VOLUME XLVI • 2016

THE FAR EASTERN LAW REVIEW

An Annual Publication of the Institute of Law

Trying Times, Changing Tides:
Rule of Law in the Era of Radical Change

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THE FAR EASTERN
LAW REVIEW

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Editor's Note

Trying times, changing tides: Rule of Law in the Era of Radical Change

I was in the middle of finishing my last task for the day at the office when suddenly a thought struck me, "I am 24 yet I feel like I have no sense of purpose and I still don't know where I am heading". I thought of going back to school and maybe getting a master's degree in Philosophy or maybe getting a second degree in Literature. But could it make a difference, I asked. Three years have passed and I neither pursued the master's degree nor the second degree that I initially planned. I am here right now rummaging through the book shelves and looking for cases assigned for my next class. I am here reciting law provisions, giving the facts of the case, and learning court's decisions. I am here learning, loving and living the law.

I dredged up my memory and recalled that day when I was still contemplating whether to take up law. Following that route, I thought, means a total revamp of my life. And I guess what held me back most then was whether I am rough and ready to take the plunge and swim in the sea of uncertainties. "Change" is something that I dread and respond to with a greater degree of reluctance. I guess, it is a problem on how I would dance with the change and accept that fulfillment and happiness lie beyond my comfort zone.

Plato, in his "theory of forms" presented two problems: ethical problem and the problem of permanence and change. In the former, he wishes to resolve the question on how can humans live a life with fulfillment and happiness where everything that they associate themselves with constantly changes. In the latter, he tackles humans' perception of the world as "both permanent and changing" and "permanent and unchanging".

Plato argues that there are those things that are meant to be changed. These are things and objects which are tangible and can be perceived through our senses. But there are also those that can be perceived through our reasoning and logic which he called as "forms". Forms are ceaseless and everlasting, they are not meant to be changed.

Laws change through time. Laws and the application of which maybe were necessary 50 years ago but are inessential in the present time. Constantly and dynamically, it responds to the changing times. I guess, laws are one of those objects which Plato referred to as things which are mutable.

However, laws have its essential form, its truth and foundation. The truth of which is that, it can be as dispensable as it can be. It needs respect, fondness and some devotion otherwise it will be like a tree without a life. This is what Rule of Law is all about. It gives purpose and light to what laws really are. Chief Justice Sereno in her dissenting opinion, said that obedience to the rule of law forms the bedrock of our system of justice. She added that through constitutionalism, we adhered to the restrictions placed not only on our political institutions but also on ourselves. This is in the hopes that no matter how chaotic democracies can be, through Rule of Law as a limitation, it can now become "restrained, principled, thoughtful and just".

Laws are like the physical body of a person, the outward appearance of a thing while rule of law serves as its soul. Without its soul, laws are lifeless and senseless.

This concept of change and the permanence of the rule of law are what this issue dares to tackle with fortitude and valor. We covered President Rodrigo Duterte's war on drugs and assess the means he employs to combat illegal drugs. With hundreds of people, who instead of getting protection from the government are rather being killed, we dared to ask, "Does the end really justify the means?"

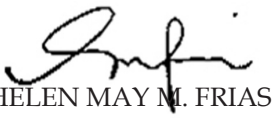
Moreover, we discussed the strict requirements of the Constitution to reinstate death penalty. Specifically, we focused on the heinousness requirements and presented a problem on the determination and specification of heinous crimes. We believe that the lack of clear and unequivocal heinousness or depravity standards under the law runs counter with the abolitionist nature of the constitutional provision on death penalty.

We also worked on a hypothetical scenario where the Philippines imposes a three-child policy. It arises when the current president became expressive of his intention to regulate the rapid increase of the Philippine population. The article embarked on the state's right to exercise police power to address and resolve population issues vis-a-vis its international obligation to eliminate discrimination against women in all matters relating to marriage and family relations.

Also included here is a review of the Congressional power of legislative investigation and the difference between Hearing in Aid of Legislation and Question Hour. There's the limits of presidential immunity with a revisit in this misunderstood privilege. Then there's a question of whether lowering the minimum age of criminal responsibility is the best solution for the country's purportedly growing problem on child crimes.

Harmonizing the gap on the dichotomy between international law obligation and national state protection through redefining refugee and state obligation has been the subject of debates not only domestically but internationally. And finally, we need to ask ourselves whether the removal of contractualization in the Philippines is inclined with the provisions of the Constitution on balancing of labor and capital.

All these are not by-products of mere illusion but as a result of a shift gearing towards radical change. In these trying times where change is properly construed or misconstrued, reason demands attention. Now, I go back to where this all started. Did I make the right decision when I decided to move with the change and chose to pursue law despite financial instability, stagnated career, and all other things that I had to compromise? The answer lies with the "greater perhaps".



HELEN MAY M. FRIAS
Editor – in – Chief

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THE RIVER IS MY CLIENT

Atty. Galahad R.A. Pe Benito

Is this fake news? It seems to be, from its outrageous claim that I represent the river as my client in a court case. It can only be fake news, for how can a river tell me what it wants or desires.

If not fake news, this can only be a joke. I am a joker, and I want to tell everybody that the river has consulted me regarding its rights and has paid me a dozen fishes for my fees.

If not fake news or a joke, I can only be nuts for telling you that the river is my client. Years after hugging the trees and advancing esoteric rights of nature, plants, and animals, I may have finally reached the summit of my lunacy, having proclaimed the "inanimate" river as my ward and my client.

"With legislations and rulings like these, there is now a greater enlightenment among the citizenry and government officials of the need to preserve and protect nature. We can never really separate our own interest from Mother Earth for that will mean her destruction."

But wait! In a world of alternative facts and fake news, in a world that turns falsehoods into truths, in a world that denies climate change and the existence of other creatures, this is one that is sure to make your day! That is, if you believe in the power of reason to make change, and in the capacity of people to choose good over bad. This is no joke, no fake news, and no lunatic attack.

This is an event crafted through the ages, blessed by the ancestors of old, and molded by the heavens and the universe. Indeed, when this salutary event was announced, there was a sense of wonder, mystery, and amazement. The move to bestow legal rights to nature, to her parts and members, has finally come to pass and finally, we have new "persons" in our midst, having the same rights and privileges as humans.

New Zealand's Whanganui River

The Whanganui River in New Zealand takes the distinction of being the first component of nature to be declared a "legal person."[1] There were attempts in the past to proclaim trees as legal persons, but they all failed. Thus, the New Zealand legislation gets the honor of being the first legislation to grant legal rights to a component of nature.

After more than a century of fighting for their rights to the Whanganui River, the Maori people have finally been heard, and have shown how perseverance can bear fruit. The Whanganui River is New Zealand's "longest navigable river" and is "central to the existence of Whanganui Iwi [people] and their health and well-being." (see explanatory note, Te Awa Tupua (Whanganui River Claims Settlement) Bill, Government Bill 129—1) Since 1873, Whanganui Iwi have long sought recognition of their authority over the River, which includes one of New Zealand's longest-running court cases. (*Id*., History of claim)

In paragraph 14 (1) of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, the Te Awa Tupua is declared "a legal person and has all the rights, powers, duties, and liabilities of a legal person." Earlier, in paragraph 12, the Te Awa Tupua is proclaimed to be "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements." To fully give meaning to this recognition, the Te Pou Tupua was established, to be the "human face of Te Awa Tupua and act in the name of Te Awa Tupua." (*id*., paragraph 18) Among the functions of Te Pou Tupua consist of acting and speaking for and on behalf of Te Awa Tupua, upholding the Te Awa Tupua status, promoting and protecting the health and well-being of Te Awa Tupua, and performing landowner functions. (*id*., paragraph 19) The Te Pou Tupua will be composed of two persons nominated by the iwi and the Crown.

The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 is a comprehensive legislation that addresses the claims of the Whanganui iwi people. While its greatest achievement may be the recognition of the river as a legal person, the Act also addresses governance, land ownership, autonomy, accountability, and taxation matters.

An aura of mysticism, oneness, and connectedness enveloped the people in attendance when New Zealand Treaty Minister Chris Finlayson declared the approval of this legislation. Finlayson's words reverberated not only in New Zealand, but the entire world as well, as he clearly outlined the rights and privileges of the Whanganui River as

[1] Aljazeera, *New Zealand river is the world's first 'legal person'* (March 16, 2017) (available at <http://www.aljazeera.com/news/2017/03/zealand-river-world-legal-person-170316091153248.html>); British Broadcasting Corporation, *New Zealand river first in the world to be given legal human status* (March 15, 2017) (available at <http://www.bbc.com/news/world-asia-39282918>).

a legal person. He stated that "[t]his settlement changes how all people view and relate to the River and aligns with what Whanganui Iwi have always known: the River is not just a resource for exploitation and it must be treated with a deep respect."[2]

This grant of legal personality to a component of nature is overdue. If we can give legal personality to corporations and estates, which we do not even see, how much more to something that exists and provides life and nutrition to most of us? If some lawyers find as funny the fact that we consider a living component of nature as a person, isn't it funnier and more nonsensical that we accord legal status to corporations and estates which, for all intents and purposes, are non-existent beings. If we fight for the existence and privileges of corporations, shouldn't we be more punctilious in pushing for the recognition of the rights of nature which provides us sustenance? Legislations like this help prevent the total degradation of nature with the appointment of bodies and people tasked to care for their well-being and protection.

India's Ganges and Yamuna Rivers

The New Zealand legislation was infectious. Shortly after Whanganui River was accorded legal status as a person, an Indian court, the High Court of Uttarakhand at Nainital, followed suit with a ruling that the Ganga (a.k.a. Ganges) and Yamuna Rivers were juristic/legal persons. This case[3] originated from a mandamus petition of a concerned citizen, Mohd Salim, requesting the High Court of Uttarakhand at Nainital to direct the Government to remove illegal constructions in the Yamuna river. The High Court acted favorably on the petition by promptly ordering the Central Government to evict the respondent. However, neither the State of U.P. nor the State of Uttarakhand cooperated with the Central Government in making effective the orders of the High Court, so that the required evictions were unenforced. Thus, the High Court was forced to issue another order, where it expressed its serious displeasure over the non-cooperation of the two states. The High Court noted that the "Rivers Ganga and Yamuna are loosing (sic) their very existence" such that "[t]his situation requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna." The High Court noted the sacred nature of the two rivers and cited a case that held a "Hindu idol to be a juristic entity." The Court explained that "the concept of a 'Juristic Person' arose out of necessities in the human development."

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[2] Chris Finlayson, Treaty Negotiations Minister and Associate Minister for Maori Development, New Zealand *SPEECH TO UNESCO AMBASSADORS: RECOGNISING LEGAL PERSONHOOD FOR NATURAL FEATURES* (April 10, 2017) (available at <http://www.chrisfinlayson.co.nz/category/speech/>).

[3] *Mohd Salim v. State of Uttarakhand & others*, Writ Petition (PIL) No.126 of 2014, March 20, 2017.

> 16. With the development of the society where the interaction of individuals fell short to upsurge the social development, the concept of juristic person was devised and created by human laws for the purposes of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, as their Lordships have held in the judgments cited hereinabove, that for a bigger thrust of socio-political-scientific development, evolution of a fictional personality to be a juristic person becomes inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. Corpus Juris Secundum, Vol.6, page 778 explains the concept of juristic persons/artificial persons thus: "Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require for its development. (See Salmond on Jurisprudence 12th Edition Pages 305 and 306). Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons.

In the end, the High Court declared the Rivers Ganga and Yamuna as juristic/ legal persons, and to effectuate this declaration, the following order was promulgated:

> 19. Accordingly, while exercising the parens patrie (sic) jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna. The Director NAMAMI Gange, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand are hereby declared persons in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries. These Officers are bound to uphold the status of Rivers Ganges and Yamuna and also to promote the health and well being of these rivers.

> 20. The Advocate General shall represent at all legal proceedings to protect the interest of Rivers Ganges and Yamuna.

This decision by an Indian court shows that courts can also recognize the legal personality of an entity or being by the exercise of judicial power. By the use of legal fiction, the High Court recognized the legal personality of the rivers and to make this effective, constituted a government officer as the representative of the rivers responsible for their protection. This is necessary to carry into effect the protection of the rivers which have been neglected for so long. It is also an action-forcing mechanism that ensures the effective implementation of its orders by government officials. Thus, the duly constituted "persons in loco parentis" act like the board and officers of a corporation. The difference is that while corporations are mere artificial beings, the rivers are considered living entities, which even provide nourishment to many people.

A lengthy process for recognition

The movement to grant legal standing for components of nature started since time immemorial. Our ancestors have always believed that there is life in every part of nature, something which everybody must respect and recognize. Part of this belief has religious foundations since all things created by God are considered sacred. For others, this belief evolved out of necessity since nature has become part and parcel of the lives of most people. Disrespect nature and you destroy it. Destroy it and you have no life, no dignity, and no future. Thus, the movement to grant legal standing has always been coupled with the necessity of protecting Mother Earth.

But why protect components of nature that cannot speak or communicate? Well, because from our perspective, we were also voiceless and powerless once upon a time. Women, slaves, minors, colonized people, and yes, Filipinos, had no rights before. Remember also that in the infamous case of *Scott v. Sanford*,[4] the United States Supreme Court held that the negro of the African race was not a citizen of the United States. But there came a realization later on that we were all created equal, shared the same attributes, and so had the same rights and privileges. Only upon this realization did we accord other people their basic human rights. Thus, who can say that humans are better off than animals? Surely, no one can claim that God will save only humans at the end of time. In the biblical story of Noah's Ark, God saved not only humans, but animals and plants as well. This alone should serve as lesson that redemption is for all of nature, not only humans.

[4] 60 U.S. 393 (1857).

The struggle to have rights is a long and winding process. For women, it took some time for them to even earn their right to vote. Even at present, there are certain countries that deny them the right to drive a motor vehicle. In our country, it took several years for us to become independent and earn our right to self-governance. Thus, the process to become a legal person is a lengthy process before full recognition can be attained. This is what the New Zealand experience shows us.

The capacity to have full legal rights does not depend on one's capacity to speak and communicate. The inability of the trees, rivers, plants, and animals to communicate is no reason to deprive them of their rights to be recognized as persons. Precisely, we know what hurts them, what pains them, and what kills and destroys them. If the ability to communicate is made a requisite, how then could corporations and estates communicate when we don't even see or feel them?

Why grant inanimate objects legal personality?

Precisely, why is there a need to vest inanimate objects with legal personality? An earlier United States Supreme Court case laid out the basis for the grant of legal personality, though only in the form of a dissenting opinion. Justice Douglas, in his dissenting opinion in *Sierra Club v. Morton*,[5] opined that:

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. This suit would therefore be more properly labeled as *Mineral King v. Morton*.
>
> Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole -- a creature of ecclesiastical law -- is an acceptable adversary, and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

[5] 405 U.S. 727, 741 (1972).

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes -- fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water -- whether it be a fisherman, a canoeist, a zoologist, or a logger -- must be able to speak for the values which the river represents, and which are threatened with destruction.

When we grant legal standing to a river, a lake, or a tree, we are therefore recognizing their importance in nature. While they cannot talk, speak, or communicate, we cannot deny the fact that they are an essential component of our everyday lives and that if despoiled, all of us suffers. Their presence is therefore felt by us in ways that we can only experience in our daily lives. They are therefore alive and existing. With this realization, we can go to court to vouch for their rights and privileges. Only through this exercise of legal fiction can their significance be recognized in law and in judicial proceedings. Deny it and the laws of nature will eventually fail.

Significance of river's legal standing

The grant of legal status to rivers enhances their continued preservation and protection under the law. Now, individuals can bring suit on behalf of the rivers against polluters and destructive project proponents which were not possible before. It makes it easier to file a case since the river has now the legal standing to appear before the courts through human representatives. With legislations and rulings like these, there is now a greater enlightenment among the citizenry and government officials of the need to preserve and protect nature. We can never really separate our own interest from Mother Earth for that will mean her destruction.

Some have expressed the reservation that granting inanimate objects the right to sue will flood the courts with unwanted and frivolous suits. This is a red-herring, though, as experience has shown that the liberalization of environmental laws and its rules of procedure did not really clog the dockets of courts. Instead, it even enhanced the efficient administration of environmental laws.

Manila Bay is next legal person

With the New Zealand legislation and Indian court ruling, the world is slowly opening up to the reality that we are not alone in this world. There are other earthly creatures that have rights and that need protection. The world is opening up to the reality that we must live in peaceful co-existence with other components of nature. Humans are just a part of one great ecosystem and that there are other living members like us. To deny their existence is to assert our superiority which concept has already been long abandoned.

This development bodes well for humanity. It only means that we are still capable of doing the right things in a world that denies climate change and affirms post-truths. Deliverance and redemption are still possible, and we just might be able to save humanity from the destructive hand of progress.

With the world warming up to newer ways of dealing with the environment, is the Philippines far behind? Perhaps, it is now time to grant legal personality to Manila Bay and other bodies of water that are in continued danger of degradation from pollution and destructive projects. That legislation may also include Rizal Park since the history and significance of both places are intimately intertwined. Only by recognizing their legal existence will we be able to preserve their significance in our history and in our daily lives. I am sure and confident that it is only a matter of time now that this will come to fruition.

Atty. Galahad R.A. Pe Benito earned his Master of Laws in Energy and Environment, with distinction, from Tulane Law School in the United States. A graduate of the Ateneo Law School, he is the author of "ECC Basics" and "Environmental Law: Pollution Control." He has been fighting for so long for the preservation of Manila Bay, the removal of dangerous oil depots in the City of Manila, and the non-cutting of trees for road widening projects.

WWW.TERRORISM.COM: The Question of Cyberterrorism and the Use of Force in the 21st Century*

Anthony Raymond A. Goquingco, J.D.

"Tomorrow's terrorist may be able to do more damage with a keyboard than with a bomb."

I. INTRODUCTION

On 11 September 2001, the world witnessed the most destructive terrorist act in human history when operatives of Al Qaeda crashed commercial passenger airplanes into the World Trade Center and the Pentagon. This tragedy brought to fore the threat which was international terrorism. In the days that followed what has come to be known as 9/11, the United Nations (UN) and the different countries of the world adopted a series of measures to counter the threat of international terrorism.

A. Terrorism in the 21st Century

i. Traditional Terrorism

After 9/11, the outrage over the attacks on the Pentagon and the World Trade Center prompted the United Nations and many countries to issue statements condemning international terrorism. Furthermore, the international legal community began to take steps to address the growing problem of international terrorism. The problem, however, of the measures taken by the international legal community is its focus on what can be called traditional terrorist acts.

The UN Security Council has defined terrorism as "…criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols

* A paper presented to Prof. Jane E. Stromseth in fulfillment of the requirements for the course International Law Seminar Use of Force and Conflict Resolution, Georgetown University Law Center, Washington, D.C. April 30, 2007.

relating to terrorism."[1] Most domestic laws also define terrorism in a similar manner.[2] The laws and measures against international terrorism still view terrorism as a physical act of destruction and do not take into consideration emerging technology. The legal community must realize that terrorism is no longer confined to acts of physical destruction. A new threat is being developed and one may call this threat cyberterrorism.

ii. Cyberterrorism

On 06 February 2007, it was reported that "[h]ackers briefly overwhelmed at least three of the 13 computers that help manage global computer traffic Tuesday in one of the most significant attacks against the Internet since 2002."[3] Furthermore, another author writes that: "The profusion of viruses has even become a national-security issue. Government officials worry that terrorists could easily launch viruses that cripple American telecommunications, sowing confusion in advance of a physical 9/11-style attack."[4] In fact, "al Qaeda has become the first guerrilla movement in history to migrate from physical space to cyberspace. With laptops and DVDs, in secret hideouts and at neighborhood Internet cafes, young code-writing jihadists have sought to replicate the training, communication, planning, and preaching facilities they lost in Afghanistan with countless new locations on the internet."[5]

"Clearly, cyberterrorism is a concern which must be addressed by the international legal community. The fact that cyberterrorism has not resulted in any public disaster is not a reason to delay in examining the phenomena and coming up with responses to deal with it."

This may just be the beginning. Imagine a scenario wherein a computer virus released over the internet by a terrorist group infects not only computers which handle internet traffic but manages to infiltrate national defense, telecommunication, financial, air traffic control, and emergency response computers. The virus instead of slowing down the

[1] Security Council Resolution 1566, 08 October 2004, UN Doc. S/RES/1566 (2004).

[2] *See* 18 USC § 2231 for the United States of America and the Human Security Act of 2007, Republic Act No. 9372, for the Republic of the Philippines.

[3] Anick Jesdanun, Associated Press, *Hackers Overwhelm Some Key Internet Traffic Computers*, The International Herald Tribune, 06 February 2007, http://www.iht.com/articles/ap/2007/02/06/business/NA-TEC-US-Internet-Attacks.php (last accessed 23 March 2007).

[4] Clive Thompson, *The Virus Underground*, New York Times Magazine, 08 February 2004, http://www.nytimes.com/2004/02/08/magazine/08WORMS.html?pagewanted=9&ei=5070&en=fc9ff36a223613e4&ex=1162875600&adxnnl=0&adxnnlx=1162777621-7beK72NJJWpL3sRZSRWqVA (last accessed 23 March 2007).

[5] Steve Coll and Susan Glauser, *Terrorists Turn to the Web as Base of Operations*, The Washington Post, 07 August 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/08/05/AR200508051138_pf.htm (last accessed 23 March 2007).

computer system actually forces the shut-down of the various networks. Such an attack could result in a variety of effects ranging from the shutdown of financial networks, to airplanes crashing to the ground due to lack of navigational data and communication, to the loss of coordination between local law enforcement and emergency response units and military units. The potential loss of life and damage caused by such a cyber attack would be enormous. Furthermore, the crippling effects of such an attack would leave a country virtually defenseless to more traditional acts of terrorism including a nuclear terrorist attack.

B. Scope Limitations and Objectives

Clearly, cyberterrorism is a concern which must be addressed by the international legal community. The fact that cyberterrorism has not resulted in any public disaster is not a reason to delay in examining the phenomena and coming up with responses to deal with it.

In view of the foregoing, this paper will examine cyberterrorism in the context of the international legal framework surrounding the use of force. The paper will try to determine whether or not cyberterrorism constitutes an aggressive act and consequently is prohibited by the basic principles of the United Nations. In addition, the paper will investigate cyberterrorism in light of the proposed definition of the crime of aggression. Finally, the paper will consider whether or not cyberterrorism constitutes an aggressive act or armed attack which gives rise to the right of self-defense under international law and to what extent can force be used in response to a cyberterrorist attack.

It is the proposition of this paper that cyberterrorism can be considered an aggressive act under the principles of the United Nations and customary international law, at least if it rises to a certain level of gravity or destruction. Thus, cyberterrorism is prohibited by international law and can give rise to a nation's right to use force in self-defense.

II. THE INTERNATIONAL LEGAL FRAMEWORK AND TERRORISM

A. The United Nation Conventions on Terrorism

International terrorism is not a new phenomenon. In the 1960s, the international legal community was faced with a growing number of acts which threatened the safety of air travel. As a response to this threat, the international community agreed to adopt

certain measures to criminalize certain acts committed on aircraft.[6] This was to be the first international treaty on terrorism. In the years that followed, several other treaties were agreed upon dealing with a variety of subjects. [7] The most recent of these treaties is the International Convention for the Suppression of Acts of Nuclear Terrorism.[8]

These treaties form the backbone for the international legal framework against terrorism. "These treaties do not establish individual criminal responsibility under international law."[9] Instead, the treaties create an obligation on state parties to criminalize certain acts under domestic law.[10] In addition, the treaties also encourage states to extradite individuals accused of committing acts defined in the treaties and to increase inter-state cooperation in areas of information sharing and law enforcement.

As a result, the treaties create a web of overlapping national criminal jurisdictions to outlaw terrorist acts.[11] Instead, "[t]he international conventions seek to utilize domestic criminal law to eliminate international terrorism rather than to establish 'international crimes.'"[12] Thus, a comprehensive international regime which can effectively deal with international terrorism has not been put into place.[13] It is worth noting, that in addition to a comprehensive international regime that deals with international terrorism, the development of a strong domestic legal system prosecutes terrorism and allows for law enforcement cooperation is likewise an important aspect to prevent and respond to terrorism.

Furthermore, the international legal framework, unexpectedly, does not touch on the subject of cyberterrorism. "The lack of provisions dealing with cyber terrorism is

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[6] 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 1248 U.N.T.S. 451.

[7] *See* (1) Convention for the Suppression of Unlawful Seizure of Aircraft; (2) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; (3) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; (4) International Convention Against the Taking of Hostages; (5) Convention on the Physical Protection of Nuclear Material; (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (7) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; (8) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; (9) Convention on the Marking of Plastic Explosives for the Purpose of Detection; (10) International Convention for the Suppression of Terrorist Bombing; and (11) International Convention for the Suppression of the Financing of Terrorism.

[8] The convention is not yet in force. It was adopted in April 2005, opened for signature on 14 September 2005 and will enter into force when it has been ratified by 22 Member States.

[9] Helen Duffy, The War on Terror and the Framework of International Law 90 (2005).

[10] *Id*.

[11] Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, 29 B.C. Int'l & Comp. L. Rev. 23, 31 (2006).

[12] *Id*. at 34-35.

[13] *Id*. at 31.

somewhat surprising, as the internet is becoming the single most widely used system for communications of any kind among individuals, thus also criminals and terrorists."[14] A commentator rightly points out that:

> Neither the various UN conventions on terrorism, nor the 1977 European Convention on the Suppression of Terrorism expressly contemplate cyber terrorism, leaving those interpreting these conventions, which lack a definition of cyber terrorism, with the difficult task of assessing, on a case-by-case basis, whether the language of these international instruments is adequate to cover a terrorist attack on the Net.[15]

B. The United Nations Resolutions on Terrorism

Prior to the events of 9/11, the United Nations was not as involved as it is today in the prevention and prosecution of international terrorism. In addition to facilitating the adoption of the first international conventions prohibiting certain terrorist acts, the United Nations has basically taken a passive role in the fight against terrorism. The General Assembly in the 1970s and 1980s passed a series of resolutions which condemned terrorist acts and encouraged states to take positive measures in preventing terrorism including signing and ratifying the different conventions on terrorist activities.[16]

The Security Council, on the other hand, was not as active in actions against terrorism during the 1970s and 1980s. It was only in 1989 and throughout the1990s that the Security Council issued a series of resolutions relating to international terrorism.[17] It was only after the events of 9/11 that the United Nations took a more active stance against international terrorism.

A day after the attacks in New York, Washington, D.C., and Pennsylvania, the Security Council issued a resolution condemning the terrorist attacks that had taken place.[18] More importantly, the resolution expressly stated that any act of international

[14] Ugo Draetta, *The Internet and Terrorist Activities, in* ENFORCING INTERNATIONAL LAW: NORMS AGAINST TERRORISM 453, 453 (Andrea Bianchi ed., 2004).
[15] *Id*. at 454.
[16] *See* the following General Assembly Resolutions: UN Doc. A/Res/3034(XXVII), UN Doc. A/Res/31/102, UN Doc. A/Res/32/147, UN Doc. A/Res/34/145, UN Doc. A/Res/36/109, UN Doc. A/Res/38/130, UN Doc. A/Res/39/159, and UN Doc. A/Res/40/61.
[17] *See* the following Security Council Resolutions: UN Doc. S/Res/635 (1989), UN Doc. S/Res/748 (1992), UN Doc. S/Res/731 (1992), UN Doc. S/Res/1044 (1996), UN Doc. S/Res/1054 (1996), UN Doc. S/Res/1189 (1998), UN Doc. S/Res/1214 (1998), UN Doc. S/Res/1267 (1999), UN Doc. S/Res/1269 (1999), and UN Doc. S/Res/1333 (2000).
[18] Security Council Resolution 1368, 12 September 2001, UN Doc. S/Res/1368 (2001).

terrorism was a threat to international peace and security.[19] This was key since it enabled the Security Council to make use of its powers under Chapter VII of the United Nations Charter.

The decision to declare terrorism as a threat to international peace and security was a conscious decision made by the Security Council and is reflected by the statements of the Ambassadors of China and Mauritius, among others.[20] This marked a turning point in the United Nation's attitude toward international terrorism. Sixteen days later, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 1373 which obligated states to undertake a wide variety of measures against terrorism. Following the adoption of Resolution 1373, the Security Council approved several resolutions strengthening the regime that had been established. These measures included the creation of two working groups under the Security Council and the revitalization of the Committee on Terrorism in 2004.

The General Assembly of the United Nations was also not idle. In a plenary session held the day after the attacks, the General Assembly adopted a resolution calling for international cooperation to prevent and eradicate acts of terrorism.[21] This was followed by a series of resolutions which reiterated the call for international cooperation and established a set of measures and guidelines to eliminate international terrorism.[22] This eventually led to the Global Counter-Terrorism Strategy adopted by the General Assembly on 08 September 2006.[23] Furthermore, state parties continue to work towards an international convention on terrorism.

C. The Limitation of the International Legal Framework

It may seem, at first glance, that the United Nations has set-up an effective legal regime to combat international terrorism. The different resolutions, both by the General Assembly and the Security Council, establish far reaching measures and plans of action to effectively counter the threat of terrorism. UN actions have also established several working groups and bodies that are specifically designed to tackle the threat

[19] *Id*.
[20] Record of the Security Council Meeting, 12 September 2001, UN Doc. S/PV.4370.
[21] General Assembly Resolution 56/1, 12 September 2001, UN Doc. A/Res/56/1 (2001).
[22] *See* General Assembly Resolution 56/88, 12 December 2001, UN Doc. A/Res/56/88 (2002); General Assembly Resolution 57/27, 19 November 2002, UN Doc. A/Res/57/27 (2003); and General Assembly Resolution 58/81, 09 December 2003, UN Doc. A/Res/58/81 (2004).
[23] General Assembly Resolution 60/288, 08 September 2006, UN Doc. A/Res/60/288 (2006).

of international terrorism. One of the most concrete steps taken by the UN in the fight against international terrorism is the General assembly's adoption of the Global Counter-Terrorism Strategy. All of these have been undertaken since the United Nations considers international terrorism as one of the most serious threats to the collective and individual security of the international legal community.[24]

In spite of all the measures taken by the United Nations and the importance placed on eradicating terrorism, it is evident that there are serious limitations in the international legal framework currently in place. These limitations hinder and put the international legal system at a disadvantage as it tries to deal with the ever evolving threat of international terrorism.

The most serious limitation of the international legal system is the dichotomy within the system. The legal framework to combat international terrorism rests on two pillars: the thirteen international conventions[25] and the different resolutions by the United Nations. It is undisputed that both the international conventions and the resolutions by the United Nations, especially Security Council resolutions under Chapter VII of the UN Charter, create binding obligations on member states to effectively counter terrorism. The problem, however, is that the two pillars of the international legal framework come from different perspectives – a law enforcement perspective and a use of force perspective.

An examination of the different international conventions will show that these require state parties to criminalize under domestic law certain acts which have been labeled as terrorist acts. In fact, the UN Security Council has obligated all states to establish terrorist acts as serious criminal offenses in domestic law and regulation.[26] A later Security Council resolution further reinforced this notion by considering terrorism to be criminal acts.[27]

On the other hand, Resolution 1373 also labels terrorism to be acts which threaten international peace and security.[28] Furthermore, the resolution invokes the Chapter VII powers of the Security Council to address the threat of international terrorism. It is clearly provided that: *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore

[24] Sheikha Haya Rashed Al Khalifa, President, United Nations General Assembly, Statement on the Introduction of the United Nations Global Counter-Terrorism Strategy (08 September 2006) *available at* http://www.un.org/terrorism/strategy-gapres-statement.html (last accessed 24 March 2007).

[25] As noted earlier, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism has not yet entered into force. The author, however, counts them as part of the international agreements in place to combat international terrorism.

[26] Security Council Resolution 1373, 28 September 2001, UN Doc. S/Res/1373 (2001).

[27] *Supra* note 1.

[28] *Supra* note 24.

international peace and security (emphasis supplied)."[29] Thus, actions undertaken under Chapter VII of the UN Charter imply that force may be used in order to deal with a threat to international peace and security.

Although the law enforcement and use of force perspectives in dealing with international terrorism are not mutually exclusive, the existence of both paradigms results in some confusion. *Is the problem of international terrorism to be pursued purely under a law enforcement paradigm as suggested by the international conventions? Or can force be used in order to address the situation?* As Professor George P. Fletcher states:

> If they are crimes, the obligation of the governments is to arrest the suspects and bring them to trial. They cannot use deadly force unless specific police officers are under a personal threat to their lives. They cannot argue, 'Well, it is too difficult to make arrest, let's bomb the house or, if necessary, the whole neighborhood.' In contrast, if the recurrent attacks constitute a situation of armed conflict, violence governed by the law of war, the government is entitled to deploy its military against the military forces of the enemy. ***Thus the fundamental problem is whether we classify a particular situation of violent attacks as crime or as war*** (emphasis supplied).[30]

This confusion was most evident in the failure of the United States to act on intelligence and information which was readily available leading up to 9/11. As one author states: "The answer lies partly in the decision of the U.S. administration to deal with political violence as a threat to civil order rather than as an assault on national security."[31]

Another weakness of the international legal system is the lack of a common definition of terrorism. As one author states: "The most controversial aspect of international anti-terrorism law is precisely the definition."[32] "There is no global convention that can be said to establish a general definition of 'terrorism' and obligations in respect thereof, that might be binding upon state parties under international law."[33]

"The main obstacle to a positive discussion [of a definition of terrorism] originated from attempts of United States- and Russia-led coalitions to justify terrorism by presenting it as a "movement for national liberation," or a "North-South conflict," and the ideological

[29] Article 39, United Nations Charter.
[30] George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. Int'l Crim. Just. 894, 897 (2006).
[31] Loretta Napoleoni, Terror Incorporated: Tracing the dollars Behind the Terror Network 4 (2005).
[32] Marco Sassoli, *Terrorism and War*, 4 J. Int'l Crim. Just. 959, 960 (2006).
[33] *Supra* note 9 at 31.

differences between socialist and capitalist countries (clarification added)."[34] This lack of a common core definition greatly undermines the legal framework and exposes the system to abuses. It is clear that a "[w]hat looks, smells and kills like terrorism is terrorism"[35] approach can no longer be adopted.

Another shortcoming of the international legal framework dealing with terrorism is the fact that the different international instruments do not create a comprehensive legal regime. Instead, the international conventions create a system of overlapping domestic or local legal systems which try to effectively deal with the threat of terrorism.[36] As one author notes, the conventions address specific conduct which may fall within the scope of what is referred to as terrorist activity and set forth a framework of obligation on state parties.[37] The problem with this methodology is that it fails to take into consideration that the domestic legal systems of states have their own criminal and procedural laws which may be inspired by different legal traditions.[38] Thus, "the lack of uniform legislative solutions at the domestic level may prejudice the overall effectiveness of the international regime."[39]

Lastly, the system is reactive rather than proactive. An examination of the different international treaties dealing with terrorism will show that a majority of these were responses to terrorist acts which had taken place prior to the treaties. It is essentially a piecemeal approach which fails to take into consideration new forms of terrorism which is being developed by terrorist organizations.[40]

These limitations of the international legal system hinder the capacity of the legal system to deal with terrorist threats. Instead of a flexible legal regime capable of dealing with emerging threats, the current system is quite rigid and reactionary. It fails to recognize and respond to new threats – one of which being cyberterrorism. The succeeding sections will explore the concept of cyberterrorism in relation to an act of aggression and whether or not cyberterrorism can give rise to the right of self-defense under international law.

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[34] Stanislav L. Tkachenko, *An International Perspective on Terrorism*, 35 Stetson L. Rev. 889, 891 (2006).

[35] *See* Sir Jeremy Greenstock, KCMG Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, General Assembly Debate on Terrorism, 1 October 2001, (2001), http:// www.un.org/terrorism/statements/ukE.html.

[36] *Supra* note 11 at 31.

[37] *Supra* note 9 at 23.

[38] Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 14 Eur. J. Int'l L. 881, 893 (2006).

[39] *Id*. at 893-894.

[40] *See supra* note 9 at 24.

III. AGGRESSION: DEFINING ITS PARAMETERS

Is terrorism an act of aggression or an "armed attack" under the international legal framework governing the use of force? This is the fundamental question faced by international lawyers today. The question becomes even more relevant when applied to cyberterrorism considering that cyberspace is a unique environment. As Professor Sharp notes: "Cyberspace is not a physical space – it defies measurement in any physical dimension or time-space continuum. It is a shorthand term that refers to the environment created by the confluence of cooperative networks of computers, information systems, and telecommunication infrastructures commonly referred to as the Internet and the World Wide Web."[41]

This section of the paper examines the concept of aggression and armed attack. Furthermore, it will explore the emerging definition of the crime of aggression and its effect on terrorism, in general, and cyberterrorism, in particular.

A. Article 2(4) of the United Nations Charter: The Basic Principle

The prohibition on the use of force is the cornerstone of the international legal system which finds itself explicitly provided in the Charter of the United Nations. Article 2(4) provides that:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
>
> . . .
>
> 4. All Members shall ***refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state***, or in any other manner inconsistent with the Purposes of the United Nations (emphasis supplied).[42]

The prohibition on the use of force traces its roots to the Kellogg-Briand Pact of 1928 which provides that states "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."[43] Elaborating on the principle, Professor John Norton Moore provides that "the basic governing principle is that force may not be aggressively used in international relations as an instrument of national policy, but that it may be used in individual or

[41] WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 15 (1999).
[42] United Nations Charter Article 2, paragraph 4.
[43] Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force 25 July 1929).

collective defense as a response to such an aggressive use of force by others."[44] The same sentiment is echoed by another commentator when he states that: "Article 2(4) essentially prohibits states from using force against one another."[45] This prohibition on the aggressive use of force, however, is not absolute. The UN Charter does, in certain instances, allow states to use force, particularly in self-defense to an armed attack. This, however, will be discussed in a later section.

The problem, however, lies in what constitutes aggression under international law. Professors McDougal and Feliciano criticize the view that: "[t]he commitment of members to "refrain from the use or threat of force" is sometimes assumed by commentators to refer to the use or threat of armed or military force."[46] Clearly, by adopting such a narrow view of aggression, there exists the possibility of excluding certain coercive and violent acts. Yet, there is a need, at the very least, to identify the basic elements which constitute aggression because it is only in case of aggression[47] or an armed attack that a state may resort to the use of force as a measure of self-defense.

Strictly speaking, international law makes a distinction between the terms "armed attack" and "act of aggression." In light, however, of the fact that the French text of Article 51, which is equally authoritative with the English, speaks of the right of defense against "agression armee" as "droit natural", the author uses the terms interchangeably as a trigger for a lawful act of self-defense.

B. Aggression as an International Criminal Act

In trying to determine what constitutes aggression, one may turn to the on going attempts to define the crime of aggression by the International Criminal Court (ICC). It must be remembered that the ICC is concerned with aggression as a crime subject to law enforcement. Consequently, it cannot be equated to a definition of aggression for self-defense purposes. The definition of the ICC, however, allows a better understanding of what can be considered an act of aggression in order to meet the requirements of a lawful act of self-defense.

i. The International Criminal Court and the Crime of Aggression

On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute paving

[44] John Norton Moore and Robert F. Turner, National Security Law (2nd Edition) 69(2005).
[45] Thomas M. Franck, Recourse to Force: State Action Against Threats and Armed Attacks 2 (2002).
[46] Myres S. McDougal & Florentino P. Feliciano, The International Law of War 124 (1994).
[47] Note that the author does not equate the term of "aggression" with the term "crime or war of aggression."

the way for the establishment of the ICC. The ICC was established to prosecute persons accused of the most serious crimes of international concern.[48]

Article 5 of the Statute provides that:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The court has jurisdiction in accordance with this Statute with respect to the following crimes:

   (a) The crime of genocide;
   (b) Crimes against humanity;
   (c) War crimes;
   (d) The crime of aggression.[49]

The Statute, however, fails to define the crime of aggression. Rather, it provides that: "[t]he court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime."[50] As a result, the Assembly of State Parties established a Special Working Group on the Crime of Aggression in order to provide a definition of the said crime.

ii. The Emerging Definition of the Crime of Aggression

In 2006, an informal inter-sessional meeting of the Special Working Group on the Crime of Aggression took place at the Liechtenstein Institute on Self Determination at the Woodrow Wilson School of Princeton University. The informal inter-sessional meeting produced some consensus towards achieving a definition of the crime of aggression.

In a press conference on 31 January 2007, the Chairman of the Special Working Group made a statement that progress had been made on the definition of aggression.[51] Furthermore, it was stated that:

> *The definition was likely to refer to resolution 3314*, but it was not clear whether the acts listed in that text would be part of the definition. The

[48] Rome Statute of the International Criminal Court, 17 July 1998, entry into force 01 July 2002, Article 1, 2187 U.N.T.S. 90 (1998).
[49] *Id*. at Article 5.
[50] *Id*.
[51] Press Conference by the Chairman of the Special Working Group on the Crime of Aggression, International Criminal Court Special Working Group on the Crime of Aggression *available at* http://www.un.org/News/briefings/docs/2007/070131_Wenaweser.doc.htm (last accessed 30 March 2007).

> definition would probably make it clear that aggression was a leadership crime. *It was also likely to contain a threshold clause stating that an act in question must in its character, gravity and scale constitute a manifest violation of the Charter.* Some people also wanted to include the intended object and the purpose of an act, such as establishing military occupation or annexing the territory of another State (emphasis supplied).[52]

The Report of the Special Working Group stressed "the importance of General Assembly resolution 3314 (XXIX) and the need to respect the principle of legality."[53] It was also stressed that there was a need "to qualify an act of aggression as a "manifest" violation of the United Nations Charter, or as amounting to a "war of aggression.""[54] As a result, two proposed definitions of the crime of aggression were circulated to the members of the working group.[55] The first definition provides that:

> 1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a state, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/ armed attack [which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.]
> 2. For the purpose of paragraph 1, "act of aggression" means an act referred to in [articles 1 and 3 of the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.
> 3. The provisions of articles 25, paragraph 3 (f) and [28] of the Statute do not apply to the crime of aggression.
> 4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council

[52] *Id*.

[53] Report of the Special Working Group on the Crime of Aggression, International Criminal Court Special Working Group on the Crime of Aggression 29 November 2006, ICC Doc. ICC-ASP/5/SWGCA/1 (2006).

[54] *Id*.

[55] Discussion Paper Proposed by the Chairman, International Criminal Court Special Working Group on the Crime of Aggression 16 January 2007, ICC Doc. ICC-ASP/5/SWGCA/2 (2007).

determination exists, the Court shall notify the Security Council of the situation before the Court.

5. Where the Security Council does not make such a determination within [six] months after the date of notification,
   Option 1: the Court may proceed with the case.
   Option 2: the Court may not proceed with the case.
   Option 3: the Court may, with due regard to the provisions of articles 12, 14, and 24 of the Charter, request the General Assembly of the United Nations to make a determination within [12] months. In the absence of such a determination, the Court may proceed with the case.
   Option 4: the Court may proceed if it ascertains that the International Court of Justice has made a finding in the proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.[56]

On the other hand, the Special Working Group also proposed a second definition which is essentially the same as the first. The changes being:

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a state, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack [which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.]

. . .

3. The provisions of articles 25, paragraph 3, and [28] of the Statute do not apply to the crime of aggression.[57]

Although, it will still be at least another two years before the crime of aggression can be presented to the Assembly of State Parties of the International Criminal Court for approval, the proposals of the Special Working Group are quite helpful in examining the concept of aggression. The proposals clearly show where the definition of the crime of aggression is moving towards.

[56] *Id.*
[57] *Id.*

An examination of both definitions shows that the following can be considered as basic elements of an aggressive act: (1) there is a use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the UN Charter[58]; and (2) the character, gravity, and scale constitute a manifest violation of the UN Charter.

The problem with the proposed definition of the Special Working Group of the ICC is the fact that it takes a very narrow view of aggression. By making reference and incorporating Resolution 3314 of the General Assembly, the Special Working Group has essentially limited the concept of aggression to the use of armed force by a state. Such a definition does not take into consideration developments in technology and the changing international system, particularly the internet and the abundance of non-state actors like Al-Qaeda.

C. Is Cyberterrorism an Armed Attack?

Examining the Special Working Group's proposed definition of the crime of aggression will show that the definition still sees aggression and/or armed attack in a traditional view. "This fundamental proscription against the use of interstate force is *traditionally regarded as being confined to the use or threat of 'armed' force, meaning the possible resort to a violent weapon that inflicts human injury* (emphasis supplied)."[59] *"While 'the threat or use of force' may be interpreted broadly to mean both armed and non-armed force, pragmatism tends to restrict this interpretation to armed intervention* (emphasis supplied).[60]

Applying the elements culled from the Special Working Group's proposed definition of the crime of aggression, it becomes evident that cyberterrorism does not qualify as an act of aggression. Cyberterrorism has been defined as the convergence of terrorism and cyberspace.[61] "It is generally understood to mean unlawful attacks and threats of attack against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives."[62] Thus, cyberterrorism, clearly, does not contemplate the use of force in the

[58] *See* General Assembly Resolution 3314 (XXIX), 14 December 1974, UN Doc. A/9631 (1974).

[59] D.W. Bowett, Self-Defence in International Law 148 (1958); and Ian Brownlie, International Law and the Use of Force by States 361 (1963).

[60] Christopher C. Joyner and Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 Eur. J. Int'l L. 825, 845-846 (2001).

[61] Dorothy Denning, Testimony before the Special Oversight Panel on Terrorism, Committee on Armed Services, United States House of Representatives (23 May 2000) *available at* http://www.cs.georgetown.edu/~denning/infosec/cyberterror.html (last accessed 31 March 2007).

[62] *Id.*

traditional sense. As some commentators state: "[o]bviously, computers are neither troops nor tanks."[63]

In view of the foregoing, the question whether cyberterrorism constitutes an armed attack or an act of aggression even becomes more pressing. A very narrow interpretation of what constitutes an act of aggression or an armed attack will lead to major loopholes in the international legal system which can be exploited by terrorists. One author asserts that:

> In a late modern society, the state is "hollowed out," and power is diffused across both public and private sectors. Power relates more to finance, knowledge and security. Consequently, the likely targets of terrorists shift in line with the new centres of power and the new power-holders – such as financial institutions in the City of London. Thus, ***terrorism becomes less focused upon states and territories, while terrorist groups themselves become more fluid and hybrid in objectives, forms and tactics*** (emphasis supplied).[64]

With the shift in the likely targets of terrorism, the international legal system must learn to adjust to changing times and circumstances. A static view of what is considered to be an aggressive act cannot and will not meet the demands of today's world. It must be remembered that the Special Working Group's definition of an act of aggression is based on a General Assembly Resolution passed in 1974. The world of 1974 is very different from today's world. The internet did not exist in the form we know of it today. Furthermore, modern society's dependence on technology puts it in a very delicate position which is open to a cyberterrorist attack.

The modernization of the world and the move towards an information society from an industrial society requires a re-examination of the traditional views on aggression and armed attack. Professors Joyner and Lotrionte have argued that:

> The Age of Information Warfare invites reconsideration of the restrictive scope of this prohibition. The fact that one government today can use IW instruments transnationally through cyberspace to inflict damage on cyber-based facilities in another state suggests the need to consider a broader interpretation of the prohibition on the use of force.[65]

[63] *Supra* note 60 at 845.
[64] Clive Walker, *Cyber-Terrorism: Legal Principle and Law in the United Kingdom*, 110 Penn St. L. Rev. 625, 631-632 (2006).
[65] *Supra* note 60 at 846.

Clearly, a cyberterrorist attack does not fall under the traditional concept of aggression or armed attack. However, this does not mean that these concepts should remain static. Clearly, as discussed above the notions of armed attack and aggression are starting to evolve to encompass a wider variety of acts including a cyber attack. As noted by a prominent national security law commentator, "[t]he prevailing view among international legal scholars seems to be that the use of force envisioned was more in the nature of armed force vice economic or political force, but whether or not armed force still has to be physical in nature is subject to debate (emphasis supplied)."[66] In fact, the International Court of Justice has not ruled out the possibility of limiting armed attack to the sending of military forces across the border of another State.[67] Consequently, an armed attack may not take the form of traditional military actions.

IV. THE USE OF FORCE IN RESPONSE TO TERRORISM: LEGAL DILEMMAS

The Charter of the United Nations allows states to resort to the use of force in certain limited scenarios; one of which is in lawful cases of self-defense. The question, however, is whether or not terrorism gives rise to a right to use force. This takes on particular importance in relation to cyberterrorism because of its unique nature.

A. Can Force be used Against Terrorism?

The basic rule regarding the use of force can be found in Article 2(4) and is clearly a prohibition against the unilateral recourse to force in international relations.[68] This prohibition, however, is not absolute. The UN Charter, under certain limited circumstances, does allow states to use force. The most recognized instance where forced may be used legally by a state is under the inherent right of self-defense.

The right of self-defense is enshrined in Article 51 of the United Nations Charter, which provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported

[66] Moore and Turner, *supra* note 44 at 1232-1233.
[67] *See* Case Concerning Military and Para-Military Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgments, I.C.J. Reports, 1986, p. 103, para. 195.
[68] *Supra* note 45 at 11.

> to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[69]

The inherent right of self-defense, however, is not absolute authorization to use force. As one noted commentator states: "Article 51 is not quite a *carte blanche*. It extends the right of individual and collective self-defense only "until the Security Council has taken measures to maintain international peace and security.""[70] Furthermore, customary international law dictates that any use of force in self-defense must be necessary and proportional.[71]

The concept of necessity is usually explained by referring to the letter of Secretary of State Webster in the *Caroline* case – that there must be a showing of necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."[72] Proportionality, on the other hand, has been defined as measures which are proportionate to the seriousness of the attack and warranted by the seriousness of the danger.[73] It has been noted that:

> There is, however, increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to the most comprehensive and fundamental test of all, reasonableness in particular context (emphasis supplied).[74]

In addition to the inherent right of self-defense, it has been noted that there are three other instances where force may be lawfully used by a state.[75] These are:

> (1) "pursuant to a valid decision of the United Nations Security Council (conversely, force is unlawful if contrary to a valid decision of the Security Council;" [76]

[69] United Nations Charter Article 51.
[70] *Supra* note 45 at 49.
[71] *Supra* note 44 at 85.
[72] 2 Moore, Digest of International Law 412 (1906).
[73] *Supra* note 46 at 218.
[74] McDougal and Feliciano, *supra* note 46 at 218.
[75] *Id.* at 70.
[76] *Id.*

(2) "when undertaken by a regional arrangement acting under chapter VIII of the Charter and which is (a) consistent with the "purposes and principles" of the Charter, and (b) either not an enforcement action or, if an enforcement action, is authorized by the Security Council;"[77] and
(3) "when "below the threshold" of Article 2(4) of the Charter, that is, action not "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.""[78]

As discussed, international law, as embodied in the UN Charter, only allows for a very narrow spectrum of instances where force may be legally used by a state.

The next section discusses whether or not cyberterrorism is one instance where force may be used by a state legally.

B. Cyberterrorism as an Act of Aggression and an Armed Attack

A very strict and traditional interpretation of international law terms suggests that cyberterrorism cannot qualify as an act of aggression or as an armed act because it doesn't involve the use of physical or military force. This, however, should not be the case. Technological advancement and the sophistication of state and non-state actors must always be a consideration in the interpretation of international law. International law, just like today's world, is in state of constant flux. International law norms which were developed decades ago must be able to adapt to changing times or circumstances lest the international legal system fall into a state of disuse because of its inability to cope with changes.

An acknowledged expert on the internet and cyberspace from Georgetown University points out that:

> What we do know is that information systems are vulnerable and there are people who are motivated to do bad things. For this reason, it is worth taking information warfare seriously, particularly as it affects critical national infrastructures and one's own information resources – not because a catastrophic attack is inevitable, but to prepare for an uncertain future.[79]

[77] *Id.*
[78] *Id.*
[79] DOROTHY E. DENNING, INFORMATION WARFARE AND SECURITY, 19 (1999).

This stresses the importance of the ability of the legal framework to adapt to changing times and circumstances. It is quite clear "that unarmed, non-military physical force by a state can affect another state just as severely as the use of armed military force."[80] It has also been stated that unarmed non-military physical force can produce the effects of an armed attack consequently prompting the application of the right of self-defense contained in Article 51 of the UN Charter.[81] Consequently, a conclusion can be drawn that a cyberterrorist attack may constitute an armed attack or an act of aggression under international law.

"The critical point is this: though perhaps not 'armed force' in the literal sense, resort to cyber-force may be viewed as a form of intervention that can produce certain harmful or coercive effects in other states."[82] It has been argued that "the real possibility that computer-based information operations in one state could destroy lives and damage property in other states points up the legal rationale for concluding that such activities should be prohibited as a 'use of force' under the UN Charter."[83]

Imagine and consider the following series of layered events, all of which were conducted through the use of the internet and cyberspace. A group of well-educated, slightly radical individuals decide to release a computer virus over the internet to protest what they perceive as Western neo-imperialism. The virus released from an obscure internet café in Sydney, Australia is designed to infiltrate, disrupt, and allow remote access to civilian, military, telecommunication, and emergency response computer networks world-wide.

The first phase of the virus affects civilian food manufacturing and water treatment plants in the United States. The group first remotely accesses the computers of several food manufacturers changing the level of nutritional supplements thus causing people who eat the tainted food to get sick. Simultaneously, the same group also remotely accesses water treatment plants increasing the level of chemicals to purify water to toxic levels.

The second layer of this scenario involves the same virus affecting international telecommunication computers. Computers servicing telecommunication companies are overloaded with huge amounts of data which jam the computers and disrupt telephone service throughout the world.

[80] *Supra* note 41 at 101.
[81] *Id*.
[82] *Supra* note 60 at 849.
[83] *Id*. at 850.

The third layer of this scenario consists of the computer virus causing financial computers in London, New York, Hong Kong, Singapore, and Tokyo to crash. Expectedly, the stock markets in these major financial centers plummet and the world economy is headed towards a major economic recession.

The fourth layer in this cyberterrorist attack takes place when the virus affects both electrical and natural gas grids throughout the United States and causes them to overload. This overload in the system causes power outages and explosions from the build-up and leaks of natural gas at certain junction points.

The fifth layer takes place when the virus introduced into the internet causes emergency response command and control computer networks (e.g. the 911 system of the United States) to fail. Emergency response units are now severely hampered when responding to a variety of incidents including the increasing number of calls for medical help caused by the consumption of tainted food and the number of explosions created by the leaking gas lines.

The final layer of this cyberterrorist attack occurs when the virus released by the individuals affects new generation air traffic control computers at John F. Kennedy International Airport, Heathrow International Airport, the Ninoy Aquino International Airport, and the Narita International Airport. The virus affects the air traffic control computers in such a way wherein falsified data is sent to several civilian airplanes. This corrupted data results in the crossing of flight paths ultimately resulting in the collision and crash of several airplanes over New York, London, Tokyo, and Manila.

The events described may seem like a doomsday scenario that comes straight out of a Tom Clancy novel. Yet, the possibility of such a comprehensive and massive cyber-attack on computer structures and networks is real possibility. As noted by Professor Denning, information structures are very vulnerable to an attack by certain individuals.[84]

Clearly, a cyberterrorist attack does not make use of physical armed force to inflict damage to property and cause the death of a civilian population. Yet, there is growing recognition that unarmed, non-military physical force may produce the effects of an armed attack.[85] As one author states, "***Any destructive state activity intentionally caused within***

[84] *Supra* note 80.
[85] *Supra* note 41 at 101.

the sovereign territory of another state is an unlawful use of force (emphasis supplied)."[86] The gravity of the activity, however, must be taken into consideration. An act which produces minimal effect on the sovereign territory of another state cannot be considered an unlawful use of force. Furthermore, with the growing number of non-state actors such as terrorists groups, destructive activity is no longer the exclusive province of states.

Furthermore, "***the real possibility that computer-based information operations in one state could destroy the lives and damage property in other states points up the legal rationale for concluding that such activities should be prohibited as a 'use of force' under the UN Charter law*** (emphasis supplied)."[87] Thus, it has been asserted that:

> The cross-border use of weapons and bombardment of the territory of one state by another state is one of the classic cases of a use of force within the meaning of Article 2(4). The effect can be the same, if not more severe, as if the destruction was caused by conventional kinetic means of warfare. Accordingly, **any state activity in CyberSpace that intentionally cause *any* destructive effect within the sovereign territory of another state are an unlawful use of force**.[88]

International law, therefore, seems to be moving towards a more flexible and all-encompassing view on what constitutes an act of aggression and an armed attack. A deliberate and direct attack on the internet by cyberterrorists which results in non-combatant death and destruction is considered by a growing number of scholars to constitute an armed attack which allows a state to respond to such cyberterrorism in accordance with the established rules on self-defense as provided for in Article 51 of the UN Charter.

V. RESPONDING TO CYBERTERRORISM IN THE 21ST CENTURY

A. The Right of Self-Defense as a Response to Cyberterrorism

It has been said many times that "international law is not a suicide pact among states."[89] Thus, international law explicitly recognizes a states inherent right to self-defense as provided for in Article 51 of the United Nations Charter.

[86] *Supra* note 41 at 102.
[87] *Supra* note 60 at 850.
[88] *Supra* note 41 at 102.
[89] *Supra* note 60 at 855.

i. The Strict Traditional View

Article 51 of the UN Charter is an explicit recognition that states have the right and the authority to defend themselves from an armed attack. Self-defense, however, was to act as a measure of last resort. "Only as a secondary, fail-safe resort did the drafters permit members to deploy force in their individual, sovereign capacity, and then only in self-defense against an actual armed attack."[90] Thus, Professor Thomas Franck makes the assertion that the drafters of the UN Charter deliberately closed the door on any claim of anticipatory self-defense.[91] There was a conscious decision, he argues, to limit the right of self-defense to situations where there had been an actual armed attack.[92]

This limited and narrow reading of the inherent right of self-defense contained in Article 51 of the UN Charter, however, fails to recognize the need for a more adaptive interpretation of such right. The advent of a new age of nuclear warheads and long-range rocketry would make this limited reading of Article 51 logically indefensible.[93] It would also fail to anticipate and address the rise in surrogate warfare prompted by rogue states and the rise of terrorism, in all its forms, in the last decade of the 20th Century and the first decade of the 21st Century.

ii. Anticipatory Self-Defense

Anticipatory self-defense has long been recognized by customary international law. The Caroline case was a classic attempt to define and limit this recognized right. The right of anticipatory self-defense may have been somewhat diluted by a strict interpretation of Article 51 by some commentators. However, the fact remains that customary international law still recognizes the right of anticipatory self defense.

One author notes that since Article 51 "is silent as to the right of self-defense under customary law (which goes beyond the cases of armed attack), it should not be construed by implication to eliminate that right."[94] "*It is not clear that article 51 was intended to eliminate the customary law right of self-defense and it should not be given that effect* (emphasis supplied)."[95] Interpreting the right, however, to broadly authorize preemptive strikes and anticipatory defense in response to threats, should be avoided.[96] As has been noted, "***a***

[90] *Supra* note 45 at 45.
[91] *Supra* note 45 at 45.
[92] *Id.*
[93] *Id.*
[94] Oscar Schacter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1634 (1984).
[95] *Id.*
[96] *Id.*

society does not have to wait until it is physically harmed to defend itself (emphasis supplied)."[97]

Despite the differences by noted commentators, it is agreed that in any exercise of the right of self-defense, the application of force must be both necessary and proportional.[98] Although, there have been attempts to provide concrete standards in determining what is necessary and proportional, the determination of necessity and proportionality remains a factual analysis which depends on the circumstances of a particular situation.[99] Particularly challenging is applying these concepts to responses to cyberterror attacks.

B. The Use of Force in Response to Cyberterrorism

In light of the changing conditions of today's world, the principles of self-defense and the use of force must adopt lest international law does indeed become a suicide pact among states. As an author notes: "What is especially needed today is a careful reconsideration of the concept of imminence as well as of "necessity" and "proportionality" – in short, the scope of the right of self-defense – in response to urgent and unconventional threats posed by terrorists networks bent on acquiring weapons of mass destruction."[100]

In view of the foregoing, it is clear that cyberterrorism represents an emerging threat faced by the international legal system. Despite the seemingly restrictive words of Article 2(4), "it may be noted that the terms of Article 2(4) are explicitly technologically neutral – there is no suggestion that a particular type of weapon or military instrument has to be used to fall within the provision." [101] Consequently, "It would seem possible therefore to apply the Article to new forms of technology which embrace harm that would not result from military activity."[102]

Consequently, "**it can be argued that where an attack has caused or is likely to cause physical damage to tangible property and human beings in the physical world then the target state should be entitled to use force in self-defence**."[103] Thus, there must exist a tangible effect on property and human lives in the physical world. Furthermore, these effects should be of a sufficient gravity which can be equated to an armed attack. It

[97] *Supra* note 60 at 855.
[98] *Supra* note 44 at 85.
[99] *See supra* note 96 at 135-1638.
[100] Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment,* 97 Am. J. Int'l L. 628, 638 (2003).
[101] Richard Garnett and Paul Clarke, *Cyberterrorism: A New Challenge for International Law*, in Enforcing International Law Norms Against Terrorism, 465, 481 (Andrea Bianchi ed., 2004).
[102] *Id*.
[103] *Id*. at 484.

is only when these two factors are present can a state have a legitimate claim to use force in self-defense against a cyber attack.

This view is also shared by other international legal scholars. Professors Joyner and Lotrionte provide that:

> The argument seems persuasive that cyber-based activities that directly and intentionally result in non-combatant deaths and destruction – such as the premeditated disruption of an air traffic control system that results in the crash of a civilian airliner or the corruption of a medical data base that causes civilians or wounded soldiers to receive transfusions of the wrong blood type – breach modern prohibitions on the use of force.[104]

Furthermore, "[i]t seems reasonable to qualify cyber-assaults that are sufficiently destructive as 'armed attacks', regardless of the level of intrusion."[105] The difficulty lies in contending that any unauthorized cyber-based intrusion meets the threshold of being an armed attack.[106] It has been postulated, however, that:

> If, however, the same act resulted in shutting down a state's air traffic control system, as well as in collapsing banking institutions, financial systems and public utilities, and opened the floodgates of dams that caused deaths and damage to property, considerable merit would reside in alleging that such an attack inflicted damage equivalent to that caused by an 'armed attack'. Although those information systems do not contain classified information, such computer-generated acts would obviously imperil that state's society and threaten its national security.[107]

In view of the foregoing discussion, a conclusion can clearly be drawn that cyberterrorism is an act of aggression or an armed attack when it reaches certain levels of destructive intensity. Consequently, it is a clear violation of the norms of international law, especially of Article 2(4) of the UN Charter. As an armed attack or an act of aggression, widespread and destructive acts of cyberterrorism will allow a state to resort to a use of force in self-defense under Article 51 of the UN Charter and under principles of customary international law.

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[104] *Supra* note 60 at 850.
[105] *Id*. at 855.
[106] *Id*.
[107] *Id*.

Clearly, a state may resort to the use of force in self-defense against a cyberterror attack. The question, however, is how much force can be used. The traditional understanding of proportionality under international law clearly applies. Thus, whatever force a state may use has to be proportional to the circumstances.

In the hypothetical scenario presented earlier, an all out military campaign to invade a country to punish members of a terrorist group would be uncalled for and illegal under international law. Narrow and tactical, as opposed to strategic, military action may be the proper response. Furthermore, the nature of the cyber attack, itself, gives an idea of how much force can be used by a state. Since the cyber attack, in all likelihood, will be launched by a single individual or a small group of individuals, from a few selected computers, a massive military action would not make any sense since this will only give the perpetrators an opportunity to relocate considering the logistical requirements of such a military action.

On the other hand, a surgical strike either by a small group of commandoes or military personnel will allow for a greater chance of success. In addition, such action will not only allow a state to neutralize the threat but it also allows for the capture and prosecution of the responsible individuals.

Consequently, four basic rules can be derived in relation to cyberterrorism. First, "determination must be made as to what constitutes lawful force when information operations are used transnationally."[108] Second, "a determination must be made as to what actions in information operations amount to an 'unarmed attack'."[109] Third, the duration of the cyber-attack must be considered in determining whether such an attack rises to a level of an act of aggression.[110] Finally, the use of force in response to cyberterrorism must always be proportional under international law. Considering the circumstances of a particular factual situation, the most allowable use of force is a surgical commando raid.

[108] *Id*. at 863.
[109] *Id*.
[110] *Id*.

VI. CONCLUSIONS

Today's world is one of technology and information. All countries of the world, from developing nations to highly industrialized states, all depend on computer systems and networks of one kind or another. These computer systems are relatively unprotected and vulnerable to abuse and attacks by individuals who would like to inflict damage and coerce a nation state.

Traditional rules regarding the use of force and self-defense in international law have to be re-examined and re-evaluated in light of changing circumstances and innovations. A strict and traditional application of these international law norms will essentially render international law a suicide pact. Consequently, these rules have to be viewed with some flexibility.

It is clear that cyberterrorism, when it reaches certain levels of intensity and destruction, constitutes an aggressive act. A computer assault which intentionally compromises the control system of a chemical manufacturing plant resulting in the release of toxic chemicals into the atmosphere and ecosystem is clearly of such intensity that it should be construed as an armed attack. Such an attack is clearly prohibited by the basic principles of the United Nations, in particular Article 2(4). The fact that cyberterrorism is an armed attack or an act of aggression gives rise to a states' inherent right of self-defense as embodied in Article 51 of the UN Charter. Any other conclusion would render today's international system illogical and would only result in states defying the international legal system in order to protect their existence.

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ARE CHILDREN CRIMINALS?
An Analysis of Proposed Measures to Lower the Minimum Age of Criminal Responsibility

Emmanuelle Nicole L. Valencia

I. INTRODUCTION

Amending the Juvenile Justice Law is among the priority legislative measures enumerated by President Rodrigo Duterte late last year.[1] In response to this, four bills have been proposed in the House of Representatives that seek to lower the minimum age of criminal responsibility from the current 15 years of age to just nine. The bills are currently pending with the Committee on Justice, but the results of an online poll conducted by the House in January were overwhelmingly against the measure.[2]

Another item on President Duterte's legislative agenda is the re-imposition of the death penalty. On March 7, 2017, the House of Representatives, with a vote of 216 in favor, 54 against and one abstention, approved House Bill Number 4727 on its third and final reading, reinstating the death penalty in the Philippines. The events leading to the passage of this bill in the House is revelatory of the tactics which the majority is willing to employ in order to get their way. These include "whipping" party members to toe the line, employing rules for coalition officers that mandate their support of the President's legislative agenda,[3] and

> "While children may appear to identify right and wrong behavior, they lack an appreciation for why rules exist and implications of these rules in society. This would explain why a child may understand that stealing is not the right thing to do, but when he or his family are hungry and cannot afford to eat, he may not understand why it is wrong to take bread from someone else."

[1] Romero, Alexis, *Criminal liability age may be lowered to* 12, Phil Star Global, Jun. 8, 2016, *available at* http://www.philstar.com/headlines/2016/06/08/1590859/criminal-liability-age-may-be-lowered-12 last accessed Apr. 19, 2017.

[2] *Congress conducts online poll on lowering age of criminal* liability, ABS-CBN News, Jan. 13, 2017, *available at* http://www.news.abs-cbn.com/news/01/12/17/congress-conducts-online-poll-on-lowering-age-of-criminal-liability last accessed Apr. 19, 2017.

[3] Cepeda, Mara, *When the House whips go to work for the death penalty*, Rappler, *available at* http://www.rappler.com/newsbreak/in-depth/164203-whips-death-penalty-bill last accessed Apr. 19, 2017.

threatening to divest those who vote against the measure of their committee chair and deputy speaker positions.[4]

House Speaker Pantaleon Alvarez, a staunch Duterte supporter and author of both the measure to restore capital punishment, and one of the proposed bills seeking to lower the minimum age of criminal responsibility, has asserted that these bills are "crucial components of an effective dispensation of both reformative and retributive justice."[5] If the process used by the majority to effect the passage of the re-imposition of the death penalty is to be used as a precedent, it appears that it is only a matter of time before the proposition to lower the minimum age of criminal responsibility becomes a reality.

Is lowering the minimum age of criminal responsibility in the Philippines really the best solution for the country's purportedly growing problem of child crime?

II. THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY AND CHILDREN IN CONFLICT WITH THE LAW

The minimum age of criminal responsibility (MACR) is the lowest possible age at which a child may be prosecuted in criminal court for an offense that he or she has committed. In the Philippines, since the enactment of the Juvenile Justice and Welfare Act (JJWA), the MACR has been set at 15 years of age. This means that "a child fifteen years of age or under at the time of the commission of the offense shall be exempt from criminal liability. However, the child shall be subjected to an intervention program"[6], and may be held civilly liable for his or her actions.

In reality, child offenders are not referred to anywhere in the law as criminals. Instead, they are referred to as children in conflict with the law (CICL). According to the JJWA, a CICL "refers to a child who is alleged as, accused of, or adjudged as having committed an offense under Philippine laws."[7]

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[4] Cepeda, Mara, *Death Penalty: Absent, abstaining House leaders to lose posts, warns Alvarez*, Rappler, *available at* http://www.rappler.com/nation/163372-alvarez-warning-house-leaders-death-penalty-vote last accessed Apr. 19, 2017.

[5] Gavilan, Jodesz, *Alvarez eyes House Con-Con bill in September*, Rappler, *available at* http://www.rappler.com/newsbreak/rich-media/138317-alvarez-house-priorities-duterte-platform last accessed Apr. 19, 2017.

[6] An Act Strengthening the Juvenile Justice System in the Philippines, Amending for the Purpose Republic Act No. 9344, Otherwise Known as the Juvenile Justice and Welfare Act of 2006 and Appropriating Funds Therefor, Republic Act No. 10630, Sec. 6 (2013).

[7] An Act Establishing a Comprehensive Juvenile Justice and Welfare System, Creating the Juvenile Justice and Welfare Council under the Department of Justice, Appropriating Funds Therefor and for Other Purposes, [Juvenile Justice and Welfare Act of 2006], Republic Act No. 9344, Sec. 4(e) (2006).

Statistical data shows that a typical CICL is male, aged 14-17, has low educational attainment, has stopped attending school, uses drugs and/or alcohol, and is charged with property related crimes, like theft.[8] CICL typically come from families of six, low economic standing or whose parents have unstable incomes, home lives which involve domestic or family violence, and have parents who are separated.[9]

In the first quarter of 2016, there were 1,297 CICL served by City and Municipal Social Welfare and Development Offices nationwide; these CICL underwent community-based intervention, diversion and after care programs. During the same time period, there were an additional 755 CICL housed in Bahay Pag-Asa and other youth facilities.[10]

III. LEGISLATIVE HISTORY

The Revised Penal Code (RPC) took effect in January 1, 1932.[11] In recent years, it has been heavily and repeatedly criticized for being outdated by the likes of Sen. Franklin Drilon[12] and Sen. Leila de Lima.[13] In 2011, then Secretary of Justice De Lima created an inter-agency Criminal Code Committee, which was tasked to study, and assess the RPC and its numerous amendments. The Committee aimed to consolidate these into an updated and modern criminal code that would provide clarity and effectivity in the enforcement and administration of law. The Code of Crimes draft has been completed, but has yet to become law.

Under the antiquated RPC, from the age of nine years old, children could be arrested and detained like adults, and with adults.[14] According to the Council for the Welfare of Children reports, between 1995 and 2000, there were 52,756 children who came in conflict with the law, and these children were often detained in the same cells as adult offenders.[15] Around the same time, the United Nations Committee on the Rights of the Child expressed concern about the way juvenile justice in the Philippines was administered,

[8] Council for the Welfare of Children, Situation of the Filipino Children (2012).
[9] Department of Social Welfare and Development Field Offices, Data from Regional Rehabilitation Centers for the Youth (2016).
[10] Juvenile Justice and Welfare Council, Data on CICL (2016).
[11] An Act Revising the Penal Code and Other Penal Laws, [The Revised Penal Code], Act. No. 3815, Sec. 1 (1930).
[12] Bueza, Michael, *List: Drilon's proposed changes to the Revised Penal Code*, Rappler, Mar. 7, 2015, *available at* http://www.rappler.com/newsbreak/iq/86008-list-drilon-senate-bill-amendments-revised-penal-code last accessed Apr. 9, 2017.
[13] Ramos-Araneta, Macon, *Repeal outdated penal code, Leila proposes*, Manila Standard, Oct. 31, 2016, *available at* http://thestandard.com.ph/news/-main-stories/top-stories/220216/repeal-outdated-penal-code-leila-proposes.html last accessed Apr. 9, 2017.
[14] United Nations Children's Fund, Jail is No Place for a Child, *available at* https://www.unicef.org/philippines/children/jj_1.html last accessed Apr. 10, 2017.
[15] *Id*.

and the incompatibility of the policies of the RPC with the provisions of the international covenants to which the Philippines is a signatory.[16]

Reforms to the juvenile justice system of the Philippines came in 2006 when President Gloria Macapagal-Arroyo signed into law the Juvenile Justice and Welfare Act. Arroyo had certified the legislation as an administrative priority, and both the House of Representatives and the Senate unanimously passed the measure.[17] A number of features of the JJWA were adopted from international agreements, including various United Nations documents. As a result of the passage of the law, the Philippines was praised in the international community for its commitment to protecting the rights of children.

In 2012, Deputy Speaker and Cebu representative Pablo Garcia proposed an amendment to the JJWA via House Bill 6052, which was approved on third and final reading in the House of Representatives, but was ultimately struck down in the Senate. The bill sought to lower the MACR from 15 to 12. An online poll conducted by the House of Representatives at the time showed that 65% of respondents did not believe that lowering the MACR was a justifiable policy. The late Sen. Miriam Defensor-Santiago asserted that instead of criminalizing them, the state should prioritize the safety of children, and that CICL should be subjected to child welfare, restoration, intervention and protection programs.[18]

In 2013, the JJWA was amended and strengthened. While the law maintained the exemption from criminal liability of children aged 15 and below, it held CICL responsible for civil liabilities incurred by the crimes that they committed.[19] The amended law further ensures intervention for CICLs involved in serious crimes, especially those who are below the MACR. Those CICL above 12 and up to 15, who acted with discernment and were involved in serious offenses like rape, homicide and murder, or involved in illegal drugs are considered as neglected children, and are mandatorily placed in Bahay Pag-Asa, which are intensive juvenile intervention and support centers funded by local governments. Further, repeat offenders, or CICL who have committed crimes more than three times are

[16] *Id*.

[17] United Nations Children's Fund, Philippines Enacts Law on Juvenile Justice System, *available at* https://www.unicef.org/philippines/archives/news/060405.html last accessed Apr. 10, 2017.

[18] Senate of the Philippines, Press Release: Miriam and JJWC: Rehabilitate not penalize children in conflict with the law, Jul. 4, 2012, *available at* http://www.senate.gov.ph/press_release/2012/0704_santiago2.asp last accessed Mar. 20, 2017.

[19] Evangelista, Kate, Santiago opposes lower minimum age for juvenile offenders, Phil. Daily Inquirer, Jul. 4, 2012, *available at* http://newsinfo.inquirer.net/350111/senate-oks-amendment-to-juvenile-justice-act last accessed Mar. 20, 2017.

considered as neglected children, and are compelled to undergo intervention programs supervised by the local social welfare and development officers.[20]

IV. PROPOSED LEGISLATION

There are currently four proposed bills in the House of Representatives that seek to lower the MACR in the Philippines from the present 15 years to just nine years old. These are House Bills Number 2, written by Rep. Fredenil Castro (Second District of Capiz) and Speaker Pantaleon Alvarez (First District of Davao del Norte); Number 935 written by Rep. Tobias Tiangco (Lone District of Navotas City); Number 1609 written by Rep. Mercedes Cagas (Lone District of Davao del Sur); and Number 3973, written by Rep. Estrellita Suansing (First District of Nueva Ecija).

The explanatory notes appended to these House Bills explain the authors' lines of reasoning for their proposals. Speaker Alvarez and Rep. Castro claim that youthful offenders are pampered by the current legal regime, because they know that they can get away with crimes, and that adult criminals knowingly use children below the MACR.[21] Rep. Tiangco claims that the JJWA has led to the exploitation of the youth instead of their protection, and that many crimes committed by CICL have been left unprosecuted.[22] Rep. Cagas claims that crimes involving minors have been tremendously increasing, and that syndicates are taking advantage of children because of their exemption from criminal liability.[23] Finally, Rep. Suansing asserts that there are more juvenile offenders than ever before, and that the younger age group is more prone to criminality.[24]

The authors' justifications for choosing nine as the age to which the MACR should be lowered are also delineated in their explanatory notes; the four bills all highlight that children at the present time know what they are doing because of their exposure to advanced technology and easier access to more information. The bills all cite modern technology as the biggest contributing factor in the more rapid development and maturity of children. Speaker Alvarez and Rep. Castro believe that children nine and above are already fully informed, considering the information available to them through the internet and digital

[20] Integrated Bar of the Philippines, IBP Makati Continuing Legal Education Updates on Philippine Laws and Jurisprudence, *available at* https://ibpmakatilegaleducation.wordpress.com/2013/10/30/r-a-10630-october-3-2013-an-act-strengthening-the-juvenile-justice-system-in-the-philippines-amending-for-the-purpose-republic-act-no-9344-otherwise-known-as-the-juvenile-justice-and/ last accessed Mar. 20, 2017.
[21] H.B. No. 2, 17th Cong., 1st Reg. Sess., Explanatory note (2016).
[22] H.B. No. 935, 17th Cong., 1st Reg. Sess., Explanatory note (2016).
[23] H.B. No. 1609, 17th Cong., 1st Reg. Sess., Explanatory note (2016).
[24] H.B. No. 3973, 17th Cong., 1st Reg. Sess., Explanatory note (2016).

media.[25] For his part, Rep. Tiangco has stated during the sub-committee hearing that he would consider increasing his proposal from nine to 12 years old.

Tiangco claims that with the advancements in technology and improved communication and education among the youth, the determination of what is right and wrong is no longer difficult for children.[26] Rep. Cagas asserts that under the massive influence of modern communication, minors are more mature now, and their perspectives in life are greatly improved, as contrasted with the minors of years past.[27] Rep. Suansing asserts that exposure to pervading influences like the internet and other state of the art technology, and exposure to corrupting influences like gambling, liquor and prohibited drugs have made the children of today reach an acceptable level of maturity to differentiate between right and wrong at an earlier age, even as early as nine.[28]

Aside from these justifications and explanations, what the authors of all four bills have failed to present are studies and scientific evidence to back their claims. There appears to be no basis other than their personal opinions for their proposals to lower the MACR from 15 to nine. The Department of Justice, the Philippine National Police and the National Bureau of Investigation all support the position that lowering the MACR is logical, and cite their own experiences and observations as lending support to their claims. The fact remains, however, that despite all three of these agencies having completely free access to all the requisite data, none have been able to present verifiable and quantifiable data to support their claims.

V. FACTUAL ANALYSIS

The authors of the various bills to lower the MACR claim that crime is rampant in the Philippines at the present time, and that children commit crimes at an early age. PNP statistics from 2006-2012 indicate that 98% of crimes are committed by adults, and only 2% are committed by children.[29] There is no hard evidence to suggest that these statistics have markedly altered to date.

Another justification set forth by the proponents is that crime syndicates are using children in their illegal operations to get away with their unlawful designs scot free. The fact of the matter is that when syndicates or adult individuals use children for criminal activities, the children are victims. Lowering the MACR could have the opposite

[25] *Supra* note 21.
[26] *Supra* note 22.
[27] *Supra* note 23.
[28] *Supra* note 24.
[29] Philippine National Police, Annual Comparative Statistics for CICL vs. Adults, (2012).

effect from that intended, whereby syndicates victimize even younger and more helpless children; these child victims should be rescued and protected, rather than prosecuted and vilified. Syndicates which victimize children are the ones who should be criminalized and penalized, as they are under Art. VI, Sec. 10(e)(2) and 10(e)(3) of RA 7610, the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act".[30] The issue here is a need for better enforcement of existing laws, rather than a need to create new legislation that punishes children for the crimes of adults.

On April 3, 2017, in an address before the Boy Scouts of the Philippines, President Duterte claimed that for CICL below the current MACR of 15 years old, "whatever you do, even if you kill, rape, or steal, or rape with homicide, when your mother comes, you go home."[31] Clearly, this statement was misinformed. The President was referring to the original version of the JJWA, which has since been amended in 2013.

It is erroneous to assert that victims do not get justice, and that CICL are not punished. Under the JJWA, a child charged with theft may be exempt from criminal, but not civil liability. The CICL still has to pay for the damages resulting from the offense, and must further comply with the requirement of an intervention program, supervised by a social worker. The JJWA has specific procedures by which to handle CICLs who are exempt from criminal liability, but commit serious offenses, and those who are repeat offenders. Under the current regime, children who are above 12 and up to 15 years of age who commit serious or repeat offenses shall be placed in a Bahay Pag-Asa and will undergo intensive juvenile intervention programs.[32]

"'Bahay Pag-Asa' refers to a 24-hour child caring institution established, funded and managed by local government units and licensed and/or accredited non-government organizations providing short term residential care for CICL who are above 15, but below 18 years of age who are awaiting court disposition of their cases or transfer to other agencies or jurisdictions. *xxx xxx*. Each province, highly urbanized city shall be responsible for building, funding and operating a Bahay Pag-Asa within their jurisdiction following the standards set by the DSWD and adopted by the JJWC."[33] For children 12 years and below, "the authority which will have initial contact with the child … shall give notice

[30] An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes, [Special Protection of Children Against Abuse, Exploitation and Discrimination Act], Republic Act No. 7610, (1992).
[31] Elemia, Camille, *Fact Check: Duterte Misinformed that child offenders can just go home'*, Rappler, Apr. 4, 2017, *available at* http://www.rappler.com/newsbreak/fact-check/165997-fact-check-duerte-misinformed-juvenile-justice-law last accessed Apr. 19, 2017.
[32] *Supra* note 6 at Sec. 20 A and B.
[33] *Id*.

to the local social welfare and development officer who will determine the appropriate programs in consultation with the child and the person having custody over the child."[34]

United Nations studies have shown that when children are arrested and detained, and placed in the same cells as adults, they are at greater risk for physical, sexual and psychological abuse. Detention can increase recidivism, which renders this form of intervention ineffective and more harmful, whereas children who undergo intervention and diversion programs are less likely to recidivate than their counterparts who have been incarcerated. Community based juvenile crime prevention programs are able to reduce juvenile crime and delinquency by as much as 80%, according to some studies.[35]

According to data gathered by the Juvenile Justice and Welfare Council, there are a total of 38 Bahay Pag-Asa currently existing in the Philippines; of these, two are not operational, and another two are operational, but not accredited.[36] According to an article published by Fr. Shay Cullen of the People's Recovery Empowerment Development Assistance (PREDA), social workers in various areas of the Philippines have rescued children held in detention cells by local authorities who have not been apprised of the procedure set forth in the JJWA.[37] Shay further suggests that "this negative attitude to criminalize children at an early age is the indication of incompetence and failure of the police to catch the real dangerous criminals. Perhaps they are afraid or unable to get evidence or they are part of the crime syndicates. It's easy to arrest teenagers and claim success in solving crimes."[38]

Senator Sherwin Gatchalian, who previously served as Mayor of Valenzuela City, asserted that the JJWA should be given a chance before it is amended, and that it should be fully implemented in order for it to serve its true purpose. He claimed that in Valenzuela, the government has had good results in reforming CICLS, "almost 70% of the kids there were reformed and were brought back to their families."[39]

[34] *Supra* note 7 at Sec. 20.
[35] United Nations Children's Fund, Fact Sheet on CICL, (2003).
[36] Juvenile Justice and Welfare Council, Data on Bahay Pag-Asa, (2016).
[37] People's Recovery Empowerment Development Assistance, The Child Prisoners of Philippine Jails, *available at* http://www.preda.org/fr-shays-articles/the-child-prisoners-of-philippine-jails last accessed Apr. 8, 2017.
[38] *Id*.
[39] Ager, Maila, *What kind of society gives harsh punishment to innocent kids*, Phil. Daily Inquirer, Apr. 4, 2017, *available at* http://newsinfo.inquirer.net/886301/what-kind-of-society-gives-harsh-punishment-to-innocent-kids last accessed Apr. 8, 2017.

VI. MEDICAL AND PSYCHOLOGICAL ANALYSIS

The Philippine Pediatric Society (PPS) issued a position paper on the proposed measures to lower the MACR. The PPS asserts that "children do not have the wherewithal to independently regulate and control their own thoughts and emotions, especially in highly complex, stressful and nuanced situations. *xxx xxx*. Discernment between right and wrong requires intellectual, emotional and psychological maturity. This is a tall order for children."[40]

PPS further asserts that "while children may appear to identify right and wrong behavior, they lack an appreciation for why rules exist and implications of these rules in society."[41] This would explain why a child may understand that stealing is not the right thing to do, but when he or his family are hungry and cannot afford to eat, he may not understand why it is wrong to take bread from someone else. The child may not understand the implications on society if Immanuel Kant's categorical imperative were to be applied – whereby the maxim of taking when you have a perceived need, when applied as universal law, would wreak havoc on the concepts of property, ownership, trade and sales.

PPS further claims that "CICL typically have risk factors such as poverty, mental illness, drug and alcohol abuse, exposure to crime and violence, homelessness, child abuse and neglect. *xxx xxx*. It is therefore unreasonable to expect a developing child to already discern right from wrong when he or she grew up in an environment and household where what is right may not be different from what is wrong. Therefore, to hold a child criminally responsible for such is to put the entire community's problems on the child's shoulders."[42]

The Psychological Association of the Philippines (PAP) has also issued a position paper on House Bill 2, which is just as appropriately applied to the other three pieces of legislation proposed for the purpose of lowering the MACR. The PAP paper posits that "the developmental immaturity of young people mitigates their criminal culpability. Although they may be able to discern right from wrong action, it is their capability to act in ways consistent with that discernment that is undermined."[43]

[40] Philippine Pediatric Society, Position Paper on HB 2, (2017).
[41] *Id*.
[42] *Id*.
[43] Psychological Association of the Philippines, Position Paper on HB 2, (2017).

PAP points to the age of 15 as being around the middle of adolescence. In PAP's view, those aged nine to 15 find it more difficult to act in accordance with what they know to be right and wrong when contrasted with adults. This phase of adolescence is a time of self-exploration and development of identity, wherein children's cognitive and psychosocial maturity are still being molded by their experiences as they grow into adulthood. Studies have shown that while children in this age group may engage in forms of delinquent behavior, these are typically associated with testing boundaries, and these behaviors are naturally outgrown as they become adults.[44]

PAP further claims that children and adolescents are at a stage of life where their decision-making capacity is still developing. During this stage, there are significant changes in brain anatomy and activity in the prefrontal regions, which govern impulse control, decision-making, and evaluation of risks, among others. These abilities, all of which are involved in criminal behavior, do not fully form until young adulthood, which makes young people vulnerable to engaging in risky behavior. As contrasted with adults, children place less weight on risk and have different goals and values. Children are less able and less likely to consider the long-term consequences of their actions than are adults.[45]

PAP observes that children and adolescents are more vulnerable to being coerced. As noted by the various authors of the proposed legislation, in a number of cases, children are abused by adults into engaging in criminal behavior. The youth are fearful of retribution for their refusal to participate, or are unaware that there are alternative courses of action, especially when they idolize the adults who convince them into these behaviors. Children are also more susceptible to influence because of their innate desire for approval and sense of belonging at their age, and the fact that juvenile crimes tend to take place in groups lends credence to the point that peer influence is important among the youth.[46]

PAP claims that "exposure to the criminal justice system, where the child will be labeled a criminal, and where he or she is exposed to criminal models, will more likely establish the 'criminal identity' of the young person. Studies have shown that encounters with the justice system do not deter, but rather result in greater subsequent crime for the young person."[47]

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Supra* note 32.

VII. LEGAL ANALYSIS

International Commitments

Apart from the psychological argument against the lowering of the MACR, doing so breaches a number of the Philippines' international obligations.

Lowering the MACR violates the Philippines' international obligation under the International Covenant on Civil and Political Rights.[48] The Philippines ratified the ICCPR on 23 October 1986, and it entered into force for the country on 23 January 1987. The ICCPR is one of the core international human rights treaties, and the first to explicitly mandate that State Parties provide special treatment and procedures for children in criminal matters. The ICCPR provides that each state party may choose its respective MACR age level, provided that it falls within the general limits of internationally recognized norms, under which 9 years old is far too young. The Human Rights Committee, the ICCPR's monitoring body, has previously opined that MACRs of 7 to 10 years old are unacceptably low, and incompatible with international standards, particularly ICCPR Articles 10(2)(b), 14(4) and 24(1).

Lowering the MACR violates the Philippines' international obligations under the Convention on the Rights of the Child.[49] The United Nations Convention on the Rights of the Child, which the Philippines ratified on 21 August 1990, recognizes the right of every child alleged as, accused of, adjudged, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and desirability of promoting his/her reintegration and assuming a constructive role in society. Pursuant to this, the UN Committee on the Rights of the Child (in General Comment No. 10)[50] states that a minimum age of criminal responsibility below the age of 12 years is internationally unacceptable and further recommends the age of 16 years old as a better standard.

Lowering the MACR violates the Philippines' international obligations under International Labor Organization Convention No 182.[51] When the Philippines ratified ILO Convention No. 182 on 28 November 2000, it committed to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child

[48] International Covenant on Civil and Political Rights.
[49] Convention on the Rights of the Child, *adopted* Nov. 20, 1989, U. N. T. S. 4.
[50] UN Committee on the Rights of the Child, CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10 Paragraph 32.
[51] International Labour Organization Convention No. 182, *adopted* June 1999.

labor as a matter of urgency. Under ILO 182, the use, procuring or offering of a child for illicit activities is one of the worst forms of child labor. Thus, it is not the child who has been forced into an illicit activity such as drug trafficking who should be considered the criminal, but the person who used him or her for that purpose. The child is a victim of the worst forms of child labor. The proper intervention is to remove and protect the child from the exploitative situation, not prosecute him or her.

The Philippines, as a state party to the ICCPR, ICESCR, UNCRC and other international treaties on juvenile justice and welfare, has obliged to comply with the standards set forth in these instruments. As such, the Philippines is obligated to accommodate CICLs, in consideration of the best interests of children, and in line with the principle of restorative justice. As discussed, the lowering of the MACR, especially to 9 years old, runs contrary to these obligations.

Domestic Legislation

President Duterte has repeatedly belittled the importance of the Philippines' international agreements and obligations. He has emphasized instead the domestic sphere, and purportedly respecting the Philippines' own laws before worrying about the rest of the world. It is important, therefore, to posit that the proposed lowering of the MACR runs contrary to the 1987 Constitution, the supreme law of the land, as well as other special laws.

Right of Children to Substantive Due Process

Lowering the MACR to 9 years old is violative of the Constitutional right of children to substantive due process.[52] Substantive due process requires that our laws have both a lawful purpose and are executed by lawful means.[53] While reducing criminality and teaching children to become responsible at a young age are lawful and even laudable purposes, lowering the MACR to 9 years old is not reasonably necessary to achieve the lawful goals, especially since there is no scientific or quantifiable data to support this proposition.

The crimes that are committed by children, particularly those induced by adults and syndicates, will not be reduced by sending the children to prison, if the adults who are responsible for the crimes are not identified and held accountable.

[52] PHIL. CONST. art III, § 1.
[53] *United States v. Toribio*, G.R. No. L-5060 (1910).

Detaining children, whether in prison or in child-caring facilities, as a punitive measure has not been shown to be effective in correcting their behavior. Moreover, detention conditions in the Philippines are not rehabilitative, rather, they are harsh: children have been reported to experience torture, physical, emotional, and sexual abuse while in detention.[54] Research has shown that detention has a profoundly negative impact on young people's mental and physical well-being, such as depression and poor mental health, adverse impact on their education, including learning disabilities which are neither recognized nor addressed, and a profoundly negative impact on their prospects of future employment since it drastically diminishes their ability to remain in the workforce.[55] Detention may also increase the likelihood that young people will recidivate, compromising public safety.[56] Detaining children goes against established principles of proportionality and fair treatment and contradicts the best interests of the child and the rights of the child to maximum survival and development.

Right of Children to Procedural Due Process

Lowering the MACR violates the Constitutional right of children to procedural due process.[57] Procedural due process refers to the steps which government agencies must follow in the enforcement and application of laws.[58] If the MACR is lowered, for children 9 years old to below 15 years old to be held liable, the Local Social Welfare and Development Officer will first determine whether the child acted with discernment.[59] This is procedurally infirm, since the subjective assessment of the LSWDO cannot substitute what has already been objectively determined by science. In the 1997 study conducted by Pamantasan ng Lungsod ng Maynila entitled "Beyond Innocence," it established that the average age of discernment for Filipino children is fifteen (15) years old.[60] The question of whether a child has the capacity to tell right from wrong and to understand fully the consequences

[54] Fritzie Rodriguez, *On 2nd chances: children in conflict with the law*, RAPPLER, Sept. 1, 2015, *available at* http://www.rappler.com/move-ph/issues/hunger/78690-children-conflict-law last accessed Mar. 25, 2017. Also see: Ana P. Santos, *Overcrowding in PH prisons: Is tech the solution?*, RAPPLER, Apr. 23, 2016, available at http://www.rappler.com/move-ph/130525-overcrowding-philippines-prisons-technology last accessed Mar. 23, 2017.

[55] Mae Fe Ancheta-Templa, etc. *Understanding Children in Conflict with the Law: Contradictions on Victimisation, Survivor Behavior and the Philippine Justice System – A Study of the Situation of Children in Conflict with the Law in Davao, available at* http://resourcecentre.savethechildren.se/sites/default/files/documents/3146.pdf (last accessed Apr. 3, 2017.)

[56] Rainier Allan Ronda, *Plan to lower minimum age of crime responsibility opposed*, PHIL. STAR., July 21, 2016, *available at* http://www.philstar.com/headlines/2016/07/21/1605076/plan-lower-minimum-age-crime-responsibility-opposed (last accessed Apr. 7, 2017).

[57] PHIL. CONST. art III, § 1.

[58] JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 29 (2009 ed.).

[59] *Supra* note 7.

[60] PAMANTASAN NG LUNGSOD NG MAYNILA, BEYOND INNOCENCE: STUDY ON THE AGE OF DISCERNMENT OF FILIPINO CHILDREN (1998).

of one's act is a matter that is determined by science, and is one that should be left to the determination of experts such as developmental psychologists and neurobiologists.

Right of Children to Equal Protection

Lowering the MACR violates the Constitutional right of children to equal protection.[61] The Constitutional guarantee to equal protection requires that all persons and things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed.[62] Conversely, those who are not similarly situated should be treated differently. Young people should not be held to the same standards of criminal responsibility as adults, because these two groups are fundamentally different. Children's capacity to distinguish right from wrong and fully appreciate the consequences of their acts is diminished by their age and immaturity.

Right of Parents to Rear their Children

Lowering the MACR violates the Constitutional right of parents to rear and nurture their children.[63] The Constitution recognizes the natural and primary right of parents to rear their children. The State may step in to exercise its duty as *parens patriae* (parent of the nation) only when children are abandoned, neglected, abused or exploited.[64] In such situations, the State steps in with the view to protecting the children, not punishing them. Instead of charging children with crimes, the State should maintain its long-established remedy of filing a Petition for Voluntary or Involuntary Commitment when it deems it necessary to intervene in the rearing of children.

Upholding the Best Interests of Children

Lowering the MACR is inconsistent with established domestic policies on treatment of children. The Constitution provides that the State shall promote and protect the physical, moral, spiritual, intellectual, and social well-being of our youth.[65] R.A. 7610, or the Special Protection of Children Against Abuse, Exploitation and Discrimination Act,[66] and R.A. 9344, as amended, provide that it is the policy of the State to uphold the best interests of the child.[67] The best interests of the child is the totality of the circumstances and conditions which are most congenial to the survival, protection and feelings of security of the child and most encouraging to the child's physical, psychological and emotional

[61] PHIL. CONST. art III, § 1.
[62] *Philippine Judges Association, et al. v. Hon. Pete Prado, et al.* G.R. No. 105371 (1993).
[63] PHIL. CONST. art XIV, § 2.
[64] *Perez v. Samson*, 48 O.G. 5368.
[65] PHIL. CONST. art II, § 13.
[66] *Supra* note 30.
[67] *Supra* note 7, § 2(a).

development. This means the least detrimental available alternative for safeguarding the growth and development of the child.[68]

VIII. CONCLUSION

"Detention of children should be the last resort, not the first and only option."[69] Detention of children in jails or prison-like facilities, especially when they are very young, exposes them to criminal elements which may lead them to become hardened offenders, which is a detriment to society in the long run.

Lowering the MACR, especially to 9 years old, is an ill-conceived proposal that has no basis in fact or law. It is merely a band aid solution to a larger problem that will only grow and fester if left unaddressed. Approximately 80% of CICLs are charged with property related theft and petty crimes,[70] lending credence to the theory that the underlying reason for their theft is, in fact, poverty. Rather than prosecuting child offenders, legislators would better serve our countrymen by sponsoring measures that enhance the educational and employment opportunities of the economically disadvantaged, and providing these children and their families with sources of livelihood to keep them gainfully employed, thereby eliminating any need for them to engage in a life of crime.

In the spirit of the 1987 Constitution, the authors of the proposed legislation to lower the MACR should "recognize the vital role of the youth in nation building and promote and protect their physical, moral, spiritual, intellectual and social well-being."[71] The solution to the perceived problem is one that must address the root cause of the issue: poverty.

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[68] *Id.*, § 4(b).
[69] United Nations Standard Minimum Rules for the Administration of Juvenile Justice.
[70] Situation of the Filipino Children, 2012, Council for the Welfare of Children.
[71] PHIL. CONST. Art. II Sec. 13.

AT DEATH'S DOOR: Facing the punishment of death sans clear and unequivocal heinousness standards

Helen May M. Frias

I. Epilogue

Murder, treason, qualified piracy, rape with homicide, robbery with homicide were some of the crimes classified by law as heinous, depraved or horrible. As the tides change, the Congress includes more crimes to the list.

Heinousness of crimes is one of the requirements under the law to revive death penalty. Whether a crime is heinous or not is left to the Congress to determine. And while we may all recognize that some crimes truly separate themselves from others, there is no standard, fair way to distinguish crimes that are the worst of the worst, or "evil."[1]

> "The need for a clear and unequivocal heinousness standards in this case is owed to the fact that Congress would have a limitless discretion of including any crimes that it wants whether heinous or not. And as we know, anything absolute is dangerous."

In the case of Echagaray, the Court accepted as sufficient the definition of heinous crimes as defined by Congress through RA 7659 (Death Penalty Law of 1993). In that law, the Congress demarcated heinous crimes as crimes which are inherently wicked and repugnant to the common standards of decency and morality. Perversity and wickedness were used as important considerations in determining heinous crimes.

The Congress uses such terms as depraved, atrocious, cruel, and inhuman to delineate heinous crimes from the "normal crimes". The use of these adjectives, however, does not still provide for clear and unequivocal standards of heinousness. In the final analysis, one can still keep his wonder: What makes a heinous crime "heinous"?

[1] Michael Welner, M.D., The Depravity Standard, *available at* https://depravitystandard.org (last accessed May 15, 2017).

II. Revisiting the Philippine Experience of Death Penalty

Background

Philippines has a rich history of capital offenses from the time it all started to when it was re-imposed and abolished. Death penalty in the Philippines can be traced as early as late 1800's during the Spanish Colonization. Death by firing squad and hanging were then the most popular methods of execution. Who would forget December 30, 1896 when our national hero was executed by firing squad or the notable case of Gomburza who were executed through garrote? Not long after, silya elektrika (electric chair) was introduced. At this time, Philippines was the only country to employ this method.

Since then, there were still notable executions such as the case of Marcial "Baby" Ama who was electrocuted in 1961 by the age of 16. A notorious triple execution took place in May 1972, when Jaime José, Basilio Pineda and Edgardo Aquino were electrocuted for the 1967 abduction and gang-rape of young actress Maggie dela Riva. The state ordered that the executions be broadcast on national television.[2] The electric chair as a method of execution was used until 1976. From 1950 to 1961 alone, there were around 51 people who were electrocuted.

Death penalty was abolished when the 1987 Constitution was drafted. However, it was later on re-imposed by former president Fidel V. Ramos by virtue of RA No. 7659 signed in December 1993. The purpose of the law is to dissuade the increasing number of criminality at that time which resulted in the loss of human lives and destruction of property.

In 1999, President Joseph Estrada carried out the Capital Punishment and put to death seven (7) death row convicts.[3] Leo Echegaray was marked as the first person to be executed through lethal injection after the revival of death penalty during this time. President Estrada then attempted to grant a "last-minute reprieve". He sadly failed to stop the execution when he was not able to reach the prison authorities in time

In 2006, former president Gloria Macapagal Arroyo approved the commutation of sentences of around 1,230 death row inmates from death sentence to life imprisonment. Her act was believed to be the "largest ever commutation of death sentences". She was

[2] *Wikipedia: The Free Encyclopedia.* Wikimedia Foundation, Capital Punishment in the Philippines, available at https://en.wikipedia.org/wiki/Capital_punishment_in_the_Philippines (last accessed May 15, 2017.

[3] Bernas, Joaquin G. (1987) The Constitution of the Republic of the Philippines: A Commentary. Manila, Philippines: Rex Book Store.

believed to be a strong opponent of death penalty. During her term, death penalty was suspended by virtue Republic Act No. 9346.

In lieu of death penalty, RA 9346 imposed the following penalties:

(a) the penalty of *reclusion perpetua,* when the law violated makes use of the nomenclature of the penalties of the Revised Penal Code; or
(b) the penalty of life imprisonment, when the law violated does not make use of the nomenclature of the penalties of the Revised Penal Code.[4]

In the same year, the Philippines ratified the second optional protocol to the international covenant on civil and political rights. It aims to get commitment from the state signatories to undertake the necessary means to ensure that no one is executed within its jurisdiction. This is notwithstanding the state parties' commitment to ensure that death penalty within its jurisdiction is also totally abolished.[5]

Heinous crimes included in the laws through the years

In 1941, Commonwealth Act (C.A.) No. 616 added espionage to the list. In the 1950s, at the height of the Huk rebellion, the government enacted Republic Act (R.A.) No. 1700, otherwise known as the Anti-Subversion Law, which carried the death penalty for leaders of the rebellion. From 1971 to 1972, more capital offenses were created by more laws, among them, the Anti-Hijacking Law, the Dangerous Drugs Act, and the Anti-Carnapping Law. During martial law, Presidential Decree (P.D.) No. 1866 was enacted penalizing with death, among others, crimes involving homicide committed with an unlicensed firearm.[6] "The capital crimes after regaining full sovereignty in July 1946 were murder, rape and treason."

In 2016, members of the House of Representatives through Congressman Pantaleon Alvarez and others introduced House Bill No. 1 *(An act imposing the death penalty on certain heinous crimes, repealing for the purpose Republic Act 9346, entitled "An act prohibiting the imposition of death penalty in the Philippines" and amending Act. No. 3815, as amended, otherwise known as the "Revised Penal Code," and other special penal laws)*. The bill included the following crimes when it was first introduced to the House of Representatives:

[4] An Act Prohibiting the Imposition of Death Penalty in the Philippines, Republic Act No. 9346, Section 2 (2006)
[5] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Article 1, adopted December 1989, General Assembly resolution 44/128.
[6] People v. Echegaray, 267 SCRA 682, (1997).

1. Treason;
2. Piracy in general and mutiny on the high seas or in Philippine waters;
3. Qualified Piracy;
4. Qualified Bribery
5. Parricide;
6. Murder;
7. Infanticide;
8. Rape;
9. Kidnapping and serious illegal detention;
10. Robbery with violence against or intimidation of persons;
11. Destructive Arson;
12. Plunder;
13. Importation of Dangerous Drugs and/or controlled precursors and essential chemicals;
14. Sale, trading, administration, dispensation, delivery, distribution and transportation of dangerous drugs and/or controlled precursors and essential chemicals;
15. Maintenance of a Den, Dive or Resort;
16. Manufacture of dangerous drugs and/or controlled precursors and essential chemicals;
17. Possession of dangerous drugs; and
18. Unlawful prescription of dangerous drugs.

These crimes were eventually reduced as the bill went through second and third readings in the House of Representatives.

III. Twin Requirements of Death Penalty

When death penalty was abolished under the 1987 Constitution, the Philippines was hailed as the very first Asian country to abolish the penalty of death for all crimes. Nevertheless, it also held a distinction for being the first country to abolish and later on re-impose the capital crimes. This means that despite the express provision under the Constitution prohibiting death penalty, the Congress is still not precluded to reinstate such should the necessity arise.

The 1987 Constitution reads in Article III, section 19(1) that effective upon its ratification:

> *Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless, for compelling*

reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.

It is evident in the above provision that the Constitution requires the twin requirements of heinousness of the crimes and compelling reasons. These twin requirements are abolitionist in nature such that the abolition of death penalty becomes the general rule but its re-imposition still glares from the sky as its only exception.

IV. The role of Congress in the revival of Death Penalty

The 1987 Constitution reposed upon Congress the power to revive death penalty for "compelling reasons involving heinous crimes". The constitutional exercise of this limited power to re-impose the death penalty entails:

(1) That Congress define or describe what is meant by heinous crimes;
(2) That Congress specify and penalize by death, only crimes that qualify as heinous in accordance with the definition or description set in the death penalty bill and/or designate crimes punishable *by reclusion perpetua* to death in which latter case, death can only be imposed upon the attendance of circumstances duly proven in court that characterize the crime to be heinous in accordance with the definition or description set in the death penalty bill; and
(3) That Congress, in enacting this death penalty bill be singularly motivated by "compelling reasons involving heinous crimes.[7]

This means that whenever necessary or upon the determination by Congress, if compelling reasons involving heinous crimes exist, it can as an exception legislate a law which will reinstate death penalty.

V. Heinous crimes; Criteria

Justice Santiago Kapunan, in his dissenting opinion in *People v. Alicando*, traced the etymological root of the word "heinous" to the Early Spartans' word, "haineus", meaning, hateful and abominable, which, in turn, was from the Greek prefix "haton", denoting acts so hatefully or shockingly evil.[8]

On the other hand, the Congress in the whereas clause of RA 7659 characterized heinous crimes as grievous, odious and hateful offenses and which, by reason of their

[7] *Id*.
[8] *Id*.

inherent or manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society.[9] The same definition was adopted by some of our lawmakers in their succeeding attempts to reinstate death penalty.

Taking all these into consideration, the Court in the case of Echagaray ruled that the definition of heinous crimes in RA 7659 suffices to set the standards of heinousness. The Court went on to discuss the two types of crimes under the law.

Crimes penalized by reclusion *perpetua* to death

The first classification of the crime pertains to those whose punishment is flexible from *reclusion perpetua* to death depending on the attendant circumstances as determined by the Court. These circumstances are determinative of the character of the crime whether these are "grievous, odious, or hateful, or inherently or manifestly wicked, vicious, atrocious or perverse as to be repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society." In other words, the heinous elements of these crimes may not be determined unless the Court imposes the punishment of death. The Court further bolstered its position in this wise:

The elements that call for the imposition of the supreme penalty of death in these crimes, would only be relevant when the trial court, given the prerogative to impose reclusion perpetua, instead actually imposes the death penalty because it has, in appreciating the evidence proffered before it, found the attendance of certain circumstances in the manner by which the crime was committed, or in the person of the accused on his own or in relation to the victim, or in any other matter of significance to the commission of the crime or its effects on the victim or on society…[10]

Analyzing the heinousness standards affirmed by the Court in this first type of crimes, it can be seen that these criteria seem to be flexible such that the standards are adjusted depending on the surrounding circumstances of the crime. This criterion is deliberately undetailed as to the circumstances of the victim, the accused, place, time, the manner of commission of crime, its proximate consequences and effects on the victim as well as on society, to afford the sentencing authority sufficient leeway to exercise his discretion in imposing the appropriate penalty in cases where R.A. No. 7659 imposes not a mandatory penalty of death but the more flexible penalty of reclusion perpetua to death.[11]

[9] An Act to Impose Death Penalty on certain heinous crimes, amending for that purpose the Revised Penal Laws, as amended, other special laws, and for other purposes, Republic Act No. 7659, (1993).
[10] People v. Galigao, 395 SCRA 195, (2003).
[11] *Supra* note at 6.

Crimes penalized by mandatory death penalty

While the second qualification warrants a mandatory capital punishment "upon the attendance of certain specified qualifying circumstances". The Court recognizes that crimes may take different forms. There are those crimes which by their nature are considered heinous and there are those where the abomination lies in the manner by which they were committed. The Court ruled that the evil of a crime may take various forms. There are crimes that are, by their very nature, despicable, either because life was callously taken or the victim is treated like an animal and utterly dehumanized as to completely disrupt the normal course of his or her growth as a human being.[12]

The right of a person is not only to live but to live a quality life, and this means that the rest of society is obligated to respect his or her individual personality, the integrity and the sanctity of his or her own physical body, and the value he or she puts in his or her own spiritual, psychological, material and social preferences and needs. Seen in this light, the capital crimes of kidnapping and serious illegal detention for ransom resulting in the death of the victim or the victim is raped, tortured, or subjected to dehumanizing acts xxx xxx which are penalized by reclusion perpetua to death, are clearly heinous by their very nature.[13]

VI. Lack of clear and unequivocal heinousness standards, effects

Congress possible abuse of power

The Court is very clear that heinous crimes warranting the penalty of death are of two types: **first**, crimes penalized by *reclusion perpetua* to death and **second**, crimes penalized by mandatory death penalty.

On the first type of crimes, the Court has somehow a form of intervention in the determination of whether a crime should be considered as heinous or not. There is this portion from the penalty of *reclusion perpetua* to death where the Court can work on and consider special aggravating circumstances that would warrant the punishment of death. This is where the courts aid in determining heinousness. In this case, unequivocal heinousness standards may not be necessary because it will tie the hands of the judges and will deprive them of a wider latitude in considering certain circumstances. This means then that qualifying heinous crimes is not left solely on the part of Congress. The Court has a way of ensuring that a safeguard is placed even after the death penalty bill is passed by Congress.

[12] *Id.*
[13] *Id.*

However, the second type of crimes warranting mandatory death penalty is a different story. Here, there are no safeguards (except the automatic review provision) that would ensure that penalty of death is only imposed upon crimes which are clearly heinous. The Congress has the sole discretion of defining what heinous crimes are and qualifying and classifying the crimes included. Hence, the Congress can just simply include any crimes as long as it complies with the definition it set in the law. The problem here arises because the law does not provide a clear and unequivocal heinousness standards.

What the law provides is clearly an insufficient definition or characterization of what a heinous crime is. It simply and gratuitously declared certain crimes to be "heinous" without adequately justifying its bases therefor. It supplies no useful, workable, clear and unambiguous standard by which the presence of heinousness can be determined.[14]

The need for a clear and unequivocal heinousness standards in this case is owed to the fact that Congress would have a limitless discretion of including any crimes that it wants whether heinous or not. And as we know, anything absolute is dangerous.

Worst, our lawmakers seem confused at times when qualifying a crime as heinous or not. This was demonstrated by how the pending bills at present reinstating death penalty tend to qualify and disqualify specific crimes from being classified as depraved or not. As they go through the legislative process, there were crimes that were initially included in the bill warranting the punishment of death only to be excluded eventually.

When the current death penalty bill passed the second reading, some of the crimes such as rape, plunder, and treason were removed from the list and all illegal drug related crimes remained. "The Oriental Mindoro 2nd District Representative [Alvarez] explained that the majority bloc realized it can garner more votes for the measure if the bill will just retain the drug offenses.[15] If we try to re-examine the Death Penalty Law of 1993, these crimes that were removed are exact same crimes which were considered heinous back then. Our Congressmen at present tend to be selective of the crimes they want to include not for the purpose of complying with the heinousness requirement but for the purpose of advancing their political career.

[14] *Id*.
[15] Rape, plunder, treason to be removed from death penalty bill, Philippine News, March 1, 2017.

VII. Conclusion

Describing blood as blue does not detract from its being crimson in fact; and renaming gumamela as rose will not arm it with thorns. Calling the crimes "grievous, odious and hateful" is not a substitute for an objective juridical definition. Neither is the description "inherent or manifest wickedness, viciousness, atrocity and perversity."[16]

The strict heinousness requirement before death penalty is revived is a manifestation of Philippine society's reluctance to take human life. A clear indicator of heinousness could be a safeguard to ensure that capital punishment is not imposed unless all the necessary requisites are complied with. It is a safety measure against Congress unbounded discretion to include any crimes that it desires.

A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the cases in which it is not.[17] By this, we could even save a life of a defendant who is punished by the penalty of death but underserving of the punishment because the crime he committed is not heinous.

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[16] Echegaray v. Secretary of Justice, 301 SCRA 96, (1999).
[17] Gregg v. Georgia, 428 U.S. 153, (1976).

DOES THE END JUSTIFY THE MEANS?
On Duterte's Drug War: A Machiavellian Perspective

Justine Christopher C. Lim

Introduction

One of the biggest issues of the world since time immemorial is the problem on illegal drugs. Illegal drugs can destroy and turn everything into chaos. It can change history or make a country fall down. In the mid-19th century, China's downfall to United Kingdom (UK) made a major alteration in history. Despite being a powerhouse because of its strong armed forces, China still succumbed to UK. By bribing the Chinese soldiers with opium, English soldiers easily entered and conquered China. The treaty of Nanking was forged and Hong Kong Island was ceded by China to the UK.

> "A question arises whether it is better to be loved than feared or the reverse. The answer is, of course, that it would best to be both loved and feared, but since the two rarely come together, anyone compelled to choose will find greater security in being feared than in being loved."

As illegal drugs becomes more rampant in the Philippines, the country's breakdown is also not far from happening. Operated by three major groups, illegal drug trade in the Philippines has proliferated over the years. The Chinese or Filipino Chinese drug syndicates are the first group that dominates the suppliers in the market. It facilitates production, manufacturing and bulk smuggling of dangerous drugs. Its activities are largely concentrated within their group, with the inclusion of very few and well-selected locals. The second group belongs to the African drug syndicates (ADS). It is responsible for smuggling drugs through the airports using drug couriers/swallowers. The last group is the Mexican-Sinaloa Drug Cartel, a new drug group operating in the Philippines. It is associated with the Chinese group to penetrate the Philippine Market.[1]

The proliferation of illegal drugs is getting more serious because of the involvement of our high ranking public officials who allegedly received bribes from the drug lords in

[1] http://didm.pnp.gov.ph/Command%20Memorandum%20Circulars/CMC%202016-16%20PNP%20ANTI-ILLEGAL%20DRUGS%20CAMPAIGN%20PLAN%20%E2%80%93%20PROJECT%20DOUBLE%20BARREL.pdf Accessed Last March 18, 2017.

order to protect the syndicates. This situation is similar to what happened in Columbia, home of the famous and notorious drug lord, Pablo Emilio Escobar. He established the Medellin Cartel and supplied 80% of the world's cocaine from 1975 to 1993. During his time, the police officials, army, prosecutors, judges and members of the House of Representatives were also involved in the trade and accepted bribes. The Government of Columbia in coordination with United States Drug Enforcement Agency (USDEA) tried to prosecute Escobar but the attempt led to Narco-Politics and Narco-terrorism, where thousands of people died in the process of the operation.[2]

Current Philippine president Rodrigo Duterte vowed to eliminate illegal drug trade in the country, however some people viewed the strategy being used by the administration as identical to the approached used by the Government of Columbia and expressed their fear that this could also end in Narco-Politics and Narco-terrorism. But only destiny can tell, what is evident at the moment is that drug trade in the Philippines is no longer a joke, it must be stopped before it destroys us.

Illegal Drug Situation in the Philippines

As of February 2016, Philippine Drug Enforcement Agency (PDEA) reported that 26.91% or 11,321 out of the country's 42,065 barangays were "illegal drug infected" (mostly in urban areas). A barangay is said to be drug-affected when there is a proven existence of drug user, pusher, manufacturer, marijuana cultivator or other drug personalities regardless of number in the area. On record, NCR has the highest number of drug users with 92.96% of the region's barangays, followed by CALABARZON with 49.28%.[3]

Based on PDEA's 2015 arrest data, methamphetamine hydrochloride or commonly known as "shabu" tops the list for the most abused drug. It is followed by marijuana and some party drugs like cocaine and ecstasy. Methamphetamine is a stimulant drug usually used as a white, bitter-tasting powder or a pill. Crystal methamphetamine is a form of the drug that looks like glass fragments or shiny, bluish-white rocks. It is chemically similar to amphetamine [a drug used to treat attention-deficit hyperactivity disorder (ADHD) and narcolepsy, a sleep disorder][4]. The local street price of a gram of methamphetamine roughly cost around P1562.62.[5]

[2] Page 469, *Pablo Escobar, My Father*. Escobar, Juan Pablo. St. Martin's Press, New York City. 2014.
[3] http://didm.pnp.gov.ph/Command%20Memorandum%20Circulars/CMC%202016-16%20PNP%20ANTI-ILLEGAL%20DRUGS%20CAMPAIGN%20PLAN%20%E2%80%93%20PROJECT%20DOUBLE%20BARREL.pdf. Accessed last March 18, 2017
[4] https://www.drugabuse.gov/publications/drugfacts/methamphetamine. Accessed last March 8, 2017.
[5] http://time.com/4495896/philippine-president-rodrigo-duterte/. Accessed last March 8, 2017.

The statistical data cited is indicative of the worsening drug abuse problem in the Philippines. The poor or the less fortunate sectors of the society have always been the victims of its negative effects. Although much has been done to educate them but little has changed. Its propagation especially in the slums of the cities is one reason of the current administration's serious efforts to wrestle against illegal drugs. However, the legality of the means employed by the present administration caused some noise not only in the Philippines but also internationally. Whether the means is legal is a frequent question dangling in the minds of some Filipinos.

Means Employed by Duterte Administration

In 2016, the Philippine National Police (PNP) implemented the Anti-Illegal Drugs Campaign Plan — PROJECT: "DOUBLE BARREL". Its primary purpose is to clear all drug affected barangays across the country, conduct no let up operations against illegal drugs personalities and dismantle drug syndicates. It is classified into two parts "Upper Barrel" High Value Target/Local Value Target and the "Lower Barrel" Oplan "Tokhang" (knock and plead).

The Project Lower Barrel or Oplan Tokhang is a practical and realistic means of accelerating the drive against illegal drugs in affected barangays. This concept involves the conduct of house to house visitations to persuade suspected illegal drug personalities to stop their illegal drug activities. There are five (5) stages in the conduct of "PROJECT TOKHANG" namely: Collection and Validation of Information Stage, Coordination Stage, House to House Visitation Stage, Processing and Documentation Stage, and the Monitoring and Evaluation Stage.

In the course of the operation from July 1, 2016 to November 3, 2016[6], PNP reported to have visited 2,990,496 house. The report also provides for a total of 758,377 people who surrendered, 55, 104 of whom are pushers while 703, 363 are the users. A total number of 33, 105 drug pushers and users were arrested and 1,790 of them have neutralized (*nanlaban*) during the arrest.

The all-out war against illegal drug traffickers has received good and bad criticisms from the populace. About 78% of the people gave Pres. Duterte an excellent remark on his drug war because they feel that there has been a decrease in the illicit drug problem in their communities. However, 8 out of 10 people worry that they or someone they know might become a victim of uninvestigated killings. More than 2,000 people have been killed by police in anti-narcotics operations in the Philippines since Pres. Duterte took his oath

[6] Ibid.

on the 1st of July. Another 3,000 deaths, attributed to masked men on motorcycles or vigilantes which is still under investigation.[7]

International Community on Duterte's Drug War

The uninvestigated and unexplained killings have been rampant nowadays and have already become a norm alerting the international community in the likes of European Union, Human Rights Watch and the United Nation. In December 2016, the United States withheld poverty aid to the Philippines after declaring concern over Duterte's war on drugs and human rights violations.[8]

The United Nations-affiliated International Narcotics Control Board denounced the Philippine government over the spate of extrajudicial killings that transpired in the wake of its vaunted campaign to eradicate illegal drugs. It said that extrajudicial action taken to control and exterminate drug problems was against international drug conventions.[9]

Human Rights Watch,[10] in its report accused the Philippine government of creating a climate of "human rights calamity". It indicated that President Rodrigo Duterte and senior government officials could be charged with crimes against humanity for actions and words that incited the commission of murder and other acts of violence against drug suspects and criminals.[11]

In general, the International Community believed that President Duterte drug war violates the provisions of the Universal Declaration of Human Rights where the Philippines is a State Party since 1948.[12] Under Section 2, Article 2 of the Philippine's 1987 Constitution, the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[13] Having ratified the Universal Declaration of Human Rights its provisions become part of the law of the Philippines. Hence, the alleged

[7] http://europe.newsweek.com/duterte-drug-war-approve-extrajudicial-killings-533529?rm=eu. Accessed last March 8, 2017

[8] http://www.cfr.org/philippines/human-rights-dutertes-war-drugs/p38596

[9] http://www.philstar.com/news-feature/2017/03/03/1677617/what-some-international-groups-say-about-philippine-war-drugs

[10] Human Rights Watch is a nonprofit, nongovernmental human rights organization. Established in 1978, Human Rights Watch is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups. Human Rights Watch meets with governments, the United Nations, regional groups like the African Union and the European Union, financial institutions, and corporations to press for changes in policy and practice that promote human rights and justice around the world.

[11] Ibid.

[12] The universal declaration of human rights.www.un.org. access on April 8 , 2017

[13] 1987 Philippine Constitution, Sec 2, Art. 2

human rights violations of the President is not just contrary to the international law but also to the Philippine Constitution.

As a response, President Duterte asked the United States to refrain from interfering with the Philippines' national affairs after they criticized the government's way of combating illegal drugs. The administration strongly considers the intervention of the International bodies as interference of the State's internal affairs which violates its right to self-determination and national sovereignty. These rights are guaranteed by the Philippine Constitution particularly section 7, Article 2 of the 1987 Constitution which provides:

The State shall pursue an independent foreign policy and in its relations with other states, the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.[14]

Admittedly, the drug war in the Philippines is excruciating. The number of alleged extrajudicial killings of suspected users and pushers are increasing. Some critics denounced the President and call him murderer. His supporter, however, praise him for taking actions to eradicate drug syndicates and expressed their support to his war on drug.

A Machiavellian Perspective on the drug war

Machiavelli, was a Florentine Renaissance historian, politician, diplomat, philosopher, humanist, and writer.[15] He has often been called the founder of modern political science. Machiavelli authored the best known book which contains several maxims concerning politics, *The Prince*. He suggested that the social benefits of stability and security can be achieved in the face of moral corruption. He also believed that public and private morality had to be understood as two different things in order to rule well.

As a result, a ruler must be concerned not only with reputation, but also must be positively willing to act immorally at the right times. Machiavelli believed as a ruler, it was better to be widely feared than to be greatly loved. A loved ruler retains authority by obligation while a feared leader rules by fear of punishment.[16] His primary intellectual contribution to the history of politics seems to be the fundamental break between political realism and political idealism, being a manual on acquiring and keeping political power.

[14] 1987 Philippine Constitution, Sec 7, Art. 2
[15] https://www.britannica.com/biography/Niccolo-Machiavelli
[16] Machiavelli, Niccolò (1532). *The Prince*. Italy. pp. 120–121.

If we base President Duterte's views on leadership which is apparent on his war on drugs, it's very much related to Machiavelli's perspective of a good ruler. President Duterte once stated in his interview that violence and fear are necessary in law enforcement, particularly in the war on drugs. He maintained that violence has been necessary in the government's crackdown on the illegal drug trade. "There is a need because there is a war," these were the very exact words of the President during an interview.

He reiterated that his anti-drug campaign would continue until the death of the last pusher. He has also come to realize that fear is part of making people adhere to the rules. "In the rule of law, there must be fear," he said. He likened the situation when he was Davao City Mayor, where people followed rules because he punished those who violate the rules.[17] No wonder the President earned a reputation for his iron-fisted approach to criminality.

Using the Machiavellian perspective, one can understand that in order to counter the emerging power from illegal drug dealers one must use war in order to destroy the power created. "Narco-Politics" is deep, it will kill the country slowly by means of corruption and lawlessness. If no one will hold the war on drugs, only the enemy will gain strength while the people of the republic will be left suffering.

In the Philippines, the citizens are not questioning the need to eradicate drug trafficking, what the issue and the source of division is the manner of the administration's war on drugs. This is due to the increasing numbers of uninvestigated killings which are allegedly drug war related. Are violence and fear really necessary to eradicate illegal drugs?

As pointed by Machiavelli in his book, The Prince, "A question arises whether it is better to be loved than feared or the reverse. The answer is, of course, that it would best to be both loved and feared, but since the two rarely come together, anyone compelled to choose will find greater security in being feared than in being loved."[18]

The choice of being loved or being feared is a matter discretion of the leader on what they want to impart to us. There were leaders in the history who used compassion as a tool in order to gain the trust and loyalty of the populace. On the other hand, there were leaders who used force as a tool in order to change the society.

[17] http://newsinfo.inquirer.net/857794/duterte-violence-fear-necessary-in-war-on-drugs
[18] Machiavelli, Niccolo. *The Prince*. (Chapter XVII on Concerning Cruelty: Whether it is better to loved or feared or the reverse) Translated by: Daniel Donno. Bantam Books. New York. 1966.

"Still a prince should make himself feared in such a way that, though he does not gain love, he escapes hatred; for being feared but not hatred go readily together."[19]

It is to be understood that the duty of the prince is to protect the whole nation even if it meant to destroy his own reputation. As a leader being feared is a good thing, it will protect him and his position because people fear of rising arms against the prince. In the discharge of his duty, the prince or the leader cannot pleased everybody as to their ways and means in governing the nation. Every person differs in perspective on how they want to be ruled on. In any case, the moralists and the pragmatist are always contradicting with each other. For the Moralists[20], in order to achieve the goals of the leader, they should adhere to the morality set by the dominant religion in our state, it is the Roman Catholic since the Spanish Colonial era. It is the norm of reformation that they are battling for. And for the pragmatist[21], the practical or the easiest way to eliminate the said problem on drug trafficking is to kill the pusher or the drug lord themselves.

In our case, President Duterte declared that the war on drug will be bloody, that he will not stop until the last pusher is killed. Some view this as an improper statement from the leader of a country who is supposed to uphold and protect the human rights specifically the right to life of its citizens, while some believe that the President is only instilling fear so that those pushers would stop from doing the illegal act before they get caught.

In the course of the administration's war on drug, thousands of people were killed. The reports would suggest that those were cases of extrajudicial killings committed by the police officers, the latter countered it by saying that the victims who get killed in the operation of project "*tokhang*" were those who fought back against them. The PNP also is of the opinion that the killings of alleged pushers were committed by big syndicates who are themselves involved in drug trafficking. The drug war is indeed bloody, as a result some citizens express their fear for their safety while the other said that since the drug war started, number of drug related crimes went down. The Philippine National Police (PNP) said the crime rate in the country dipped 31 percent in July, compared to the same period last year. PNP Chief Ronald Dela Rosa reported "a very significant decrease" in rape incidents. Dela Rosa said there is also a "downward trend" in the so-called "focus crimes," including murder, homicide, robbery, theft, "carnapping" (car theft), "motornapping" (motorcycle theft), and physical injuries. In fact based on their data, a total of 11,800 crimes

[19] Machiavelli, Niccolo. *The Prince*. Chapter XVII Concerning Cruelty: Whether it is better to be loved than be feared, or the reversed Translated by: Daniel Donno. Bantam Books. New York. 1966.
[20] *Moralists*, one who lives a moral life or one concerned with regulating the moral of the other.
[21] *Pragmatist*, one with a practical approach to problems and affairs who tried to strike a balance between principles and pragmatism.

were reported in July 2016, lower than the 17,105 crimes listed in July 2015. If we solely based our evaluation on the effectivity of drug war in the Philippines from the data given above, we can say that the drug war has substantially served its purpose. The strategy seems effective in forcing the people to surrender in fear of their death.

Perhaps Machiavelli is correct in saying that as long as the leader is not hated by the people but he is feared, it can go steadily together even though he is not loved. Fear is an essential element of running a nation because it establishes peace and order over the whole nation.

On Machiavellian Philosophy justifying the means being employed

"and if he finds it necessary to take someone's life he should do so when there is suitable justification and manifest cause; but above all, he should refrain from the property of others, for men are quicker to forget the death of a father rather than the loss of a patrimony."[22]

Machiavelli advocates the use of cruelty only insofar as it does not compromise the long term goodwill of the people. The people's goodwill is always the best defense against both domestic and foreign aggression. The need for cruelty insofar as to create a lasting peace is needed for the country to develop. People can easily forget the death of their father rather than the loss of a patrimony, with that being said, the loss of the few men will not make the nation mourn, but if the nation loss everything goes down. As Machiavelli stated "Cruelty and leadership are the two qualities that the people are looking for in a leader"

In so far as cruelty is concerned, people are looking for a leader that is cruel enough to punish those who violates the law in order to set example. Cruelty is defined as the act of being disposed to inflict pain or suffering. Every action the prince or the leader take must be considered in light of its effect on the state not in terms of its intrinsic moral value. As per Machiavelli, a leader must stick to the good for so long as he can but being compelled by necessity, he must be ready to take the way of evil.[23] In order to effectively apply the law, one should not consider the moral aspect of the punishment attach to the law. For the law to be effective, it should applied according to its creation. The law is the law and should not take other moral interpretation, when the law is clear there should be no other interpretation accepted.

[22] Machiavelli, Niccolo. *The Prince*. (Chapter XVII: Concerning Cruelty: Whether it is better to be loved than be feared, or the reversed) Translated by: Daniel Donno. Bantam Books. New York. 1966.
[23] Ibid. Chapter XVIII: In What way Princes Should keep their Word

In our country, we had seen enough of humanity and righteousness but it seems ineffective to prevent the nation from being shattered. For the time being, we already stick to the good for more than four decades but instead of taking away the evil, we invited more evil to our land. It was already established on the first part of this paper the worsening situation of drug trafficking in this country. Illegal drug trade just profits a single triad, in return, it destroys millions of people's lives and affects our economy, tourism and increases crime rate. Cruelty is needed in order to combat evil, evil in itself is not humane. Fear should be imposed to those who do not know fear. For the president to use the necessary cruelty to combat evil, is a duty to protect the interest of his countrymen and the future of the upcoming generations.

The present administration's war on drug aims to eradicate the illegal drug trade in the country, in the process however, people get killed, those who refused to submit themselves to the authority is allegedly being killed arbitrarily by the members of the PNP. The human rights advocates are starting to question the morality of the President who allegedly gave the order to his men to kill these people. With this, the end is unquestionably good however the means employed is not right in the eyes of morality. Machiavelli however suggest that the end does justify the means as long as the mean leading up to the end is worth the end. This principle however is difficult if not impossible to understand, because people judge everything according to the way it is employed. As per Machiavelli "For the mob is always impressed by appearances and by results and the world is composed of the mob".[24] However we have to remember, the prince has the duty to promote the welfare of the citizen rather than his appearance in front of the mob.

Conclusion

We demonized our leader, the President of the Republic, for his bloody drug war, the same way that the scholars demonized the image of Niccolo Machiavelli and his work "The Prince". Machiavelli was calling for a more unified and free Italy and his book was intended to be a handbook of leader who would undertake the task of restoring the republic. A redeemer not a tyrant. Similar to the proposition of Machiavelli and his work, our leader aims for a more unified and free Philippines. Illegal drug trade has been a huge problem of our country, causing the destruction of families and the society in general.

One may ask, do we really need to sacrifice people's life in order to attain peace and harmony in the society? A good man would answer, no, for the reason that everybody has the right to life, a belief that most of the people would take, the natural choice of every people, the safest choice among the choices. However the situation is different in the

[24] Ibid.

eyes of a leader, we cannot question his insights having trusted with the life of more than hundreds of millions of the population.

The focal point of every crusade is therefore for the good of the people. Not every Prince is willing to destroy his own name to preserve his own nation, it takes a prince who loves his country so much that he is willing to destroy his own name in order for the state to survive.

Ordinarily, every prince wish to be considered kind rather than cruel, nevertheless, he must take care to avoid misusing his kindness. Machiavelli mentioned in his book a certain Cesare Borgia who was considered cruel yet his cruelty restored Romagna, uniting it in peace and loyalty. If this result is considered good, then he must be judged much kinder than the Florentines who, to avoid being called cruel, allowed Pistoia to be destroyed. A prince, therefore, must be indifferent to the charge of cruelty if he is to keep his subjects loyal and united. Having set an example once or twice, he may thereafter act far more mercifully than the princes who, through excessive kindness, allow disorders to arise from which murder and rapine ensue. Disorders harm the citizenry, while the executions ordered by a prince harm only a few individuals.[25]

For that reason, let a prince have the credit of conquering and holding his state. I would agree that the end doesn't always justify the means, but if the end is to create peace and harmony in the society, to make it a safer place for the future generation, will you consider this end worthy enough to justify the means?

Justin Lim is a philosophy graduate. He is a lover and true seeker of wisdom. He is more of a realist than idealist especially when it comes to political issues. He likes to write about something other people can connect or relate to. He chose to write about the philosophical aspect of the current administration's leadership and approach in eliminating drug syndicate in the country to offer a different view of the change that this administration offers.

[25] Ibid. (Chapter XVII: Concerning Cruelty: Whether It is better to be Loved than to be Feared or the reverse)

THE LIMITS OF PRESIDENTIAL IMMUNITY: Revisiting a Misunderstood Privilege

Josiah Felix Quising

Introduction

"Absolute power corrupts absolutely". Democracy created the separation of powers fundamentally for checks and balances - to veer away from a one-man rule – to prevent tyranny. Presidential immunity had been used several times in courts, here and abroad, to shield the incumbent Chief Executive from suit.

"Simply put, "absolute immunity" as defined by Dean Agabin is virtually nonexistent and is discouraged both by domestic and foreign courts. The privilege of Presidency carries with it the responsibility to uphold the laws of the land."

It is a common misconception that the basis of presidential immunity is found in the Constitution. It is not. It is rooted on case law and tradition; and just how the Aguinaldo condonation doctrine was in the same pedestal for decades and was nevertheless wiped off the list of available defenses abused by corrupt politicians, presidential immunity is just as ripe for judicial review.

History of Presidential Immunity

Pre-colonial Era

The doctrine of presidential or executive immunity stems from the age-old saying: "the king can do no wrong"[1]. The idea that the King was God's appointed law-giver rose as the feudal system collapsed and the king became the head of both Church and State. Logically, he cannot be subjected to the humiliation of being held liable by his citizens in a suit[2]. After all, the highest court is the King's throne.

[1] George W. Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La. L.Rev. 476 (1953); see also Pacifico A. Agabin, Presidential Immunity and all the King's Men: The Law of Privilege as a Defense to actions for Damages, 62 Phil. L.J 113, 114 (1987) [hereinafter *Agabin*]

[2] *Id* at 478 n.11, 479

Colonial Era

Centuries have passed and the Immunity Doctrine soon arrived in colonial waters. Governor-Generals, as agents, carried the King's immunity.

This was seen in the case of *Forbes v. Chuoco Tiaco and Crossfield* where Philippine Governor-General Cameron Forbes was sued by Chuoco Tiaco, a Chinese Citizen, for damages for his unlawful deportation to Amoy, China[3]. The Court held that the Governor-General, along with judges and members of the legislature, cannot be personally indicted in civil damages for the consequences of an act executed in the performance of his official duties[4].

Noticeably, the immunity from suit now comes as a form of public policy rather than a sacred right. As early as 1910, the Court specifically limited the immunity to civil damages and within the bounds of the performance of their official duties.

1973 Constitution

As a prelude to Martial Law, the Marcosian Constitution provided that the President "shall be immune from suit during his tenure" and "[t]hereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure"[5].

The 1973 Constitution provided immunity not just for the President but extended it to anyone following his specific orders and even beyond their incumbency.

The Opposition party led by former Member of the now defunct Batasan Pambansa Alberto Romulo tried to repeal such immunity, by arguing that immunity beyond incumbency violates the principle that a public office is a public trust and that such provision brings us back to "a king can do no wrong", but to no avail.[6]

1987 Constitution

The framers of the 1987 Constitution intentionally removed presidential immunity from our current constitution. As quoted by the Court in the case of *Estrada v. Desierto*, Commissioner Suarez questioned the omission of presidential immunity in the draft

[3] 16 Phil. 534
[4] *Id* at 649
[5] PHIL. CONST. of 1973, art. VII, § 17 superseded by PHIL. CONST. of 1987
[6] 353 SCRA 452, 520.

Constitution and suggested that the first sentence of original provision in the 1973 provision be retained. However, Commissioner Bernas explained in the deliberations that there is no need to express the immunity in the Constitution where it is already established in case law[7].

Post-Martial Law Era

It may very well be said that the Commissioners gave the Court power over the very essence and existence of the doctrine of presidential immunity. The Supreme Court upheld and further developed the doctrine over many cases and attempts to indict the President.

In *Soliven v. Makasiar*, President Corazon Aquino sued Beltran for libel when the latter wrote that the President hid under the bed during an attempted coup. Beltran argued that President Corazon Aquino cannot sue her as presidential immunity creates a "co-relative disability to file a suit"[8]. The Court in this case gave the rationale for presidential immunity wherein it stated that the privilege was given to "assure the exercise of the President's duties and functions are free from any hindrance or distraction", and therefore, such defense can only be raised by the President and not by anyone else. There is no law preventing the President from filing any suit, and that her immunity does not preclude her from. This was again clarified in the case of *Rubrico v. Macapagal-Arroyo* as the Court upheld the existence of the doctrine of presidential immunity despite its omission from the 1987 Constitution[9].

The Court held in *Estrada*, among other things, that a non-sitting President does not enjoy immunity, especially that of plunder[10]. This was reiterated in the 2012 case of *Lozada v. Macapagal-Arroyo*[11] wherein it was clear that such privilege cannot be invoked beyond the President's tenure.

Recently, amidst the alleged Constitutional violations and crimes against humanity done under the Duterte Administration, both Solicitor General Calida and Justice Secretary Aguirre, on separate occasions, went to the defense of the President and said that the immunity is absolute and does not distinguish between official or unofficial acts[12].

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[7] Id.
[8] 167 SCRA 393, 399-400.
[9] G.R. No. 183871, February 18, 2010
[10] *Supra* note 6 at 522.
[11] G.R. Nos. 184379-80, April 24, 2012
[12] Tetch Torres-Tupas, '*President has absolute immunity even for wrongdoing done in his term*', PHILIPPINE DAILY INQUIRER, http://newsinfo.inquirer.net/846792/president-has-absolute-immunity-even-for-wrongdoing-done-in-his-term/amp; *see also* Keith A. Calayag, Aguirre on De Lima's case vs. Duterte : 'Presidential immunity is absolute', SUNSTAR MANILA, http://www.sunstar.com.ph/manila/local-news/2016/11/11/aguirre-de-limas-case-vs-duterte-presidential-immunity-absolute-508865.

Challenging the bold statements of the President's lawyers, Senators Trillanes and De Lima filed separate lawsuits against President Duterte.[13]

Absolute or Qualified Immunity?

The doctrine of presidential immunity is divided into two schools of thought: absolute and qualified[14]. Former Dean of the UP College of Law, Dr. Pacifico Agabin defines absolute immunity as that which extends to actions done with express knowledge that such action or actions would contravene the law or the Constitution. Qualified immunity limits the privilege and does not protect the President from liability for conduct violative of the law if done with knowledge.[15]

Contrary to the statements of Solicitor General Calida and Justice Secretary Aguirre, our Supreme Court has never held that presidential immunity is absolute. In fact, the Court carefully qualifies the application of immunity in several cases. In *Estrada*, the Court recognized the "judicial disinclination to expand the privilege especially when it impedes the search for truth or impairs the vindication of a right.[16]" This falls squarely with the rationale of the immunity – to prevent any hindrance or distraction from the exercise of Presidential duties and functions[17]. Nevertheless, even presidential immunity discussed in foreign court agrees with *Estrada* and *Soliven* and leans in favor of a qualified aspect.

The US Supreme Court in the landmark case of *Nixon v. Fitzgerald*, held that "absolute immunity" is limited to immunity from civil damages and that it covers only "official acts"[18]. This was solidified in the case of *Clinton v. Jones*[19].

Simply put, "absolute immunity" as defined by Dean Agabin is virtually nonexistent and is discouraged both by domestic and foreign courts. The privilege of Presidency carries with it the responsibility to uphold the laws of the land. The closest favorable decision our Supreme Court held to "absolute immunity" would be the 2006 case of *David v. Macapagal-Arroyo*, wherein the Court, in upholding the doctrine of presidential immunity, said that

[13] Vince F. Nonato, Ombudsman: Probe goes on for Trillanes' raps vs Duterte, PHILIPPINE DAILY INQUIRER, (Nov. 26, 2016) http://newsinfo.inquirer.net/848184/ombudsman-probe-goes-on-for-trillanes-raps-vs-duterte; see also Rose-Ann Jessia Dioquino & Virgil Lopez, De Lima files Petition vs. Duterte at SC, GMA NEWS ONLINE, (Nov. 7, 2016) http://www.gmanetwork.com/news/story/587775/news/nation/de-lima-files-petition-vs-duterte-at-sc [hereinafter *De Lima's petition*]

[14] Agabin, supra note 1, at 113.

[15] Id at 114.

[16] *Supra* note 6 at 522

[17] *Supra* note 8

[18] 451 U.S. 731, 755 (1982).

[19] 520 U.S. 681 (1997)

the President may only be removed from office through impeachment[20]. However, in 2011, the Court quoted and emphasized again the *Estrada* doctrine and held that "unlawful acts of public officials are not acts of the State and the officer who acts illegally is not acting as such but stands in the same footing as any other trespasser."[21]

Law suits against the incumbent President

Senator Antonio Trillanes IV filed corruption charges, specifically for plunder and graft, against President Duterte for allegedly maintaining ghost employees on the payroll of the Davao City government. The senator said based on 2015 Commission on Audit (COA) report, there were 11,000 ghost employees with a budget of P708 million[22]. Ombudsman Conchita Carpio-Morales confirmed that the investigation would continue despite presidential immunity[23].

The Supreme Court has yet to decide on the immunity of the president for acts done before his presidency. However, this issue on this particular application of presidential immunity were already tackled in the US case of *Clinton v. Jones*. In this case, Jones filed a lawsuit against then US President Clinton for sexual-harassment done during Clinton's term as the Arkansas Governor[24]. Jones argued that the immunity cannot be granted for actions done before Clinton took office[25]. The US Supreme Court favored Jones and emphasized that the immunity will not apply to "unofficial conducts" of the President.

Senator Leila De Lima filed a Writ for Habeas Data[26] to secure her privacy and to put an end to the personal harassments of the current administration[27].

The Supreme Court is not foreign to petitions for Writ of Habeas Data filed against an incumbent president. However, Sen. De Lima's legal counsel and De La Salle College of Law Dean Jose Manuel Diokno still considers the Senator's petition as a test case[28].

[20] G.R. No. 171396, May 03, 2006
[21] Rodriguez v. Macapagal-Arroyo, 660 SCRA 85, 107
[22] Trillanes files plunder complaint vs. Duterte, CNN PHILIPPINES, (May 19,2016), http://cnnphilippines.com/news/2016/05/05/trillanes-files-plunder-case-against-duterte.html
[23] *Supra* note 13
[24] *Supra* note 19
[25] *Id* at 682
[26] *Id*; A writ of habeas data is a remedy available to any person whose right to privacy in life, liberty, or security is violated or threatened by an unlawful act or omission of a public official or employee (Section 1, Habeas Data Rule).
[27] *Supra* note 14
[28] De Lima files test case vs Duterte's immunity from suit, Philippine Daily Inquirer, (November 7, 2016), http://newsinfo.inquirer.net/841690/de-lima-files-test-case-vs-dutertes-immunity-from-suit

In the two cases against the Arroyo Administration, the Supreme Court ruled in favor of the former president, but never because of presidential immunity. In both cases, the Supreme Court in *Rodriguez v. Macapagal-Arroyo*[29] and *Balao v. Macapagal-Arroyo*[30] dismissed the petition regarding the former President Arroyo for lack substantial evidence against her. More particularly in the case of *Rodriguez*, where the petitioner contended that the doctrine of command responsibility can be used in amparo proceedings against Arroyo, the Court held that nothing precludes it from applying the doctrine of command responsibility in amparo proceedings and habeas data[31]. Unfortunately, the Supreme Court was unable to delve deeper into the topic of the writ of habeas data vis-à-vis presidential immunity because of insufficient evidence and the fact that Arroyo was no longer the President when the Court decided[32].

It must be noted, however, that a similar issue (by analogy) was already addressed in the US in the case of *US v. Nixon*, wherein the US Supreme Court concluded that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it **cannot** prevail over the fundamental demands of due process of law in the fair administration of criminal justice."

The International Criminal Court Prosecutor Fatou Bensouda, however, warned the President that presidential immunity may protect him from domestic prosecution, but not from the ICC[33]. Bensouda stated that the killings may not be state-sponsored, but the public statements of high officials, including that of the President, seems to "condone" and "encourage" vigilantism. Any person who incites violence is well-within the jurisdiction of the International Criminal Court.

A Last Resort: Impeachment and the ICC

With the exclusion of the age-old People Power, should the Supreme Court dismiss the previously mentioned cases, the last resort the Filipino people may rely on diplomatically would be impeachment through Congress and the International Criminal Court – both of which does not protect a president from prosecution.

[29] 660 SCRA 84, 128
[30] GR No. 186050, December 13, 2011
[31] *Supra* note 28 at 112
[32] *Id* at 128
[33] ICC Prosecutor on situation in the Philippines, (October 14, 2016), http://www.philstar.com/headlines/2016/10/14/1633542/full-text-icc-prosecutor-situation-philippines

Impeachment

Under the 1987 Constitution, a president may be impeached on the following grounds:

a. Culpable violation of the constitution
b. Treason
c. Bribery
d. Graft and corruption
e. Other high crimes
f. Betrayal of public trust[34]

Congressman Gary Alejano filed the first impeachment case against President Duterte last March 16 and based the petition on culpable violations of the constitution, bribery, graft and corruption, and betrayal of public trust. The grounds were mostly founded on actions of Duterte during his term as Mayor, Vice Mayor, and Congressman of Davao City on top of the extra-judicial killings, now counting over 8,000 civilians, happening during his term as President. [35]

However, this was quickly shot down by the Speaker of the House of Representatives – Congressman Alvarez, speaking for the President, and labeled the petition as "stupid" and "lacking of substance", the same day it was filed[36].

International Criminal Court and the Rome Statute

Should Congress arbitrarily dismiss the impeachment complaint against President Duterte, the case against him would be admissible to the International Criminal Court. Under Article 17of the Rome Statute, a case would be admissible in the ICC if the State primarily responsible to handle it is "unwilling or unable genuinely to carry out the investigation or prosecution" against a respondent"[37].

The International Criminal Court specifically tries only the following crimes:

a. Genocide;
b. Crimes against humanity;

[34] PH. CONST. §2, art.11
[35] Highlights: Impeachment complaint vs. Duterte, Rappler (March 16, 2017) http://www.rappler.com/newsbreak/iq/164339-highlights-impeachment-complaint-vs-duterte
[36] Alvarez on first impeachment rap vs. Duterte: It's stupidity, Philippine Daily Inquirer (March 16, 2017), http://newsinfo.inquirer.net/881297/alvarez-on-first-impeachment-rap-vs-duterte-its-stupidity
[37] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), art. 17, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 12 April 2017]

c. War crimes;
d. Crime of aggression[38];

Extra-judicial killings fall under Crimes Against Humanity via murder. Crimes against humanity is defined by the Rome Statute as "any of the [enumerated] acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." One of the enumerated crimes is "murder". In fact, the ICC already placed on notice for his numerous statements condoning the killings[39].

As for the President, he has not denied the murders, but rejects the jurisdiction of the ICC by rejecting the "humanity" of the "criminals" that fell victim to the "drug war"[40]. In one interview with award-winning journalist Raissa Robles, President Duterte even attested to the existence of the Davao Death Squad and stated that columnist Jun Ledesma was part of it and that he need not create a DDS because he has the police department and the Air Force[41].

These statements made by no less than the President himself, if indeed true, falls well-within the Rome Statute definition of crimes against humanity as "systematic", "widespread", and "directed against any civilian population with knowledge of the attack".

Arrests under ICC

Arresting a person indicted by the ICC by itself offers a new set of complications. The International Criminal Court can only try a person present in its courtroom[42], and will remain in the Pre-Trial stage until so. Having no military or police power, the ICC is heavily dependent on the cooperation of its State Parties. Under Article 59, State Parties are obliged to immediately take steps to arrest the person in question[43]. However, if the person to be arrested is the Head of the State, who would/can arrest him? Under Article 59, any State Party who has received a request for provisional arrest or for arrest can/should do so[44].

[38] *Id* at art. 5
[39] International Criminal Court puts Duterte on notice as critics begin to speak up, Japan Times (October 17, 2016), http://www.japantimes.co.jp/news/2016/10/17/asia-pacific/icc-warns-duterte-crimes-humanity-critics-begin-speaking/#.WO3RleaffGE
[40] Duterte: Killing Criminals not a crime against humanity, Philippine Star, (March 2, 2017) http://www.philstar.com/headlines/2017/03/02/1677427/duterte-killing-criminals-not-crime-against-humanity
[41] Dear Police Officers, President Duterte just called you his "death squad", Raissa Robles: Inside Philippine Politics & Beyond (March 7, 2017) https://www.raissarobles.com/2017/03/07/dear-police-officers-president-duterte-just-called-you-his-death-squad/
[42] *Supra* note 37 at art. 63
[43] *Id*. at art.59
[44] *Id*

The case of the Sudanese President Al Bashir proves this a difficult feat. The first warrant of arrest for Al Bashir was issued on March 4, 2009, and July 12, 2010, and up 7-8 years later, he's still at large[45]. South Africa refused to arrest Bashir and defended its decision by stating that it does not have the obligation to arrest a Head of State not party to the Rome Statute[46].

Thus, full cooperation with the state-parties would be necessary for a case filed with the ICC to prosper.

Conclusion

We have no king. The Philippines is Asia's bastion of democracy and by such, sovereignty resides with no less than the Filipino people. To declare anyone above the law is a dangerous path to tread - even for a limited term - for a lot can happen in 6 years of impunity. Surely, a lot has already happened in 8 months. As Dean Agabin said "for every right there must be a remedy and we cannot let the immunity doctrine stand in the way of an effective remedy."[47]

The Constitution was written to be the supreme authority in the land. It would be contrary to its very existence if it created an office above the sovereignty of the people it was meant to protect. Solicitor General Calida once stated in a press conference: "the President can decide outside the Constitution[48]". If that is true, where now can the people go if the Court can't make the President liable for violations of the very laws he swore to uphold? Where now can we go if he transgresses the very rights he swore to protect; if he betrays the very nation he swore to serve? Are we not a nation ruled by law not of men?

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[45] The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, https://www.icc-cpi.int/darfur/albashir#10

[46] South Africa defends decision to ignore ICC's Bashir arrest warrant, Business Day, (April 7, 2017) https://www.businessdayonline.com/south-africa-defends-decision-ignore-iccs-bashir-arrest-warrant/

[47] *Agabin*, *supra* note 1, at 128

[48] Solgen asking Duterte to violate Constitution – lawmaker, Philippine Star (January 22, 2017) http://www.philstar.com/headlines/2017/01/22/1665004/solgen-asking-duterte-violate-constitution-lawmaker

LEGAL FRAMEWORK FOR E-CONTRACTING IN THE ASEAN COMMUNITY: Quo Vadis?

Mark Dean dR. Itaralde

David Hume expounded: the bases of a civilized society include the security of the person, the stability of the property, and the obligation of contract - these, being the self-evident foundations of law and justice.[1] How each state in the world proceeded to establish law, economy and politics underpinned these bases. The same sustained how we formed international relations after the two world wars. Law and justice are meant to guarantee that we continue to maintain an urbane community while everyone deals and progresses in their property, social and commercial transactions and relations. But can the law continue to perform its functions with constantly changing technology?

"But the fact that these discussions have been on-going for more than a decade now only creates a conjecture that ASEAN members are deliberately, if not indirectly, rejecting a legalistic approach to an international or regional legal framework. Instead "it rests on the pillars of informal, non-binding and consensus-oriented inter-governmental cooperation."

Information and Communications Technology (ICT) paved the way to faster world connection and borderlessness, significantly making huge and rapid impact on the social, cultural, and most importantly, economic life of many. But the faster it upgrades and introduces new means of establishing valid means of communication and therefore means of conducting relations and transactions, it is leaving behind the slow process of most of our political and legal institutions in ensuring that effective legislations and regulatory norms and practices are applicable ICT driven relations.

This article, highlights the relevance of contracting and information technology in Association of South East Asian Nation (ASEAN). The goal was to survey existing legal framework, and identify in the process the different problems that may arise as e-contracting is being applied and practiced in ASEAN. I believe that further review of e-contracting legal framework in ASEAN, will further push and trigger the development of electronic

[1] Charles Fried, Contract as Promise: A Theory of Contractual Obligation (Selby - Bigge ed. 1981). Citing A Treatise off Human Nature (Selby - Bigge Ed)

commercial transactions, now that the ASEAN Community has been officially launched.[2] The paper is limited to examining existing international and domestic legislations of ASEAN members related to international e-contracting, in the hope of contextualizing the intent of ASEAN to harmonize and bring more efficiency to the regional integration.

ASEAN

The (ASEAN) was created in 1967 to promote regional cooperation among its member countries in: a) promoting regional peace and stability, and b) accelerating economic growth, social progress and cultural development in the region.[3] It currently has 10 members: Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Officially, it launched the ASEAN Economic Community on 31 December 2015.

With more than 600 million people or around 9% of the entire earth's population, a land area covering over 4.46 million cubic kilometers, or around 3% of the earth's land mass, and an ocean three times larger than the land connecting all the states in the region[4], the challenge of establishing a regional cooperation is posing an overwhelming but very promising concern for ASEAN community.

It has been more than a decade since the ASEAN considered the enhancement and protections of electronic commercial transactions as one of its priorities. As early as year 2000, ASEAN member countries entered into e-ASEAN Framework Agreement to facilitate the establishment of the ASEAN Information Infrastructure and promote the growth of e-commerce in the region. One of the elements identified to comprise the framework is the creation of an e-commerce friendly environment[5] and part of the agreed upon measures was to enact respective domestic legislation to provide legal recognition of electronic transactions based on common reference frameworks.

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[2] Kuala Lumpur Declaration on ASEAN 2025; Forging Ahead Together; ASEAN Community Vision 2025; ASEAN Political-Security Community Blueprint 2025; ASEAN Economic Community Blueprint 2025; and ASEAN Socio-Cultural Community Blueprint 2025. < http://www.asean.org/asean-2025-forging-ahead-together/> (Last Visited March 31, 2017)

[3] Charter of the Association of Southeast Asian Nations. [2007] Art. 1 < http://www.asean.org/storage/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf > Accessed 03 January 2016.

[4] Understanding ASEAN Connectivity. ASEAN Connectivity Fact Sheet. <http://www.asean.org/storage/images/ASEAN_RTK_2014/5_ASEAN_CONNECTIVITY_Fact_Sheet.pdf > Accessed 03 January 2016

[5] e-ASEAN Framework Agreement [2000] Art. 5 <http://agreement.asean.org/media/download/20140119121135.pdf > Accessed 03 January 2016

e-Contracting

Basing from the existing domestic legislations of the ASEAN member-countries, I summed up the different definitions available in their respective domestic legislations to denote **e-Contract** as ***an offer and the acceptance of an offer which are expressed by means of electronic communications or electronic record, committed by the use of computers, computer networks, and/or other electronic media.***

Ravindra Kumar Singh, elaborated on this concept by concluding that e-contracts involve real time transactions over any form of computer network so that it may be perfected even by any exchange of any type of electronic record, like MP3 audio file, text messages or Short Message Service (SMS), Multimedia Message Service (MMS), electronic mails, by means of electronic devices.[6] Common subject matters of e-contracts are sale of physical goods, digitized products (software, digital music, videos, books), and supply of services (consultancy or advisory, electronic banking, etc.)

Businesses and consumers see the importance of e-contracting. The cost and time-saving advantage of e-contracting, the new and faster platform for the buying, selling or exchanging of goods, services, and information through electronic networks are just some of the advantages.[7] But as it is currently applied, there are legal nuances and uncertainties that doubt its capacity to maximize the concept.

e-Contracting Legal Predicaments

The main legal issues about formation of international e-contracts are: (i) how the parties can be assured that electronic communication can pass the validity requirements of contract; and (ii) how the parties can validly identify each other in the cyberspace. In the bigger perspective of ASEAN integration, given the legal systems diversity of the ASEAN nations, is there a legal framework that will protect individuals dogged to apply e-contracting in their transactions?

There are two key approaches adopted in understanding these legal issues. The first is "***functional equivalency***". This entails identification of particular legal rules in the non-digital commercial world and extending the same by analogy to electronic

[6] Ravindra Kumar Singh, *Conception of Contracts in the Era of Information Technology: A Critical Study and Appraisal of the Diverse Aspects of the Electronic Contracts*, http://hdl.handle.net/10603/49009;

[7] Palanissmy Ayyappan, *Legal Issues in e-Commerce and e-Contracting – An Overview of Initiatives in Malaysia*, 3 International Journal on e-Education, e-Business, e-Management and e-Learning 173–177, 173-177 (2013), http://www.ijeeee.org/Papers/217-ET046.pdf (last visited Mar 31, 2017).

transaction, like fitting cyberspace activities within the ambit of conventional existing rules.[8] This approach can be very useful in analyzing e-contracts application based on existing international legal conventions and practices and even subsisting domestic laws governing paper-based contracts.

A second approach is by ***identifying the fundamental principles*** that inspired the rules governing non-digital transactions and to look afresh at those principles at how those could best served the uniquely different realm of cyberspace. This approach conceivably has the merit of leading to a much more healthy development of the law in the long term, discovering *sui generis* rules for e-contracting that takes into account the unique features and potentials of computer-based communications systems.[9]

International Legal Backdrop

As mentioned, the ten-member ASEAN already adopted the e-ASEAN Framework Agreement in the year 2000. It was intended to enhance the region's global competitiveness by revolutionizing, and benefiting from, the opportunities of ICT in establishing electronic commerce (e-commerce) and electronic government systems. This Agreement however, never entered into force as not all member-states, as required, have ratified it until now.

Despite unenforceability of e-ASEAN Framework Agreement, Philippines (2000)[10], Thailand (2002)[11], Viet Nam (2005)[12], Malaysia (2006)[13], Brunei Darussalam (2008)[14], and Singapore (2010)[15] adopted laws on e-commerce following the 1996 UNCITRAL Model Law on Electronic Commerce (MLEC)[16] while Myanmar[17], Indonesia[18], and Lao People's Democratic Republic[19] respectively adopted their e-commerce law seemingly without reference to MLEC. The MLEC basically sustained the functional equivalency approach,

[8] Anil Samtani, Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues [2001], 9 International Journal of Law and Technology. No. 2.Oxford University Press, 93 <http://ecommercelaw.ru/sites/default/files/electronic%20commerce%20in%20Asia.pdf >

[9] ibid.

[10] Republic Act No. 8792 (Electronic Commerce Act of 2000) [2000], Philippines

[11] Electronic Transactions Act B.E. 2544 [2001], Thailand

[12] Resolution No. 51/2001/QH10, Law On E-Transactions [2001], Viet Nam

[13] Act 658, Electronic Commerce Act 2006 [2006], Malaysia

[14] Electronic Transactions Act, Laws of Brunei CAP 196, [2008] Brunei Darussalam

[15] Electronic Transactions Act (Chapter 88) (Original Enactment: Act 16 Of 2010) [2012] Singapore

[16] UNCITRAL Model Law on Electronic Commerce. <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html > Accessed 10 January 2016

[17] The Electronic Transactions Law (The State Peace and Development Council Law No. 5/2004) The 12th Waxing of Kason 1366 M.E. [2004], Myanmar

[18] Law of The Republic of Indonesia Number 11 of 2008 Concerning Electronic Information and Transactions [2008], Indonesia

[19] National Assembly No 20/NA [2012], Vientiane, Lao

as it provides that electronic communications should be given equivalent legal effect as paper-based communications.[20] And as can be gleaned from the respective texts of states influenced by the MLEC, the same functional equivalency principle became prevalent and standing rule in the domestic legislations of these ASEAN members.

In 2001, UNCITRAL likewise released the Model Law on Electronic Signatures (MLES). Only Thailand and Viet Nam considered or were influenced by the MLES.[21] The scope of MLES primarily underscored non-discrimination, technological neutrality and functional equivalence, similar to MLEC. The MLES established criteria of technical reliability for the equivalence between electronic and hand-written signatures as well as basic rules of conduct that may serve as guidelines for assessing duties and liabilities for the signatory, the relying party, and trusted third parties intervening in the signature process.[22]

As of this writing, while Philippines has already signed, only Singapore signed and ratified the United Nations Convention on the Use of Electronic Communications in International Contracts (UNECIC).[23] Singapore, however, made a declaration that the UNECIC "shall not apply to electronic communications relating to any contract for the sale or other disposition of immovable property, or any interest in such property, to creation or execution of a will, the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, that may be contracted for, in any contract governed by the Convention".[24] "The UNECIC applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States".[25]

Additionally, the 1980 Vienna Convention on Contracts for the International Sales of Goods (CISG) would also be a good source of international legal principles for the international transactions. However, since its adoption in 1980, only Singapore and Viet Nam signed and ratified the CISG. The CISG governs contracts for the international sales of goods between private businesses, excluding sales to consumers and sales of services,

[20] UNCITRAL Model Law on Electronic Commerce. Art. 5 <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html > Accessed 10 January 2016

[21] UNCITRAL Model Law on Electronic Signatures <http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2001Model_signatures.html> Accessed 10 January 2016

[22] UNCITRAL Model Law on Electronic Signatures, Trade Facilitation Implementation Guide. <http://tfig.unece.org/contents/uncitral-model-law-esignatures.htm> Accessed 16 January 2016

[23] United Nations Convention on the Use of Electronic Communications in International Contracts [2005] http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html Accessed 16 January 2016

[24] ibid.

[25] ibid.

as well as sales of certain specified types of goods[26]. It applies to contracts for sale of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State. It may also apply by virtue of the parties' choice. The second part of the CISG deals with the formation of the contract, which is concluded by the exchange of offer and acceptance.[27] The CISG also allows for freedom of form of the contract.[28]

The review of the status of these existing international conventions and instruments directly generates a presumption that there is no treaty that provides for uniform application of e-contracting in the region. In fact, there is no multilateral convention enforceable at this point. What is clear from the development of multilateral relations in ASEAN is the emergence of a regional mindset that favors e-commerce in general, which hopefully includes international e-contracting. But the fact that these discussions have been on-going for more than a decade now only creates a conjecture that ASEAN members are deliberately, if not indirectly, rejecting a legalistic approach to an international or regional legal framework. Instead "it rests on the pillars of informal, non-binding and consensus-oriented inter-governmental cooperation."[29] Perhaps, to stabilize a legal framework that will be consistent for application, at least within the ASEAN region, a stir towards legalistic approach will ease existing doubts about e-contracting.

e-Contracting Domestic Legislations

At the onset, ASEAN citizens, will not be able to rely on any legal framework in Cambodia, as Cambodia has not yet passed any law related to electronic contracting. Legal safeguards will definitely be harder to establish for those who wish to pursue any international e-contracting involving the jurisdiction of Cambodia. There has been a consistent news however, that with the support of several international organizations, Cambodia has been drafting a law related to this matter.

In analyzing and distinguishing the respective domestic laws of ASEAN members, it is important to highlight that not all ASEAN members have the same legal systems. Some are following civil law while some are observing common law systems. Perhaps, this is the first hurdle in understanding e-contracting in an ASEAN regional setting, as application of the laws differ from each jurisdiction.

[26] < http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html > Accessed 16 January 2016
[27] ibid.
[28] ibid.
[29] Jorn Dosch, The ASEAN Economic Community: What Stands in the Way? [2015] East-West Center, No. 119

To answer the first legal issue laid down earlier, the problem of legal validity of e-contract were mostly resolved by the ASEAN Members by adopting a provision that basically declared that e-contract shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record. Regardless of the form therefore, the ultimate determination of whether a contract will be valid in one jurisdiction is to consider the qualifications provided under the existing laws on respective jurisdiction related to the contracts in general. For Example in Indonesia, legally binding contracts are contracts that have satisfied the qualifications as provided under Book III, Article 1320 of the Indonesian Civil Code. Such qualifications are: (i) there must be consent of the individuals who are bound thereby; (ii) there must be capacity to conclude an agreement; (iii) there must be a specific subject; and (iv) there must be an admissible cause. These qualifications are also applicable for e-contracts pursuant to Article 47 (2) of GR 82/2012 of Indonesia. Despite the above qualifications, which mark the civil law system adopted by Indonesia, GR 82/2012 also recognizes "the offer and acceptance principle, which generally applies in countries with common law systems"[30] like Singapore. Article 50 of GR 82/2012 stipulates that "an electronic transaction is deemed to be concluded when there is a consensus between the parties involved, which occurs when the offer sent by a party is accepted and approved by its counterparty".

The common provision reflected in the domestic legislation largely admitted the suggested approach by the MLEC on functional equivalency, and officially declared that electronic communications will be regarded as valid means of concluding and executing a contract. Noticeably, the domestic laws of Brunei Darussalam, Singapore and Lao Democratic Republic provided negative lists that will not qualify as e-contract and will not be an enforceable one if made under electronic communications. This list is absent from the legislations of other ASEAN Members, making it harder to further validate whether these kinds of contract will be valid under their jurisdictions.

As to the second issue, all the existing domestic legislations also provided for recognition and validity of electronic signatures attached to the e-contract. In general, what their respective provisions considered is that the electronic signatures shall have lawful legal force and legal effect so long as the same can be uniquely identified as authentic. Some other ASEAN members distinguished different types of electronic signatures and even differed its application to mutual agreement of the parties to the contract. In effect, the contracting parties can validly identify their counterparts, even if e-signature constitutes their offer or acceptance of offer through certain requirements that are laid down in the respective legislations of the ASEAN Member states.

[30] Doing Business In Indonesia: E-Commerce. < http://www.ssek.com/download/document/E-Commerce_Guidelines_for_Indonesia_95.pdf> Accessed 15 January 2016

What is unclear however in the domestic legislations are whether the laws will be applicable for cross-border e-contracts. Most of the domestic legislations are silent on this matter, which would naturally require further inquiry and research as to the available regulations and protections that foreign nationals may have in case of cross-border e-contracts. Perhaps, this assumption is supported by the fact that Lazada Group, a Rocket Internet electronic commerce company operating in South East Asia, penetrated the ASEAN market by putting respective domestic companies in all of its locations and operations in South East Asia, instead of operating one company in the whole of the region, because of the changing regulatory requirements country by country.[31]

Considering the intent of the ASEAN Community to harmonize its framework across all members, the present set up must admit that it is actually far from realizing that harmonized system. The goal of harmonization should not only provide better protections for e-contracting but likewise afford better confidence for legal safeguards for those who wish to avail of the opportunities of e-contracting. While 9 out of the 10 members of the ASEAN have already sealed the legality of e-contracting in their respective jurisdiction, hopefully, this accomplishment will be followed by a period of further reflection and consolidation where deeper questions on the effectiveness and suitability of enforcing these laws through international e-contracting will be regarded to benefit the ASEAN region as a whole.

Recommendations and Conclusions

The discussions did not consider other important aspects of the e-commerce as applied in the regional setting. International consumer protections and possible online dispute settlement procedure of an international electronic commerce, as well as regulation of international online payments and taxations are all interesting topics related to this discussion.

The basic form of e-contracting has been domestically addressed by most ASEAN states. While it diminishes doubt to e-contracting, the recent experience in online shopping, and e-contracting, related to payment fraud, fake products being sold, non-payment, etc., only show that there are still other aspects that legal authorities and regulators should look into to make the system more effective.

[31] KPMG International Cooperative. MNCs in Southeast Asia: The View of Multinationals in ASEAN. [2015] <https://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/MNCs-in-Southeast-Asia-The-view-of-multinationals-in-ASEAN-O-201504.pdf >Accessed 17 January 2016

"The Internet is a fluid medium with no national boundaries in place."[32] As the ASEAN Community continues to put more efforts in realizing a stronger and more effective regional cooperation, it can be gleaned from the above analyses and discussions the need for consolidated regional and legalistic approach. While the concept of "functional equivalency" became the basic foundation of establishing legal foundation to e-contracting, the possibilities are endless in defining sui generis rules for e-commerce. The comments of Susana H.S. Leong is applicable, that only when jurisdictions around the world (in this case, the ASEAN Community) converge towards a generally accepted standard of legal rights and liabilities that all parties in the digital environment may then enjoy true and meaningful protection.[33] The efforts exerted locally by different ASEAN member-countries, and the consensus-oriented measures provided by the ASEAN leaders will never be futile but should instead be a source of motivation to further facilitate economic integration, active collaboration and mutual assistance among ASEAN members. Regardless of the slow growth and development of the concept of e-contracting, the opportunities remain limitless. But perhaps, as the ICT advances radically and abruptly, the law and policy-makers must be ready to adapt to these changes as they improve the rules and regulations and principles governing e-contracting in the region. At this juncture, establishing and sustaining a civilized society no longer ends in our physical world. As the virtual world continues to evolve as valid platform for social and commercial transactions, so must our laws extend to the same platform.

Mark Dean dR. Itaralde finished AB Political Science, Magna cum Laude¸ at Far Eastern University in 2005. Interest for business law stemmed from his eight (8) years work exposure in Ayala Land, Inc. having served its Legal Affairs Division for two (2) years, then seconded (upstream) to Ayala Group Legal for another two (2) years, and cross-posted to AyalaLand Offices as Associate Manager for Leasing and Operations for four (4) years. He recently completed Juris Doctor – Master of Business Administration (dual program) of the consortium of Far Eastern University and De La Salle University. He is currently affiliated with International Bar Association Law Students' Committee – Editorial, and Young International Council for Commercial Arbitration (Young ICCA). Our recent experience bared how technology has drastically changed the parameters of our dealings. And then, there are recent developments in multilateral political and economic integrations (e.g., Association of Southeast Asian Nations communities). The need for appropriate and unwavering laws and regulations therefore becomes relevant in the realm of the expanding setting of our transactions. Is there a Rule of Law which can be invoked for borderless virtual contracts? (This article received the highest ratings as final requirement for the Information and Communications Technology Law class of Atty. John Roy Robert Real II)

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[32] Anil Samtani. Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues. [2001] International Journal of Law and Technology. Vol. 9 No. 2 Oxford University Press., 93 <http://ecommercelaw.ru/sites/default/files/electronic%20commerce%20in%20Asia.pdf> Accessed 10 January 2016

[33] Anil Samtani. Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues. [2001] International Journal of Law and Technology. Vol. 9 No. 2 Oxford University Press., 93 <http://ecommercelaw.ru/sites/default/files/electronic%20commerce%20in%20Asia.pdf> Accessed 10 January 2016 citing Susanna H.S. Leong. Internet Copyright – Singapore; Vol. 16 No. 3 [2000] Computer Law and Security Report 180

HOW DOES ICT AFFECT INTERNET RETAILING VIS-À-VIS THE RIGHT OF MINORS TO DISAFFIRM CONTRACTS?[1]

Esther Lauren Perez

I. Background of the Study

Of the 20 million users of Android and iOS applications, around 5% of the consumers are children from 13-17 years old.[2] Most virtual games that minors engage in require a monthly payment. Other online games "use a micropayment model, where there is no charge to play but the players may purchase virtual goods (i.e. weapons, virtual currency, clothes, or household items) for a premium."[3] Moreover, as of 2011, it was reported that 80% of teens in the U.S.A use social networking sites, and have an overall buying power of $91.1 billion.[4]

"There is no doubt that ICT vis-à-vis the influx of Internet usage have revolutionized the way people interact, transact, and communicate with one another. In order for society to fully enjoy the benefits of technology, laws must also be able to adapt with these revolutionary changes."

It is therefore apparent that minors and their online transactions are significant contributors to businesses and the economy at large.

Most laws around the world, including Philippine law, provide a special disqualification against minors from entering into contracts. This entails that contracts entered into by minors are voidable, and may be annulled at their will.

The ability to annul a contract creates doubt for the parties. Those "transacting with a minor must consider that their contracts may be voided until, the minor reaches the age of majority."[5] As Internet retailing becomes more frequent, the effects of this advantage become more remarkable.

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[1] Updated version of a critical paper submitted in partial fulfillment of the course requirements in Information & Communications Technology Law 2nd term A.Y. 2015-2016 under Atty. John Roy Robert Real.

[2] Jordan, Mallory. "Freemium Isn't Free: 25 to 34 Year Olds Spend the Most on Extra Content." *Joystiq.com*. September 10, 2011.

[3] Cheryl Preston., and Brandon Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment* , Kansas Law Review, (December 2012).

[4] Id.

[5] Republic Act No. 386 § 1391.

Some would argue that the minority incapacity doctrine, or the ability of minors to disaffirma contract, poses an impossible problem for merchants who want to give customers the convenience of electronic transactions, and at the same time want to guarantee that these transactions will be valid and enforceable. If the legal system's view of minors remains the same in this day and age, then society will not be able to wholly feel the benefits of e-commerce.[6]

"Increased Internet use has produced increased uncertainty on an internet user's rights.[7]" The New Civil Code (NCC) provides that the incapacity of unemancipated minors is "subject to the modifications determined by law, and is understood to be without prejudice to special disqualifications established in the laws".[8] Thus, in certain cases, minors may also give consent, such as when buying necessities like food.[9] However, at the moment, Philippine laws have not yet delved into the nature of online contracts vis-à-vis the right of minors to disaffirm.

This paper will examine the effect of Information Communications Technology (ICT) on online transactions entered into by minors by looking into applicable laws, the concept of consent, the right of minors to disaffirm contracts, related issues, as well as a conclusion of the research, and recommendations for the future.

II. Philippine Law

Internet retailing is a trend noticed and acknowledged by the Philippine government. This motivated the enactment of the E-Commerce Law.[10]

It has four main functions: 1) It makes electric documents, signatures, and transactions valid;[11] 2) It enables the admission of electronic documents and signatures as evidence;[12] 3) It penalizes hacking, virus-making, and other unauthorized forms of access to information and interference in communication systems.[13] 4) It calls upon the government to institute programs that are not only supportive of e-commerce, but also

[6] Juanda Lowder Daniel. *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through Cyberspace*, Gonzaga L.R. 239-255 (2008).
[7] Jordan, Mallory. "Freemium Isn't Free: 25 to 34 Year Olds Spend the Most on Extra Content." *Joystiq.com*. September 10, 2011.
[8] Republic Act No. 386 § 1329.
[9] HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS 315-316 (2003).
[10] Republic Act No. 8792.
[11] Lallana, Emmanuel C., and Rodolfo S. Noel. *The Philippine E-Commerce Law: A Preliminary Analysis*. Manila: AGILE, 2002.
[12] Id.
[13] Id.

motivates online visibility of the government.[14] Closely related to the E-Commerce law are the Rules on Electronic Evidence. These rules apply whenever an electronic data message is offered or used in evidence.[15] Unfortunately, the e-commerce law does not address the issue of disaffirmance when it comes to online contracts. The provisions of the Civil Code still govern.

A contract is defined as "a meeting of the minds between two persons whereby one binds himself with respect to the other, to give something or to render some service."[16] Its elements are "1) Consent of the Contracting parties, 2) Object Certain which is the subject matter of the contract, and the cause of the obligation.[17]"

III. Consent

It was only in the nineteenth century when jurists noted that the wills of parties should govern over obligations.[18] This rejected the old principle that fairness of an exchange justifies contractual obligations. Prior to the nineteenth century, equity courts would reject the enforcement of a contract wherein the price was deemed insufficient by a judge.[19] Hence, "modern contract law is fundamentally a creature of the nineteenth century.[20]"

Legally speaking, there is no consent absent the capacity to give such consent.[21] Accordingly, Art. 1327 of the NCC lists down persons who have no capacity to enter into contracts. Unemancipated minors are included in that list. Those that are below 18 years old are specifically prohibited from entering into contracts, unless accompanied by the legal guidance of their parents or guardians who are at the age of majority.[22]

IV. Consent and Voidable Contracts in Relation to Minors

Compared to other incapacitated individuals who have to establish that they are incapacitated, i.e. not in a state of drunkenness or insanity, minors are given a blanket right to disaffirm solely based on their age[23], except in some cases wherein minors have

[14] Id.
[15] A.M. NO. 01-7-01-SC.
[16] HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS (2010).
[17] Republic Act No. 386 § 1318.
[18] Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, HARVARD L.R., 917 (March 1974).
[19] Id.
[20] Id at 917-956.
[21] Felix Gochan vs. Heirs of R. Baba. 409 SCRA 306, (Supreme Court 2003); Heirs of Ingjug-Tiro vs. Sps. Casals, 363 SCRA 435 (Supreme Court 2001).
[22] Republic Act No. 386 § 1327.
[23] James Chang, and Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, UC IRVINE L.R., 627-657 (2012); Republic Act No. 386 § 1327, 1390.

expressly misrepresented their age.[24] However, if a minor could not be bound by direct acts such as execution of deeds of sale because he/she is incapable of giving consent, then it would be absurd for him/her to be bound by indirect acts such as the misrepresentation of age.[25]

A contract where one party is unable to consent is voidable.[26] The law recognizes that those mentioned in Art. 1327 may easily become victims of fraud as they are not capable of understanding the nature of their actions. Hence, they can enter only into a contract through a parent or guardian.[27]

Art. 1329 also provides that the incapacity of unemancipated minors "is subject to the modifications determined by law, and is understood to be without prejudice to special disqualifications established in the laws.[28]" This means that contracts entered into by incapacitated persons, including minors are voidable. But in some instances, the law may modify their incapacity. These instances include situations such as when minors purchase necessaries such as food, and he/she pays a certain price therefore[29], and if a guardian or legal representative enters the contract[30]. The action for annulment of a voidable contract for minors may be allowed to be brought within four years after his/her guardianship ceases,[31] or the time when he/she reaches the age of majority. The minor's guardian may also bring forth the action in behalf of the minor.[32] However, if the minor upon reaching the age of majority impliedly or expressly ratifies the voidable contract, which he/she entered, the action to annul set forth shall also be annulled.[33]

Contracts with minors are usually voidable at the choice of the minor, but binding on the adult. This means that minors can back out of contracts, but other parties may not.[34]

In Michael Malto v. Philippines, wherein a 17-year Assumption college student had an illicit affair with her professor, the court affirmed that a child couldn't give consent

[24] HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS 316 (2003) citing Mercado v. Espiritu, 37 Phil 215 (Supreme Court 1917); Id.
[25] De Leon citing Justice Padilla, dissenting in *Suan Chiao vs. Alcantara*. 85 Phil. 669 (Supreme Court 1950).
[26] Republic Act No. 386 § 1390.
[27] HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS 314 (2003).
[28] Republic Act No. 386 §1329.
[29] Republic Act No. 386 §1489 §290.
[30] Republic Act No. 386 §1381 paras 1,2.
[31] Republic Act No. 386 §1391-1392.
[32] Republic Act No. 386 §1329.
[33] Uys Soo Lim v. Tan Unchuan. 38 Phil. 552 (Supreme Court, 1918); Republic Act No. 386 § 1392.
[34] James Chang and Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, UC IRVINE L.R., 627-657 (2012); Republic Act No. 386 § 1327, 1390.

to a contract under Civil laws. Thus, the minor student had a right to disaffirm the said contract once she reached the age of majority.[35]

Nonetheless, the Philippines' Supreme Court has also held that a contract would be considered as valid where a minor actively misrepresents his actual age and convincingly leads the other to believe in his legal capacity. This is in accordance with the rules on estoppel.

But, this rule is limited to cases wherein the minor actively misrepresents his age, and the vendor who sees the minor basing on the minor's appearance deems him to be an adult.[36] As early as 1917 in Mercado and Mercado v. Espiritu, the Supreme Court has already held that the sale of real estate effected by minors who were near the adult age, and who pretended to have already reached the age of majority cannot be permitted to excuse themselves from compliance. Therefore the contract is valid.

However, in the absence of false representations by a minor regarding his/her age, the "mere fact that the person with whom he dealt with believed him to be of age even though his belief was warranted by the minor's appearance and the surrounding circumstances, and the minor knew of such belief, will not render the contract valid or estop the minor to disaffirm."[37]

V. E-Contract Issues in Relation to Minors

E-Commerce encompasses all business conducted by computer networks.[38]

The infancy doctrine was established to create a balance between the buyers who are minors, and sellers in an offline setting. [39] Hence, if a seller engages in a transaction with minors whom he physically sees and interacts with and still pushes thru with the transaction, the minor is given a right to disaffirm the contract in order to lessen the possibility of sellers making unconscionable contracts with minors.[40]

[35] Michael John Z. Malto v. People of the Philippines. G.R. No. 164733 (Supreme Court, 2007).
[36] Suan Chiao vs. Alcantara. 85 Phil. 669 (Supreme Court, 1950); HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS 314 (2010) citing Justice Carson, concurring in Mercado v. Espiritu. G.R. No. L-11872 (Supreme Court, 1917).
[37] HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS 545 (2010) noting citation by Justice Carson 22 Cyc. 610.
[38] Neeraj Dubey. *Legal Issues in E-Commerce: Think Before you Click!* Newstex, March 14, 2014.
[39] HECTOR S. DE LEON, THE LAW ON OBLIGATIONS AND CONTRACTS 313-315 (2003).
[40] James Chang, and Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, UC IRVINE L.R., 627-657 (2012); Republic Act No. 386 § 1327, 1390.

However this incapability in light of present-day circumstances is being questioned in most jurisdictions. The right of minors to disaffirm is based on their incapacity under infancy doctrine, which according to some is "inappropriate with respect to online contracts. [41]" This is because adolescents nowadays have a degree of technical expertise that in many cases surpass adults. Hence, the infancy doctrine jeopardizes the thriving of online businesses that consider adolescents as an important part of their clientele.[42]

Interestingly, the capacity of minors is recognized in other areas of law such as Torts and Criminal Law.

As a general rule, minors may be held liable for torts. Adolescents may be held liable for torts. This is because adolescents are assumed to be capable of deciding and appreciating the implication of their acts.[43]

Consequently it could be argued that because of the blanket view that minors are incapacitated under contract law, they cannot be held liable in tort. This is because of their right to disaffirm contracts. If not, tort law would circumvent contract law.[44]

Likewise, a minor is also capable of committing a crime. Criminal law recognizes the capacity of minors to commit a crime via discernment. Republic Act 9344 or the Juvenile Justice and Welfare Act of 2006 states that minors who are below "15 years old at the time of the commission of the offense shall be exempt from criminal liability."[45] Moreover those between 15 years of age until 18 years of age shall also be exempt from criminal liability. However this exemption is abandoned if the child was verified to have acted with discernment. The courts determine discernment.[46] To determine if a minor acted with discernment, his mental capacity to appreciate the disparity between right and wrong, may be judged by considering all the circumstances disclosed by the record of the case, his appearance, his attitude and his behavior and conduct, not only before and during the commission of the act, but also after and even during the trial should be taken into consideration.[47]

[41] Juanda Lowder Daniel. *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through Cyberspace*, Gonzaga L.R. 239-255 (2008).
[42] Id.
[43] Id., ARTURO TOLENTINO. CIVIL CODE OF THE PHILIPPINES: COMMENTARIES AND JURISPRUDENCE, Vol. I (1990).
[44] Juanda Lowder Daniel. *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through Cyberspace*, Gonzaga L.R. 239-255 (2008).
[45] Republic Act 9344 Section 6.
[46] Id.
[47] Llave v. People. G.R. No. 166040 (Supreme Court, 2006) citing People v. Doquena 68 Phil. 580 (1939).

As of the moment, there are no cases in the Philippines that deal with minors entering into online contracts. But, with the influx of the digital age, and the popularity of class actions against online firms it would be beneficial to dabble into this issue in order to prepare Philippine laws for this phenomenon.

As an illustration, when parents give their credit cards to their children, it could be argued that parents have given their children an extension of their credit card or the right to use their credit cards, and tantamount to legal guidance, via an agent-principal relationship.[48] On the other hand, it could also be argued that minors do not have the capacity to become the legal agents of their parents. This is because agency is a contract between two parties, and minors are generally incapacitated to enter into contracts.[49]

The popular case of I.B. v. Facebook,[50] which is being heard in the state of California, poses an interesting argument on the ambiguity raised by this online phenomenon. This case is a class action against Facebook instituted by the parents or legal guardians of several minor children that purchased some games from Facebook using their parents' credit cards. These cards were charged multiple times without their parents' consent. The parents basically tried to get a refund from Facebook, but to no avail and so they instituted an action against Facebook. The plaintiffs asked the court to void the online contracts between their minor children and the social network. They alleged that the contracts were void in the first place because minors, who have the right to disaffirm contracts based on their incapacity, instituted them. Moreover, children, the plaintiffs argued, have no right to had no immediate control of their parents' cards and had no such power to delegate to Facebook the right to withdraw funds from their parents' cards. The court dismissed the complaint, and ruled in favor of Facebook because the plaintiff's failed to state a claim for declaratory relief under Rule 670(1).[51] In 2015, although the Plaintiffs were allowed to classify minors living within, and outside California to claim a declaratory and injunctive relief claims, restitution of money along with these reliefs were not allowed by the Court.[52] Injunctive and declaratory reliefs are provisional remedies which are ancillary remedies that take place while the main action is pending.[53] According to the Court, the Petitioners failed to prove how the monetary restitution is incidental to the injunctive, and declaratory relief claims. Hence, the substantive issues of the case have not yet been concluded.

[48] See Chang, James, and Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, UC IRVINE L.R., 627-657 (2012); Republic Act No. 386 § 1327, 1390.
[49] Republic Act No. 386 § 1868.
[50] I.B., by and through his Guardian ad Litem Bryan Fife, et al., v. Facebook, inc. C 12-1894 (United States District Court for the Northern District of California, 2012).
[51] Id.
[52] I.B. v. Facebook Inc., 82 F. Supp. 3d 1115 (2015)
[53] Willard B. Riano, Civil Procedure (The Bar Lecture Series) (2016).

Another interesting case is a lawsuit against Apple which also involved parents of minor children suing Apple's misleading "free apps". Here, the petitioners claimed that Apple gave away free applications wherein users, including children, could buy virtual currency after downloading the app. Within minutes of downloading the app, the children incurred up to $338.72. The court denied Apples' motion to dismiss the case and allowed it to proceed. Apple argued that while it is the minors that purchased the applications, what is binding is the relevant and enforceable contract between it and the parents. Also, according to Apple it should not be held liable for in-app purchases because the terms of service placed responsibility on the end-users. On the other hand, the parents argued that each in-app purchase was a separate voidable contract that may be disaffirmed by the parents or guardians in behalf of the minors. In the case the court notes an interesting argument made by Apple that states that in this situation there could be no contract. This is because if a child uses his/her parents credit card without permission, this is considered as a situation wherein the offer was made to the parents, but is accepted by their children, and the consideration is given by the offerree or the parent.[54] The case was eventually settled between the parties.[55]

Similarly, several parents also filed a similar lawsuit against Google over in-app purchases made by minor children. Here, Google allowed a 30-minute window for in-app purchases. The court dismissed the claim for disaffirmance because the parents failed to bring the claim on behalf of the child, but the court allowed the plaintiff to proceed on the ground of unjust enrichment.[56]

VI. Conclusion/ Recommendation

There is no doubt that ICT vis-à-vis the influx of Internet usage have revolutionized the way people interact, transact, and communicate with one another. In order for society to fully enjoy the benefits of technology, laws must also be able to adapt with these revolutionary changes. This paper challenges the current state of the privilege of minors to disaffirm contracts, and suggests its realignment so as to ensure that the law adequately protects both minors and businesses.

Prior to the influx of online transactions, adults have been able to depend on their perception based on offline circumstances. Now, with the increased anonymity offered by

[54] In Re Apple In-App Purchase Litigation. Case No. 5:11-CV-1758 EJD. 855 F.Supp.2d 1030 (United States District Court, N.D. California, San Jose Division, 2012).

[55] Id.; Edward Wyatt, and Bryan X. Chen. *Apple to Refund App Store Purchases Made Without Parental Consent*. N.Y. Times. January 15, 2014, at http://www.nytimes.com/2014/01/16/technology/government-and-apple-settle-childrens-app-purchase-inquiry.html?_r=1.

[56] Imber-Gluck v. Google, 14-cv-1070 (North District of California, 2014).

the Internet this has become quite impossible. Currently a lot of online merchants ask for the age of people entering their sites. Perhaps, this is because of the precedence that minors that misrepresent their age are held liable under jurisprudence. However, there is also precedence that minors could not adequately give consent. Based on this, wouldn't such misrepresentation be voidable as well?

Moreover, studies show that this requirement imposed upon online businesses actually prevents E-Commerce because it inconveniently burdens sellers who would need to add a prompt on each page of their website, and also discourages browsers from viewing their website.[57] Finally, adolescents nowadays "possess a degree of technical savvy that in many cases exceeds that of adults."[58] Disputably, This technical savvy increases the ability of minors to discern and give consent to online contracts up to a certain extent.

The Civil Code's provision on the right of minors to annul contracts because of incapacity to contract is based on the premise that minors are susceptible to fraud. Moreover, it was premised on the notion, during a time, when minors do not really have that much opportunity to transact with adults. The provision was premised on an offline setting wherein people that transact with one another would usually see each other face to face. There were no online contract scenarios at the time the law was made. Times have changed. Hence, this paper puts forward the question of whether the law is still sufficient to protect the rights of sellers, specifically those that don't see whom they are dealing with in an online setting, in light of the automatic right of minors to annul contracts. As of the moment, there are no cases in the Philippines involving online retailers and minors.

The Civil Code expressly states that "unemancipated minors," or those that are below 18 years old, are incapable of giving consent to a contract.[59] The only way for a minor to be emancipated is for him/her to reach 18 years old, or by recording an agreement the in the Civil Register between the minor, and his/her parent that exercises parental authority over the minor.[60] Aside from minors, "insane or demented persons, and deaf-mutes who do not know how to read and write" are also incapacitated to give consent.[61] Compared to minors whom the law gives a clear, and automatic right to annul contracts solely based on their age, these other incapacitated individuals have to prove that they were in a state of insanity, or were deaf-mutes incapable of reading and writing at the time of the transaction. These grounds are not based on simple date of birth, but on the convincing the judge of the circumstances relating to his/her state of mind, and health.

[57] Cheryl Preston and Brandon T. Crowther . *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment* . KANSAS L.R. (2012).
[58] Id.
[59] Republic Act No. 386 §1327.
[60] Executive No. 209 §290.
[61] Republic Act No. 386 §1327.

The Supreme Court has consistently held that when the law is clear, there is no room for interpretation.[62] Here, Art. 1327 of the Civil Code clearly states that minors are incapable of giving consent, and contracts entered into by them are voidable.[63] There is no law, or provision that modifies this. Other instances when minors are considered as capacitated to enter into contracts are specifically stated in the Civil Code. These include the purchase of necessary items like food,[64] and the entrance of a minor into a contract through a guardian or legal representative.[65]

However, despite the clear provision under Arts. 1327 and 1329 of the Civil Code, court decisions relating to minors and their transactions have been varied. Some would stay true to the provision, by saying that minors may not be held liable because of their incapacity to contract.[66] On the other hand, there are rulings that state that a "minors' act of misrepresenting his/her age, and their near approach thereto" would make the contract valid, under the principle of estoppel.[67] This qualification is based on the appearance and the acts of minors.

Debatably, it is still based on face-to-face transactions wherein buyers and sellers see each other, and instances when minors don't physically look like minors anymore. As noted from the previous examples of cases in other jurisdictions, there are eight-year-olds, 12-year-olds, and four-year-olds that incur thousands of dollars worth of purchases from online songs, apps, and games.

For the record, it could be argued, that some minors on retail websites do not really misrepresent themselves because the terms and conditions are not clearly prompted on the surveyed online retailers websites, and are enclosed in a long document, which are not easily noticeable or understandable.

There is also authority to the argument which poses that if a minor could not be bound by direct acts such as execution of deeds of sale because he/she is incapable of giving consent, then it would be absurd for him/her to be bound by indirect acts such as the misrepresentation of age.[68]

[62] Cebu Portland Cement Co. v. Municipality of Naga. G.R. Nos. 24116-17 (Supreme Court, 2007).
[63] Republic Act No. 386 §1390.
[64] Republic Act No. 386 §1489, Executive No. 209 § 290.
[65] Republic Act No. 386 §1381.
[66] Michael John Z. Malto v. People of the Philippines. G.R. No. 164733 (Supreme Court, 2007).
[67] Mercado v. Espiritu, 37 Phil 215 (Supreme Court 1917); De Leon citing Justice Padilla, dissenting in *Suan Chiao vs. Alcantara*. 85 Phil. 669 (Supreme Court 1950).
[68] Young v. Tecson, C.A.; Justice Padilla dissenting in Suan Chiao v. Alcantara, 1950.

At the end of the day, instead of providing quick solutions that do not really address the protection needs of both minors and businesses in this day and age, it would be wise to revamp the laws relating to contracts in order for them to reflect the current state of events, and facilitate the efficient transaction of commerce involving minors on the Internet.[69]

Arguably, it is the right time to come up with a definition of civil discernment, similar to what is being done in Criminal Law. After all, even without the automatic right to disaffirm contracts based on age, minors are still protected by other civil remedies like those against undue influence, fraud, and unjust enrichment. In any event, even if the Civil Code is reformed to specifically do away with the automatic right to disaffirm or to maintain it, other remedies such as those against unconscionability, duress, and fraud are also available.

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[69] *See* Daniel, Juanda Lowder. *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through Cyberspace*, Gonzaga L.R. 239-255 (2008); James Chang, and Farnaz Alemi, *Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts*, UC IRVINE L.R., 627-657 (2012); Republic Act No. 386 § 1327, 1390.

THE DICHOTOMY OF INTERNATIONAL LAW OBLIGATION AND NATIONAL STATE PROTECTION: An Option of Harmonizing the Refugee Law in Philippines Accepting Refugees

Hannah Cabrera

"In the long run, we shape our lives, and we shape ourselves. The process never ends until we die. And the choices we make are ultimately our own responsibility."
– Eleanor Roosevelt

I. Introduction

The difference of principles and ideologies of state leaders predominantly raises conflicts among countries, which caused the previous war and atrocities committed to other states and its people. In those historical wars, people became vulnerable to human rights violations committed by individuals, by the state itself or by another country. Some fled to escape and sought asylum in a neighbouring state, which they were granted a non-citizen status. The international community, in recognition of the necessity to provide the refugees' and displaced person's basic and fundamental human rights under the Universal Declaration of Human Rights (UDHR), the United Nations High Commission on Refugees (UNHCR) was established which created an international law mandating sovereign states to perform an international legal obligation of extending protection to qualified refugees to enjoy asylum from persecution. An international customary law or treaty devised to serve as medium for basic fundamental human rights law exercised by the states.

"It is difficult to determine under the international law standards, the state's action as to the bounds when confronted with the negative impact of accepting refugees which is at risk of developing restrictive measures that once adopted by states, becomes actual new customary international law."

The conflicting situation arises when the inevitable consequence of crossing the dichotomy between the state's international legal obligation to respect the principle of *non-refoulment* as an exercise to protect refugees against persecution, and the state's material interest to protect its citizens of the potential omission of the conduct expected from a refugee within the accepting state. It is essential to recognize that states signatory to the 1951 Geneva Convention and UNHCR is currently stuck in a rigid medium compelling absolute compliance in an international customary law or treaty designed to deal with

the aftermath of the historical World War II. Even during the drafting of the 1951 Refugee Convention, issues were raised concerning on protection of national self-interest of receiving states especially regarding the status of refugees admitted by the receiving state. It was then decided that when the serious harm ends, so does the refugee status, thus the law is clearly based on a theory of temporary protection

Today, some of the perpetrators are equal sovereign states invoking certain rights and territorial integrity or sovereignty; terrorism committed by refugees received by the state. As a result, countries that once opened their doors to refugees were tempted to shut those doors for fear of assuming open-ended responsibilities, of abetting uncontrolled migration and people-smugging, or of jeopardizing national security.[1]

In choosing whether to abide with the responsibility bestowed by the international law or not, the sovereign state entering into such medium navigates itself either to stream directly or refract and pass from one medium to another with varying density. As a result of any decisions made by the state, situations for the displaced persons and refugees changed in time caused by serious problems on national concerns.

The Philippines historically has been accepting refugees since time immemorial. State leaders have recognized the need of the people to be supported. In the recent past, the country's policy in accepting refugees tends to shift in a different direction, rejecting or discontinuing to grand refugees a "trump card." This is then to review the definition of refugees under the international law, the principle of non-refoulment or the right to remain in the host state in relation to the present event for the future generation. The various impact of the influx of refugees in the developed and developing states should also be factored into the question of national interest and security as it may be deemed that the international treaty, although it also sought to protect the receiving state, continuously leans towards the protection of refugee. It can be viewed that if the trend continues, it may result in an en bloc denial of access and refusal to accept an international obligation.

II. History of Philippines Accepting Refugees

A. Philippines's Then: State Accepting Refugees from World War

During the First World War, the Second World War and the Russian Civil War from 1917 until 1948 between the "White Russian Army" and the "Red Russian Army"

[1] Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians)United Nations High Commissioner for Refugees - http://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html. Last accessed: March 15, 2017.

people were fleeing their countries to avoid being forcibly recruited to join the Army. And those who opposed were taken as hostages and were shot to forcibly comply. Aside from the devastations caused by the Civil war, the "Povolzhye famine" or the Russian famine in 1921 to 1922 caused death of millions of people. During this time, people were forced to cannibalism when Prodrazvyorstka[2] was imposed seizing food from peasants since aid coming outside of Russia were initially rejected.[3] These people sought refuge in the Philippines.Through President Elpidio Quirino, they were accepted in the country, and its acceptance was coined as the "great compassion" as it was the only country whichwas willing to shelter them.At this time, the Philippines was barely two years old as a new republic and still recovering from the ravages of the wars.

At the midst of Second World War and Commonwealth period in the Philippines, President Manuel Quezon along with the United States feared for the lives of the people of Germany in the era considered as the first genocide of the 20th century.[4] The Nazi government at this time issued discriminating policies allowing the systematically taking, killing, and mistreatment of Jews without due process, notably known as the Holocaust. Those who were captured were brought to concentration camps. Within these camps, gas chambers were built killing millions of men, women and children – specifically Jews; some were tortured to death; they were left to die of hunger.[5] Some left their homeland and sought refuge in the country. Following that incident, a decree was issued known as the Philippine Immigration Act wherein it allowed the country "for humanitarian reasons, and when not opposed to public interest," to admit foreigners seeking refuge from religious, political or racial persecution in their own countries.[6] The act preceded the landmark international conventions relating to status of refugees and the status of the stateless people that was adopted in 1951 and 1954 respectively.

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[2] Prodrazvyorstka was a Bolshevik policy and campaign of confiscation of grain and agricultural produce from the peasants for a nominal fixed price according to specified quotas.Prodrazvyorstka - Languages – Wikipedia. https://en.wikipedia.org/wiki/Prodrazvyorstka

[3] S. Dean. "The communist cannibals: Shocking images reveal the depravation suffered by peasants forced to eat HUMANS during the 1920s Russian famine". http://www.dailymail.co.uk/news/article-4076244/Distressing-photos-1920s-Russian-famine-turned-hopeless-peasants-cannibals-five-million-people-starved-death.html. (2010)

[4] Olusoga, David and Erichsen, Casper W (2010). The Kaiser's Holocaust. Germany's Forgotten Genocide and the Colonial Roots of Nazism. Faber and Faber. ISBN 978-0-571-23141-6

[5] Levi, Neil; Rothberg, Michael (2003). The Holocaust: Theoretical Readings. Rutgers University Press. p. 465. ISBN 0-8135-3353-8.

[6] Commonwealth Act No. 613. The Official Gazette of the Philippines. www.gov.ph/1940/08/26/commonwealth-act-no-613. Last accessed: March 20, 2017.

B. Philippines Now: Change of Tone of Philippines in Accepting Refugees

The Philippine Government in 2015 later had set a new tone in accepting refugees. When Australia refused to accept refugees from Syria, it asked the Philippines to accept them in exchange of financial aid. President Aquino seriously considered but it did not prosper. In a statement issued during a press conference at Tokyo, he explained that it should be understood that we are a bigger population than Australia. We are not in a capacity to accept them at this time and afford them permanent residency– referring to the 1979 agreement of accepting refugees fleeing from Vietnam and Cambodia where refugees where processed for a three (3) year temporary stay but stayed for 15 years and became permanent residents.[7]

INTERNATIONAL AND DOMESTIC OBLIGATION TO ACCEPT REFUGEES

A. Human Rights and Protection of the Refugees under the International Law

In protecting the lives, dignity and health of persons, the three pillars – international humanitarian law, Human Rights Law and Refugee Law were gradually sculpted and formed into being. This is to address the complexity of rights of the people and responsibility of the states to ensure that these rights are protected.

The Universal Declaration of Human Rights (UDHR), drafted by representatives from different legal and cultural backgrounds,[8] aims to protect individual's human rights. It defines human right as rights inherent to all human beings, whatever our nationality, place of residence, sex, national, or ethnic origin, color, religion, language, and any other status. It ensures that all are equally entitled to these rights without discrimination. One of these rights is the right to seek and enjoy in other countries asylum from persecution. However, this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the United Nations.[9]

The circumstances of World War II and the incidents led the United Nations to create a system between states providing protection and asylum to people who were at risk of being persecuted.[10] The United Nations approved of the establishment of the United

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[7] S. Orendain. "Philippines Rejects Permanent Resettlement of Refugees from Australia". http://www.voanews.com/a/ap-philippines-studying-australian-plan-to-send-refugees/3024450.html

[8] Universal Declaration of Human Rights

[9] *Id*.

[10] A. Millbank., "The Problem with the 1951 Refugee Convention ". 2000. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05. Last Accessed: March 21, 2017

Nations Convention Relating to the Status of Refugees in 1951 governing the contracting state parties' rights and responsibilities in the Refugee Convention.[11]

The 1951 Refugee Convention and the 1967 Protocol , in lieu of the responsibility of the states under the international human rights law expressed in the Universal Declaration of Human Rights, define refugees – resulting from the events that occurred on 1 January 1951, are persons with well-founded fear of being persecuted because of their race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to seek protection of the habitual residence due to such fear.[12]

The interface between international human rights law and refugee law is that general protection is offered in the former and specific protection to refugees forms the latter.[13] Under the human rights law, all people's right are protected and in cases of refugees, it ensures that they are protected during and prevention of displacement. In terms of the refugee law, specific protection is accorded to refugees seeking sanctuary in alien territory.[14] The law provides basic human rights of refugees: (1) Right to Protection Against Refoulment; (2) Right to seek asylum; (3) Right to Equality and Non-Discrimination; (4) Right to life and personal security; (5) Right to return and (4) the Right to remain.

In the International Covenant on Civil and Political Rights (ICCPR) where the Philippines is also a signatory,each state is obligated torespect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion or other opinion, national or social origin, property, birth or other status. Under the international law, refugees are entitled to respect of human rights – requiring state parties to protect the human rights of all individuals subject to their jurisdiction, including refugees.

B. Philippines Responsibility to the Rights of the Refugees concluded in the Domestic law

The Philippines, through accession and having the same legal effect of ratification, is a party to the 1951 United Nations Convention Relating to the Status of the Refugees

[11] Treaty Series – Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Volume 606. United Nations, 1970.
[12] United Nations Convention Relating to the Status of Refugees. Chapter 1, Art. 1, 1951.
[13] E.C. Gillard, "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", 2005. https://www.icrc.org/eng/resources/documents/statement/6t7g86.htmhttps://www.icrc.org/eng/resources/documents/statement/6t7g86.htm
[14] Id.

and the 1967 Protocol Relating to the Status of the Refugees on July 22, 1981. Under these conventions, refugees who were compelled to flee their country due to internal or external aggression[15] are given asylum by a Contracting State or cannot return them to places where their lives or freedom is threatened. The rule is not an absolute one, as the convention and protocol provides exception when the refugee poses a threat to national security or public order.[16]

In the International Covenant on Civil and Political Rights (ICCPR) where the Philippines is also a signatory,each state is obligated torespect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion or other opinion, national or social origin, property, birth or other status. Under the international law, refugees are entitled to respect of human rights – requiring state parties to protect the human rights of all individuals subject to their jurisdiction, including refugees.

Under the Article II of the 1987 Constitution of the Philippines[17], the Philippines adopts the generally accepted principles of international law as part of the law of the land which refers to customary international law which is binding among states through state practice including *opinio juris* and acceptance from the majority of the states and not the minority of the states.

DILEMMA OF THE INTERNATIONAL LAW OBLIGATION: INTERNATIONAL AND DOMESTIC DILEMMA

A. Dilemma on definition

The refugee is on the borderline between the traditional international law restricting borders and domains of control and new international issues. The traditional framework of the Refugee convention is conceptually outlined on the conditions of the Cold War. Recently, the United Nations acknowledges that new categories of refugees arose due to several factors – economic and environmental factor. The World Bank Group and the UN Refugee Agency revealed that majority of people are forced to flee due to poverty or insufficiency to meet their fundamental needs. This economic factor increases the influx of refugees in the neighbouring country. While in terms the environmental factor, the United

[15] Article
[16] International Convention on the Law on Refugees, Article 32, 33
[17] The 1987 Philippine Constitution, Art. 2 § 4

Nations recognizes that nationals of the country experiencing climate change tend to leave their state in pursuit of a more habitable place.

The burden of accepting refugees are more carried by the receiving state rather than the whole international community – economic, political and financial concerns are raised. The states do not derive mutual benefit from observing the provisions of the international treaty and therefore little incentive to supervise one another's conduct.[18] The violations of the international refugee law towards an accepting state pose a challenge to the refugee regime having without an enforcement mechanism. State's adoption of policies and measures, which attempt to diminish the number of refugees obtaining access to their territories and reduce the rights… It is difficult to determine under the international law standards, the state's action as to the bounds when confronted with the negative impact of accepting refugees which is at risk of developing restrictive measures that once adopted by states, becomes actual new customary international law.

The Convention enumerated those who does not benefit from the treaty, such as those persons who (a) committed a crime against peace, a war crime, or a crime against humanity provided in the international law; (b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as refugee; (c) are guilty of acts contrary to purposes and principles of the United Nations.[19]

1. Economic impact

BRIDGING THE DICOTOMY THROUGH HARMONIZATION OF THE REFUGEE LAW

In lieu of the effects of war to civilians, the international committee drafted various laws that established measures and mechanisms designed to immediately provide effective protection of rights, preventing its violation and providing remedies when violations occur that shaped the 1951 Refugee Convention. In the draft submitted, it provided under Article 1 A (2) in the 1951 Refugee Convention a definition of refugee, to wit:

[18] Pacta in facorem tertiorum": normally the contracting states derive rights from the international conventions and undertake obligations under the; in this case, however, the beneficiaries of the Convention are the refugees, persons who do not enjoy national protection. Since they themselves do not directly derive any enforceable rights from the Convention, the international community has considered it desirable that the international organ charged with the protection of refugees should also supervise its application to the beneficiaries – the refugees. "Gerrit Jan van Heuven Goedhart: The problem of Refugees, 82, Recucil des Cours, Hague Academy of International Law, 261, 293 (1953).

[19] Article 1 United Nation High Commission on Refugee

> *As a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable, or owing to such fear for reason other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.*[20]

In the definition provided in Section 6 (B) of the Statute of the UNHCR

> *who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.*

The United Nations High Commissioner for Refugees, in formulating its statute, incorporated and recognized Article 14 of the Universal Declaration of human rights in providing rights of every person to seek asylum from persecution in other countries. It has to be noted that the term refugee as defined in the 1951 Refugee Convention is a pre-requisite to identify the requirements to be considered as a refugee and to invoke or avail of the rights incorporated in it. The contracting states then rely on this essential definition to comply with its indefinite commitment to the refugees.[21]

The proposed international treaty divided those signatories to the treaty as the whether there should include an exception in accepting refugees and in the principle of non-refoulment or not.[22] On one hand, it was found highly controversial to include an exception in the treaty as it will be highly undesirable for refugees. In such incident, a signatory country will not be responsible for sending a person back to its persecutor leading to its persecution or death. On the other hand in not including exceptions, some signatory countries may opt not to ratify the Refugee Convention especially when it is detrimental to national security. In resolving the conflict, the United Nation High Commission on Refugees prescribed qualifications the benefit for non-refoulment which provides:

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[20] Article 1 A(2), 1951

[21] R. Rubio-Martin, "Human Rights and Immigration", 2014, ISBN-13: 9780198701170, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198701170.001.0001/acprof-9780198701170-chapter-2#ref_acprof-9780198701170-chapter-2-note-31. Last Accessed: March 21, 2017

[22] Paul Weis: The Refugee Convention, 1951: The Travaux Preparatoires Analysed With a Commentary by Dr. Paul Weis 326-36 (Paul Weis ed., 1995).

> The *benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

In the provision of the Refugee Convention, the phrase "reasonable grounds for regarding a danger to the security of the country" was not elucidated in detail during the drafting, carrying with it two essential implications: (1) the signatory states are permitted within its own discretion if found with reasonable certainty that the person is a threat to the country; (2) possibility of permitting an entry of an highly dangerous person in the receiving state.

It can be recalled that the treaty was established to resolve the issue of increase in frequency and magnitude of refugees and displaced persons seeking asylum resulting from the Second World War. Today, the international community signatory to the treaty is obligated to connect the gap in the international law especially to be made applicable in modern times for the benefit of the future generation.

In line with this, refugees deciding to seek asylum experience discrimination in law in the surrogate state. The selective intent of the law being mainly aimed towards refugees must not be discriminatory in both the refugee and the state. Discrimination as defined, "any distinction, exclusion, restriction, or preference based on which the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedom in the political, economic, social, cultural or any other field in public life."[23] In the refugee's side, nature of discrimination is experienced due to race, ethic group, origin, religion or social status.[24]

On the other hand, the treaty that gives state an immense responsibility to refugees does not prescribe for a responsibility in the international law and community for possible consequences in cases of outflow of refugees, and them committing the acts of terrorism and aggression in the state. A country refusing to accept causes resentment in the international community, alleging discrimination which is penalized in international law. However, it also raises the question as to what protection and support will the international community provide to the lives of the citizens of the people within the asylum state. The times are different. Discrimination is a denial of right to both the refugee and the state.

[23] See Convention on the Elimination of All Forms of Racial Discrimination article 1.1 and Convention on the Elimination of All Forms of Discrimination Against Women article 1

[24] S Joseph, J Schultz and M Castan The International Covenant on Civil and Political Rights: Cases, materials and commentary OUP NY 2000 paragraph 23.22

THE CONGRESSIONAL POWER OF LEGISLATIVE INVESTIGATION

Alexander Charles Uy

Legislative power is the power to make and amend or repeal laws[1]. With the ever expanding number of subjects that require legislation, one cannot expect the law-makers to be able to keep in touch with every progress that is seemingly being made every day.

As early as 1950, the Supreme Court recognized that sometimes the lawmakers could not have every information that they require in order to craft a law[2]. Rather than rely on the hazy – and sometimes faulty – understanding of lawmakers of the situation, it would be better for them to just resort to gathering information from people who actually know the situation on the ground[3]. Hence, the 1987 Constitution gives Congress the power to gather information through procedures that are specifically provided for by the organic law.

> "One can say, therefore, that the Senate or the House of Representatives could hold a person in detention for life, and while the Court recognized this in the same case, it also expressed confidence that the Senate and the House would not exercise the power beyond the proper bounds. Nevertheless, the Court assured that should the Senate and House resort to such arbitrariness, the portals of this Court would always be open to those whose rights might thus be transgressed."

Under the 1987 Philippine Constitution, there are two ways with which Congress could enhance its understanding of and influence over the implementation of the legislation it has enacted[4]. This would be the power to conduct inquiries in aid of legislation and the power to conduct question hour. The former has the objective of obtaining information that may be used for legislation, while the latter has the objective of obtaining information in the pursuit of the oversight powers of Congress[5].

[1] Kilusang Mayo Uno v the Director General, National Economic Development Authority, G.R. No. 167798, April 19, 2006
[2] Arnault vs. Nazareno, G.R. No. L-3820, 18 July 1950,
[3] Id at 3
[4] ABAKADA Guro Party List vs. Purisima, G.R. No. 166715, 14 August 2008
[5] Senate v Ermita G.R. No. 169777, April 20, 2006

The oversight powers of congress concern post-enactment measures undertaken by Congress: (a) to monitor bureaucratic compliance with program objectives, (b) to determine whether agencies are properly administered, (c) to eliminate executive waste and dishonesty, (d) to prevent executive usurpation of legislative authority, and (e) to assess executive conformity with the congressional perception of public interest[6].

Although the power of oversight has been held to be intrinsic in the grant of legislative power and integral to the checks and balances inherent in a democratic system of government[7], the 1987 Constitution provides for two articles that specifically allow the Legislative to conduct both inquiries in aid of legislation and question hour.

DEFINITIONS AND STATUTORY BASIS

Under Section 21 of Article VI, the Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected[8].

The power of Congress to conduct inquiries in aid of legislation encompasses everything that concerns the administration of existing laws, as well as proposed or possibly needed statutes[9]. Subject to the limitations imposed upon both Houses of Congresses, the Senate and the House of Representatives may conduct inquiries in aid of legislation. The subject of the inquiries may be existent laws, in order to recalibrate them, making them more effective for the changing times, or the formulation of new a law itself.

Laws change in order to accommodate the ever-changing realities, but a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change; and where the legislative body does not itself possess the requisite information — which is not infrequently true — recourse must be had to others who do possess it[10].

By resorting to inquiries in aid of legislation, Congress could gather the information necessary to craft legislation that is apt for the current situation. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion

[6] Id at 5
[7] Id at 5
[8] Article VI, Section 21, 1987 Constitution
[9] In the matter of the petition for habeas corpus of Camilo L. Sabio, GR Mo. 174340, October 17, 2006
[10] Id at 3

is essential to obtain what is needed[11]. Such power to compel attendance of witnesses in inquiries in aid of legislation includes members of the executive, though such members of the executive may validly claim executive privilege[12].

The power of Congress to compel members of the Executive Department to appear before the House or any of its committee may be deduced from the landmark case of *Arnault v. Nazareno*[13], where the Court ruled that the matters that may be subject of legislation and the matters that may be the subject of legislative inquiries are one. It follows that the operation of government, being a legitimate subject for legislation, is a proper subject for investigation[14].

Thus, if the information possessed by executive officials on the operation of their offices is necessary for wise legislation on that subject, by parity of reasoning, Congress has the right to that information and the power to compel the disclosure thereof[15].

On the other hand, Section 22 of Article VI provides that 'the heads of departments may, upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate, or the Speaker of the House of Representatives at least three days before their scheduled appearance[16]'.

BRIEF HISTORY

Although the 1987 Constitution provides for specific provisions allowing for both inquiries in aid of legislation and question hour, it must be noted that it is only in the present Constitution that such powers had been made explicit. Prior to the enactment of the 1987 Constitution, the power of legislative inquiry has always been held to be inherent in the power to legislate, thus, 'although there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions as to be implied. In other words, the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function.'[17]

[11] Id at 3
[12] Id at 6
[13] Id at 3
[14] Id at 6
[15] Id at 6
[16] Section 22, Article VI, 1987 Constitution
[17] Id at 3

In the United States, Congressional investigations date back to 1792 when the House passed a resolution to examine the disastrous St. Clair expedition[18]. The most famous American case involving the power of legislative inquiry, however, would be the case of McGrath v Daugherty[19], where the United States Supreme Court held, for the first time, that, under the United States Constitution, Congress has the power to compel witness and testimony[20]. The same case of McGrath v Daugherty would later be cited in the case of *Arnault v. Nazareno* which is the earliest case involving inquiries in aid of legislation in the Philippines.

In contrast, question hour is something that is not usually seen in republican governments. Question hour is a feature of most parliamentary forms of government where it is a confrontation initiated by parliament so that the members of parliament can confront the Prime Minister and other ministers in regards to their actions[21].

In the Philippine setting, the provision on question hour came before the provision on Hearings in Aid of Legislation. The 1973 Constitution also provided for a question hour, thus,

> *'Sec. 12(1), Article VIII, 1973 Constitution: There shall be a question hour at least once a month or as often as the Rules of the Batasang Pambansa may provide, which shall be included in its agenda, during which the Prime Minister, the Deputy Prime Minister or any Minister may be required to appear and answer questions and interpellation by Members of the Batasang Pambansa. Written questions shall be submitted to the Speaker at least three days before a scheduled question hour. Interpellations shall not be limited to the written questions, but may cover matters related thereto. The agenda shall specify the subjects of the question hour. When the security of the State so requires and the President so states in writing, the question hour shall be conducted in executive session.*[22]'.

There are several differences between the provision of the 1973 Constitution on question hour with the provisions of the 1986 Constitution. Perhaps chief amongst these would be the fact that under the 1973 Constitution, the Prime Minister, the Deputy Prime Minister, and any other Ministers may be required to appear and answer questions. The reason why the Prime Minister may be required to attend is because in a parliamentary form of government such as the one prescribed by the 1973 Constitution, the Prime Minister

[18] http://www.senate.gov/artandhistory/history/common/briefing/Investigations.htm (12-3-16)
[19] McGrath v Daugherty 273 US 135, January 17, 1927
[20] Id at 21
[21] Id at 6
[22] Section 12(1), Article VIII, 1973 Constitution

and his government remain in power so long as they enjoy the confidence of the National Assembly. This makes them accountable to the National Assembly[23].

However, following the republican form of government prescribed by the 1987 Constitution[24] and the separation of powers between the Executive and Legislative branches, the Chief Executive is no longer accountable to Congress. For this reason, Congress could no longer compel the attendance of the President or his Secretaries to be confronted in regards to the actions of the government. However, it does not mean that the legislature is rendered powerless to elicit information from department heads in all circumstances[25].

This is where the power of legislative inquiry comes in. For even if there is separation of powers, Congress is not precluded from obtaining information from every source that it could get[26].

DIFFERENCE BETWEEN HEARING IN AID OF LEGISLATION AND QUESTION HOUR

The primary consideration in a question hour is the limitation imposed as to who may be invited to appear before either House. Only department heads may appear before Congress during question hour and the subject of inquiry is limited to their respective departments. Also, in question hour, the written questions upon such department heads shall be submitted to the Senate President or the Speaker of the House at least three days before their scheduled appearance[27].

However, in inquiries in aid of legislation, the power of Congress to conduct inquiries in aid of legislation encompasses everything that concerns the administration of existing laws as well as proposed or possibly needed statutes[28].

From the very language of the statute, Congress may invite department heads to appear before either House or any of its committees, but such invitation is not mandatory. This is because the power to conduct question hour is merely to obtain information as to how the statutes are being implemented. Therefore, its right to such information is not as imperative as that of the President to whom department heads must give a report of

[23] Id at 6
[24] Section 1, Article II, 1987 Constitution
[25] Id at 6
[26] Id at 3
[27] Article VI, Section 22, 1987 Constitution
[28] Id at 10

their performance as a matter of duty. Nonetheless, when the inquiry in which Congress requires their appearance is in aid of legislation, the appearance is mandatory for the same reasons stated in *Arnault*[29].

When the resource person refuses to provide the information requested on the ground that such information is covered by executive privilege, the executive privilege must be invoked by the president. Such would be true, however, only if the information is being requested during an inquiry in aid of legislation. There would be no need to invoke executive privilege in question hour as it is possible for the president to bar his department heads from attending the question hour in the first place.

Therefore, while closely related and complementary to each other, inquiries in aid of legislation and question hours should not be considered as pertaining to the same power of Congress.

LIMITATIONS IN INQUIRIES IN AID OF LEGISLATION

Without limitations, the Congress may begin numerous inquiries as to any matter which the members of Congress may desire to talk about. An unconstrained congressional investigative power, like an unchecked Executive, generates its own abuses[30]. To prevent such abuses, the law imposes certain limitations upon the power of legislative inquiry of Congress.

In the landmark US case of *Kilbourn v Thompson*[31], the United States Supreme Court came up with the 'Kilbourn Test', a set of limitations in the scope of inquiries made by the United States Congress. Under the Kilbourn Test, (1) Inquiries must not invade areas constitutionally reserved to the courts or the executive, (2) Inquiries must deal with subjects which Congress could validly legislate, (3) The resolution authorizing the investigation must specify a congressional interest in legislating on that subject, and (4) Where the inquiry can result in no valid legislation, then the private affairs of individuals are not valid targets for inquiry[32].

While the Kilbourn Test is not being used in the Philippines, it carries some aspects applicable with the limitations imposed by law and jurisprudence upon the Congress of the Philippines when they are conducting inquiries in aid of legislation.

[29] Id at 6
[30] Neri v Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, September 4, 2008
[31] Kilbourn v Thompson, 103 U.S. 168 (1880)
[32] Id at 36

Section 21, Article VI of the 1987 Constitution limits inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in, or affected by such inquiries shall be respected[33].

Meaning of "in aid of legislation"

The power of both houses of Congress to conduct inquiries in aid of legislation is not absolute or unlimited. Its exercise is circumscribed by the afore-quoted provision of the Constitution. The rights of persons under the Bill of Rights must be respected, including the right to due process and the right not to be compelled to testify against one's self.[34]

The Supreme Court once stopped a hearing in aid of legislation, in the case of *Bengzon v. Senate Blue Ribbon Committee*. In such case, Senate Minority Leader Juan Ponce Enrile delivered a privilege speech before his colleagues where he called upon his colleagues to look into possible violations of RA 3019, the Graft and Anti-Corrupt Practices Act. The matter was then referred to the Senate Blue Ribbon Committee who then compelled Bengzon to testify.

Fearing violations to their constitutional rights, petitioners in this case filed before the Supreme Court a petition for prohibition with prayer for a temporary restraining order and/or injunctive relief. The Court took note of the speech delivered by Senator Enrile and held that the speech of the senator contained no contemplated legislation. Instead, he merely called upon the Senate to investigate possible violations of RA 3019[35].

Another reason why the Supreme Court stopped the inquiry in aid of legislation in the case of *Bengzon v. Senate Blue Ribbon* Committee is because the case was already pending before the Sandiganbayan even before the said privilege speech.

The Court, thus, said that to allow the committee to investigate would only pose the possibility of conflicting judgments, or that it may influence the ultimate judgment of the Sandiganbayan should the committee reach its judgment before the Sandiganbayan, the possibility[36].

However, the mere filing of an administrative or criminal complaint before a court or quasi-judicial body does not automatically bar the conduct of legislative inquiry. In the

[33] Section 21, Article XVII, 1987 Constitution
[34] Bengzon v Senate Blue Ribbon Committee, G.R. No. 89914, November 20, 1991
[35] Id at 39
[36] Id at 39

case of *Standard Chartered Bank v Senate Committee on Banks*[37], the Court ruled that to do so would make it extremely easy to subvert any intended inquiry by Congress through the convenient ploy of instituting a criminal or administrative complaint.

In the instant case, the Senate Committee on Banks, decided to conduct an inquiry in aid of legislation regarding the illegal sale of unregistered and high-risk securities by petitioner Standard Chartered Bank, on the strength of a Resolution introduced by Senator Enrile. Acting on such resolution, the Committee summoned the petitioners. However, in their letter, the petitioners argued that there was already a pending case before the regular courts in regards to the same subject.

Ruling in favor of respondent Senate Committee on Banks, the Supreme Court held that the mere filing of an administrative or criminal complaint before judicial or quasi-judicial bodies is not an automatic bar to the conduct of legislative investigations[38]. Indeed, the exercise of sovereign legislative authority, of which the power of legislative inquiry is an essential component, cannot be made subordinate to a criminal or an administrative investigation[39].

In accordance with duly published rules of procedure

In the case of *Neri v Senate Committees*[40], the Supreme Court nullified a decision from the Senate holding the petitioner in contempt for his refusal to appear before the Senate Committees and answer the questions of the senators. In nullifying the order, the Supreme Court considered the argument of the Office of the Solicitor General that the hearings in aid of legislation being undertaken by the Senate Committees were procedurally infirm for not having been published.

The Solicitor General argued,

> *'The phrase 'duly published rules of procedure' requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of rules as it may deem fit.* ***Not having published***

[37] Standard Chartered Bank v Senate Committee on Banks, G.R. No. 167173, December 27, 2007
[38] Id at 42
[39] Id at 42
[40] Id at 35

its Rules of Procedure, the subject hearings in aid of legislation conducted by the 14th Senate, are therefore, procedurally infirm.'[41]

Under the Civil Code, 'Laws shall take effect after fifteen days following the completion of their publication either in the *official gazette*, or in a newspaper of general circulation in the Philippines, unless it is otherwise provided[42]. The landmark case of *Tanada v Tuvera*[43] states that presidential decrees that provides for fines, forfeitures, or penalties for their violation or otherwise impose a burden on the people[44], must be published.

Although the case specifically limits itself only to presidential decrees, the requirements of fair play would require the Congress to also publish its own rules, especially considering that, contempt (disobedience of any order of the Committee or refusal to be sworn or to testify, or testifying falsely or evasively) is punished with detention by the Committee under the custody of the Sergeant at Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt.[45]

Justice Quisimbing, in his separate opinion in the case of *Neri* stated that that the publication, either in the Official Gazette or a newspaper of general circulation, of the Senate Rules of Procedure is indispensable[46]. This is to comply with the due process requirements to give fair notice to those concerned of the rules that may put their liberties at risk.

Indeed, "laws must come out in the open in the clear light of the sun instead of skulking in the shadows with their dark, deep secrets. Mysterious pronouncements and rumored rules cannot be recognized as binding unless their existence and contents are confirmed by a valid publication intended to make full disclosure and give proper notice to the people. The furtive law is like a scabbarded saber that cannot feint, parry or cut unless the naked blade is drawn.[47]"

However, in his dissenting opinion in the same case, Chief Justice Puno believed that the Senate, being a continuing body, need not publish its rules every time that there would be new members in the body[48].

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[41] Id at 35
[42] Article 2, Civil Code of the Philippines, as amended by E.O.200
[43] Tanada v Tuvera, G.R. No. L-63915, April 24, 1985
[44] Id at 48
[45] Section 18, Rules of Procedure Governing Inquiries in Aid of Legislation
[46] Separate Opinion of Justice Quisimbing, Motion for Reconsideration, Neri v Senate Committees, G.R. No. 180643, September 4, 2008
[47] Id at 48
[48] Dissenting opinion of Chief Justice Puno, Motion for Reconsideration of Neri v Senate Committees, G.R. No. 180643, September 4, 2008

Cutting the continuity of the Senate body would put into question the acts of Congress, as the Senate has dispensed with the publication of not only the Rules of Procedure Governing Inquiries, but also that of Senate Rules of Proceedings for the last ten years.[49]

The current rules on Legislative Inquiry had been published in September, 2012.

Rights of persons appearing in, or affected by such inquiry, shall be respected

Under the Rules of Court, a witness must answer questions, although his answers may tend to establish a claim against him[50]. It is, however, the right of the witness, (1) to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor, (2) not to be detained longer than the interests of justice require, (3) not to be examined except only as to matters pertinent to the issue, (4) not to give an answer which will tend to subject him to penalty for an offense unless otherwise provided by law; and (5) not to give an answer which will tend to degrade his reputation, unless it be the very fact at issue or to a fact from which the fact in issue would be presumed[51].

These rights of a witness have been identified in the Rules of Court, however, under the Rules of Procedure Governing Inquiries in Aid of Legislation, the technical rules of evidence applicable to judicial proceedings which do not affect substantial rights need not be observed by the committee[52]. Although an inquiry in aid of legislation is not a judicial proceeding, the language of the said Rules is merely permissive ("need not") instead of mandatory ("shall not"), which means that it is within the discretion of the members of the committee as to whether or not to apply the technical rules on evidence.

In any case, the same rules allow for a witness to be protected against self-incrimination. Under Section 19 of the Rules, a witness can invoke his right against self-incrimination only when a question tends to elicit an answer that will incriminate him is propounded to him[53]. A witness may also be assisted by counsel during the taking of his testimony before the committee, though such counsel could not actually answer the questions or argue orally in favor of his client during such testimony and is limited only to giving his client advice in order to protect the rights of the witness[54].

[49] Id at 53
[50] Section 3, Rule 132, Rules of Court
[51] Id. At 55
[52] Sec. 10, Rules of Procedure Governing Inquiries in Aid of Legislation
[53] Section 19, Rules of Procedure Governing Inquiries in Aid of Legislation
[54] Section 14, Rules of Procedure Governing Inquiries in Aid of Legislation

In the case of *Standard Chartered Bank v. Senate Committee on Banks*[55], the petitioners invoked their right to privacy in order to escape being compelled to testify during the inquiry. The Court held that the right to privacy is not an absolute right, and that the same should not be allowed to thwart a legitimate congressional inquiry. Furthermore, using the test laid down in the cases of *Sabio v Gordon*[56] and *Morfe v Mutuc*[57], the Court held that when there is clearly a compelling state interest to the information that is being asked from the witnesses, such witness could not invoke his or her right to privacy.

In the same *case*[58], the Court also held that the petitioners could not invoke their right against self-incrimination owing to the fact that they are not being indicted as accused in a criminal proceeding, they are merely summoned as resource persons or as witnesses. Likewise, they would not be subjected to any penalty by reason of their testimony.

LIMITATIONS ON QUESTION HOUR

As with the provision providing for the power of Congress to hold inquiries in aid of legislation, the limitations of the power of Congress to hold a Question Hour session is also provided for in the provision providing for the power.

From the very wordings used by the provision, it can be seen that only the heads of departments are under the umbrella of Section 22, Article VII. Unlike in an inquiry in aid of legislation, a resource person, no matter how knowledgeable he is with the topic being discussed by either House, could not be compelled, or even voluntarily appear, before such House.

The scope of topics that may be discussed under the question hour provision of the constitution is also limited only to those matters that pertain to the departments of the head of the department. Thus, the Secretary of Agriculture could not be expected to be able to answer questions regarding the energy demands of the country at any particular point as that would be an issue that does not fall under his department.

It must also be noted that consent of the president is required before a member of the cabinet or a department head could appear before either House on their own initiative, and while the provision does not say that consent of the president is required before a member of the cabinet could appear before either House when they are requested by said House, the president may prohibit such member of the cabinet from appearing.

[55] Id at 42
[56] Id at 10
[57] Jesus Morfe v. Armelito Mutuc, G.R. No. L-20387, January 31, 1968
[58] Id at 42

This was the ruling in the case of *Senate v Ermita*[59] where the Court ruled that the requirement that the presidential consent is necessary before appearing before either House of Congress is valid only as to Question Hour, but not in Inquiries in Aid of Legislation.

Again, it must be remembered that the power of Congress to conduct question hour is related to its power of oversight, rather than its legislative power.

LEGISLATIVE CONTEMPT

No discussion in the Hearings in Aid of Legislation would be complete without a discussion on the power of both the Senate and the House of Representatives to hold those people who had been invited as resource persons in contempt.

The concept of legislative contempt is different from contempt as defined and penalized by the 1997 Rules of Court[60]. That contempt requires that the misbehavior being punished be directed toward the court or toward court proceedings, but hearings in aid of legislation, despite the inclusion of the term 'hearing' in its name, is conducted not by courts but by Congress. It is true that the constitutional provision on hearings in aid of legislation[61] or question hour[62] does not provide for the power of either house to hold a person in contempt.

The power of both Houses of Congress to hold a person in contempt is instead found in the internal rules of the Senate[63] and the House of Representatives[64]. The contempt provision of the House of Representatives say that a person held in contempt may be remanded to the custody of any person and in the place that would be so designated by the Chairman of the committee that held the person in contempt. The contempt provision of the Senate, on the other hand, says that such person may be held in the custody of the sergeant-at-arms of the Senate at any place that would be designated.

It is only the contempt provision of the Senate that provides for a way for the person so detained to be free from contempt. Under the same contempt provision, the person held in contempt may be released from the custody of the sergeant-at-arms and the contempt citation lifted if he would 'produce the require documents, or agree to be sworn in to testify, or otherwise to purge himself of that contempt[65].'

[59] Id at 6
[60] Section 1, Rule 71, 1997 Rules of Court
[61] Id at 9.
[62] Id at 17.
[63] Section 18, Rules of Procedure Governing Inquiries in Aid of Legislation
[64] Section 11, Rules of procedure governing inquiries in aid of legislation of the House of Representatives
[65] Section 18, Rules of Procedure Governing Inquiries in Aid of Legislation

Necessarily, the next discussion should fall on the duration of the detention of the person held in contempt. The Court, in the case of *Arnault v. Nazareno*[66] answered precisely this question. According to the Court, the power of the Senate to hold a person in detention for contempt is indefinite. The power subsists as long as Senate continues to perform the particular legislative function involved. The power to punish for contempt is not terminated upon the adjournment of the session; doing such would require the Senate to repeat the contempt proceedings in every session until the investigation is completed – which is *'absurd, unnecessary, and vexatious'*.[67]'

One can say, therefore, that the Senate or the House of Representatives could hold a person in detention for life, and while the Court recognized this in the same case[68], it also expressed confidence that the Senate and the House would not exercise the power beyond the proper bounds. Nevertheless, the Court assured that should the Senate and House resort to such arbitrariness, '*the portals of this Court would always be open to those whose rights might thus be transgressed'*[69]

As was provided for by the rules of the Senate and the House, the power to detain a person held in contempt would have no application once that person had purged himself of that contempt. In a way, he holds 'in his own hand the tool to free himself.[70]'

CONCLUSION

The Congressional power of Legislative Investigation is a power that is granted by the Constitution itself to the two houses of Congress for the purpose of eliciting information that they would think is necessary to assist them in the crafting of better laws. Indeed, if those people who are supposed to make the laws are so insulated from those who would be affected by the laws that they make, there would be no guarantee that they could come up with laws that would serve the public good.

It is but one of the methods available to the members of both the House of Representatives and the Senate to elicit information, but it seems that it is the more favored method, not helped by the fact that most congressional inquiries turn into soap operas with the help of live broadcast, with the members of the congressional bodies and their witnesses taking on the role of villains, heroes, damsels in distress and everything in between.

[66] Id at 3
[67] Id at 3
[68] Id at 3
[69] Id at 3
[70] Julius Caesar, Act 1, Scene 3.

It has, thus, become another tool in the arsenal of the members of Congress to call out their political enemies and even outright accuse them, with some even turning such congressional hearings into de facto trials, without the need to follow the strict rules set up at real trials to ensure fair play for both sides. Indeed, it is not farfetched to claim that the Congressional Power of Inquiry had been turned into a tribunal of public opinion where those people who are controlling the proceedings could crucify just about anyone that they want, protected not only by the fact that they could always claim that the questions that they are asking have something to do with their legislative agenda, but also by the immunity given to them as members of Congress.

In this regard, it must be remembered that the power of Congress to conduct inquiry is for the purpose of finding out facts. It is true that it is the individual members of the body to decide for themselves as to the limitations of the facts that they want to know. In the end, it would have to be those who are exercising the power who would have to limit themselves, and they would have to be reminded that the purpose of the Congressional Power of Legislative Investigation is legislative, not judicial, thus, it is beyond the power of such investigation to decide as to the innocence or guilt of a person. It should be beyond the power of such bodies to elicit information that would have nothing to do with their legislative agenda.

Alexander Charles Uy graduated from the Far Eastern University with a degree in Bachelor of Science in Commerce, Major in Legal Management. He was the Logistics Head of FEU-CBO, and a member of the FEU-Moot Court Council. In this era of radical change, he believes that it is important to be aware of one of the mechanics that Congress can use in the exercise of its legislative function. The Power of Legislative Inquiry allows Congress to scrutinize the need for new laws or the need to amend existing ones, and from there alone, it is a tool that could bring about change or prevent it.

THREE-CHILD POLICY: The State's Prerogative in Implementing Population Laws vis-a-vis Human Rights

Edjay M. Aguinaldo

"I will reinstall the program of Family Planning. *Tatlo* [Three Child] *tama na 'yan...* Better shape up. *Huwag na muna simbahan, away kami d'yan eh. Noon pa 'yan,* it started during [President Fidel] Ramos' time. He was the only President who fought for family planning,[1]"

– *President Rodrigo Duterte*

CURRENT SITUATION OF THE PHILIPPINE POPULATION

As of March 22, 2017, the Department of Health declared that the total and overall population of the Philippines is 103,778,620, ranking 13th all over the world[2] compared from its calculated population of 100,981,437 on 2015 as verified by the Census Population[3]. With these records on hand, the Philippine Government is establishing a very stable and effective measure to eradicate the continuously improving and alarming increase on the country's populace. However, with the overwhelming laws and policies our country has made to address this concern, the issue seems to be unresolved.

"However, incontestable is the fact that the supposed means that the government would undertake to effect this program would be unmeritorious since it would encourage abortion and infanticide- a crime that is punishable under the Revised Penal Code."

In 2016, as part of his election campaign, President-Elect Rody Duterte declared that he will impose three-child policy as a way of alleviating this debacle that is continuously being deal with, every year, by the Philippine Leaders. Today, this statement from the President seems to be out of his priorities, but the question is, what if the President will be successful to implement this kind of measure? Will the three-child policy that is similarly imposed in China be applicable to our country? What would be its implication to the inherent, constitutional, and statutory rights of an individual, specifically the women, as well as the unborn?

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[1] ABS-CBN News, Duterte in Family Planning: Three Kids are enough, June 27, 2016, available at http://news.abs-cbn.com/nation/06/27/16/duterte-on-family-planning-3-kids-are-enough (last accessed March 22, 2017).

[2] Countries in the World by Population (2017), available at http://www.worldometers.info/world-population/population-by-country/ (last accessed February 28, 2017).

[3] Population of the Philippines on 2015, available at http://www.popcom.gov.ph/rm/2015-07-15-02-03-05/population-policy-manual/16-rm/173-popdev-planning-at-the-local-level-modules (last accessed February 28, 2017).

ISSUES REGARDING WOMEN AND CHILDREN'S RIGHTS

Article 16 of the Convention on the Elimination of all forms of Discrimination against Women states that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights". Nevertheless, in pursuing nationalist or even economic interests and policies, the States seem to intervene in matters of reproduction through pro-natalist or anti-natalist measures. These measures boil limit the reproductive capacities of men and women, though according to research, women are more directly affected since pregnancy imposes inequitable burden of work to women[4] such as in cases of child rearing, and in worst cases of abortion. This prompted women's movement to bring the issue of reproduction as an inalienable and inherent human right[5].

On the other hand, doubt as to the applicability of the United Nations Convention on the Rights of the Child as to the unborn was raised at international level. Various groups alleged that those who are not yet born cannot be given a personality to be protected by laws; and since they are not literally children, more specifically a "human being" below 18 years of age[6], those rights, including the right to life, enumerated by the Convention is not applicable to them.

PHILIPPINE GOVERNMENT'S SINCERE EFFORTS TO RESOLVE POPULATION ISSUES

Policy with regard to managing and utilizing continuous increase in the population all started in the year 1967 when the late President Ferdinand Marcos expressed his desire of addressing this dilemma. He signed the Universal Declaration on Population which acknowledges among others the family as the natural and fundamental unit of society, and its prerogative with regard to the aspect of procreation including the size of the family[7].

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[4] Marriane Mollman, Decisions Denied: Women's Access to Contraceptives and Abortion in Argentina 33 (June 2005).

[5] Richard Pierre Claude & Burns H. Weston, Humans Rights in the World Community, Issues and Action 128, last accessed march 21, 2017. (Third Ed. 2006).

[6] United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25, art.1 (1989).

[7] **Legal Commentary**, *Philippines RH Act: Rx for controversy The Responsible Parenthood, Reproductive Health and Population and Development Act of 2012*-**Appendix "A" Philippines Population Control and Management Policies, available at** http://www.consciencelaws.org/law/commentary/legal055-002.aspx (last accessed February 28, 2017).

However, due to the rapid increase of population every year the Declaration urged that the Governments should also balance this inherent human right by providing couples not only the education but also the means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children[8]. Contained also in the Declaration is the recognition that the population problem should be considered in the national long-range planning.

As way of implementing and incorporating this idea in the Philippines, Philippine Population Program was officially launched through the Executive Order No. 233 on the year 1970. Through this, The Commission on Population (POPCOM) was created and was mandated to serve as the central coordinating and policy making body of the government in the field of population. Specifically, they are tasked to:

1. Formulate program recommendation on population as it relates to economic and social development consistent with and implementing the population policy approved by this Office on 4 December 1969;
2. Coordinate and evaluate the implementation of approved program recommendations and project proposals;
3. Undertake such action projects as are necessary;
4. Undertake, promote, and public studies and investigations on the Philippine population in all its aspects;
5. Assemble and disseminate technical and scientific information relating to medical, social, economic and cultural phenomena as these affect or are affected by population; and
6. Perform such other duties as proper authorities may from time to time direct the Commission to undertake[9].

Just after one year, Republic Act 6365, known as the Population Act of the Philippines was enacted into law by Congress, putting the Commission on Population under the Office of the President. The said law emphasizes the need to formulate a national program of family planning which respects the religious belief of every individual involved.[10]

[8] Turbay Ayala and Lord Caradon, Studies in Family Planning, available at https://www.jstor.org/stable/1965194?seq=2#page_scan_tab_contents (last accessed February 28, 2017).
[9] Office of the President, Creating the Commission on Population, Executive Order No. 233, [E.O. No. 233], (1970).
[10] An Act Establishing a National policy on Population, Creating the Commission on Population and for other Purposes [Population Act of the Philippines], Republic Act No. 6365 (1971).

In 1972, Presidential Decree 79 was promulgated enlarging the coverage of RA 6365, involving both the public and private sectors to undertake a National Family Planning Program. Its Commissioner composed of the Secretary of Education and Culture (now termed as Secretary of Department of Education), Secretary of Health, Secretary of Social Welfare (now coined as Secretary of Department of Social Welfare and Development), Dean of the University of the Philippines Population Institute and the Director-General of the National Economic Development Authority. In 1975 by virtue of P.D. 166, private organizations and individuals were included in the formulation and implementation of population programs and policies. Section 8 of the said law states that:

> **Sec. 8. Board of Commissioners**. All functions and powers of the POPCOM shall be vested in, and exercised by, a Board of Commissioners hereinafter referred to as the Board, composed of: Secretary of Education and Culture, Secretary of Health, Secretary of Social Welfare, Dean of the University of the Philippines Population Institute, Director-General of the National Economic and Development Authority and four other members from the private sector to be appointed by the President based on competence, long standing interest and experience in population control studies and programs and related sciences, each of such members to serve for a term of three years from the date of appointment." (Underscoring Supplied)

In 1986, through Executive Order No. 123, the Commission on Population was attached to the then Ministry of Social Services and Development, now termed as Department of Social Welfare and Development, as the planning and coordinating agency.[11] Nonetheless, in 1990 by virtue of Executive Order No. 408, the Commission was placed under the Office of the President in order to facilitate coordination of policies and programs relative to population[12]. In accordance with the power of the President under the Administrative Code of 1987 to transfer any agency under the Office of the President to any other department or agency as well as transfer agencies to the Office of the President from other departments or agencies, after one year, through Executive Order No. 476, POPCOM was again transferred and was considered an attached agency of the National Economic and Development Authority. Lastly, on March 24, 2003, during Arroyo Administration,

[11] Office of the President, Reorganizing the Ministry of Social Services and Development now referred to as Ministry of Social Welfare and Development, Executive Order No. 123 [E.O. No. 123], section 2 (1986) *available at* http://www.ncda.gov.ph/disability-laws/executive-orders/executive-order-no-123/ (last accessed February 17, 2017).

[12] Office of the President, **Placing The Commission On Population Under The Control And Supervision Of The Office Of The President**, Executive Oder No. 408 [E.O. No. 408], (1986) *available at* http://www.gov.ph/1990/06/18/executive-order-no-408-s-1990/ (last accessed February 17, 2017).

an Executive Order No. 188 was issued attaching POPCOM, finally, to the Department of Health[13].

The most recent law regarding the Population Control is the Reproductive Health Law which was enacted as law on December 21, 2012. This law mainly emphasizes on the relevance of the Philippines' advocacy of openness to life, provided that parents bring forth to the world only those children whom they can raise in a truly humane way[14].

Today, the laws and orders issued by the Congress and the President served as population policies in the Philippines. As time goes by, the State invents new policies to regulate rapid population growth. This is to ensure that the State complies with its duty to promote a just and dynamic social order and ensure the nation's prosperity. It is only this time that problems of poverty, inadequate social services and unemployment may be addressed.

HISTORICAL BACKDROP OF ONE-CHILD POLICY IN CHINA

Mao Zedong is one of the Chinese leaders who are highly known in encouraging women to produce huge number of offspring for the purpose of boosting the labor force and the ranks of the People's Liberation Army in China. In order for him to implement his policy, he outlawed abortion, and the use of contraceptives. Due to this program of Mao, the population of China multiplied in number from about 500 million in 1949 to almost a billion three decades later. Aiming to improve and upgrade its economic status, Chinese Leader Deng Xiaoping who succeeded Mao was prompted to abolish the latter's traditional ideology, and momentarily regulate the Communist China's population growth for almost number of years including the famous One Child Policy. In implementing this policy, the National Population and Family Planning Commission, which is composed of almost 300,000 family-planning workers, was the one tasked to monitor the number of children inside every family[15].

However, contrary to common knowledge, China's One Child Policy is not of no exception. Mostly, it is only strictly implemented and applied to Han Chinese who are living in urban areas of the country, which represent 91% of the country's population,

[13] Office of the President, **Transferring The Commission On Population From The National Economic Development Authority To The Office Of The President And Then Placing It Under The Control And Supervision Of The Department Of Health**, Executive Order No. 188, (2003) *available at* http://www.gov.ph/2003/03/24/executive-order-no-188-s-2003/ (last accessed February 17, 2017).

[14] **An Act Providing For A National Policy On Responsible Parenthood And Reproductive Health** [The Responsible Parenthood and Reproductive Health Act of 2012], Republic Act No. 10354 (2012).

[15] Facts and Details about China's One Child Policy, *available at* http://factsanddetails.com/china/cat4/sub15/item128.html (last accessed March 1, 2017).

and to government employees. This requirement was not imposed to ethnic minorities in China[16], and also to those parents who have reared a child who has a disability, or those mothers or fathers that are employed or is working in high-risk occupation such as mining. In fact, they are allowed to have a second child, however, only after five years from their first conception.[17]

Since the success of this program will result to an enormous and sudden decrease in country's population, China provided a One-Child Glory Certificate that would entitle the recipient some incentives or rewards such as higher wages, better schooling and employment, low-cost fertilizers, and preferential treatment in obtaining governmental assistance and loans.[18] However, for families who will violate the One Child Policy, there are sanctions such as fines, employment termination, confiscation of belongings, and difficulty in obtaining governmental assistance. Two of the means promoted by the government are universal access to contraception, and abortion. According to Chinese authorities, almost 250 to 300 million births were prevented and were reduced to the country's data record because of this policy[19]. Sadly, based on China's Health Ministry, a total of 336 million cases of abortion were recorded under the One-Child Policy[20].

Today as of the start of 2016, because of low birth rate, and the dilemma of rapidly aging population and a shortage of working-age residents, causing stress on health care and social services for the elderly, this policy of birth control was loosed to "Two-Child Policy"[21].

CONCLUSION AND RECOMMENDATION

Every state has an inherent police power that is being utilized to regulate liberty for the general welfare of its citizen. In exercising this power, the State may incorporate in its Constitution, laws, and ordinances policies it deemed necessary to implement. The Supreme Court described Police Power as the "most pervasive, the least limitable and the most demanding of the three inherent powers of the State. It reasoned that individual, as

[16] China One Child Policy Facts, Ten Essential Facts About China's One Child Policy *available at* http://geography.about.com/od/chinamaps/a/China-One-Child-Policy-Facts.htm (last accessed March 1, 2017).
[17] The Effect of China's One Child Family Policy after 25 Years, Therese Hesketh, Ph.D., Li Lu, M.D., and Zhu Wei Xing, M.P.H., *available at* http://www.nejm.org/doi/full/10.1056/NEJMhpr051833#t=article (*last accessed* February 13, 2017).
[18] Supra Note 9.
[19] *Id*.
[20] Malcolm Moore, 336 Million Abortions under China's One-Child Policy, The Telegraph, March 15, 2013, *available at* http://www.telegraph.co.uk/news/worldnews/asia/china/9933468/336-million-abortions-under-Chinas-one-child-policy.html (last accessed March 22, 2017).
[21] CNN, China's new two-child policy sparks increase in births, January 23, 2017, available at http://edition.cnn.com/2017/01/23/world/china-two-child/ (last accessed April 7, 2017).

a member of society, is hemmed in by the police power, which affects him even before he is born and follows him still after he is dead — from the womb to beyond the tomb — in practically everything he does or owns. Its reach is virtually limitless. It is a ubiquitous and often unwelcome intrusion. Even so, as long as the activity or the property has some relevance to the public welfare, its regulation under the police power is not only proper but necessary. And the justification is found in the venerable Latin maxims, *Salus populi est suprema lex and Sic utere tuo ut alienum non laedas*, which call for the subordination of individual interests to the benefit of the greater number[22]". However, this power should be counterbalanced with the view that individual rights as a human being enshrined by the Fundamental Law should be uphold. For this reason the Highest Tribunal laid down the guidelines in proper exercise of Police Power. These are, first, the interests of the public generally, as distinguished from those of a particular class require the exercise of police power; and second, the means for the accomplishment of the purpose are not unduly oppressive to individuals[23].

President Rody Duterte became famous because of his utmost desire to effectuate change in the Philippines- to bring to end criminalities, stop corruption in the government, and etc. Without any doubt, the State is very sincere in addressing population issues and problems. It is the general welfare of the Filipino Citizens that he desires primarily. **However, incontestable is the fact that the supposed means that the government would undertake to effect this program would be unmeritorious since it would encourage abortion and infanticide- a crime that is punishable under the Revised Penal Code.** Just as how the President wanted total reformation, the availability of a systematic solution should be present. Clearly, the end does not justify the means. In view of that, the choice and decision with regard to the size of the family must inevitably rest with the family itself, and cannot be made by anyone else including the State. The State can only provide alternatives to them by informing them the available means to control childbirth in the form of contraceptives and family planning.

Moreover, the Philippine Population is not the same as the situation which China faced many years ago. Although the statistics are clear and uncontestable, these are far more less than China's Population on the past. A strict regulation and implementation of population laws, and a well-defined population policy is what our country truly needed at this moment. Nevertheless, the probability of imposing this population scheme is not impossible. Just as how surprising the birth rate of China increased rapidly by mere tolerance on the part of Chinese Leaders, the Philippine Population might be facing the

[22] Ynot v. Intermediate Appellate Court, G.R. No. 74457, (1987).
[23] Ynot, G.R. No. 74457.

same situation in the future. At the end of the day, only when all the possible means and methodologies fail will this Three-Child Policy be significant.

In the aspect of Children's Right, according to studies, review of the domestic laws in each country is to be taken into consideration to understand its viewpoint in the issue of the scope and applicability of human rights to the unborn, since internationally, there are diverse opinions on whether the right to life includes them[24].

Under the Constitution, the State recognizes the sanctity of family life, and its responsibility to equally protect the life of the mother and the life of the unborn from its conception[25]. Article 256 of the Revised Penal Code made criminal an act of any person who shall intentionally cause an abortion, and provides the appropriate penalty thereof[26]. According to Fr. Joaquin G. Bernas, there are two points incorporated in the legal definition and purpose of the protection to the unborn as mandated under the 1987 Constitution. As he clarified, it is not an assertion that the unborn is legal person that can perform acts with legal effects. Secondly, it is not an assertion that the life of an unborn is the same as the life of the mother. He pointed out that sparing the child from the life of poverty should not be an excuse to sacrifice their well-being which can be attended by various welfare institutions organized by the Philippines such as the Department of Social Welfare and Development. Also, the framers of the Constitution wanted to prevent the Philippines from adopting the doctrine of the U.S. Supreme Court in the case of Roe vs. Wade [410 U.S. 113 (1973)] which liberalizes abortion laws up to the sixth month of pregnancy provided that it can be done without danger to the mother[27].Thus, as explained by the Supreme Court, even a child inside the womb already has "life". It follows then that if the unborn already has life, then the cessation thereof even prior to the child being delivered, qualifies as death[28]. Clearly, we will be facing the situation of conflicting laws if the Three-Child Policy would be imposed.

Lastly, basic is the concept of Pacta Sunt Servanda which literally means "agreements must be kept". It is an international law concept on agreeing states or nations to comply in good faith their treaty obligations. In relation, since the Philippines is both a state-party to the United Nations Convention on the Elimination of all forms of Discrimination Against Women, and Convention on the Rights of a Child, the Philippines should uphold its commitment with greatest caution and vigilance, lest our country can be

[24] The Life Resources Charitable Trust, Rights of the Unborn Child available at http://www.life.org.nz/abortion/abortionlegalkeyissues/rightsunbornchild/ (last accessed March 21, 2017).
[25] **PHIL. CONST. art. II, § 12**.
[26] An Act Revisiting the Penal Code and other Penal Laws, [Revised Penal Code], Act No. 3815, art. 256, (1930).
[27] Joaquin G. Bernas, S.J, Constitutional Structure and Powers of Government, Notes and Cases Part I. 39 (2010 Edition.
[28] Imbong v. Ochoa, G.R. No. 204819, (2014).

held to violate this international concept, as well as the Constitution which unequivocally declares that the generally accepted principles of International Law is deemed part of our Philippine Laws[29].

Based on the above arguments, it is crystal clear that the Philippines vests paramount primacy in our domestic laws about the realization of individual rights that can neither be intruded nor violated by the State such as in the case of women, and the unborn.

Change is a constant thing. It can bring different results- some are good, some are bad. In imposing transformation, every State is venturing on the possibility of a law being a legitimate exercise of its power, and its beneficial effects to its citizens. According to Mohandas Gandhi, no two leaves are alike, and yet there is no antagonism between them or between the branches on which they grow. The fact that this policy became successful in China would not justify its implementation here in our country. Our country is a home of brilliant legislators, and public officers who diligently enact and enforce laws for the betterment of Filipinos. By now, the change that we desire is not a "new law" so to speak. What we are looking for is a better, long-ranged, and effective implementation of existing laws relating to population. At the end of the day, there are numerous roads to lessen country's population; three-child policy is not one of them, today.

Edjay M. Aguinaldo is an incoming third year of the Juris Doctor program of FEU. Beyond doubt, he appreciates and admires how President-elect Rodrigo Duterte underscores the need of "change" in the Philippine Government System through the difficult course of eliminating corruption, improving the lives of Filipinos, stopping criminalities, and the like. However, as one would believe, several modes and methods the President devises to effect this change are considered by many to fall foul not just to some laws, but even the Constitution. Being a law student and an advocate of the law in the future, this is the reason why he scrutinizes and studies the impact of imposing this population-eradicating measure in our country, and its constitutional parallelism. At the end of the day, it is worthy to put into mind that President Duterte's term would only last for six years, nevertheless, the effect that this measure could give to our country, would prevail until declared void by the Judiciary. He believes that we need to put this into mind.

29

ERADICATING CONTRACTUALIZATION: Do our Philippine Laws Permit it?

Judith Javier

INTRODUCTION

Labor contractualization was a pivotal campaign issue in the last presidential election. All candidates promised to eradicate contractualization including current president Rodrigo Duterte. This policy appears to be promising for our labor force but the question is: do we really protect our people and the economy by eradicating contractualization?

> "Employers have the right and prerogative to choose their workers. The law, while protecting the rights of the employees, authorizes neither the oppression nor destruction of the employer. When the law angles the scales of justice in favor of labor, the scale should never be so tilted if the result is an injustice to the employer."

The trend towards contractualization is attributed to the globalized labor markets. The relationship between labor and capital today exists in the context of globalization. It is characterized by the infusion of new technologies, flow of ideas, exchange of goods and services, increase of capital and financial flows, internationalization of business and business processes and dialogue as well as the movement of persons especially working men and women.[1]

Globalization can affect welfare through the workings of the labor market. In particular trade reforms, increasing market access, exports and competition, may promote efficiency and cause certain sectors to gain in terms of increased investments, employment creation, and increased wages.

On the other hand, it may also lead to job destruction and deterioration of other sectors in the economy particularly in the heavily protected import-competing sector. While anecdotal evidence abounds, there is as yet no comprehensive picture of the impact of globalization on employment and wages.[2]

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[1] International labor conference (97th session) , Declaration On Social Justice For A Fair Globalization, June 10, 2005, at 5, available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf (last visited Feb. 19, 2017)

[2] Globalization, Labor Markets And Human Capital In the Philippines Winfred M. Villamil and Joel Hernandez www.dlsu.edu.ph/research/centers/aki/_pdf/_.../VillamilandHernandez.pdf

Contractualization is known internationally as "Precarious Works". Precarious workers are those who work to fill permanent job needs but are denied permanent employee rights. These workers receive lower wages and are exposed to dangerous working condition. They rarely receive social benefits and are often denied the right to join a union.[3]

Philippines have adopted a neoliberal mode of globalization.[4] Under this mode of globalization, a regime of precarious employment through contractualization is implemented by replacing regular workers with temporary ones who would not be entitled to benefits and seniority rights.[5] This practice is known as the casualization, flexibilization, or informalization of labor.[6] *The definition is under the context of globalization*

CONTRACTUALZATION: HOW DO OUR PHILIPPINE LAWS DEFINE IT?

Our laws do not have a concrete definition of contractualization. It is a term that cannot be found in the Labor Code nor in the rules and regulations issued by the Department of Labor and Employment (DOLE).

Contractualization or **labor contractualization** "Contractualization" in the Philippine context follows from a law that allows firms to hire labor from labor suppliers. Another word for it is "outsourcing." The firm hires another firm to furnish the labor supply.[7]ii is the replacing of regular workers with temporary workers who receive lower wages with less or no benefits at all. These temporary workers are sometimes called contractuals, trainees, apprentices, helpers, casuals, piece raters, agency-hired, and project employees, among others. They do the work of regular workers for a specified and limited period of time, usually less than six months. The work they do is "desirable and necessary" for the company's survival, but they never become regular employees even if they get rehired repeatedly under new contracts.

Article 106 of the Labor Code is captioned "contractor or Sub contractor" but the provision itself does not define nor distinguish the two, neither does it distinguish Contracting and Sub Contracting.

[3] International Labor Rights Forum Precarious Work, LaborRights.org, at http://www.laborrights.org/issues/precarious-work (last visited Feb. 19, 2017)
[4] center for womens Resources at 2
[5] Id.
[6] Id.
[7] http://www.philstar.com/business/2015/12/16/1532990/contractualization-labor-2016-election-issue

Department of Labor defines the following term:

Contracting or subcontracting is an arrangement whereby a principal agrees to put out or farm out with a contractor or subcontractor the performance or completion of a specific job, work or service within a definite or predetermined period, regardless of whether such job, work or service is to be performed or completed within or outside the premises of the principal.[8]

Contractor or subcontractor refers to any person or entity engaged in a legitimate contracting or subcontracting arrangement.[9]

Contractual employee includes one employed by a contractor or subcontractor to perform or complete a job, work or service pursuant to an arrangement between the latter and a principal.[10]

Principal refers to any employer who puts out or farms out a job, service or work to a contractor or subcontractor.[11]

While there are two parties in the ordinary-employee relationship the employer and the employee, contractual employment has three parties principal or employer who decides to farm out a job to subcontractor.[12]

OTHER TERM FOR CONTRACTUALIZATION

a. ENDO – Literally means end of contract Endo or end of contract is a practice that utilizes contractualization to abuse workers instead of valuing their contribution to different businesses. "Endo" is the shortened version of "end of contract" and is used to refer to the definitive end of contractual employment. It is also used to refer to workers who work under such contracts.[13]

b. 555 – This is a scheme where workers can only work for five months at a time, renewable for another two 5-month contracts, after which they can work as open contract workers. The limit is at five months because under the Labor Code, an employee who is allowed to work after the probationary period of six months shall be

[8] Art 106 labor code
[9] Id.
[10] Id.
[11] Id.
[12] DOLE, Dep't Order No. 18-A S3(c)(d)(e)(h) (2011)
[13] PhilippineLaw Journal p. 344 De confusing contractualization

considered a regular employee and shall be entitled to the rights and benefits accorded such workers.[14] The term "5-5-5" a brand of sardines, a contractual worker by its meager income, can afford to eat.[15]

EVOLUTION OF CONTRACTUALIZATION IN THE PHILIPPINES

Spanish Era

Under the Spanish Regime a Cabo System emerge - It is an arrangement between a shipping company and a labor organization whereby the latter, as an independent contractor, engages its members, who are paid through union payrolls, to provide *arrastre* and stevedoring services to the company.[16]

"Cabo" refers to a person or group of persons or to a labor group which, in the guise of a labor organization, supplies workers to an employer, with or without any monetary or other consideration whether in the capacity of an agent of the employer or as an ostensible independent contractor.[17]

American Era

It was in the early 1900s when the American colonial government, through its newly established Department of Labor, passed a labor code. This code introduced the concept of the right of workers to security of tenure while legalizing the use of contractual labor through the "Independent Contractor" system. This system prevailed mainly in ports, plantations, haciendas, constructions and lumberyards.

Martial Law Era

The contemporary trend in contractualization started as the economic zones were opened in our country, under PD No, 66 workers in economic were excluded from applicability of Civil Service law in terms of employment of workers.

> *Section 13 Non-applicability of the Civil Service Law, and the Regulation of the Wage and Position Classification Office. All officials and employees of the Authority shall be selected and appointed on the basis of merit and fitness based on a comprehensive and progressive merit system to be established by the*

[14] See LABOR CODE Art. 287
[15] Id.
[16] Allied Free Workers Union Vs. Compania Maritima G.R. No. 22951 19 SCRA 258, 267 Jan 31, 1967
[17] DO -18-02

> *Authority immediately upon its organization and consistent with Civil Service rules and regulations. The recruitment, transfer, promotion, and dismissal of all personnel of the Authority, including temporary workers, shall be governed by such merit system. Likewise, all personnel of the Authority shall be exempt from the regulations of the Wage and Position Classification Office.*[18]

President Marcos during the time of Martial Law promulgate PD 422 whose main policy is for the State to afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed and regulate the relations between workers and employers.. The Labor Code of the Philippines , which was enacted forty years ago in 1974, sets forth the rules for hiring and termination of private employees, the conditions of work, employee benefits, and the guidelines in the organization and membership in labor unions ,as well as, in collective bargaining. Following constitutional mandate, it seeks to protect the poor against unfair labor practices, strengthen their bargaining power and promote their standard of living.

The Code defines workers as any member of the labor force, whether employed or unemployed.[19]

Herrera Law Republic Act 6715

According to several Labor Union, a very limited contractualization regime in the past, limited to janitorial services and similar short-term business arrangements became the norm as a result of the sweeping new provisions; hence, the tag "Herrera Law

It should be noted that contractual employment is allowed under Article 106 of the Labor Code:

> *Article 106. Contractor or subcontractor. Whenever an employer enters into a contract with another person for the performance of the former's work, the employees of the contractor and of the latter's subcontractor, if any, shall be paid in accordance with the provisions of this Code. In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him.*

[18] PD 66 section 13
[19] PD 422 Art 3, 13

The Secretary of Labor and Employment may, by appropriate regulations, restrict or prohibit the contracting-out of labor to protect the right of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinctions between labor-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer for the purposes of this Code, to prevent any violation or circumvention of any provision of this Code.

There is "labor-only" contracting where the person supplying the workers to an employer does not have the substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.

Under Article 280 of RA 6715, the employment status of a worker engaged in activities necessary or desirable in the usual business or trade of the employer shall automatically become regular after six months, except if the worker's employment has been fixed for a specific period of time, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season.[20]

As it is evident that Article 280 of the Labor Code, under a narrow and literal interpretation, not only fails to exhaust the gamut of employment contracts to which the lack of a fixed period would be an anomaly, but would also appear to restrict, without reasonable distinctions, the right of an employee to freely stipulate with his employer the duration of his engagement, it logically follows that such a literal interpretation should be eschewed or avoided. The law must be given a reasonable interpretation, to preclude absurdity in its application. Outlawing the whole concept of term employment and subverting to boot the principle of freedom of contract to remedy the evil of employer's using it as a means to prevent their employees from obtaining security of tenure is like

[20] Art 280 Labor Code

cutting off the nose to spite the face or, more relevantly, curing a headache by lopping off the head.[21]

CONCLUSION

Contractualization has no official or standard definition, it is a term not found in the Labor Code and not even in the rules and regulation issued by DOLE .

Even laws confuse the terms. Article 106 of the Labor Code is captioned "Contractor *or* Subcontractor," but the provision itself does not distinguish between the two. This is still the case despite the provision being interpreted in various department orders, the latest one being D.O. No. 174 which provides for the Rules Implementing Articles 106-109 of the Labor Code.[22]

To be able to provide the support our labor sectors have been asking for, we need to clarify the coverage of the term "contractual employment". The definition and coverage of contractualization as an employment scheme , need to be grounded on a more stable form, amendments should provide for a comprehensive definition which will sufficiently address the needs of employees engaged in the various other forms of precarious work. Jobs which is necessary and desirable to the usual business of the company should be well defined so as not open to circumvention by the employer.[23]

Moreover, contracting arrangement is a valid exercise of management prerogative but it must be exercised in good faith, management must be motivated by good faith and contracting out should not be done to circumvent the law. Provided there was no malice or that it was not done arbitrarily, the courts will not interfere with the exercise of this judgment.[24]

Contracts of employment for a fixed period are not unlawful. What is objectionable is the practice of some scrupulous employers who try to circumvent the law protecting workers from the capricious termination of employment. Employers have the right and prerogative to choose their workers. The law, while protecting the rights of the employees, authorizes neither the oppression nor destruction of the employer. When the law angles

[21] BRENT SCHOOL, INC.DIMACHE vs. RONALDO ZAMORA and DOROTEO R. ALEGRE G.R. No. L-48494 February 5, 1990
[22] DOLE Dep't Order No. 018-A-11 (2011)
[23] Joaquin Servidad vs. National Labor Relations Commission, et al., G.R. No. 128682 dated March 18, 1999
[24] Manila Electric v. Quisumbing G.R. No. 127598 February 22, 2000

the scales of justice in favor of labor, the scale should never be so tilted if the result is an injustice to the employer.[25]

Simply stated there should be a balance between the right of the labor and the right of the employer. When the law angles the scales of justice in favor of labor, the scale should never be so tilted if the result is an injustice to the employer.[26]

Judith Javier is an incoming third year of Juris Doctor Program of FEU. She is 51 years old and taking her chance to fulfill her dream of becoming a lawyer. Law students are usually fresh graduates and basically more adopted to the rigors of studying, memorizing provisions and application of what has been learned. For her, it is unusual to have a student at her age to get a college degree and more so to get a law degree. But times are changing now, gone are the days that middle aged people forego their dreams. So she decided to take a leap of faith and continued in her journey to law profession though memorizing handicaps her and she's been out of the academic circulation for 27 years. She would like to change the notion that studying Law is only for the young, For her, it is never too late to make a change. Being in the labor sector for decades now, she realized the need to discuss whether contractualization or the removal of which really is truly beneficial to the economy of the Philippines and its people.

[25] Labayog v. M.Y. San Biscuits, Inc.
[26] Labayog v. M.Y. San Biscuits, Inc., 527 Phil. 67, 72-73 (2006)

Recent Jurisprudence

RECENT JURISPRUDENCE ON LANDMARK CASES

Prepared by Austin Viel Medina

Ocampo, et al vs. Enriquez

(Saturnino C. Ocampo, et al. vs. Rear Admiral Ernesto C. Enriquez, et al.,
G.R. No. 225973;
Rep. Edcel C. Lagman vs. Executive Secretary Salvador C. Medialdea,
G.R. No. 226097, November 8, 2016)

FACTS

During the campaign period for the 2016 Presidential Election, then candidate Rodrigo R. Duterte publicly announced that he would allow the burial former President Ferdinand E. Marcos at the Libingan ng Mga Bayani ("LNMB").

On August 7, 2016, Defense Secretary Delfin N. Lorenzana issued a Memorandum to AFP Chief of Staff General Ricardo R. Visaya regarding the interment of former President Ferdinand E. Marcos at the Libingan ng Mga Bayani.

On August 9, 2016, AFP Rear Admiral Ernesto C. Enriquez issued a directive to the Philippine Army on the Funeral Honors and Service for President Marcos.

Dissatisfied with the foregoing issuance, the following were filed by petitioners:

1. Petition for Certiorari and Prohibition3 filed by Satumino Ocampo and several others,4 in their capacities as human rights advocates or human rights violations victims as defined under Section 3 (c) of Republic Act (R.A.) No. 10368 (Human Rights Victims Reparation and Recognition Act of 2013).

2. Petition for Certiorari-in-Intervention5 filed by Rene A.V. Saguisag, Sr. and his son,6 as members of the Bar and human rights lawyers, and his grandchild.7

3. Petition for Prohibition8 filed by Representative Edcel C. Lagman, in his personal capacity, as member of the House of Representatives and as Honorary Chairperson of Families of Victims of Involuntary Disappearance (FIND), a duly-registered corporation

and organization of victims and families of enforced disappearance, mostly during the martial law regime of the former President Marcos, and several others,9 in their official capacities as duly-elected Congressmen of the House of Representatives of the Philippines.

4. Petition for Prohibition10 filed by Loretta Ann Pargas-Rosales, former Chairperson of the Commission on Human Rights, and several others,11 suing as victims of State-sanctioned human rights violations during the martial law regime of Marcos.

5. Petition for Mandamus and Prohibition12 filed by Heherson T. Alvarez, former Senator of the Republic of the Philippines, who fought to oust the dictatorship of Marcos, and several others,13 as concerned Filipino citizens and taxpayers.

6. Petition for Certiorari and Prohibition14 filed by Zaira Patricia B. Baniaga and several others,15 as concerned Filipino citizens and taxpayers.

7. Petition for Certiorari and Prohibition16 filed by Algamar A. Latiph, former Chairperson of the Regional Human Rights Commission, Autonomous Region in Muslim Mindanao, by himself and on behalf of the Moro17 who are victims of human rights during the martial law regime of Marcos.

8. Petition for Certiorari and Prohibition18 filed by Leila M. De Lima as member of the Senate of the Republic of the Philippines, public official and concerned citizen.

ISSUES

Procedural

1. Whether President Duterte's determination to have the remains of Marcos interred at the LNMB poses a justiciable controversy.

2. Whether petitioners have locus standi to file the instant petitions.

3. Whether petitioners violated the doctrines of exhaustion of administrative remedies and hierarchy of courts.

Substantive

1. Whether the respondents Secretary of National Defense and AFP Rear Admiral committed grave abuse of discretion, amounting to lack or excess of jurisdiction, when they issued the assailed memorandum and directive in compliance with the verbal order of President Duterte to implement his election campaign promise to have the remains of Marcos interred at the LNMB.

2. Whether the issuance and implementation of the assailed memorandum and directive violate the Constitution, domestic and international laws, particularly:

   (a) Sections 2, 11, 13, 23, 26, 27 and 28 of Article II, Section 1 of Article III, Section 17 of Article VII, Section 1 of Article XI, Section 3(2) of Article XIV, and Section 26 of Article XVIII of the 1987 Constitution;
   (b) R.A. No. 289;
   (c) R.A. No. 10368;
   (d) AFP Regulation G 161-375 dated September 11, 2000
   (e) The International Covenant on Civil and Political Rights;
   (f) The "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" of the United Nations (U.N.) General Assembly; and
   (g) The "Updated Set of Principles for Protection and Promotion of Human Rights through Action to Combat Impunity" of the U.N. Economic and Social Council;

3. Whether historical facts, laws enacted to recover ill-gotten wealth from the Marcoses and their cronies, and the pronouncements of the Court on the Marcos regime have nullified his entitlement as a soldier and former President to interment at the LNMB.

4. Whether the Marcos family is deemed to have waived the burial of the remains of former President Marcos at the LNMB after they entered into an agreement with the Government of the Republic of the Philippines as to the conditions and procedures by which his remains shall be brought back to and interred in the Philippines.

RULING

The Supreme Court denied the petitions.

Procedural issues

Political question

The Court agrees with the OSG that President Duterte's decision to have the remains of Marcos interred at the LNMB involves a political question that is not a justiciable controversy. In the excercise of his powers under the Constitution and the Administrative Code of 1987 to allow the interment of Marcos at the LNMB, which is a land of the public domain devoted for national military cemetery and military shrine purposes, President Duterte decided a question of policy based on his wisdom that it shall promote national healing and forgiveness. There being no taint of grave abuse in the exercise of such discretion, as discussed below, President Duterte's decision on that political question is outside the ambit of judicial review.

Locus standi

Petitioners have no legal standing to file the petitions for certiorari, prohibition and mandamus because they failed to show that they have suffered or will suffer direct and personal injury as a result of the interment of Marcos at the LNMB.

Petitioners cannot also file as taxpayers. They merely claim illegal disbursement of public funds, without showing that Marcos is disqualified to be interred at the LNMB by either express or implied provision of the Constitution, the laws or jurisprudence.

Petitioners Saguisag, et al., as members of the Bar, failed to disclose the direct or potential injury which they may suffer as a result of the act complained of. Their interest in this case is too general and shared by other groups, such that their duty to uphold the rule of law, without more, is inadequate to clothe them with requisite legal standing.

Petitioners also failed to prove that the case is of transcendental importance. At this point in time, the interment of Marcos at a cemetery originally established as a national military cemetery and declared a national shrine would have no profound effect on the political, economic, and other aspects of our national life considering that more than twenty-seven (27) years since his death and thirty (30) years after his ouster have already passed. Significantly, petitioners failed to demonstrate a clear and imminent threat to their fundamental constitutional rights.

As to petitioners Senator De Lima and Congressman Lagman, they failed to show that the burial of Marcos encroaches on their prerogatives as legislators.

Exhaustion of administrative remedies

Petitioners violated the exhaustion of administrative remedies. Contrary to their claim of lack of plain, speedy, adequate remedy in the ordinary course of law, petitioners should be faulted for failing to seek reconsideration of the assailed memorandum and directive before the Secretary ofNational Defense. The Secretary of National Defense should be given opportunity to correct himself, if warranted, considering that AFP Regulations G 161-375 was issued upon his order. Questions on the implementation and interpretation thereof demand the exercise of sound administrative discretion, requiring the special knowledge, experience and services of his office to determine technical and intricate matters of fact. If petitioners would still be dissatisfied with the decision of the Secretary, they could elevate the matter before the Office of the President which has control and supervision over the Department of National Defense (DND).

Hierarchy of Courts

While direct resort to the Court through petitions for the extraordinary writs of certiorari, prohibition and mandamus are allowed under exceptional cases, which are lacking in this case, petitioners cannot simply brush aside the doctrine of hierarchy of courts that requires such petitions to be filed first with the proper Regional Trial Court (RTC). The RTC is not just a trier of facts, but can also resolve questions of law in the exercise of its original and concurrent jurisdiction over petitions for certiorari, prohibition and mandamus, and has the power to issue restraining order and injunction when proven necessary.

Substantive issues

The President's decision to bury Marcos at the LNMB is in accordance with the Constitution, the law and jurisprudence.

While the Constitution is a product of our collective history as a people, its entirety should not be interpreted as providing guiding principles to just about anything remotely related to the Martial Law period such as the proposed Marcos burial at the LNMB.

Section 1 of Article XI of the Constitution is not a self-executing provision considering that a law should be passed by the Congress to clearly define and effectuate the principle embodied therein. Pursuant thereto, Congress enacted the Code of Conduct

on Ethical Standards for Public Officials and Employees, the Ombudsman Act of 1989, Plunder Act, and Anti-Red Tape Act of 2007. To complement these statutes, the Executive Branch has issued various orders, memoranda, and instructions relative to the norms of behavior/code of conduct/ethical standards of officials and employees; workflow charts/ public transactions; rules and policies on gifts and benefits; whistle blowing and reporting; and client feedback program.

Petitioners' reliance on Sec. 3(2) of Art. XIV and Sec. 26 of Art. XVIII of the Constitution is also misplaced. Sec. 3(2) of Art. XIV refers to the constitutional duty of educational institutions in teaching the values of patriotism and nationalism and respect for human rights, while Sec. 26 of Art. XVIII is a transitory provision on sequestration or freeze orders in relation to the recovery of Marcos' ill-gotten wealth. Clearly, with respect to these provisions, there is no direct or indirect prohibition to Marcos' interment at the LNMB.

The second sentence of Sec. 17 of Art. VII is likewise not violated by public respondents. Being the Chief Executive, the President represents the government as a whole and sees to it that all laws are enforced by the officials and employees of his or her department. Under the Faithful Execution Clause, the President has the power to take "necessary and proper steps" to carry into execution the law. The mandate is self-executory by virtue of its being inherently executive in nature and is intimately related to the other executive functions. It is best construed as an imposed obligation, not a separate grant of power. The provision simply underscores the rule of law and, corollarily, the cardinal principle that the President is not above the laws but is obliged to obey and execute them.

There is no violation of RA 289.

Petitioners miserably failed to provide legal and historical bases as to their supposition that the LNMB and the National Pantheon are one and the same. This is not at all unexpected because the LNMB is distinct and separate from the burial place envisioned in R.A. No 289. The parcel of land subject matter of President Quirino's Proclamation No. 431, which was later on revoked by President Magsaysay's Proclamation No. 42, is different from that covered by Marcos' Proclamation No. 208. The National Pantheon does not exist at present. To date, the Congress has deemed it wise not to appropriate any funds for its construction or the creation of the Board on National Pantheon. This is indicative of the legislative will not to pursue, at the moment, the establishment of a singular interment place for the mortal remains of all Presidents of the Philippines, national heroes, and patriots.

Furthermore, to apply the standard that the LNMB is reserved only for the "decent and the brave" or "hero" would be violative of public policy as it will put into question the validity of the burial of each and every mortal remains resting therein, and infringe upon the principle of separation of powers since the allocation of plots at the LNMB is based on the grant of authority to the President under existing laws and regulations. Also, the Court shares the view of the OSG that the proposed interment is not equivalent to the consecration of Marcos' mortal remains. The act in itself does not confer upon him the status of a "hero." Despite its name, which is actually a misnomer, the purpose of the LNMB, both from legal and historical perspectives, has neither been to confer to the people buried there the title of "hero" nor to require that only those interred therein should be treated as a "hero." Lastly, petitioners' repeated reference to a "hero's burial" and "state honors," without showing proof as to what kind of burial or honors that will be accorded to the remains of Marcos, is speculative until the specifics of the interment have been finalized by public respondents.

RA 10639 is not violated

The Court cannot subscribe to petitioners' logic that the beneficial provisions of R.A. No. 10368 are not exclusive as it includes the prohibition on Marcos' burial at the LNMB. It would be undue to extend the law beyond what it actually contemplates. With its victim-oriented perspective, our legislators could have easily inserted a provision specifically proscribing Marcos' interment at the LNMB as a "reparation" for the Human Rights Violations Victims (HRVVs). The law is silent and should remain to be so. This Court cannot read into the law what is simply not there. It is irregular, if not unconstitutional, for Us to presume the legislative will by supplying material details into the law. That would be tantamount to judicial legislation.

The enforcement of the HRVV s' rights under R.A. No 10368 will surely not be impaired by the interment of Marcos at the LNMB. As opined by the OSG, the assailed act has no causal connection and legal relation to the law. The subject memorandum and directive of public respondents do not and cannot interfere with the statutory powers and functions of the Board and the Commission. More importantly, the HRVVs' entitlements to the benefits provided for by R.A. No 10368 and other domestic laws are not curtailed. R.A. No. 10368 does not amend or repeal, whether express or implied, the provisions of the Administrative Code or AFP Regulations G 161-375.

There is no violation of International Human Rights Laws

The nation's history will not be instantly revised by a single resolve of President Duterte, acting through the public respondents, to bury Marcos at the LNMB. Whether petitioners admit it or not, the lessons of Martial Law are already engraved, albeit in varying degrees, in the hearts and minds of the present generation of Filipinos. As to the unborn, it must be said that the preservation and popularization of our history is not the sole responsibility of the Chief Executive; it is a joint and collective endeavor of every freedom-loving citizen of this country.

Notably, complementing the statutory powers and functions of the Human Rights Victims' Claims Board and the HRVV Memorial Commission in the memorialization of HRVV s, the National Historical Commission of the Philippines (NHCP), formerly known as the National Historical Institute (NHJ), is mandated to act as the primary government agency responsible for history and is authorized to determine all factual matters relating to official Philippine history.

II. The President's decision to bury Marcos at the LNMB is not done whimsically, capriciously or arbitrarily, out of malice, ill will or personal bias

The LNMB was not expressly included in the national shrines enumerated in PD 105

P.D. No. 105 does not apply to the LNMB. Despite the fact that P.D. No. 208 predated P.D. No. 105, the LNMB was not expressly included in the national shrines enumerated in the latter. The proposition that the LNMB is implicitly covered in the catchall phrase "and others which may be proclaimed in the future as National Shrines" is erroneous because: (1) As stated, Marcos issued P.D. No. 208 prior to P.D. No. 105; (2) Following the canon of statutory construction known as ejusdem generis, 138 the LNMB is not a site "of the birth, exile, imprisonment, detention or death of great and eminent leaders of the nation,"; and (3) Since its establishment, the LNMB has been a military shrine under the jurisdiction of the PVAO.

Assuming that P.D. No. 105 is applicable, the descriptive words "sacred and hallowed" refer to the LNMB as a place and not to each and every mortal remains interred therein. Hence, the burial of Marcos at the LNMB does not diminish said cemetery as a revered and respected ground. Neither does it negate the presumed individual or collective "heroism" of the men and women buried or will be buried therein. The "nation's esteem and reverence for her war dead, " as originally contemplated by President Magsaysay in issuing Proclamation No. 86, still stands unaffected. That being said, the interment of

Marcos, therefore, does not constitute a violation of the physical, historical, and cultural integrity of the LNMB as a national military shrine.

The LNMB is considered as a national shrine for military memorials. The PVAO, which is empowered to administer, develop, and maintain military shrines, is under the supervision and control of the DND. The DND, in tum, is under the Office of the President.

The presidential power of control over the Executive Branch of Government is a self-executing provision of the Constitution and does not require statutory implementation, nor may its exercise be limited, much less withdrawn, by the legislature. This is why President Duterte is not bound by the alleged 1992 Agreement between former President Ramos and the Marcos family to have the remains of Marcos interred in Batac, Ilocos Norte. As the incumbent President, he is free to amend, revoke or rescind political agreements entered into by his predecessors, and to determine policies which he considers, based on informed judgment and presumed wisdom, will be most effective in carrying out his mandate.

Moreover, under the Administrative Code, the President has the power to reserve for public use and for specific public purposes any of the lands of the public domain and that the reserved land shall remain subject to the specific public purpose indicated until otherwise provided by law or proclamation. At present, there is no law or executive issuance specifically excluding the land in which the LNMB is located from the use it was originally intended by the past Presidents. The allotment of a cemetery plot at the LNMB for Marcos as a former President and Commander-in-Chief, a legislator, a Secretary of National Defense, a military personnel, a veteran, and a Medal of Valor awardee, whether recognizing his contributions or simply his status as such, satisfies the public use requirement. The disbursement of public funds to cover the expenses incidental to the burial is granted to compensate him for valuable public services rendered.

Likewise, President Duterte's determination to have Marcos' remains interred at the LNMB was inspired by his desire for national healing and reconciliation. Presumption of regularity in the performance of official duty prevails over petitioners' highly disputed factual allegation that, in the guise of exercising a presidential prerogative, the Chief Executive is actually motivated by utang na loob (debt of gratitude) and bayad utang (payback) to the Marcoses. As the purpose is not self-evident, petitioners have the burden of proof to establish the factual basis of their claim. They failed. Even so, this Court cannot take cognizance of factual issues since We are not a trier of facts.

AFP Regulations G 161-375 must be sustained

Under AFP Regulations G 161-375, the following are eligible for interment at the LNMB: (a) Medal of Valor Awardees; (b) Presidents or Commanders-in-Chief, AFP; (c) Secretaries of National Defense; (d) Chiefs of Staff, AFP; (e) General/Flag Officers of the AFP; (f) Active and retired military personnel of the AFP to include active draftees and trainees who died in line of duty, active reservists and CAFGU Active Auxiliary (CAA) who died in combat operations or combat related activities; (g) Former members of the AFP who laterally entered or joined the PCG and the PNP; (h) Veterans of Philippine Revolution of 1890, WWI, WWII and recognized guerillas; (i) Government Dignitaries, Statesmen, National Artists and other deceased persons whose interment or reinterment has been approved by the Commander-in-Chief, Congress or the Secretary of National Defense; and G) Former Presidents, Secretaries of Defense, Dignitaries, Statesmen, National Artists, widows of Former Presidents, Secretaries of National Defense and Chief of Staff.

Similar to AFP Regulations G 161-374, the following are not qualified to be interred in the LNMB: (a) Personnel who were dishonorably separated/reverted/discharged from the service; and (b) Authorized personnel who were convicted by final judgment of an offense involving moral turpitude.

In the absence of any executive issuance or law to the contrary, the AFP Regulations G 161-375 remains to be the sole authority in determining who are entitled and disqualified to be interred at the LNMB. Interestingly, even if they were empowered to do so, former Presidents Corazon C. Aquino and Benigno Simeon C. Aquino III, who were themselves aggrieved at the Martial Law, did not revise the rules by expressly prohibiting the burial of Marcos at the LNMB. The validity of AFP Regulations G 161-375 must, therefor, be sustained for having been issued by the AFP Chief of Staff acting under the direction of the Secretary of National Defense, who is the alter ego of the President.

AFP Regulations G 161-375 should not be stricken down in the absence of clear and unmistakable showing that it has been issued with grave abuse of discretion amounting to lack or excess of jurisdiction. Neither could it be considered ultra vires for purportedly providing incomplete, whimsical, and capricious standards for qualification for burial at the LNMB.

It is not contrary to the "well-established custom," as the dissent described it, to argue that the word "bayani" in the LNMB has become a misnomer since while a symbolism of heroism may attach to the LNMB as a national shrine for military memorial, the same does not automatically attach to its feature as a military cemetery and to those who were already laid or will be laid therein. As stated, the purpose of the LNMB, both from the legal

and historical perspectives, has neither been to confer to the people buried there the title of "hero" nor to require that only those interred therein should be treated as a "hero."

In fact, the privilege of internment at the LNMB has been loosen up through the years. Since 1986, the list of eligible includes not only those who rendered active military service or military-related activities but also non-military personnel who were recognized for their significant contributions to the Philippine society (such as government dignitaries, statesmen, national artists, and other deceased persons whose interment or reinterment has been approved by the Commander-in-Chief, Congress or Secretary of National Defense). In 1998, the widows of former Presidents, Secretaries of National Defense and Chief of Staff were added to the list. Whether or not the extension of burial privilege to civilians is unwarranted and should be restricted in order to be consistent with the original purpose of the LNMB is immaterial and irrelevant to the issue at bar since it is indubitable that Marcos had rendered significant active military service and military-related activities.

Petitioners did not dispute that Marcos was a former President and Commander-in-Chief, a legislator, a Secretary of National Defense, a military personnel, a veteran, and a Medal of Valor awardee. For his alleged human rights abuses and corrupt practices, we may disregard Marcos as a President and Commander-in-Chief, but we cannot deny him the right to be acknowledged based on the other positions he held or the awards he received. In this sense, We agree with the proposition that Marcos should be viewed and judged in his totality as a person. While he was not all good, he was not pure evil either. Certainly, just a human who erred like us.

Aside from being eligible for burial at the LNMB, Marcos possessed none of the disqualifications stated in AFP Regulations G 161-3 7 5. He was neither convicted by final judgment of the offense involving moral turpitude nor dishonorably separated/reverted/discharged from active military service.

The fact remains that Marcos was not convicted by final judgment of any offense involving moral turpitude. No less than the 1987 Constitution mandates that a person shall not be held to answer for a criminal offense without due process of law.

Also, the equal protection clause is not violated. Generally, there is no property right to safeguard because even if one is eligible to be buried at the LNMB, such fact would only give him or her the privilege to be interred therein. Unless there is a favorable recommendation from the Commander- in-Chief, the Congress or the Secretary of National Defense, no right can be said to have ripen. Until then, such inchoate right is not legally demandable and enforceable.

Assuming that there is a property right to protect, the requisites of equal protection clause are not met. 181 In this case, there is a real and substantial distinction between a military personnel and a former President. The conditions of dishonorable discharge under the Articles of War attach only to the members of the military. There is also no substantial distinction between Marcos and the three Philippine Presidents buried at the LNMB (Presidents Quirino, Garcia, and Macapagal). All of them were not convicted of a crime involving moral turpitude. In addition, the classification between a military personnel and a former President is germane to the purposes of Proclamation No. 208 and P.D. No. 1076. While the LNMB is a national shrine for military memorials, it is also an active military cemetery that recognizes the status or position held by the persons interred therein.

Likewise, Marcos was honorably discharged from military service. PVAO expressly recognized him as a retired veteran pursuant to R.A. No. 6948, as amended. Petitioners have not shown that he was dishonorably discharged from military service under APP Circular 17, Series of 1987 (Administrative Discharge Prior to Expiration of Term of Enlistment) for violating Articles 94, 95 and 97 of the Articles of War. The NHCP study is incomplete with respect to his entire military career as it failed to cite and include the official records of the AFP.

The word "service" in AFP Regulations G 161-375 should be construed as that rendered by a military person in the AFP, including civil service, from the time of his/her commission, enlistment, probation, training or drafting, up to the date of his/her separation or retirement from the AFP. Civil service after honorable separation and retirement from the AFP is outside the context of "service" under AFP Regulations G 161-375.

Hence, it cannot be conveniently claimed that Marcos' ouster from the presidency during the EDSA Revolution is tantamount to his dishonorable separation, reversion or discharge from the military service. The fact that the President is the Commander-in-Chief of the AFP under the 1987 Constitution only enshrines the principle of supremacy of civilian authority over the military. Not being a military person who may be prosecuted before the court martial, the President can hardly be deemed "dishonorably separated/reverted/discharged from the service" as contemplated by AFP Regulations G 161-375. Dishonorable discharge through a successful revolution is an extra-constitutional and direct sovereign act of the people which is beyond the ambit of judicial review, let alone a mere administrative regulation.

It is undeniable that former President Marcos was forced out of office by the people through the so-called EDSA Revolution. Said political act of the people should not be automatically given a particular legal meaning other than its obvious consequence - that

of ousting him as president. To do otherwise would lead the Court to the treacherous and perilous path of having to make choices from multifarious inferences or theories arising from the various acts of the people. It is not the function of the Court, for instance, to divine the exact implications or significance of the number of votes obtained in elections, or the message from the number of participants in public assemblies. If the Court is not to fall into the pitfalls of getting embroiled in political and oftentimes emotional, if not acrimonious, debates, it must remain steadfast in abiding by its recognized guiding stars - clear constitutional and legal rules - not by the uncertain, ambiguous and confusing messages from the actions of the people.

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