessarily have to uproot himself from his home country, leave his family and friends, and take the risk of deviating from a promising career path — all for the purpose of pursuing his profession as an educator, but this time in a foreign land. The new foreign hire is faced with economic realities: decent abode for oneself and/or for one's family, effective means of transportation, allowance for the education of one's children, adequate insurance against illness and death, and of course the primary benefit of a basic salary/retirement compensation.
>
> Because of a limited tenure, the foreign hire is confronted again with the same economic reality after his term: that he will eventually and inevitably return to his home country where he will have to confront the uncertainty of obtaining suitable employment after a long period in a foreign land.
>
> The compensation scheme is simply the School's adaptive measure to remain competitive on an international level in terms of attracting competent professionals in the field of international education.[8]

When negotiations for a new CBA commenced in June 1995, petitioner ISAE contested the salary differential and asserted that ISAE should be declared the appropriate bargaining unit for both the local- and foreign-hires. Upon reaching a bargaining deadlock, ISAE filed a notice of strike, and after efforts at mediation proved fruitless, the Department of Labor and Employment (DOLE) assumed jurisdiction over the dispute.

7. *ISAE*, 333 SCRA at 16.

8. *Id.* at 16-17.

On 10 June 1996, then DOLE Acting Secretary, Cresenciano B. Trajano, issued an Order resolving the parity and representation issues in favor of ISM. Then DOLE Secretary Leonardo A. Quisumbing subsequently denied ISAE's motion for reconsideration in an Order dated 19 March 1997.

Acting Secretary Trajano upheld the point-of-hire classification for the distinction in salary rates, as follows:

> The principle "equal pay for equal work" does not find application in the present case. The international character of the School requires the hiring of foreign personnel to deal with different nationalities and different cultures, among the student population.
>
> We also take cognizance of the existence of a system of salaries and benefits accorded to foreign hired personnel which system is universally recognized. We agree that certain amenities have to be provided to these people in order to entice them to render their services in the Philippines and in the process remain competitive in the international market.[9]

In sum, Acting Secretary Trajano considered the following as a substantial distinction between the foreign- and local-hires so as to find no breach of the equal protection clause: on one hand, the foreign-hires had no security of tenure, no amenities of their own in the Philippines, and had to be extended an attractive compensation package to entice them to join ISM's faculty; while on the other hand, the local-hires enjoyed security of tenure.

In like manner, Acting Secretary Trajano pointed to a provision of the just-expired 1992 – 1995 CBA, which demonstrated "the parties' recognition of the difference in the status of two types of employees, hence, the difference in their salaries."

Finally, Acting Secretary Trajano found that racial discrimination was not an issue, for ISM had hired 38 non-Filipinos as local-hires, who received the same benefits as the Filipino local-hires.

Before the Supreme Court, petitioner ISAE, in a special civil action for *certiorari*, asserted that the point-of-hire classification employed by ISM discriminated against Filipinos, *i.e.*, the grant of higher salaries to foreign-hires constituted racial discrimination, and expressly prayed in its petition that the Court direct ISAE "to upgrade the salaries and benefits paid the locally-hired faculty by paying the same wages and benefits it pays its foreign-hired faculty starting July 1, 1995, the date of effectivity of the new CBA...."

9. *Id.* at 18.

In granting the petition in part,[10] the dispositive portion of the Court's decision stated:

> WHEREFORE, the petition is GIVEN DUE COURSE. The petition is hereby GRANTED IN PART. The Orders of the Secretary of Labor and Employment dated June 10, 1996 and March 19, 1997, are hereby REVERSED and SET ASIDE insofar as they uphold the practice of respondent School of according foreign-hires higher salaries than local-hires.[11]

III. The Opinion of the Court in ISAE

The author emphasizes the distinction between the dispositive portion of a decision and the opinion of the court rendering such decision:

> The dispositive or decretal portion or the *fallo* is what actually constitutes the judgment or resolution of the court and which can be the subject of execution, although the other parts of the decision may be resorted to in order to determine the *ratio decidendi* for such judgment or resolution. The judgment of the court is to be found in the dispositive part of the decision. The judgment must be distinguished from the opinion of the court...[12]

That having been said and the dispositive portion of *ISAE* having been reproduced above, the Court's opinion in *ISAE* as to the invalidity of the salary differential may be divided into two parts: first, flowing from ISM's failure to discharge its evidentiary burden that there was a work load and/or efficiency difference between the local- and foreign-hires, then the principle of "equal pay for work of equal value" controlled; and second, reliance on provisions of international and municipal law, purportedly showing how a definite legal standard is extant in this jurisdiction whose muster the salary differential could not pass.

A. *Equal Pay for Equal Work*

To lay the premises for the applicability of the principle of "equal pay for work of equal value," in general, the Court noted Article XIII, Section 3 of the Constitution, directing the State to promote "equality of employment opportunities for all," and Article 3 of the Labor Code, providing that the State should "ensure equal work opportunities regardless of sex, race or creed." Pursuant to such mandates, the Court declared that it could not close

10. The Court denied the petition insofar as ISAE prayed that the local- and foreign-hires be deemed to belong to the same bargaining unit.

11. *ISAE*, 333 SCRA at 26.

12. 1 Florenz D. Regalado, Remedial Law Compendium 364 (6d ed. 1997).

"its eyes to unequal and discriminatory terms and conditions of employment."

Specifically as regards wage discrimination, the Court initially pointed to the prohibition against gender-based wage discrimination set forth in Article 135 of the Labor Code, while Article 248 thereof proscribed an employer's use of wage-discrimination "in order to encourage or discourage membership in any labor organization." Then, coupled with Article 7 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[13] mandating States Parties to recognize the right of everyone to "[f]air wages and equal remuneration for work of equal value without distinction of any kind," the Court declared:

> The foregoing provisions impregnably institutionalize in this jurisdiction the long honored legal truism of "equal pay for equal work." Persons who work with substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries. This rule applies to the School, its "international character" notwithstanding.[14]

A vital portion of the Court's ruling is as follows:

> The School contends that petitioner has not adduced evidence that local-hires perform work equal to that of foreign-hires. The Court finds this argument a little cavalier. If an employer accords employees the same position and rank, the presumption is that these employees perform equal work. This presumption is borne by logic and human experience. If the employer pays one employee less than the rest, it is not for that employee to explain why he receives less or why the others receive more. That would be adding insult to injury. The employer has discriminated against that employee; it is for the employer to explain why the employee is treated unfairly.
>
> The employer in this case has failed to discharge this burden. There is no evidence here that foreign-hires perform 25% more efficiently or effectively than the local-hires. Both groups have similar functions and responsibilities, which they perform under similar working conditions.[15]

Reiterating the definition of "salary" as "a reward or recompense for services performed" or the "consideration paid at regular intervals for the rendering of services,"[16] the Court thus saw no nexus between the salary differential and "the need to entice foreign-hires to leave their domicile," as "[t]he dislocation factor and limited tenure affecting foreign-hires are

13. G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

14. *ISAE*, 333 SCRA at 22 - 23.

15. *Id.* at 23 (emphasis supplied).

16. *Id.* at 23-24 (citations omitted).

adequately compensated by certain benefits accorded them which are not enjoyed by local-hires, such as housing, transportation, shipping costs, taxes, and home leave travel allowances." The Court categorically ruled:

> While we recognize the need of the School to attract foreign-hires, salaries should not be used as an enticement to the prejudice of local-hires. The local-hires perform the same services as foreign-hires and they ought to be paid the same salaries as the latter. xxx[17]

Parenthetically, while the Court's mention of the employer having failed to discharge its evidentiary burden could allow for room to argue that the Court's opinion merely constituted law of the case, it seems more likely that the Court, through the phrase "salaries should not be used as an enticement to the prejudice of local-hires," coupled with the repeated mention of the "equal pay for equal work" principle, intended to lay down a hard and fast rule that would constitute *res judicata.*

In concluding, the Court implied that the equal protection clause had been breached, holding:

> In this case, we find the point-of-hire classification employed by respondent School to justify the distinction in the salary rates of foreign-hires and local hires to be an invalid classification. There is no reasonable distinction between the services rendered by foreign-hires and local-hires. The practice of the School of according higher salaries to foreign-hires contravenes public policy and, certainly, does not deserve the sympathy of this Court.[18]

The Court's opinion may thus far be summarized, to wit:

1) The principle of "equal pay for equal work" applies as an actionable norm in this jurisdiction;

2) The employer, ISM, failed to adduce evidence that foreign-hires performed 25% more work, or performed the same work 25% more efficiently or effectively, than local-hires;

3) Thus, the same salary should be paid as the evidence on record showed that the foreign- and local-hires rendered the same services, *i.e.*, there was no reasonable distinction to justify the salary differential.

As regards striking down the salary differential on the basis of ISM failing to discharge its evidentiary burden, thus calling for application of the principle of "equal pay for equal work," the author finds the Court's reasoning more or less understandable. Concretely, the author perceives the constraint under which the Court labored, namely, the principle of "equal

17. *Id.* at 24.

18. *Id.* at 25.

pay for equal work" or the prohibition against wage discrimination exists, directly or indirectly, as a statutory norm only in three instances, *i.e.*, as a retaliatory measure against any employee who has filed any complaint or in connection with the employee's testimony,[19] as a form of discrimination against a woman on account of her gender,[20] and as a form of unfair labor practice in order to encourage or discourage membership in any labor organization.[21]

However, the Court's total omission of a discussion on how the limited tenure of foreign-hires could have validly justified the salary differential is disconcerting. The author agrees with the Court in that the "dislocation factor" and the need to attract foreign-hires should have been properly addressed through the benefits not afforded local-hires, such as "housing, transportation, shipping costs, taxes and home leave travel allowances." Yet, the Court's opinion leaves much to be desired, neglecting, as it did, to explain why Acting Secretary Trajano's finding, that the fixed term employment of foreign-hires served as a valid distinction, was tainted with grave abuse of discretion. This prompts the raising of the following questions:

Was it simply a matter of assigning another designation to the salary differential? Could ISM still have granted the foreign-hires the value of the 25% salary differential, but termed it as a "signing bonus?" Did the Court imply that managerial prerogatives are now limited such that, even absent bad faith or an intent to circumvent the law, fixed-term employees must receive the same salary as regular or tenured employees, and that anything of pecuniary value given by the employer to a fixed-term employee to compensate for the latter's lack of regular employment must not be designated as a "salary?" Are not the three specific statutory prohibitions against wage discrimination exclusive in character?

The implications of the Court's omission *vis-à-vis* that portion of Section 2(c) of P.D. No. 732, that is, ISM's personnel being exempt from otherwise applicable laws and regulations attending their employment, except *laws* that have been or will be enacted for the protection of employees shall be discussed later in this comment.

B. *The Court's Obiter Dicta in ISAE*

The questions posed earlier need not detain the author any longer, as it is the Court's reliance on non-self-executory provisions of law that this comment seeks to analyze. Aside from aforementioned Articles 135 and 248 of the

19. *Id.* art. 118.

20. *Id.* art. 135.

21. *Id.* art. 248(e).

Labor Code and Article 7 of the ICESCR, the Court invoked the following legal provisions, as such:[22]

> That public policy abhors inequality and discrimination is beyond contention. Our Constitution and laws reflect the policy against these evils. The Constitution[23] in the Article on Social Justice and Human Rights exhorts Congress to "give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities." The very broad Article 19 of the Civil Code requires every person, "in the exercise of his rights and in the performance of his duties, [to] act with justice, give everyone his due, and observe honesty and good faith."
>
> International law, which springs from general principles of law,[24] likewise proscribes discrimination. General principles of law include principles of equity,[25] *i.e.*, the general principles of fairness and justice, based on the test of what is reasonable.[26] The Universal Declaration of Human Rights,[27] the International Covenant on Economic, Social and Cultural Rights,[28] the International Convention on the Elimination of All Forms of Racial Discrimination,[29] the Convention against Discrimination in Education,[30]

22. *ISAE*, 333 SCRA at 19-21, 24.
23. *Referring to* PHIL. CONST. art. XIII, § 1.
24. *Citing* Statute of the International Court of Justice, art. 38.
25. *Citing* MIRIAM DEFENSOR-SANTIAGO, INTERNATIONAL LAW 75 (1999), citing Judge Hudson in River Meuse Case, (1937) Ser. A/B No. 70.
26. *Citing* Ibid., citing Rann of Kutch Arbitration (India vs. Pakistan), 50 ILR 2 (1968).
27. *Citing* Adopted by the General Assembly of the United Nations on December 10, 1948. Article 1 thereof states: "All human beings are born free and equal in dignity and rights." Article 2 provides, "1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
28. *Citing* Adopted by the General Assembly of the United Nations in Resolution 2200 (XXI) of 16 December 1966. Article 2 provides: "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
29. *Citing* Adopted by the General Assembly of the United Nations in Resolution 2106 (XX) Dec. 21, 1965. Article 2 of the Convention states: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races . . . ."
30. Adopted at Paris, Dec. 14, 1960. Under Article 3, the States Parties undertake, among others, "to abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education." Under Article 4, "The States Parties to this Convention undertake further more to formulate, develop and apply a national policy which, by method appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education . . . ."

> the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation[31] — all embody the general principle against discrimination, the very antithesis of fairness and justice. The Philippines, through its Constitution, has incorporated this principle as part of its national laws.
>
> In the workplace, where the relations between capital and labor are often skewed in favor of capital, inequality and discrimination by the employer are all the more reprehensible.
>
> The Constitution[32] specifically provides that labor is entitled to "humane conditions of work." These conditions are not restricted to the physical workplace — the factory, the office or the field — but include as well the manner by which employers treat their employees.
>
> The Constitution enjoins the State to "protect the rights of workers and promote their welfare,"[33] "to afford labor full protection."[34] The State, therefore, has the right and duty to regulate the relations between labor and capital.[35] These relations are not merely contractual but are so impressed with public interest that labor contracts, collective bargaining agreements included, must yield to the common good.[36] Should such contracts contain stipulations that are contrary to public policy, courts will not hesitate to strike down these stipulations.

This comment shall now proceed to dissect every provision of law relied upon as authority by the *ISAE* Opinion, as they appear therein.

1. Article XIII, Section 1 of the Constitution.

31. *Citing* Adopted by the General Conference of the International Labor Organization at Geneva, June 25, 1958. Article 2 provides that, "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national condition and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."
32. *Citing* PHIL. CONST. art. XIII, § 3.
33. *Citing* PHIL. CONST. art. II § 18..
34. *Citing* PHIL. CONST. art. XIII, § 3, *also* LABOR CODE, art. III.
35. *Citing* PHIL. CONST. art. XIII, § 3, *also* LABOR CODE, art. III.
36. *Citing* CIVIL CODE, art. 1700.

Article XIII, Section 1 of the Constitution provides:

> SECTION 1. *The Congress shall give highest priority to the enactment of measures* that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.[37]

The phrase emphasized above, however, being specifically addressed to Congress, unequivocally requires legislation to carry out the constitutional mandate, absent which, may not be validly deemed self-executory.

2. Article 19 of the New Civil Code.

Next came Article 19 of the New Civil Code – however, it is elementary in Civil Law that the doctrine of *abuse of rights* is, as a general rule, "a mere declaration of principles,"[38] and becomes actionable only in conjunction with Articles 21, 2217, 2219(10), and 2229, of the New Civil Code, *i.e.*, liability for moral and exemplary damages may arise when one wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy. The absence of good faith, moreover, is essential to abuse of right,[39] and "[t]ime and again this Court has held that good faith is presumed and the burden of proving bad faith is on the party alleging it."[40]

On this score, just two points: First, ISM cannot be deemed to have acted in bad faith in light of the bargaining history between ISM and ISAE, *i.e.*, the provision of the just-expired 1992 – 1995 CBA, which, according to Acting Secretary Trajano, demonstrated "the parties' recognition of the difference in the status of two types of employees, hence, the difference in their salaries." Second, before the Supreme Court, petitioner ISAE did not pray for moral nor exemplary damages arising out of any alleged abuse of right on the part of ISM, likewise demonstrating the inapplicability of the abuse of right doctrine in the context of the CBA dispute between the parties.

3. Article 38 of the Statute of the International Court of Justice; Article 9 of the New Civil Code; general principles of law; and equity.

Article 38 of the Statute of the International Court of Justice (ICJ) is merely the enumeration of the "sources of law" under international law. Clearly,

37. PHIL. CONST. art. XIII, § 1, emphasis supplied.

38. DESIDERIO P. JURADO, CIVIL LAW REVIEWER 28-29 (1989), [hereinafter JURADO] (citing Velayo v. Shell, 100 Phil. 186 (1956)).

39. Sea Commercial Company v. Court of Appeals, 319 SCRA 210 (1999).

40. BPI Express Card Corporation v. Court of Appeals, 296 SCRA 260 (1998).

the Supreme Court could not have meant that Article 38 of the Statute applied in this jurisdiction nor was decisive in ruling upon the contentions of ISAE and ISM. Reasonably construing the *ISAE* opinion, the Court could only have meant that in deciding disputes among States and other proper subjects of Public International Law, the ICJ could utilize "general principles of law" as a source of law.

Parenthetically, as regards the "general principles of law" adverted to by the Court in *ISAE*, suffice it to state, a discussion of the quality of rules of International Law is imperative in light of the absence of, on the international plane, an international legislature which passes international legislation or an international court to which all members of the international community must compulsorily submit.[41]

As cited by the Court in *ISAE*, Article 38 of the Statute of the ICJ lists "general principles of law as recognised by civilised nations" as a source of international law. These "general principles," however, are not "specific rules formulated for practical purposes, but [mere] general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law. Thus Lord Phillimore, who proposed the formula, explained that by general principles of law he meant "maxims of law."[42] As such, the inclusion of such "general principles" in Article 38 of the Statute was meant only to avoid a *non liquet* situation.

In literal terms, *non liquet* has been translated as "it is not clear."[43] The weight of authority in International Law clearly favors the view that "general principles of law was inserted [in Article 38 of the Statute] to plug the gaps and to avoid an undermining of international law which an inability to render judgment through an insufficiency of law would undoubtedly incur" in disputes involving proper subjects of public international law.[44]

Within this jurisdiction, a *non liquet* situation is dealt with in Article 9 of the New Civil Code: "No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws." The intent of the Code Commission in framing Article 9 was as follows:

> Under the old Civil Code, it was expressly stated that "when there is no statute exactly applicable to the point in controversy, the custom of the place shall be applied, and, in default thereof, the general principles of law."

41. *See* REBECCA M. WALLACE, INTERNATIONAL LAW 7 (1986).

42. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24 (1987).

43. Locsin v. Valenzuela, 194 SCRA 194, 206 (1991).

44. WALLACE, *supra*, note 38, at 20; MALCOLM N. SHAW, INTERNATIONAL LAW 81 (1986); and 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 91 (1963).

> (*Art. 6.*) This rule was modified by the Code Commission in the original project of the Civil Code when it provided that, in default of customs, the judge shall apply that rule which he believes the law-making body should lay down guided by the general principles of law and justice. *Believing that this change would result in an undue delegation of legislative power, Congress deleted the entire provision.* As it now stands, the Civil Code of the Philippines is silent with respect to this point. It is, however, submitted that we can still apply the old rule considering the provisions of Arts. 10, 11 and 12 of the present Civil Code. In other words, if the law is silent, or is obscure or insufficient with respect to a particular controversy, the judge shall apply the custom of the place, and in default thereof, the general principles of law and justice.[45]

The next authority relied upon was equity. However, in municipal law, it is clear that equity is a mere general guideline which can not prevail over a positive provision of law, *viz.*, "[e]quity has been defined as justice outside law, being ethical rather than jural and belonging to the sphere of morals than of law. It is grounded on the precepts of conscience and not on any sanction of positive law."[46]

Admittedly, pursuant to Article 9 of the New Civil Code, the *ISAE* opinion could have validly resorted to "the general principles of law and justice" (together with "the principles of fairness, justice, and the test of reasonableness") to avoid a *non liquet.* However, the implications of utilizing equity and "general principles of law and justice" within the ambit of Article 9 of the New Civil Code as sources of law, even within a municipal context, shall be discussed in the next portion of this comment.

4. International law.

a. International conventions and instruments.

The reliance by the *ISAE* Court on the Universal Declaration of Human Rights (UDHR), the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Discrimination in Education,[47] and the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation,[48] viewed with precision, merely affirms the general proscription against unwarranted

45. JURADO, *supra* note 35, at 7, (emphasis supplied).

46. Manning International Corporation v. NLRC, 195 SCRA 155, 162 (1991).

47. Convention Against Discrimination in Education, May 22, 1962, 429 U.N.T.S. 93.

48 Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 15, 1960, 362 U.N.T.S. 31.

discrimination and adds nothing, at least from a municipal standpoint, to what the equal protection of the 1987 Constitution mandates.

Worse, the author is constrained to point out that reliance on the Convention Against Discrimination in Education is plainly inapposite. A plain reading of the Convention readily reveals that it does not pertain to the right of school workers against discrimination as *ISAE* seems to imply, but mandates States Parties to the Convention not to deprive any person or group of persons of *access to education* of any type or at any level,[49] which translates to prohibitions against discrimination in the admission of pupils to educational institutions, differences of treatment by public authorities, and to promoting equality of opportunity and of treatment in the matter of education.[50]

It is further submitted that the Court's invocation of these international instruments may not be validly read as precedent that these directly and by themselves, even absent Congressional action, impose a treaty-based obligation to outlaw a distinction between local- and foreign-hires or tenured employees and fixed-term employees.

b. *PT & T v. NLRC*

It would not remiss, at this time, to compare *ISAE* with *PT & T v. NLRC*,[51] wherein the Supreme Court declared:

> [P]etitioner's policy of not accepting or considering as disqualified from work any woman who contracts marriage runs afoul of the test of, and the right against, discrimination, afforded all women workers by our labor laws and by no less than the Constitution.
>
> In the Court's opinion in *PT&T*, it noted that numerous:
>
> Corrective labor and social laws on gender inequality have emerged with more frequency in the years since the Labor Code was enacted on May 1, 1974, as Presidential Decree No. 442, largely due to our country's commitment as a signatory to the United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). [Adopted in 1979 by the General Assembly of the United Nations, was signed by the Philippines a year after the U.N.'s adoption, but the Philippines ratified the CEDAW only in 1981].[52]

49. *See id.* art. 1(a).

50. *See id.* art. 3(b) and (c); art. 4.

51. 272 SCRA 596, 605 (1997).

52. *Id.* at 602-03.

The Court then proceeded to enumerate the various municipal or domestic statutes which explicitly prohibit discrimination against women with respect to terms and conditions of employment, promotion, and training opportunities:

> Principal among these laws are Republic Act No. 6727 [Approved, 9 June 1989] which explicitly prohibits discrimination against women with respect to terms and conditions of employment, promotion, and training opportunities, Republic Act No. 6955 [Approved, June 13, 1990] which bans the "mail-order-bride" practice for a fee and the export of female labor to countries that cannot guarantee protection to the rights of women workers; Republic Act No. 7192, [Approved, February 12, 1992] also known as the "Women in Development and Nation Building Act," which affords women equal opportunities with men to act and to enter into contracts, and for appointment, admission, training, graduation, and commissioning in all military or similar schools of the Armed Forces of the Philippines and the Philippine National Police; Republic Act No. 7322 [Approved, March 30, 1992] increasing the maternity benefits granted to women in the private sector; Republic Act No. 7877 [Approved, February 14, 1995] which outlaws and punishes sexual harassment in the workplace and in the education and training environment; and Republic Act No. 8042, [Approved, June 7, 1995] or the "Migrant Workers and Overseas Filipinos Act of 1995," which prescribes as a matter of policy, inter alia, the deployment of migrant workers, with emphasis on women, only in countries where their rights are secure. Likewise, it would not be amiss to point out that in the Family Code, [Effective August 3, 1988] women's rights in the field of civil law have been greatly enhanced and expanded.
>
> In the Labor Code, provisions governing the rights of women workers are found in Articles 130 to 138 thereof. Article 130 involves the right against particular kinds of night work while Article 132 ensures the right of women to be provided with facilities and standards which the Secretary of Labor may establish to ensure their health and safety. For purposes of labor and social legislation, a woman working in a nightclub, cocktail lounge, massage clinic, bar or other similar establishments shall be considered as an employee under Article 138. Article 135, on the other hand, recognizes a woman' s right against discrimination with respect to terms and conditions of employment on account simply of sex. Finally, and this brings us to the issue at hand, Article 136 explicitly prohibits discrimination merely by reason of the marriage of a female employee.[53]

Of relevance to this comment is that in footnote 11 of the *PT & T* Opinion,[54] the Court even mentioned that the Philippines adhered to major international human rights instruments, such as the UDHR, the International Convention on Civil and Political Rights, and the ICESCR.

53. *Id.* at 603.

54. *Id.*

In stark contrast with *ISAE*, however, the *PT&T* Court could rely upon the very same international instruments mentioned in *ISAE*, precisely because of specific legislation, *i.e.*, Articles 130 to 138 of the Labor Code, as quoted above, implementing the obligations set forth in the international instruments.

The provision pertinent to *PT&T* was Article 136 of the Labor Code, which expressly prohibited a stipulation against marriage in a contract of employment:

> It shall be unlawful for an employer to require as a condition of employment or continuation of employment that a woman shall not get married, or to stipulate expressly or tacitly that upon getting married, a woman employee shall be deemed resigned or separated, or to actually dismiss, discharge, discriminate or otherwise prejudice a woman employee merely by reason of marriage.

The *PT&T* Court then even took the pains to narrate the legislative history of Article 136, *viz.*:

> This provision had a studied history for its origin can be traced to Section 8 of Presidential Decree No. 148, [Promulgated on March 13, 1973] better known as the "Women and Child Labor Law," which amended paragraph (c), Section 12 of Republic Act No. 679, [Approved on April 15, 1952. It was later amended by Republic Act No. 1131, which in turn was approved on June 16, 1954.] entitled "An Act to Regulate the Employment of Women and Children, to Provide Penalties for Violations Thereof, and for Other Purposes." The forerunner to Republic Act No. 679, on the other hand, was Act No. 3071 which became law on March 16, 1923 and which regulated the employment of women and children in shops, factories, industrial, agricultural, and mercantile establishments and other places of labor in the then Philippine Islands.[55]

Attention must be had that the forerunner of Article 136 of the Labor Code was P.D. No. 148, Section 8, promulgated on 13 March 1973 – hence, even as far as early as 20 years ago, there was already a definite legislative policy[56] which the Court merely applied to the facts in *PT&T*. However, in *ISAE*, there has never been any statutory nor regulatory standard concerning salary parity between tenured employees and fixed-term employees.

All told, insofar as these international instruments are concerned, their implementation by Congress was indubitably displayed in *PT & T*, which simply can not be said respecting *ISAE* concerning how a salary differential

55. *Id* at 610.

56. Presidential Decree Amending Further Certain Sections of Republic Act Number 679, as Amended, Commonly Known as the Woman and Child Labor Law, P.D. No. 148 § 8 (1973).

between tenured employees and fixed-term employees constituted unwarranted discrimination.

c. The Incorporation Clause.

For the sake of precision, the paragraph of the *ISAE* opinion mentioning the international instruments above ends with the statement: "[t]he Philippines, through its Constitution, has incorporated this principle as part of its national laws".[57] It would thus not be unreasonable to presume that the *ISAE* Court was obviously referring to the incorporation clause of the Constitution, *i.e.*, Article II, Section 2.

What weight or force, however, must be accorded to the "generally accepted principles of international law" which the Philippines adopts as part of the law the land? On this score, the intent of the framers of the 1987 Constitution is clear; *i.e.*, the general principles of international law adopted pursuant to the Constitution's incorporation clause are merely at the same level as a statute which must be enacted by Congress. This is reflected in the debates of the Constitutional Commissioners:

> THE PRESIDENT: Commissioner Guingona is recognized.
>
> MR. GUINGONA: May I be allowed to inquire from the committee because, depending on the answer, I may not have to introduce an amendment. When we speak of "laws of the land," do we refer to statutory laws and constitutional law? As I have observed earlier, I believe the principles and provisions of international law, both customary and conventional, should not be placed at par with the provisions of our Constitution in this jurisdiction because there could be conflicts between the provisions of treaties, for example, and the express provisions in our Constitution.
>
> I cited an example about the ownership ratio with respect to corporations operating public utilities where our Constitution expressly provides a 60-40 ratio. Suppose a treaty provision provides for a majority participation of Filipinos, if we were to refer to the treaty provisions as part of our statutory laws only, then there would be no problem because a conflict in the two provisions would inevitably result in the unconstitutionality of the treaty provision. So, I would like to ask the members of the committee whether or not in referring to "the laws of the land" we mean both the statutory and constitutional laws.
>
> MR. AZCUNA: May I answer that for the committee? *When we talk of the generally accepted principles of international law as part of the laws of the land, we mean that it is part of the statutory type of laws, not of the Constitution.*

57. PHIL. CONST. art. II, § 2.

> MR. GUINGONA: I see. Thank you very much.[58]

The discussion from the Record of the 1986 Constitutional Commission is truly reflective of the intent of the Commission, as may be gleaned even from the Commission's Journal which summarized the exchange between Commissioners Guingona and Azcuna:

> *Mr. Guingona inquired whether "law of the land" would refer to statutory laws or the Constitution* considering that the principles and provisions of international law, both customary and conventional, should not be placed at par with the provisions of the Constitution inasmuch as there could be conflicts between the provisions of treaties and that of the Constitution. He cited the ownership ratio with respect to corporations operating public utilities where the Constitution expressly provides a 60:40 ratio. He maintained that should treaty provisions be made part of statutory laws, there would be no problem, because in case of conflict, the treaty provision would be unconstitutional. *Mr. Azcuna replied that they would be part of statutory laws and not of the Constitution.*[59]

Prescinding from the foregoing, it may not be said that the *ISAE* Court intended that the international instruments were self-executory in this jurisdiction, absent Congressional implementation.

Even assuming, for the sake of argument, that the Court could validly ignore the intent of the framers in this instance, nevertheless, *ISAE* ignores the *dictum* in *Secretary of Justice v. Lantion*[60] that the "doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there appears to be conflict between a rule of international law and the provisions of the constitution or statute of the local state."[61] Pointedly, where was the conflict in *ISAE* between international law and municipal law that necessitated application of the incorporation clause?

5. Article XIII, Section 3, and Article II, Section 18, of the Constitution.

As relied upon by the *ISAE* Court, Article XIII, Section 3 of the Constitution reads:

58. 4 RECORD OF THE 1986 CONSTITUTIONAL COMMISSION, Sept. 18, 1986, R.C.C. No. 86 (emphasis supplied).

59. 3 JOURNAL OF THE 1986 CONSTITUTIONAL COMMISSION, Sept. 19, 1986, Journal No. 86 (emphasis supplied).

60. 322 SCRA 160, 197 (2000).

61. *Id.*

SECTION 3. *The State shall afford* full protection to labor, local and overseas, organized and unorganized, and promote full employment and *equality of employment opportunities for all.*[62]

It shall guarantee the rights of all workers to self-organizations, and peaceful concerted activities, including the right to strike in accordance with law. *They shall be entitled to* security of tenure, *humane conditions of work*, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth. [emphasis supplied]

On its part, Article II, Section 18 of the Constitution provides that one State policy is that:

Section 18. The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare.

It would be a stretch to argue that *ISAE* interpreted these constitutional provisions as self-executory, for it is rudimentary that a declared State policy in Article II of the Constitution is a mere guideline,[63] while the nature of "social rights" in Article XIII of the Constitution is that they are not rights in the strict sense that the self-executory rights in the Bill of Rights are.[64]

IV. Questions Arising From The *ISAE* Decision

A. *Prospective or Retroactive Application?*

To reiterate, while *ISAE* expressly prayed in its petition that the Court render judgment directing *ISAE* to upgrade the salaries and benefits paid the locally-hired faculty by paying the same wages and benefits it pays its

62. Emphasis supplied.

63. *See* Joaquin G. Bernas, S.J., Constitutional Structure and Powers of Government, Notes and Cases, Part I, 8 (1997), which mentions that only Article II, Section 16 recognizes "the right of the people to a balanced and healthful ecology" has been recognized as a right-conferring provision, as held in Oposa v. Factoran, 224 SCRA 792 (1993).

64. *See* 2 Joaquin G. Bernas, S.J., The Constitution of the Republic of the Philippines: A Commentary 468-69 (1988).

foreign-hired faculty starting 1 July 1995, the date of effectivity of the new CBA the dispositive portion of the Court's Decision merely stated:

WHEREFORE, the petition is GIVEN DUE COURSE. The petition is hereby GRANTED IN PART. The Orders of the Secretary of Labor and Employment dated June 10, 1996 and March 19, 1997, are hereby REVERSED and SET ASIDE insofar as they uphold the practice of respondent School of according foreign-hires higher salaries than local-hires.[65]

The *ISAE* Court's silence as to the retroactivity to 1995 of the *ISAE* Decision promulgated in 2000, coupled with the opinion's reliance upon numerous non-self-executory provisions of law, and the absence of a legislative prohibition, such as that under Articles 118, 135, and 248[e] of the Labor Code, against a salary differential between tenured employees and fixed-term employees, gives rise to a question of prospectivity or retroactivity of the *ISAE* Decision.

It must not be overlooked that Section 2(c) of P.D. No. 732, exempts ISM's personnel from otherwise applicable laws and regulations attending their employment, except "laws that have been or will be enacted for the protection of employees."

Concretely, then, in absence of a statutory norm prohibiting an employer from paying a higher salary to fixed-term employees to compensate for their limited tenure, may the *ISAE* Decision fall within the ambit of the phrase "laws that have been or will be enacted for the protection of employees"? It would be a fair inference to make that Section 2(c) of P.D. No. 732 contemplated a Congressional or quasi-legislative act when it used the word "laws," thus rendering necessary the discussion below.

The leading case on the principle of prospectivity of judicial decisions is *Albino S. Co v. Court of Appeals*:[66]

"Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines," according to Article 8 of the Civil Code. "Laws shall have no retroactive effect, unless the contrary is provided," declares Article 4 of the same Code, a declaration that is echoed by Article 22 of the Revised Penal Code: "Penal laws shall have a retroactive effect insofar as they favor the person guilty of a felony, who is not a habitual criminal...."

x x x

The principle of prospectivity has also been applied to judicial decisions which, "although in themselves not laws, are nevertheless evidence of what

65. *ISAE*, 333 SCRA at 26.

66. 227 SCRA 444 (1993).

the laws mean, . . . (this being) the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system....'"[67]

So did this Court hold, for example, in *People v. Jabinal*,:

x x x

x x x The interpretation upon a law by this Court constitutes, in a way, a part of the law as of the date that law was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the law thus construed intends to effectuate. The settled rule supported by numerous authorities is a restatement of the legal maxim '*legis interpretatio legis vim obtinet*' — the interpretation placed upon the written law by a competent court has the force of law.[68]

So, too, did the Court rule in *Spouses Gauvain and Bernardita Benzonan v. Court of Appeals, et al.* and *Development Bank of the Philippines v. Court of Appeals, et al.*, :

x x x

x x x But while our decisions form part of the law of the land, they are also subject to Article 4 of the Civil Code which provides that 'laws shall have no retroactive effect unless the contrary is provided.' This is expressed in the familiar legal maxim *lex prospicit, non respicit*, the law looks forward not backward. The rationale against retroactivity is easy to perceive. The retroactive application of a law usually divests rights that have already become vested or impairs the obligations of contract and hence, is unconstitutional (Francisco v. Certeza, 3 SCRA 565 [1961]).

The same consideration underlies our rulings giving only prospective effect to decisions enunciating new doctrines. Thus, we emphasized in *People v. Jabinal*. . . when a doctrine of this Court is overruled and a different view is adopted, the new doctrine should be applied prospectively and should not apply to parties who had relied on the old doctrine and acted on the faith thereof."[69]

A compelling rationalization of the prospectivity principle of judicial decisions is well set forth in the oft-cited case of *Chicot County Drainage Dist. v. Baxter States Bank*[70]. The *Chicot* doctrine advocates the imperative necessity to take account of the actual existence of a statute prior to its nullification, as an operative fact negating acceptance of "a principle of absolute retroactive invalidity."

67. Emphasis supplied.

68. Emphasis supplied.

69. Emphasis supplied.

70. 308 U.S. 371 (1940).

Thus, in this Court's decision in *Tañada v. Tuvera*[71], promulgated on 24 April 1985 — which declared "that presidential issuances of general application, which have not been published, shall have no force and effect," and as regards which declaration some members of the Court appeared "quite apprehensive about the possible unsettling effect . . . (the) decision might have no acts done in reliance on the validity of those presidential decrees . . ." — the Court said:

". . . The answer is all too familiar. In similar situations in the past this Court had taken the pragmatic and realistic course set forth in *Chicot County Drainage District v. Baxter Bank* to wit:

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*; *Chicago, I. & L. Ry. Co. v. Hackett*. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Much earlier, in *De Agbayani v. PNB*[72]— concerning the effects of the invalidation of "Republic Act No. 342, issued by the then President Osmeña, continued Executive Order No. 32, issued by the then President Osmeña, suspending the enforcement of payment of all debts and other monetary obligations payable by war sufferers," and which had been "explicitly held in *Rutter v. Esteban*[73]...(to be) in 1953 'unreasonable, and oppressive, and should not be prolonged a minute longer . . .'" — the Court made substantially the same observations, to wit:

71. 136 SCRA 371 (1940).

72. De Agbayani v. PNB, 38 SCRA 429 (1971).

73. Rutter v. Esteban, 93 Phil. 68 (1953).

> The decision now on appeal reflects the orthodox view that an unconstitutional act, for that matter an executive order or a municipal ordinance likewise suffering from that infirmity, cannot be the source of any legal rights or duties. Nor can it justify any official act taken under it. Its repugnancy to the fundamental law once judicially declared results in its being to all intents and purposes a mere scrap of paper . . . It is understandable why it should be so, the Constitution being supreme and paramount. Any legislative or executive act contrary to its terms cannot survive.
>
> Such a view has support in logic and possesses the merit of simplicity. It may not however be sufficiently realistic. *It does not admit of doubt that prior to the declaration of nullity such challenged legislative or executive act must have been in force and had to be complied with.* This is so as until after the judiciary, in an appropriate case, declares its invalidity, it is entitled to obedience and respect. Parties may have acted under it and may have changed their positions. What could be more fitting than that in a subsequent litigation regard be had to what has been done while such legislative or executive act was in operation and presumed to be valid in all respects. It is now accepted as a doctrine that prior to its being nullified, its existence as a fact must be reckoned with. This is merely to reflect awareness that precisely because the judiciary is the governmental organ which has the final say on whether or not a legislative or executive measure is valid, a period of time may have elapsed before it can exercise the power of judicial review that may lead to a declaration of nullity. It would be to deprive the law of its quality of fairness and justice then, if there be no recognition of what had transpired prior to such adjudication.[74]

Once more, unlike *PT & T* (which noted a specific Congressional prohibition against gender discrimination), the *ISAE* Decision had no legislative nor executive prohibition against a salary differential in favor of a fixed-term employee to interpret. Lending itself to the same end would the *ISAE* Court's invocation of "equal pay for equal work" as a general principle of law and various non-self-executory provisions of law.

At worst, then, the *ISAE* Decision could be deemed judicial legislation, as the Decision could conceivably be read as establishing a norm of statutory force and effect, *i.e.*, fixed-term employees may not be paid a higher salary than tenured employees in order to compensate for the former's limited tenure.

Of course, there is the application of the "principle of equal pay for equal work," and, pursuant to Article 9 of the New Civil Code, "the general principles of law and justice" in order to avoid a *non liquet*. However, absent a pre-existing standard established by statute or by executive issuance, moreover, the *ISAE* Court's cryptic silence in the dispositive portion as to retroactivity of the *ISAE* Decision (despite an express prayer to that effect), it

74. Albino Co v. CA, 227 SCRA 444 (1993).

would not be untenable to characterize the *ISAE* Decision as establishing a new judicial doctrine (proscribing a salary differential in favor of fixed-term employees to compensate for their limited tenure) that should be applied only prospectively – after all, as held in *Philippine Scout Veterans Security & Investigation Agency v. NLRC*,[75] "[i]n every case of doubt, the doubt must be resolved against the retrospective effect." This would likewise be in consonance with Section 2(c) of P.D. No. 732, *i.e.*, the *ISAE* Decision would be deemed a "law" as used therein.

B. Nunc Pro Tunc *Judgments*

As thus far displayed, the dispositive portion of the *ISAE* Decision did not expressly declare that salary parity would be applied retroactively, while a reading of the entire opinion will readily reveal that retroactive application of salary parity may not be implied from the language used in the opinion. To bolster the argument against retroactivity, it would not be amiss to turn to the principles governing *nunc pro tunc* judgments.

The definition, nature, scope, and workings of a *nunc pro tunc* judgment were extensively discussed in *Lichauco v. Tan Pho*:[76]

> In order that a court may enter a *nunc pro tunc* order, that is to say, an order in writing containing what was previously ordered verbally, it is necessary that there should be a basis for said *nunc pro tunc* order, that is, some circumstance in the record relative to the order which is sought to be supplied by the *nunc pro tunc*, whether said circumstance relates to the whole of the order or to a point thereof, in such a way that the part not found in the record may be a necessary part, an inevitable and ordinary consequence of the point appearing therein.
>
> x x x
>
> The object of a judgment *nunc pro tunc* is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form on the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been.
>
> A *nunc pro tunc* entry in practice is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in

75. 262 SCRA 112, 120-21 (1996).

76. 51 Phil. 862 (1923).

the record of action really had, but omitted through inadvertence or mistake.[77]

A *nunc pro tunc* judgment only properly pertains to "clerical errors, or mistakes or omissions plainly due to inadvertence or negligence [which] may be corrected or supplied after the judgment has been entered [and] does not enable [courts or tribunals] to change their judgments in substance or in any material respect. [T]he law does not authorize the correction of judicial errors, however flagrant and glaring they may be, under the pretense of correcting clerical errors."[78]

As regards what matters constitute "purely clerical errors" so as to give rise to a valid *nunc pro tunc* judgment, the Supreme Court has noted that "a purely clerical error" is one which does not involve the exercise of judicial function,[79] such as, "mistakes in naming the points of the compass, or by designating lots, parcels, plats and tracts by the wrong numbers, or by giving the wrong figures or ranges and townships have been recognized as clerical errors, as have mistakes in courses, distances and calls,"[80] or when a decision does not specify the extent of the liability of each defendant, then their liability is deemed merely joint and not jointly and severally.[81]

Contreras v. Felix[82] discusses the nexus between *nunc pro tunc* judgments and the rule that the dispositive portion controls execution of a judgment:

> It is said that the judgment is at variance with the context of the decision. Granting this for the moment to be the case, yet the discrepancy pointed out is not of the nature that would justify modification of the judgment. The principles we have cited in the preceding paragraphs should put this matter at rest. More to the point is another well-recognized doctrine, that the final judgment as rendered is the judgment of the court irrespective of all seemingly contrary statements in the decision. "A judgment must be distinguished from an opinion. The latter is the informal expression of the views of the court and cannot prevail against its final order or decision. While the two may be combined in one instrument, the opinion forms no part of the judgment. So, . . . there is a distinction between the findings and conclusions of a court and its Judgment. While they may constitute its decision and amount to the rendition of a judgment, they are not the judgment itself. They amount to nothing more than an order for judgment, which must, of course, be distinguished from the judgment." At the root of the doctrine that the premises must yield to the conclusion is perhaps, side by side with the needs of writing finis to litigations, the recognition of the truth that "the trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons." "It is an everyday experience of those who study judicial decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not." It is not infrequent that the grounds of a decision fail to reflect the exact views of the court, especially those of concurring justices in a collegiate court. We often encounter in judicial decisions, lapses, findings, loose statements and generalities which do not bear on the issues or are apparently opposed to the otherwise sound and considered result reached by the court as expressed in the dispositive part, so called, of the decision.[83]

77. *Id.* at 875 (citations omitted).

78. Contreras v. Felix, 78 Phil. 570 (1947).

79. Llanes & Company v. Bocar, 69 SCRA 318 (1976).

80. Filipino Legion Corporation v. Court of Appeals, 56 Phil. 674 (1974).

81. *See* Maramba v. de Lozano, 20 SCRA 474 (1967).

82. 78 Phil. 570 (1947).

In view of the preference for prospective application of laws, and jurisprudence applying the preference to judicial decisions establishing new doctrines, it would seem unsound to claim that the retroactive application of the *ISAE* Decision is, in the language of *Contreras*, "a purely clerical error which does not involve the exercise of judicial function."

C. *Equal Protection*

Before closing, a review of the basics of equal protection law is in order. For the sake of academic discussion, even absent a congressional proscription against fixed-term employees being paid a higher salary than tenured employees, then the salary differential could be deemed void *ab initio*, thus buttressing the assertion that the *ISAE* Decision be applied retroactively, for being violative of a constitutional norm.

The equal protection clause is embodied in the second sentence of Article III, Section 1 of the 1987 Constitution, which states: "No...person be denied the equal protection of the laws."

Equal protection of the law is a recognition that the State has "the power to recognize and act upon factual differences between individuals and classes. It recognizes that inherent in the right to legislate is the right to classify. The problem, thus, in equal protection cases, is one of determining the validity of the classification made by law,"[84] where the law creates a system that can foster inequality in operation[85] or where the law fails to classify or recognize differences calling for differential treatment.[86]

83. *Contreras*, 78 Phil. at n. 70.

84. 1 JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 61 (1987).

85. *See* People v. Vera, 65 Phil. 56 (1937).

86. *See* Villegas v. Hiu Chiong Tsai Pao Ho, 86 SCRA 270 (1978).

People v. Cayat[87] thus laid down the four-fold test by which to adjudge the validity or reasonableness of differential treatment, *i.e.*, a classification:

1. Must rest on substantial distinctions;
2. Must be germane to the purpose of the law;
3. Must not be limited to existing conditions only; and
4. Must apply equally to all members of the same class.

The nature of the equal protection clause has been described thusly:

> The equal protection of the laws is embraced in the concept of due process, as every unfair discrimination offends the requirements of justice and fair play. It has nonetheless been embodied in a separate clause in Article III, Sec. 1, of the Constitution to provide for a more specific guaranty against any form of undue favoritism or hostility from the government. Arbitrariness in general may be challenged on the basis of the due process clause. But if the particular act assailed partakes of an unwarranted partiality or prejudice, the sharper weapon to cut it down in the equal protection clause.
>
> According to a long line of decisions, equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed. Similar subjects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others.[88]

The underscored phrase thus renders it tenuous to have employed the equal protection clause to strike down the salary differential in *ISAE*, as only private action, and not governmental power, was involved. In like manner, *People v. Marti*[89] and *Serrano v. NLRC*[90] limited the search and seizure clause and the procedural due process clause, respectively, of the Bill of Rights to governmental power.

V. Conclusions

This comment has analyzed the bases for, and reasoning and conclusions of, the *ISAE* opinion and dispositive portion. As stated earlier, the author is unable to disagree with the proposition that since the employer failed to adduce evidence that foreign-hires performed 25% more work, or accomplished the same work 25% more efficiently or effectively, than local-hires, then salary parity is the consequential burden that the employer must bear.

87. 68 Phil 12, 18 (1939).

88. Philippine Judges Association v. Prado, 227 SCRA 703, 711-12 (1993) (emphasis supplied).

89. 193 SCRA 57, 64-68 (1991).

90. 323 SCRA 445, 468 (2000).

The discussion, however, simply can not end there. If only for the issues of absence of a legislative standard to implement non-self-executory provisions of law, whether international or municipal, and prospective or retroactive application of the Decision, the author hopes that this comment shall provide some semblance of insight for the legal community and those who stand to be affected by or are in a position to address the import of the *ISAE* Decision.

For instance, is an employer's prerogatives now so limited, such that even absent breach of a specific statutory norm or bad faith or an intent to circumvent the law, fixed-term employees must receive the same salary as regular or tenured employees, and that anything of pecuniary value given by the employer to a fixed-term employee to compensate for the latter's lack of regular employment must not be designated as a "salary?" As regards time of payment: in order to escape the taint of being deemed part of "salary," must any payment to compensate a fixed-term employee for his or her lack of tenure be given in lump sums, or at least, not at regular intervals? Certainly, of course, Congress should look into the desirability of amending the Labor Code so as to imbue the "general principle" of "equal pay for equal work" with statutory force in this jurisdiction—even outside of Articles 118, 135, and 248(e) of the Labor Code.

In closing, the author is constrained to express regret that the *ISAE* Court was far from accurate, much less, precise, by having pronounced such broad and sweeping *obiter dicta* through invocation of non-self-executory provisions of international and municipal law. As has been said, "lines should not be drawn simply for the sake of drawing lines."[91]

91. Pearce v. Commissioner of Internal Revenue, 314 U.S. 593 (1942).