COGITANT LEGALIS

ATENEO JOURNAL OF LAW, POLICY, AND ADVOCACY JULY 2021

ARTICLES

NOTE

ESSAYS

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Ateneo de Zamboanga University
Xavier University ATENEO DE CAGAYAN
ATENEO DE DAVAO UNIVERSITY
ATENEO DE NAGA UNIVERSITY

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ATENEO LAW JOURNAL

FOREWORD

Cogitant Legalis. Ad Maiorem Dei Gloriam

We all know the story quite well.

It was 500 years ago, in May 20 of 1521, at the Battle of Pamplona, Spain, when the leg — and the ego — of a vainglorious Ignacio de Loyola were fractured by the crippling impact of a hostile cannonball. Debilitated and frustrated, Ignacio was forced to retreat to his home to physically recover and recuperate in isolation.

It was during this period of tedium and immobility that he pored over reading materials on the life of Christ and of the saints that was consequential to his spiritual awakening, conversion, and the commencement and dogged pursuit of a lifelong mission dedicated to the service of others for the greater glory of God. Integral was his founding of the Society of Jesus.

The lasting effects of that cannonball moment of Ignacio, canonized into sainthood in March of 1622, has been far-reaching in time and space. Five hundred years hence, we find ourselves engaged in, and committed to, individually carrying out the work of San Ignacio through each of the law schools of the five Philippine Jesuit Universities: Ateneo de Davao, Ateneo de Manila, Ateneo de Naga, Ateneo de Zamboanga, and Xavier University – Ateneo de Cagayan.

Recognizing our common roots, the unity of our purpose and our shared mission as educators in law, committed equally to scholastic excellence and the responsible pursuit of our profession, the five Philippine Jesuit law schools have come together, in the spirit that graced Ignacio and his companions, on the quincentenary of that cannonball moment, to collaborate in siring this special law journal: *Cogitant Legalis — Ateneo Journal of Law, Policy, and Advocacy*.

The name and subtitle of this special journal captures our vocation as law schools — to teach our young to think legally. That is to say, to know the law as well as appreciate its role in an organized society, to learn to use and apply law to protect the common good and achieve the ends of justice, and to promote and defend the rule of law.

This journal purposefully assembles contributions from each of our law schools consisting in selected scholastic commentaries and think pieces that touch upon and dive deep into matters of consequence in the field of law. These include writings on themes and topics directly relevant to our institutional and individual calling as Ignatian law schools, lawyers, and educators such as discourses on issues impacting persons and communities in the periphery, whose needs and dignity we are summoned to pay special attention to.

Consider these samplings:

Xavier University – Ateneo de Cagayan College of Law's Fr. Ismael Jose III V. Chan-Gonzaga, S.J., J.D. looks into a critical issue of international law affecting refugee rights as he examines, and takes a position on, the practice by refugee host states of effectively outsourcing Refugee Convention commitments to provide asylum to displaced refugees with the building of offshore detention and processing camps for refugees in other countries.

Spotlighting the war on the illegal drug trade, Ateneo de Zamboanga University College of Law student Rey David M. Lim peruses problem areas on the legal processes such as capture and arrest, planting of evidence, excessive force, detention, plea bargaining, and prosecution and reflects on how Atenean lawyers can be agents of change and advocates of justice in service to defendants in drug cases who cannot afford legal counsel.

Examining how mediators can reconcile the science of neuro-linguistic programming and the Ignatian spiritual exercise of discernment in leading parties to arrive at a voluntary resolution of their disputes through mediation is the focus of Ateneo de Naga University College of Law's Vergenee Marree A. Abrenica-Orillosa.

Patricia Anne D. Sta. Maria of the Ateneo de Manila University School of Law highlights inadequacies of the Philippine Disaster Risk Reduction and Management Act and corruption in implementation as systemic roadblocks to providing genuine relief to the marginalized sectors who often end up disproportionately suffering on account of a fragile natural disaster relief system.

Ateneo de Davao University College of Law's Romeo T. Cabarde, Jr. probes into the Philippine Mining Act with focus on its apparent shortcomings in comprehensively assuring that the benefits of natural resources are primarily enjoyed by the Filipino people, especially the poor and the impoverished local mining communities.

This collaborative journal contains these and more.

We trust that you find the carefully curated contents of *Cogitant Legalis* insightful and the camaraderie that has caused it to be, inspiring.

Who knows if reading through *Cogitant Legalis* in this time of pandemic-induced immobility might lead you too, in respect of the law, to an awakening, a conversion, and a commencement and dogged pursuit of a lifelong mission dedicated to the service of others for the greater glory of God.

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UNDERSTANDING SEX, GENDER, SEXUAL ORIENTATION, AND GENDER IDENTITY IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS LAW AND EUROPEAN UNION LAW

*Anne Maureen B. Manigbas**

I. Introduction

Diversity is an integral dimension of human experience. This extends to an array of characteristics including, but not limited to, race, nationality, religion, age, sex, sexual orientation, and gender identity. However, deeply rooted biases and prejudices perpetuated by damaging stereotypes embedded in history, society, and norms increase the propensity towards marginalization of certain groups, including persons with diverse gender identities.[1]

The recognition and celebration of every person's diversity is inherently linked with the principles of equality and non-discrimination, which are among the pillars upon which International Human Rights Law (IHRL) is built on.[2] This is enshrined in Article 2 of the Universal Declaration of Human Rights (UDHR), which provides that "all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, [color], sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status."[3] The principle of non-discrimination is also reaffirmed in the International Covenant on

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1 Gender Equality Law Center, Gender Stereotyping, *available at* https://www.genderequalitylaw.org/gender-stereotyping (last accessed July 20, 2021) [https://perma.cc/MFS8-36S3].

2 Jarrah Clifford, *Equality*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 427 & 432 (Dinah Shelton ed., 2013).

3 Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 2, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

Civil and Political Rights (ICCPR)[4] as well as the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[5]

The European Union (EU) legal framework also espouses the same fundamental principle of non-discrimination, which is reflected in its two primary treaties. Article 2 of the Treaty on European Union (TEU) underscores that the principles of non-discrimination and equality between women and men comprise fundamental values of the EU.[6] Meanwhile, Article 19 of the Treaty on the Functioning of the European Union (TFEU) obligates the EU "to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation" in laying down policies and executing activities.[7]

In addition, the Charter of Fundamental Rights of the European Union (CFREU) guarantees the right of everyone to be equal before the law[8] and prohibits "any discrimination based on any ground such as sex, race, [color], ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age[,] or sexual orientation[.]"[9] It must be noted that the provisions of the CFREU bind EU institutions and Member States only when they are implementing EU Law.[10]

EU's secondary legislation, which includes regulations, directives, and decisions, expanded the European legal order on equality and non-discrimination. The Equality Framework Directive[11] and the Racial Equality Directive,[12] which were both adopted in 2000, were a welcome addition to the growing protection framework against discrimination. The

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4 International Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

5 International Covenant on Economic, Social and Cultural Rights art. 2, ¶ 2, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

6 Consolidated Version of the Treaty on European Union art. 2, *signed* Feb. 7, 1992, 2012 O.J. (C 326) 13 [hereinafter TEU].

7 Consolidated Version of the Treaty on the Functioning of the European Union art. 19 ¶ 1, *signed* Mar. 25, 1957, 2012 O.J. (C 326) 47 [hereinafter TFEU].

8 Charter of Fundamental Rights of the European Union art. 20, *adopted* Dec. 7, 2000, 2000 O.J. (C 364) 1 [hereinafter CFREU].

9 *Id.* art. 21, ¶ 1.

10 *Id.* art. 51, ¶ 1.

11 Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, Council Directive 2000/78/EC, 2000 O.J. (L 303) 16 (Nov. 27, 2000) [hereinafter Equality Framework Directive].

12 Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (June 29, 2000).

Framework Directive specifically prohibits discrimination on the basis of sexual orientation, among others, in the field of employment, occupation, and similar areas.[13] The subsequent enactment of the Gender Goods and Services Directive[14] and the Gender Equality Directive (Recast)[15] expanded the scope of the guarantee of equal treatment between men and women in access to supply of goods and services and occupational social security schemes. While these Directives are primarily applied to discrimination in the context of employment, they mirror the principles of equality and non-discrimination by restating the guarantees found in IHRL and EU primary legislation.[16]

It must be noted at the onset that EU is an intergovernmental organization and a supranational organization. It derives its powers from its primary legislation or founding treaties, namely the TEU, TFEU, and the CFREU, which became a legally binding instrument by virtue of the Treaty of Lisbon, placing it at the same level and legal value of the first two treaties.[17] It should be emphasized, however, that IHRL inspires the EU legal framework. The TEU affirms the role of the Union in protecting human rights and the strict observance and development of international law, including respect for the principles of the UN Charter.[18] Similarly, the CFREU reaffirms, with due regard to the competences of the Community, international obligations common to the Member States, which includes obligations under UN Treaties.[19] EU secondary law on anti-discrimination also recognize international human rights instruments such as the UDHR, ICCPR, ICESCR, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of All Forms of Racial Discrimination as building blocks to the right of equality before the law.[20]

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13 Equality Framework Directive, *supra* note 11, art. 1.

14 Council Directive 2004/113/EC of 13 December 2004 Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, Council Directive 2004/113/EC, 2004 O.J. (L 373) 37 (Dec. 13, 2004) [hereinafter Gender Goods and Services Directive].

15 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), Directive 2006/54/EC, 2006 O.J. (L 204) 23 (July 5, 2006).

16 Gender Goods and Services Directive, *supra* note 14, whereas cl. ¶ 2.

17 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 49 C, *signed* Dec. 13, 2007, 2007 0.J. (C 306) 1.

18 TEU, *supra* note 6, art. 3, ¶ 5.

19 CFREU, *supra* note 8, pmbl.

20 Equality Framework Directive, *supra* note 11, whereas cl. ¶ 4 & Gender Goods and Services Directive, *supra* note 14, whereas cl. ¶ 2.

Based on the brief overview provided above, it is clear that both IHRL and EU law proscribe discrimination on the basis of sex. While there are badges of recognition of rights of persons with diverse sexual orientation and gender identity in the form of state practice, soft law, regional human rights systems, United Nations treaty bodies,[21] explicit and binding legal standards governing the protection against discrimination on the grounds of sexual orientation, gender identity, and expression remain elusive. Queer theorists and academics have explained this by arguing that traditional notions of human rights are shaped by heteronormative assumptions and norms.[22]

The introduction of the Yogyakarta Principles[23] and the Yogyakarta Principles Plus 10 (YP+10),[24] however, has paved the way for a more nuanced understanding of the diverse and fluid nature of gender, sexual orientation, and gender identity. These principles, which are based on the concept universality of rights, are considered to be the most authoritative statement that reflect or restate the IHRL obligations of States in protecting and promoting the rights of persons with diverse sexual orientations, gender identities, and sex characteristics.[25] In addition, it aims to codify advancements in law and other best practices that protect against discrimination, but have yet to achieve binding status.[26] Although not legally binding, these principles have been relied on by countries in

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21 David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT'L L. 821, 823 (2010).

22 Matthew Waites, *Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137, 140 (2009) (citing Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRIT. INQ. 547, 548 (1998)) & Andrew Park, *Yogyakarta Plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. INT'L L. 223, 229 (2019).

23 International Commission of Jurists, The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, *available at* http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf (last accessed July 20, 2021) [https://perma.cc/9FE7-BX5S] [hereinafter Yogyakarta Principles].

24 International Commission of Jurists, The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, *available at* http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf (last accessed July 20, 2021) [https://perma.cc/43F8-GRBM] [hereinafter YP+10].

25 Asia Pacific Forum of National Human Rights Institutions, Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights 131 (2016).

26 Brown, *supra* note 21, at 824 (citing Yogyakarta Principles, *supra* note 23, at 6-7).

shaping their domestic legal policies for the protection of persons of diverse sexual orientations and gender identities.[27]

This Article explores the developments in the understanding or definitions of sex, sexual orientation, gender identity, and expression. It will reflect on its inclusion in the interpretation and application of the non-discrimination principle under international human rights law and EU law. In doing so, a comparative overview of the normative legal standards enshrined in these frameworks will be provided and discussed. It will also examine general comments of UN treaty bodies as well as its opinions in individual complaints lodged before them. Selected case law of the Court of Justice of the European Union (CJEU) will be discussed to highlight the developments of the interpretation of sex, gender, sexual orientation, and gender identity.

II. Understanding Discrimination on the Basis of "Sex"

"Sex" is defined as "the sum of the peculiarities of structure and function that distinguish a male from a female organism."[28] From this legal definition, the term "sex" essentially creates two categories, namely "male" or "female," based on a person's biological makeup. Under the IHRL and the EU anti-discrimination law frameworks, "sex" is among the grounds by which discrimination is prohibited.

The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[29] is a core human rights treaty that specifically addresses sex-based discrimination. Building from the foundation set by the International Bill of Human Rights,[30] CEDAW aims to eliminate sex-based discrimination, particularly those that "biological women" have experienced historically.[31] Feminist theories and concepts on sexual

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27 Park, *supra* note 22, at 241 (citing PAULA L. ETTELBRICK & ALIA TRABUCCO ZERÁN, THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT 3-4 (2010)).

28 SEX, BLACK'S LAW DICTIONARY (11th ed. 2019).

29 Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 1 [hereinafter CEDAW].

30 The International Bill of Human Rights is composed of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social, and Cultural Rights. Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights, *available at* https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf (last accessed July 20, 2021) [https://perma.cc/MY7B-KRLB].

31 Tom Dreyfus, *The Half-Invention of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles*, 37 AUSTL. FEMINIST L.J.

rights were generally underdeveloped during the preparatory phase of CEDAW, with the limited understanding that "sex" and "gender" covers only the heteronormative binaries.[32] As such, the CEDAW Committee defines "sex" as "biological differences between men and women."[33] This definition is considered in the understanding of "discrimination against women," which means

> *any distinction, exclusion or restriction made on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment[,] or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil[,] or any other field.[34]

Similarly, the EU treaties reinforce the definition of "sex" through its non-discrimination principle, constantly reiterating that men and women must receive equal treatment. The CFREU prohibits discrimination on the basis of sex by reaffirming the concept of equality between women and men "in all areas, including employment, work[,] and pay."[35] The whereas clauses of the Equality Framework Directive further provide that in implementing the principle of equal treatment, the Community must "aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination."[36] In addition, case law of the CJEU on sex discrimination predominantly settles matters that revolve on the issue of either women or men experiencing less favorable treatment than persons of the opposite sex.[37] In the case of *Defrenne v. Sabena*[38] decided by the CJEU in the late 1970s, an air hostess filed an action against her employer, claiming that she suffered employment discrimination on the basis of her sex. She explained that she received less pay compared to her male colleagues who were performing the same tasks as cabin stewards.[39] In finding for the applicant, the CJEU ruled that

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33, 42 (2012) (citing Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 122 (2011)).

32 *Id.*

33 United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 5, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

34 CEDAW, *supra* note 29, art. 1 (emphasis supplied).

35 CFREU, *supra* note 8, art. 23.

36 Equality Framework Directive, *supra* note 11, whereas cl. ¶ 3.

37 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 162 (2018).

38 Defrenne v. Sabena, Case C-43/75, 1976 ECR I-455, at 457.

39 *Id.*

> the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective [labor] agreements, as well as in cases in which *men and women receive unequal pay for equal work* which is carried out in the same establishment or service, whether private or public.[40]

It further emphasized that "respect for fundamental personal human rights is one of the general principles of Community law."[41] It continued on to say that "the elimination of discrimination based on sex forms part of those fundamental rights" that the EU Community has the duty to observe.[42]

While "sex" as a ground for discrimination is understood in both frameworks as anatomical or physiological differences between females and males, the scope of protection is vastly varied. The protection against sex-based discrimination under CEDAW covers a wide range of areas where women have been traditionally treated disproportionately less compared to men. This includes the right to non-discrimination against women in the field of education,[43] healthcare,[44] employment,[45] administration of property and legal capacity to administer contracts,[46] and political participation, which includes the right to vote.[47] It also recognizes the need to eliminate discrimination faced by women in accessing their economic, social, and cultural rights.[48]

On the other hand, the scope of EU's legal framework on sex-based discrimination is limited only to the competences of the Union vis-à-vis the Member States.[49] Since the EU is primarily a political and economic union, its anti-discrimination laws and policies are generally hinged on economic and market-oriented equality.[50] As such, its secondary

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40 *Id.* ¶ 40 (emphasis supplied).

41 Defrenne v. Sabena, Case C-149/77, 1978 ECR I-1365, ¶ 26.

42 *Id.* ¶ 27.

43 CEDAW, *supra* note 29, art. 10.

44 *Id.* art. 12.

45 *Id.* art. 11, ¶ 1.

46 *Id.* art. 15, ¶ 2.

47 *Id.* art. 7.

48 *Id.* art. 13.

49 *See* TEU, *supra* note 6, arts. 4, ¶ 1 & 5 & TFEU, *supra* note 7, arts. 3-6.

50 Rikki Holtmaat & Christa Tobler, *CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination*, 12 MAASTRICHT J. EUR. & COMP. L. 399, 400 (2005) (citing MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION (2002) & SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION (Jo Shaw ed., 2000)).

legislation on sex equality applies only within the context of access to employment,[51] social security,[52] and goods and services.[53] The limited scope of EU anti-discrimination laws is further reinforced by CJEU's case law. In *Jackson and Cresswell v. Chief Adjudication Officer (1992)*,[54] the CJEU imposed a strict interpretation excluding social welfare benefits from the application of EU secondary legislation on the equal treatment of men and women.[55] It also ruled in the cases of *Hoffman v. Barmer Ersatzkasse*[56] and *Bilka v. Weber von Hartz*[57] that EU's secondary legislation on non-discrimination does not cover matters such as the organization of the family to divide the responsibility of parents in relation to a woman's pregnancy and maternity leave, and the restructuring of a company's occupational pension scheme to accommodate women workers who have family responsibilities.[58]

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51 Equality Framework Directive, *supra* note 11.

52 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), Directive 2006/54/EC, 2006 O.J. (L 204) 23 (July 5, 2006); Council Directive of 19 December 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, Council Directive 79/7/EEC, 1979 O.J. (L 6) 24 (Dec. 19, 1978); Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the Application of the Principle of Equal Treatment Between Men and Women Engaged in an Activity in a Self-Employed Capacity and Repealing Council Directive 86/613/EEC, Directive 2010/41/EU, 2010 O.J. (L 180) 1 (July 7, 2010); Council Directive 92/85 /EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or Are Breastfeeding (Tenth Individual Directive Within the Meaning of Article 16 (1) of Directive 89/391/EEC), Directive 92/85/EEC, 1992 O.J. (L 348) 1 (Oct. 19, 1992); & Council Directive 2010/18/EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and Repealing Directive 96/34/EC, Directive 2010/18/EU, 2010 O.J. (L 68) 13 (Mar. 8, 2010).

53 Gender Goods and Services Directive, *supra* note 14.

54 Sonia Jackson and Patricia Cresswell v. Chief Adjudication Officer, Joined Cases C-63/91 & C-64/91, 1992 ECR I-4737.

55 *Id.* ¶¶ 26-28.

56 Hofmann v. Barmer Ersatzkasse, Case C-184/83, 1984 ECR I-3047.

57 Bilka v. Weber von Hartz, C-170/84, 1986 ECR I-1607.

58 *Id.* ¶ 40 & *Hofmann*, 1984 ECR I-3047, at 3065.

III. Understanding Gender and Gender Stereotypes

Nowadays, many might have encountered the statement "gender is a social construct" in some form or another.[59] The CEDAW Committee defines "gender" as "socially constructed identities, attributes[,] and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights [favoring] men and disadvantaging women."[60]

The structural barriers that lead to the vast difference in the social positioning between men and women are influenced by "political, economic, cultural, social, religious, ideological[,] and environmental factors[.]"[61] In a sense, gender norms, roles, and stereotypes are mostly shaped by how culture, society, and the community treat women and men. Kate Millett perceives gender as "the sum total of the parents', the peers', and the culture's notions of what is appropriate to each gender by way of temperament, character, interests, status, worth, gesture, and expression."[62] For example, because of a woman's biological capability to give birth, society has traditionally limited her role to performing child rearing and caring duties. Thus, little girls are usually gifted with cooking sets or baby dolls. In some countries, it is still common for girls to be taught cooking and sewing lessons as part of their home economics classes, as if preparing her for such role in society.[63]

On the other hand, culture and patriarchal societies have painted an image that men are the breadwinners of the family and are usually associated with jobs that show strength, for example, soldiers, law enforcers, and fire fighters. In fact, the word "manpower" to refer to the

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59 *See generally* Julia Churchill Schoellkopf, Gender: An Infinite and Evolving Theory (A Paper Published by the Lesbian Gay Bisexual Transgender Queer Center), at 2, *available at* https://core.ac.uk/download/pdf/56692095.pdf (last accessed July 20, 2021).

60 United Nations Committee on the Elimination of Discrimination Against Women, *supra* note 33.

61 *Id.*

62 Mari Mikkola, Feminist Perspectives on Sex and Gender, *available at* https://plato.stanford.edu/entries/feminism-gender/#GenTer (last accessed July 20, 2021) [https://perma.cc/R6YJ-E2B6] (citing KATE MILLETT, SEXUAL POLITICS 31 (1971)).

63 *See* Paulette Delgado, Is Home Economics Still Relevant in the 21st Century?, *available at* https://observatory.tec.mx/edu-news/home-economics-21st-century (last accessed July 20, 2021) [https://perma.cc/6UMD-P98P].

workforce or human resources[64] is in fact gendered, which seemingly reflects the perception that it is only men who are eligible to do jobs that are physically demanding. Thus, young boys would be seen playing with toy guns, robots, and cars, but never a cooking or tea set. Boys are also taught carpentry or electronics in class. These kinds of gender roles and stereotypes create certain damaging expectations, such as wives being submissive to their husbands and women perpetually playing the role of damsels in distress, or that men cannot show emotions since "boys don't cry."[65]

Gender discrimination is thus a result of these societal and cultural norms, roles, and stereotypes. For example, since women have long been restricted to doing tasks within the home, the economic value of the work they do outside the home in the form of salaries are usually lower compared to that of men. Thus, the wide gender pay gap.[66] Also, opening up of professions that are traditionally dominated by men to women continues to be a work in progress.[67]

This can be seen in the case of *Johnston v. Chief Constable of the Royal Ulster Constabulary (RUC)*,[68] which involves unequal treatment of women officers in RUC. Due to the increasing number of police officers being assassinated in Northern Ireland at that time, the Chief Constable issued a new policy where male officers were allowed to carry firearms in the course of their regular duties.[69] However, he excluded women officers from this policy and further declared that they would not be receiving any training in the handling and use of firearms.[70] He later on decided that women should not be involved in operations which would require them to carry firearms.[71] Since there were already enough women in the RUC full-time reserve who perform duties assigned only to women officers,

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64 Merriam-Webster, Man Power, *available at* https://www.merriam-webster.com/dictionary/manpower (last accessed July 20, 2021) [https://perma.cc/MQ9P-Z5B5].

65 Gender Equality Law Center, *supra* note 1.

66 *See* Elise Gould, et al., What is the Gender Pay Gap and Is It Real?, *available a*t https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real (last accessed July 20, 2021) [https://perma.cc/D4N4-PZAS].

67 *See, e.g.*, Clarissa C. David, et al., Sustainable Development Goal 5: How does the Philippines Fare on Gender Equality? (A Discussion Paper Published Online by the Philippine Institute for Development Studies), at 9-11, *available at* https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1745.pdf (last accessed July 20, 2021).

68 Johnston v. Chief Constable of the Royal Ulster Constabulary, Case C-222/84, 1986 ECR I-1651.

69 *Id.* at 1665.

70 *Id.*

71 *Id.*

Johnston's contract was not renewed.[72] She raised this issue claiming that the non-renewal of her contract constituted discrimination.[73]

The Chief Constable's justification for such policy, which is fraught with gender stereotypes provides

> that if women were armed they might become a more frequent target for assassination and their fire-arms could fall into the hands of their assailants, that the public would not welcome the carrying of fire-arms by women, which would conflict too much with the ideal of an unarmed police force, and that armed policewomen would be less effective in police work in the social field with families and children in which the services of policewomen are particularly appreciated.[74]

Basically, the Chief Constable grounded his policy on the gender stereotype that women are weaker than men. Thus, the female police officers may be overpowered by assailants, which would contradict their mandate of serving and protecting the general public. It also banked on the stereotype that females are better suited for work that showcases their maternal instincts, hence, the idea that women officers work better in providing social services to families and children.

In response to these, the CJEU ruled that both male and female police officers are equally exposed to the same risks and dangers when performing their duties.[75] It concluded that a "total exclusion of women from such an occupational activity which, owing to a general risk not specific to women, is imposed for reasons of public safety is not one of the differences in treatment that Article 2 (3) of the directive allows out of a concern to protect women."[76]

IV. Expanding the Understanding of Sex and Gender: Sexual Orientation, Gender Identity, Expression, and Sexual Characteristics

The steady growth of activism centered on the protection and promotion of LGBTQIA+ rights has led to the call that "gender is fluid."[77] Advocates have been adamant in pushing for genuine inclusion of all

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72 *Id.* at 1666.

73 *Id.* at 1667.

74 *Johnston*, 1986 ECR I-1651, at 1686.

75 *Id.* at 1689.

76 *Id.*

77 *See generally* Megha Mohan, Video, *Gender is Fluid in My Culture*, BBC NEWS, July 29, 2020, *available at* https://www.bbc.com/news/av/world-53575603 (last accessed July 20, 2021) [https://perma.cc/J5FC-MMA8] (discussing gender fluidity in Indian, Native American, and Aboriginal cultures).

persons with diverse sexual orientation and gender identities into the implementation of anti-discrimination policies.[78] Hence, the discourse on sex and gender veered away from the traditional binary and heterosexual categories. Now, discussions are moving towards the understanding that "gender and sex are fluid and changeable, may be singular[,] or multiple[,] or resist definition altogether."[79]

In 2007, the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) were issued as a response to the mounting human rights violations committed by governmental and private actors against persons of diverse sexual orientations and gender identity with impunity.[80] These principles opened the door to several possibilities by (1) providing activists a tool for advocacy; (2) offering governments a simple guide to human rights compliance; and (3) presenting a new language that can be used to discuss issues that are relevant to the LGBTI people.[81] Finally, it laid down a working legal definition of the two distinct concepts of sexual orientation and gender identity.[82]

"Sexual orientation" refers to "each person's capacity for profound emotional, affectional[,] and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."[83] This could be understood by generally categorizing it into "(a) homosexual, describing same-gender attraction; (b) heterosexual, describing opposite-gender attraction; and (c) bisexual, describing both opposite and same-sex attraction."[84]

Meanwhile, "gender identity" is defined in the Yogyakarta Principles as

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78 *See, e.g.,* An Act Prohibiting Discrimination on the Basis of Sexual Orientation and Gender Identity or Expression (SOGIE) and Providing Penalties Therefor, S.B. No. 689, 17th Cong., 1st Reg. Sess. (2019).

79 Dreyfus, *supra* note 31, at 37.

80 Brown, *supra* note 21, at 828.

81 Park, *supra* note 22, at 239-40 (citing Sheila Quinn, An Activist's Guide to the Yogyakarta Principles, *available at* https://outrightinternational.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf (last accessed July 20, 2021) [https://perma.cc/7CB2-F543] & ETTELBRICK & ZERÁN, *supra* note 27, at 11).

82 Yogyakarta Principles, *supra* note 23.

83 *Id.* at 6.

84 International Commission of Jurists, Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners Guide No. 4, at 20, *available at* https://www.refworld.org/pdfid/4a783aed2.pdf (last accessed July 20, 2021) [https://perma.cc/K9J3-44UU].

> each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical[,] or other means) and other expressions of gender, including dress, speech[,] and mannerisms.[85]

It can be further classified to "transgender" and "transsexual." The former is described as "someone whose deeply held sense of gender is different from their physical characteristics at the time of birth."[86] The latter category on the other hand is "one who has undergone physical or hormonal alterations by surgery or therapy, in order to assume new physical gender characteristics."[87]

While the Yogyakarta Principles are considered international soft law,[88] these are hinged on the normative statement of State obligations under international human rights law.[89] Anchoring on the universality of human rights, the Principles declare that "all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights, [and] that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities."[90] Furthermore, it gains strength from the "absolute prohibition of discrimination in regard to the full enjoyment of all human rights, [including] civil, cultural, economic, political[,] and social" rights.[91] It also emphasized that the respect for sexual rights, sexual orientation and gender identity is integral to the full realization of equality between men and women.[92]

Developments in IHRL and jurisprudence coupled with the emerging understanding of how civil liberties of people are infringed on the basis of their sexual orientation, gender identity, gender expression, and sex characteristics have led to the adoption of the Yogyakarta Principles Plus 10 (YP+10)[93] in 2017. YP+10 defines "gender expression" as "each person's presentation of the person's gender through physical appearance [—] including dress, hairstyles, accessories, cosmetics [—] and mannerisms, speech, [behavioral] patterns, names[,] and personal references, and noting further that gender expression may or may not conform to a

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85 Yogyakarta Principles, *supra* note 23, at 6.

86 International Commission of Jurists, *supra* note 84, at 21.

87 *Id*.

88 Brown, *supra* note 21, at 828.

89 Park, *supra* note 22, at 241 (citing ETTELBRICK & ZERÁN, *supra* note 27).

90 Yogyakarta Principles, *supra* note 23, at 9.

91 *Id*.

92 *Id*.

93 YP+10, *supra* note 24.

person's gender identity."[94] It is further explained that "'gender expression' is included in the definition of gender identity in the Yogyakarta Principles and, as such, all references to gender identity should be understood to be inclusive of gender expression as a ground for protection."[95] Meanwhile, it defines "sex characteristics" as "each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty."[96]

The Yogyakarta Principles and YP+10 led to a more holistic appreciation of the complexities and diversity of the gender spectrum, which is now reflected in the terms sexual orientation, gender identity, gender expression, and sex characteristics (SOGIESC). Again, although not legally binding, these principles are highly persuasive, especially in the development of domestic policies. For example, Israel amended its Libel and Slander Law of 1997 to include as hate crimes violent acts proven to be motivated by sexual identity or expression of another.[97] Iceland has recently legislated its Law on Equal Treatment in the Workplace, prohibiting discrimination on the basis of sexual orientation, gender identity, gender expression, and sex characteristics.[98] Canada

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94 *Id.* at 6.

95 *Id.*

96 *Id.*

97 For example, Argentina's Gender Identity Law (Law No. 26.743) enacted in 2012 adopts the Yogyakarta Principles' definition of "gender identity" (Art. 2). Furthermore, it specifically provided for the right to gender identity, which includes the rights to:

(a) recognition of their gender identity;
(b) the free development of their person according to their gender identity; and
(c) be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there. (Art. 1)

In order to fully enjoy the right to gender identity under Argentina's Gender Identity Law, all persons may apply for the amendment of their legal documents to reflect their self-perceived gender identity and corresponding name (Art. 3). Most recently, Argentina passed a decree allowing for the National Identity Documents and passports of Argentinian citizens and non-national residents to include a third gender category, "X," which covers "non-binary, undetermined, unspecified, undefined, not informed, self-perceived, not recorded; or another meaning with which the person who does not feel included in the masculine/feminine binary could identify." *See* Cristian González Cabrera, Argentina Recognizes Non-Binary Identities, *available at* https://www.hrw.org/news/2021/07/22/argentina-recognizes-non-binary-identities (last accessed July 20, 2021) [https://perma.cc/HM3D-U7V7].

98 Micah Avry Guiao, *supra* note 97 (citing Ingibjorg Rosa, Gay Iceland, Laws Finally Guarantee Equal Employment Rights for Queer People!, *available at*

passed "An Act to Amend the Canadian Human Rights Act and the Criminal Code,"[99] which led to the inclusion of gender identity and gender expression as prohibited grounds for discrimination in its Human Rights Act. Furthermore, it penalizes any act motivated by bias, prejudice, or hate on the ground of sexual orientation, gender identity, or expression.[100]

It must be noted that neither sexual orientation nor gender identity is among the prohibited discrimination grounds explicitly identified in the IHRL core binding instruments. UN treaty bodies, however, have interpreted and declared its inclusion in the overall human rights protection framework in several instances. The landmark case of *Toonen v. Australia*[101] brought before the UN Human Rights Committee (UNHRC) in 1994 challenged the policy of the Australian government in criminalizing consensual sexual acts between males in the private sphere as a violation of the ICCPR. The Committee declared, among others, that "sexual orientation" is included in the ground of "sex," which Articles 2 (1) and 26 of the ICCPR expressly protect against discrimination.[102] In the case of *Young v. Australia*[103] decided in 2003, the UNHRC revisited its pronouncement in *Toonen*. It declared that the State violated Article 26 of the ICCPR when it deprived the applicant from enjoying the pension benefit of his deceased same-sex partner, which would not have been the case if it were a heterosexual couple.[104]

Meanwhile, the UN Committee on Economic, Social and Cultural Rights has issued various General Comments that pertain to sexual orientation, gender identity, and intersex status. In 2000, its General Comment No. 14 included sexual orientation as a specific ground upon which discrimination is prohibited.[105] This was reiterated in General

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https://gayiceland.is/2018/icelandic-equality-laws-include-queer-people-at-last (last accessed July 20, 2021) [https://perma.cc/PH2Z-93RE]).

99 An Act to Amend the Canadian Human Rights Act and the Criminal Code, S.C. 2017, c. 13, § 2 (2017) (Can.).

100 *Id.* § 4.

101 Human Rights Committee, *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

102 *Id.* ¶ 8.7.

103 Human Rights Committee, *Young v. Australia*, U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003).

104 *Id.* ¶ 11.

105 Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 18, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

Comment No. 15 on the Right to Water,[106] General Comment No. 18 on the Right to Work,[107] and in General Comment No. 19 on the Right to Social Security.[108] The ICESCR Committee cited the Yogyakarta Principles when it interpreted the term "other status" to include "sexual orientation" and "gender identity."[109] This is a significant step in veering away from the traditional view that sexual orientation is included in the category of sex, which was first pronounced by UNHRC in *Toonen*.[110] It explained in its General Comment No. 20 that

> '[o]ther status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual[,] or intersex often face serious human rights violations, such as harassment in schools or in the workplace.[111]

The CEDAW Committee in General Comment No. 28 also interpreted its non-discrimination clause under Article 2 to include sexual orientation and gender identity from the perspective of intersectionality.[112] Meanwhile, UN Treaty Bodies have referred to issues related to sexual orientation, gender identity, or sex characteristics in relation to the review of State reporting procedures required under its respective treaty.[113]

Moving on to the EU Anti-Discrimination Law framework, sexual orientation is likewise mentioned. Its prohibition on discrimination based

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[106] Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002): Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 13, U.N. Doc. E/C.12/2002/11 (2002).

[107] Committee on Economic, Social and Cultural Rights, *The Right To Work: General Comment No. 18 Adopted on 24 November 2005 (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 12 (b) (i), U.N. Doc. E/C.12/GC/18 (2005).

[108] Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security (Art. 9)*, ¶ 29, U.N. Doc. E/C.12/GC/19 (2007).

[109] Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 32, U.N. Doc. E/C.12/GC/20 (2009).

[110] Human Rights Committee, *supra* note 101.

[111] *Id.*

[112] United Nations Committee on the Elimination of Discrimination Against Women, *supra* note 33, ¶ 18.

[113] *See generally* Asia Pacific Forum of National Human Rights Institutions, *supra* note 25, at 94 (citing International Commission of Jurists, SOGI UN Database, *available at* https://www.icj.org/sogi-un-database (last accessed July 20, 2021) [https://perma.cc/54SB-63AT]).

on sexual orientation is expressed in Article 10 of the Treaty on the Functioning of the European Union,[114] while the Equality Framework Directive proscribes discrimination on the ground of sexual orientation, among others, with regard to employment and occupation.[115]

With regard to discrimination on the ground of gender identity, EU law partly includes it within the scope of sex, meaning equal treatment between men and women. In the case of *P v. S and Cornwall County Council*,[116] the applicant claims that she was discriminated on the ground of sex when she was dismissed from work after undergoing gender reassignment procedure.[117] The CJEU ruled that it was a violation of the Equality Framework Directive —

> Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated [unfavorably] by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.
>
> To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.[118]

While this case was celebrated for its progressive interpretation of the Equality Framework Directive, it can be observed that it follows the UNHRC in *Toonen* in the sense that it incorporated the concept of gender identity, specifically transsexuals, into the umbrella of "sex." However, this is probably because gender identity is not among the grounds identified in the Equality Framework Directive.[119] It also raises the question of whether transgenders can be included in this interpretation.

The CJEU seemed to have regressed, however, when it applied the concept of formal equality in the case of *Grant v. South-West Trains Ltd.*,[120] which was decided upon a mere two years after *P v. S and Cornwall County Council.* In this case, the railway company granted travel concessions to their worker's spouse or heterosexual partner with whom the worker has a meaningful relationship with.[121] The same travel allowance, however, was not available to Ms. Grant's same-sex partner, with whom she had a "meaningful relationship" with for more than two

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114 TFEU, *supra* note 7, art. 10.

115 Equality Framework Directive, *supra* note 11.

116 P v. S and Cornwall County Council, Case C-13/94, 1996 ECR I-2143.

117 *Id.* ¶ 5.

118 *Id.* ¶¶ 21 & 22.

119 *See* Equality Framework Directive, *supra* note 11.

120 Grant v. South-West Trains, Case C-249/96, 1998 ECR I-621.

121 *Id.* ¶ 5.

years.[122] The CJEU ruled that this did not constitute discrimination as prohibited by EU secondary legislation —

> The refusal to allow Ms[.] Grant the concessions is based on the fact that she does not satisfy the conditions prescribed in those regulations, more particularly on the fact that she does not live with a 'spouse' or a person of the opposite sex with whom she has had a 'meaningful' relationship for at least two years.
>
> That condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned. *Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex.*
>
> *Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.*[123]

The CJEU in the same case also managed to perpetuate the damaging stereotype that homosexual relationships are not considered "meaningful" nor "stable." It cited the European Commission on Human Rights, which considered that even with the progressive attitudes towards homosexuality, "stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the [European Convention of Human Rights]."[124] It added that the European Court of Human Rights has also interpreted that Article 12 of the Convention on the prohibition of discrimination applies only to "traditional marriages" between heterosexual couples.[125] Given these, the CJEU concluded that Community law at that time does not contemplate the situation where stable homosexual relationships are equivalent to traditional marriages or stable relationships outside marriage between a heterosexual couple.[126] A similar logic was applied by CJEU in the case of *D and Kingdom of Sweden v. Council of the European Union*.[127] It ruled that an official who is in a registered partnership with his or her partner of the same sex is not comparable to an official who is married.[128] Thus, deprivation of household allowances received by a married EU Council official to the applicant, who is in a registered partnership with his same-sex partner, does not constitute discrimination under Community law.[129]

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[122] *Id.* ¶¶ 7 & 8.

[123] *Id.* ¶¶ 26–28 (emphasis supplied).

[124] *Id.* ¶ 33.

[125] *Id.* ¶ 34.

[126] *Grant*, 1998 ECR I-621 ¶ 35.

[127] D and Sweden v. Council, Joined Cases C-122/99 P & C-125/99 P, 2001 ECR I-4319.

[128] *Id.* ¶ 51.

[129] *Id.* ¶ 52.

The CJEU had the opportunity to rule on the prohibition of discrimination on the ground of sexual orientation through the case of *Maruko v. Versorgungsanstalt der deutschen Bühnen (VddB).*[130] It involved the refusal by the VddB of Maruko's claim to a widower's pension, which is part of the compulsory occupational pension scheme, which his deceased life partner was a member of.[131] The Court ruled that the Equality Framework Directive must be interpreted as precluding national laws from preventing same-sex life partners from obtaining survivor's benefits available to married spouses, if (a) the surviving same-sex life partner was in a comparable situation to spouses with regard to the purpose and function of the benefit; and (b) if marriage was reserved for opposite sex couples only.[132] In another case, the CJEU ruled that there is direct discrimination on the ground of sexual orientation, which violates the Equality Framework Directive, if same-sex partners who had contracted a civil solidarity pact under French law would not be entitled to receive employment benefits that were available to married couples.[133] In effect, the *Maruko* case implicitly overruled the judgement of the CJEU in *Grant* and *D and Kingdom of Sweden.*

V. Conclusion

It is undeniable that social movements have made great strides in advocating for the promotion and protection of rights of persons with diverse sexual orientations and gender identities. The Yogyakarta Principles and YP+10 have been essential standard-setting tools that have allowed the mainstreaming of these groups into the discourse of rights protection. This has contributed to the deeper understanding that sex and gender go beyond the binary categories that are traditionally restricted to men and women, which has been the prevailing context at the inception of many of the IHRL and EU Law instruments.

As this Article has shown, the more nuanced appreciation of the fluidity of sex and gender has slowly shaped the evolution of the principles of equality and non-discrimination established in international human rights law and EU law. It is observed that the incorporation of the definitions laid down in the Yogyakarta Principles and YP+10 is more apparent in the IHRL framework. There is still a constant demand for a

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[130] Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, 2008 ECR I-1757.

[131] *Id.* ¶ 2.

[132] *Id.* ¶ 73.

[133] Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, Judgment, Case C-267/12, ECLI:EU:C:2013:823, ¶ 47 (CJEU Dec. 12, 2013).

legally binding human rights instrument for the protection of these diverse groups. The evolution of the EU anti-discrimination law has experienced major successes, especially in the realm of gender equality. The lack of definitions of sex, gender, sexual orientation, gender identity, gender expressions, and sex characteristics embodied in its legal order, however, has made it challenging for the CJEU to have a more uniform interpretation of these concepts. This has led to the flip-flopping of decisions that have excluded other persons of diverse sexual orientations or gender identity, which defeats the purpose of an anti-discrimination regime.

Seeing these developments in IHRL and EU law in giving life to the principles of equality and non-discrimination, it is concluded that there is so much more that can be done. Despite the mounting challenges in lobbying for laws at the domestic and international level for the protection of persons of diverse sexual orientations and gender identities, there must also be a recognition of the small and big wins that have been accomplished in this journey. After all, these are seeds of commitment that will grow into concrete and meaningful actions for the establishment of a more inclusive society, where every person's humanity and inherent dignity are respected.

THE CATASTROPHE OF CORRUPTION: EXAMINING THE INTERSECTIONS OF THE PHILIPPINES' DISASTER RESPONSE FRAMEWORK WITH CORRUPTION, VULNERABILITY, AND DEVELOPMENT

Patricia Anne D. Sta. Maria[*]

I. Introduction

What makes a disaster and why can it be deadlier to experience a typhoon in one country than in another? Why exactly does a community's level of development, standard of living, and quality of institutions matter for people's chances at surviving an earthquake? What kind of laws does a country need in light of the fact that it is caught in a cycle of natural calamities?

These are just some of the questions conventionally asked when discussing the issue of natural disasters in the Philippines. Described as "an undeveloped country where lives can disappear *en masse*, sometimes in preventable ways[,]"[1] the Philippines has long been engaged in a struggle to produce effective disaster relief systems. Its first attempts at disaster relief legislation were marred by a short-sightedness that treated disasters as inevitable and established a purely reactive framework for disaster response. These proved ineffective against the extreme weather events which regularly visited the Philippines, and seemed to be getting stronger as years went by.[2]

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1 Chico Harlan, *In the Philippines, Natural Disasters are Common; Ways to Reduce Their Impact Aren't*, WASH. POST, Nov. 16, 2013, *available at* https://www.washingtonpost.com/world/asia_pacific/in-the-philippines-natural-disasters-are-common-ways-to-reduce-impact-arent/2013/11/16/c0d77e24-4ecd-11e3-97f6-ed8e3053083b_story.html?utm_term=.c037ee4a680f (last accessed July 20, 2021) [https://perma.cc/7WDZ-XG5Q].

2 *See* The Climate Reality Project, How is Climate Change Affecting the Philippines?, *available at* https://www.climaterealityproject.org/blog/how-climate-change-affecting-philippines (last accessed July 20, 2021) [https://perma.cc/6XDT-5R7A].

In 2010, the Philippine Congress passed Republic Act No. 10121, otherwise known as the Philippine Disaster Risk Reduction and Management Act of 2010 (DRRM Act).[3] The DRRM Act signaled a shift in the government's disaster response philosophy. From being limited to immediate relief, the DRRM Act sought to add resilience building and risk reduction to its mandate.[4] This was in accordance with the Hyogo Framework for Action, an instrument adopted by members of the United Nations (UN) designed to help countries reduce losses from natural disasters by 2015.[5] The DRRM Act also introduced the concept of vulnerability to natural disasters and aimed to broaden what it considered when assessing the same. Despite the promise of the law, however, extreme weather events such as typhoon Haiyan have shown that there are still significant deficiencies in the government's disaster relief system, and that it has yet to fully internalize the more progressive positions embodied by the DRRM Act.

This Article examines those deficiencies, but also asks another question. Given both the realities of disaster relief and the new perspectives espoused by the DRRM Act, how does corruption within the government affect both the effectiveness of the disaster relief system as well as the country's vulnerability to natural disasters? While often, the focus has been on how corruption debilitates relief operations in the immediate aftermath of a disaster, less focus has been directed towards how corruption creates situations of vulnerability to begin with. Considering the new and broader policy direction which the DRRM Act introduces however, it would be a mistake to insulate the study of corruption within one area of disaster relief only. This Article thus hopes to contribute to clarifying the effects of corruption on the impacts natural disasters can have in the Philippines by offering a broader take on the matter.

In addition, this Article discusses the question of how the country must account for corruption in order to shape a rule of law which establishes an effective regime for addressing natural disasters. Even as the UN calls

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[3] An Act Strengthening the Philippine Disaster Risk Reduction and Management System, Providing for the National Disaster Risk Reduction and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds Therefor and for Other Purposes [Philippine Disaster Risk Reduction and Management Act of 2010], Republic Act No. 10121 (2010).

[4] *Id.* § 2 (a).

[5] United Nations Office for Disaster Risk Reduction, Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, *available at* https://www.unisdr.org/files/1217_HFAbrochureEnglish.pdf (last accessed July 20, 2021) [https://perma.cc/NE5E-F2TQ].

the Philippines' risk-reduction laws as "among the best in the world[,]"[6] the thesis of this Article is that the current legal system still fails to create sustainable progress towards resilience partly because it fails to consider the wider impact which corruption can have on DRRM. One objective therefore is to make recommendations towards improving the DRRM framework through refining definitions and expanding the scope of laws considered pertinent for comprehensive disaster response.

II. A Shift in Perspective: Appreciating the Role of Vulnerability in the Context of Disaster Response

Extreme weather events are no longer one-time, or even rare, occurrences. The Philippines, for example, averages around 20 typhoons per year.[7] It has been ranked by the UN Office of the Coordination of Humanitarian Affairs as the world's third highest disaster risk country.[8] The frequency of natural hazards has led to a state of affairs where communities who may not have yet had the opportunity to fully recover from one catastrophe are in immediate danger of being affected by another one. But what determines the devastating impact of natural hazards, effectively turning them into disasters? What makes a place, or a populace, vulnerable to natural disasters?

A. The Two Sides of Vulnerability

As a concept within the disaster relief framework, vulnerability pertains to "the potential to be harmed by natural hazards."[9] It is a way of thinking about the impact a natural hazard brings to a specific area or population. In theory, an extreme weather event or a natural hazard only becomes a "disaster" when the community it affects is vulnerable, and an immense amount of damage is caused from which the community cannot

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6 Harlan, *supra* note 1.

7 Asian Disaster Reduction Center, Information on Disaster Risk Reduction of the Member Countries: Philippines, *available at* https://www.adrc.asia/nationinformation.php?NationCode=608&Lang=en (last accessed July 20, 2021) [https://perma.cc/M9X5-3WLH].

8 Dennis Mersereau, *Why So Many People Died from Haiyan and Past Southeast Asia typhoons*, WASH. POST, Nov. 12, 2013, *available at* https://www.washingtonpost.com/news/capital-weather-gang/wp/2013/11/11/inside-the-staggering-death-toll-from-haiyan-and-other-southeast-asia-typhoons/?utm_term=.18981a474344 (last accessed July 20, 2021) [https://perma.cc/X28V-K9BC].

9 Petra Tschakert, et al., Vulnerability to Natural Hazards, *available at* https://www.e-education.psu.edu/geog30/node/379 (last accessed July 20, 2021) [https://perma.cc/Y492-SMGW].

immediately recover. In contrast, resilience is the quality of communities who are able to withstand natural hazards, without the impact escalating to the level of a disaster.[10] Resilience is therefore the conceptual opposite of vulnerability.

People often see vulnerability as immediately and exclusively connected to the strength or intensity of an impending hazard. A more accurate discussion of vulnerability, however, recognizes two categories: the natural factors and the human factors.[11]

Natural factors include the kind of calamity that is forthcoming, its intensity and attributes inherent to the location and topography of a country. The Philippines, for example, is located along the typhoon-belt, or what is sometimes known as the pacific ring of fire — "a large Pacific Ocean region where many of Earth's volcanic eruptions and earthquakes occur."[12] This makes the country more likely than others to experience natural hazards. Natural factors, however, cannot by themselves account for the entire impact of extreme weather events. Similar catastrophic weather events could occur in two countries and each may still suffer considerably different levels of loss. Going back to the example of the Philippines, one researcher has opined that "[i]f cyclones of identical intensity were to strike Japan and the Philippines, the Philippines would have 17 times the death toll."[13]

Human factors are those considerations which affect vulnerability and are rooted in conditions of the communities which experience the natural hazard. These are human-controlled or -related attributes, systems, and structures, which can either mitigate or aggravate the impact of extreme weather events. Some common examples of human factors include wealth, education, and governance.[14]

1. Wealth

Describing the role wealth plays, one study states that

> [t]he poor are less able to afford housing and other infrastructure that can withstand extreme events. They are less able to purchase resources needed for

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[10] *See* United Nations Office for Disaster Risk Reduction, Resilience, *available at* https://www.preventionweb.net/disaster-risk/concepts/resilience (last accessed July 20, 2021) [https://perma.cc/XG2G-9NGR].

[11] Tschakert, et al., *supra* note 9.

[12] Jessie Wingard & Anne-Sophie Brändlin, Philippines: A Country Prone to Natural Disasters, *available at* https://www.dw.com/cda/en/philippines-a-country-prone-to-natural-disasters/a-17217404 (last accessed July 20, 2021) [https://perma.cc/G4BB-L29Y].

[13] Harlan, *supra* note 1.

[14] Tschakert, et al., *supra* note 9.

> disaster response and are less likely to have insurance policies that can contribute. They are also less likely to have access to medical care. Because of these and other factors, when disaster strikes, the poor are far more likely than the rich to be injured or killed.[15]

A report released in 2016 by the UN Office for Disaster Risk Reduction supports this argument. The report, entitled "Poverty & Death: Disaster Mortality 1996-2015[,]" found that of the 1.35 million people who died in 7,056 disaster events which occurred in that time span, 90% of those deaths occurred in low and middle-income countries.[16] The report also noted that while some of the most deadly disasters have happened in high-income countries such as France and Japan, no high-income countries appear in the top 10 list of those which have suffered the highest cumulative losses of life.[17] Other studies have likewise come to similar conclusions, including one which noted that having a "strong financial sector [has] a negative effect on the number of people killed by natural disasters."[18]

2. Education

Education affects the extent of a natural disaster's adverse impacts on multiple levels. "When populations are literate, then written messages can be used to spread word about hazards in general or about specific disasters. ... When populations include professionals trained in hazards, then these people can help the populations with their hazards preparations and responses."[19] Additionally, the Hyogo Framework for Action recognizes education as means for building "a culture of safety and resilience at all levels."[20] The Framework identifies "[i]ncluding disaster risk reduction subject matter in formal, non-formal, and informal education"[21] as crucial to mitigate the harmful impacts of natural disasters.

In relation to a person's ability to remove themselves from dangerous areas, levels of education also often imply how able a person is to obtain

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15 *Id.*

16 United Nations Office for Disaster Risk Reduction, #IDDR2016: Ban Ki-moon Says New Disaster Mortality Report a "Damning Indictment of Inequality," *available at* https://www.undrr.org/news/iddr2016-ban-ki-moon-says-new-disaster-mortality-report-damning-indictment-inequality (last accessed July 20, 2021) [https://perma.cc/25GL-P2JS].

17 *Id.*

18 Derek Kellenberg & A. Mushfiq Mobarak, *The Economics of Natural Disasters*, 3 ANN. REV. RESOURCE ECON. 297, 305 (2011).

19 Tschakert, et al., *supra* note 9.

20 United Nations Office for Disaster Risk Reduction, *supra* note 5, at 3.

21 *Id.*

employment and a living wage. A person with sufficient education is therefore less likely to return to a high-risk area because they are unable to find employment in relocation sites. They are also more likely to have insurance or other financial resources to better recover from the loss of property due to natural disasters. A study done by Elizabeth Frankenberg, et al., on the effects of levels of education to post-disaster recovery found that those with higher education fared better in the long term.[22] Thus —

> [T]he evidence suggests that the better educated were more effective at adjusting to the changed reality of their lives relative to those with less education. In part, this likely reflects the resources they had before the tsunami as well as their experiences in the months after the tsunami, when they were able to afford to move to private homes rather than live in camps ... the better educated were more able to mitigate declines in consumption levels relative to the cuts in spending made by those with less education. Finally, [five] years after the tsunami, the better educated were in better psychosocial health than those with less education, indicating a more rapid recovery.
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> ...
>
> [T]he protective effects of education are likely a reflection of greater accumulated financial resources and possibly social resources available to the better educated in times of need. It is also possible that those who have invested more in education make better choices in times of adversity, are more entrepreneurial, and are more effective at taking on new challenges.[23]

3. Governance

The term "governance" encompasses a number of things which affect a society's vulnerability to natural disasters. Most directly, it covers the system of disaster response and management a country implements in order to address the effects of natural calamities as and after they occur. In the Philippines, this is the DRRM Act. This law mandates the creation of a National Disaster Risk Reduction and Management Plan (NDRRMP) to build resilience and institutionalize methods for addressing disasters, including those brought about by projected climate risks.[24] How well this law is both structured and carried out matters greatly towards how much loss is avoided or at least mitigated by the Philippines when natural calamities strike. As will be discussed in the subsequent section, "there is a growing political consensus that the [National Disaster Risk Reduction and Management Council (NDRRMC), the government body primarily

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[22] Elizabeth Frankenberg, et al., Education, Vulnerability, and Resilience after a Natural Disaster, at 15, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4144011/pdf/nihms501456.pdf (last accessed July 18, 2021) [https://perma.cc/44KF-KR8D].

[23] *Id*. at 15-16.

[24] Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (z).

tasked to implement the NDRRMP], is ineffective"[25] for a number of reasons.

Governance can also cover regulations and legal regimes which cover social security, labor standards, and environmental protection, to name a few. These other aspects of governance are important because, as has already been hinted at and as will be expounded on, vulnerability is a multi-dimensional condition. It necessitates scrutiny of a community's situation beyond the time proximate to the onset of a natural disaster. When studying vulnerability therefore, the laws which govern the day-to-day life of a community are just as important as those which govern crisis situations.

Finally, speaking of governance also implies questions about its quality. Whatever regime is set up on paper must be enforced well and must be free from the debilitating effects of corruption. One scholar has noted that studies that address the damage caused by natural disasters have found that low-quality governance, characterized by corruption and income inequalities, increases the resultant death rates.[26] Some have even suggested that as between the natural disaster itself and the failures of governance which follow in the aftermath, it is the latter which truly harms communities.[27] Evaluating governance as a factor affecting vulnerability therefore implies not only a review of the laws as they appear on paper, but the manner in which they are carried out.

Both natural and human factors are necessary for a complete understanding of vulnerability, but what role does corruption play in this discourse?

B. Corruption as the Threat within Natural Disasters

Part of the theory of this Article is that corruption aggravates the impact of natural hazards, contributing to their becoming natural disasters. This is because corruption directly increases the vulnerability

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[25] Leo Lin, *Preparing for Disaster in the Philippines*, THE DIPLOMAT, Nov. 22, 2017, *available at* https://thediplomat.com/2017/11/preparing-for-disaster-in-the-philippines (last accessed July 20, 2021) [https://perma.cc/Q7PA-73DS].

[26] Eiji Yamamura, *Impact of Natural Disaster on Public Sector Corruption*, 161 PUB. CHOICE 385, 386 (2014) (citing Nejat Anbarci, et al., *Traffic Fatalities and Public Sector Corruption*, 59 KYKLOS 327, 327-344 (2006); Matthew E. Kahn, *The Death Toll from Natural Disasters: The Role of Income, Geography, and Institutions*, 87 REV. ECON. & STATISTICS 271, 271-84 (2005); & Monica Escaleras, et al., *Public Sector Corruption and Major Earthquakes: A Potentially Deadly Interaction*, 132 PUB. CHOICE 209, 209 (2007)).

[27] Makoi Popioco, Corruption in Disaster Recovery: Disturbing Tales from the Philippines and Haiti, *available at* http://the-ipf.com/2015/11/27/corruption-in-ines-and-haiti (last accessed July 20, 2021) [https://perma.cc/TN35-VUV4].

of a community. Corruption does this by hampering key components of resilience-building, thereby creating or maintaining the vulnerable condition of a community.

1. What is Corruption?

R.A. No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act,[28] does not give an exact definition of corruption. It provides, however, a list of corrupt practices of public officers, which covers a wide range of actions following a common pattern: public officials abusing their position for private gain. This corresponds to most definitions of corruption in the literature. Notably, there is Samuel Huntington's description of corruption as "[behavior] of public officials which deviates from accepted norms in order to serve private ends."[29]

In Huntington's definition, three elements are highlighted. First, corruption is an act of someone in public office or power. Second, Huntington notes that there are accepted norms which are deviated from when talking about corruption. Finally, Huntington's definition points out that the goal of corruption is to serve private ends. The deviation which someone in power engages in leads to personal profit. Notably, the profit need not be that of the person in power.

It is important to remember therefore that corruption, as used in this Article, and also as reflected in the Philippines' legal system, involves not only wrongdoing, but wrongdoing made possible by a person's access to public resources or occupation of a public position.

2. Corruption and Development

A country's level of development figures significantly in how vulnerable or resilient it is to natural hazards. In an article by Ilan Noy and Rio Yonson, it was found that "[t]here is a general consensus in [ ] cross-country studies that low-income countries are more vulnerable and less resilient than countries with higher levels of development."[30] One study which focuses on China for example, has shown that regions where specifically economic development was higher displayed lower fatalities than less developed regions in the face of natural disasters.[31] This is why

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[28] Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960) (as amended).

[29] ROBIN THEOBALD, CORRUPTION, DEVELOPMENT, AND UNDERDEVELOPMENT 2 (1990) (citing SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 59 (1968)).

[30] Ilan Noy & Rio Yonson, *Economic Vulnerability and Resilience to Natural Hazards: A Survey of Conceptual Measurements*, 10 SUSTAINABILITY 2850, 2862 (2018).

[31] *See generally* Jidong Wu, et al., *Economic Development and Declining Vulnerability to Climate-Related Disasters in China*, 13 ENVTL. RES. LETTERS 1, 4 (2018).

civil society organizations in the Philippines, such as the Citizens' Disaster Response Center, push for disaster management policies which aid development.[32]

Development is a big word and studies that use this term may be researching different things. To structure the discussion in this Section, the Author thus turns to some common indicators of development which the literature has identified as relevant to vulnerability to disaster and analyzes in each case how corruption affects them.

3. Education

As discussed in earlier parts of this Article, an individual's level of education significantly impacts how vulnerable they are to a natural disaster. Not only does education allow one to better understand the nature of a coming natural hazard and assess the risk, but sufficient education will also make coping and recovery more probable. As found by some scholars —

> General level of education is also an important determinant for one's survival and longer-term well[-]being following disaster events. Education affects well[-]being outcomes through channels, such as its impact on access to information and resources, as well as social capital and earning potential. In addition, education is a primary means through which one obtains essential cognitive skills and scientific knowledge to inform one's interpretation of surrounding environments, including risk perceptions and disaster preparedness knowledge.[33]

Education also plays a significant role in determining whether a person will be able to obtain decent employment, which in itself is a factor that affects vulnerability to natural hazards and resilience. Based on the Philippine experience, many people who are evacuated from at-risk areas

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[32] Citizens' Disaster Response Center, Vision, *available at* https://www.cdrc-phil.com/vision (last accessed July 20, 2021) [https://perma.cc/922H-SSXH].

[33] Junko Mochizuki & Asjad Naqvi, *Reflecting Disaster Risk in Development Indicators*, 11 SUSTAINABILITY 996, 997 (2019) (citing Erich Striessnig, et al., *Effects of Educational Attainment on Climate Risk Vulnerability*, 18 ECOLOGY & SOC'Y. 1, 1 (2013); Wolfgang Lutz, et al*., Universal Education is Key to Enhanced Climate Adaptation*, 346 SCI. MAG. 1061, 1062 (2014); Roman Hoffman & Raya Muttarak, A Tale of Disaster Experience in Two Countries: Does Education Promote Disaster Preparedness in the Philippines and Thailand, at 3, *available at* econstor.eu/bitstream/10419/126222/1/840091230.pdf (last accessed July 20, 2021) [https://perma.cc/7Q4M-D3H2]; Allison Anderson, Combating Climate Change through Quality Education, *available at* https://www.brookings.edu/research/combating-climate-change-through-quality-education (last accessed July 20, 2021) [https://perma.cc/76YR-2UDH]; & Raya Muttarak & Wolfgang Lutz, *Is Education a Key to Reducing Vulnerability to Natural Disasters and hence Unavoidable Climate Change?*, 19 ECOLOGY & SOC'Y. 1, 1 (2014)).

often move back because it is too difficult to find employment in relocation sites.[34] A lack of education limits options for people who are forced to place themselves in harm's way in order to work.

It is important therefore that communities have access to sufficient resources to educate themselves, and that the State prioritizes the quality of education, especially for sectors such as children, the poor, or those who live in remote areas who are particularly at risk during extreme weather events. Unfortunately, the state of public education in the Philippines leaves much to be desired. Part of this is attributable to the rampant corruption within the Department of Education (DepEd).

DepEd has long been accused of being "one of the most corrupt national agencies in the Philippines[.]"[35] One study found that political connections in the form of recommendations from local and national politicians were considered more than actual merit in the appointment and promotion of teachers. This has resulted into the appointment of unqualified individuals and obstruction of efforts to strengthen professionalism within the public teaching profession.[36]

Another area of corruption, within the education sector, pointed out by no less than a former undersecretary, is in the bidding for and distribution of text books, with bribes from private publishers reaching up to ₱50 million.[37] One account, this time from a senior DepEd Official, noted that a member of Congress called him with explicit instructions to choose a local publisher over several international publishers with more competitive rates, because the Congressperson would stand to personally profit from the contract.[38]

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[34] Ralph S. Brower, et al., *Evolving and Implementing a New Disaster Management Paradigm: The Case of the Philippines*, *in* DISASTER AND DEVELOPMENT: EXAMINING GLOBAL ISSUES AND CASES 296 (Naim Kapucu & Kuotsai Tom Liou eds., 2014).

[35] Vicente Chua Reyes, *Systemic Corruption and the Programme on Basic Education in the Philippine Department of Education*, 25 J. DEV. SOCIETIES 481, 482 (2010) (citing LEDIVINA V. CARIÑO, GABRIELLE R. IGLESIAS, & MA. FE V. MENDOZA, INITIATIVES TAKEN AGAINST CORRUPTION: THE PHILIPPINE CASE (1998); & United Nations Development Programme of the Management Development and Governance Division, Programme for Accountability and Transparency BI-ANNUAL REPORT 1998 *available at* http://www.undp-aciac.org/publications/other/undp/ta/bian98e.pdf (last accessed July 20, 2021).

[36] *Id*. at 482-83 (citing YVONNE T. CHUA, ROBBED: AN INVESTIGATION OF CORRUPTION IN PHILIPPINE EDUCATION (1999)).

[37] Isagani Cruz, *Corruption at DepEd*, PHIL. STAR, May 8, 2008, *available at* https://www.philstar.com/opinion/2008/05/08/60851/corruption-deped (last accessed July 20, 2021) [https://perma.cc/G7LD-DUGD].

[38] Chua Reyes, *supra* note 35, at 496.

Corruption in the DepEd has led to an acute shortage of textbooks and infrastructure, as well as the hiring of unqualified personnel, all of which compromise the millions of students who depend on public education. As one study has put it —

> Starting with hiring and training of teachers and provision of adequate classrooms and distribution of essential textbooks ... DepEd has been typified by rampant corruption and concomitantly a severe implementation shortage. Corruption at DepEd has been described as 'large-scale' and with 'tragic results' that have not only 'led to hundreds of millions of pesos of public funds going to pockets of corrupt individuals, but also to a critical shortage of textbooks and school desks[.]'[39]

The quality of public education in the Philippines remains to be severely compromised,[40] in no small part due to corruption. Considering therefore the role education plays in contributing to either the vulnerability or resilience of a community to natural disasters, a reasonable connection can be made between the corruption which debilitates the Department of Education and the vulnerability which is engendered by the lack of quality education in the Philippines.

4. Income Inequality and Resource Availability

In the earlier parts of this Article, there was some discussion about how those living in poverty were more vulnerable to the impacts of natural hazards. While the same extreme weather event can hit people of different income levels, those with more material resources have a better chance of recovering sooner. Those living above the poverty line are also more likely to be located in safer areas or experiencing better living conditions.[41]

While some studies have shown that there is no direct link between poverty and corruption — "[c]orruption, by itself, does not produce poverty"[42] — what these studies have found is that "corruption has direct consequences on economic ... factors, intermediaries that in turn produce

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39 Vicente Chua Reyes, *The Philippine Department of Education: Challenges of Policy Implementation Amidst Corruption*, 30 ASIA PAC. J. EDUC. 381, 385 (2010) (citing CHUA, *supra* note 36, at 52).

40 *See* Manila Bulletin, Most Textbooks in Public Schools Obsolete — Teachers, *available at* https://ph.news.yahoo.com/most-textbooks-public-schools-obsolete-teachers-171053079.html (last accessed July 20, 2021) [https://perma.cc/8JPE-TT8U].

41 Mochizuki & Naqvi, *supra* note 33, at 998.

42 Eric Chetwynd, et al., Corruption and Poverty: A Review of Related Literature (A Final Report Submitted to USAID), at 6, *available at* https://pdf.usaid.gov/pdf_docs/PNACW645.pdf (last accessed July 20, 2021) [https://perma.cc/KSW7-QA77].

poverty."[43] Some of these factors include income inequality and employment. In a study done by the International Monetary Fund (IMF), researchers found that "[t]he magnitude of the effect of corruption on income inequality is considerable."[44] Another study noted that "[e]vidence from diagnostic surveys of corruption in several countries suggests that corruption aggravates income inequality because lower income households pay a higher proportion of their income in bribes."[45] Corruption also exacerbates income inequality when it diverts state resources from social services targeted at those most in need. As researchers from the IMF found, "[t]he use of government-funded programs to extend benefits to relatively wealthy population groups, or the syphoning of funds from poverty-alleviation programs by well-connected individuals, will diminish the impact of social programs on income distribution and poverty."[46]

A concrete example of how corruption can aggravate income inequality is when it affects social security programs, which are designed to help the public shoulder the cost of basic needs such as medical care, give access to resources such as housing or calamity loans in times of acute need, and otherwise serve as a form of social safety net. When people cannot access these resources, they are forced to shoulder more of the financial burden themselves, sometimes taking on unconscionable loans and pushing themselves further into poverty. In the Philippines unfortunately, some of its major social security agencies — the Social Security System, the Philippine Health Insurance Corporation, and the Home Development Fund, commonly known as Pag-IBIG, have all been marred by corruption scandals, hampering many of their crucial services.[47]

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[43] *Id.*

[44] Sanjeev Gupta, et al., Does Corruption Affect Income Inequality and Poverty?, at 14, *available at* https://www.imf.org/external/pubs/ft/wp/wp9876.pdf (last accessed July 20, 2021) [https://perma.cc/Y6WE-TZ7G]. *See also* Chetwynd, et al., *supra* note 42, at 9-10.

[45] Chetwynd, et al., *supra* note 42, at 10.

[46] Gupta, et al., *supra* note 44, at 7.

[47] *See, e.g.*, Lian Buan, *Pag-IBIG Officials Liable for Alleged P33-M Loan Scam – COA*, RAPPLER, Jan. 18, 2017, *available at* https://www.rappler.com/nation/158792-pagibig-officials-liable-loan-scam-coa (last accessed July 20, 2021) [https://perma.cc/UT69-MVWU]; Camille Elemia, *Garin, Padilla Face Graft Complaint Over P10.6-B PhilHealth Seniors' Fund*, RAPPLER, May 29, 2018, *available at* https://www.rappler.com/nation/203623-janette-garin-alex-padilla-graft-complaint-philhealth-fund (last accessed July 20, 2021) [https://perma.cc/EB5U-ZN44]; & Julius N. Leonen, *21 SSS Execs Face P145-M Graft Complaint*, PHIL. DAILY INQ., Jan. 25, 2018, *available at* https://newsinfo.inquirer.net/963465/21-sss-execs-face-p145-m-graft-complaint (last accessed July 20, 2021) [https://perma.cc/5257-MJ9R].

Under the general category of "wealth and poverty" therefore, corruption affects vulnerability on multiple levels. For individuals and communities, corruption hampers social safety nets which cuts off their access to resources. Corruption also aggravates income inequality and pushes people further into poverty. For the State, corruption robs it of public funds which could be used both towards building long-term resilience and addressing acute needs brought about by natural disasters.

5. Health

Along with education and income, health is often used as a proxy for standards of living,[48] "and [is] in turn affected by disaster risk and damages."[49] Consequently, health has frequently been identified as a factor which affects vulnerability to disaster.[50] Thus —

> Access to health facilities and the availability of health experts are important factors affecting immediate disaster survival and longer-term recovery outcomes. ... Commonly observed health impacts of disasters include enteric diseases, respiratory illnesses, mental health issues, and vector borne diseases such as malaria. Higher levels of vaccination, the safe disposal of dead bodies, better nutrition, and good hygiene practices can reduce the risk of such follow-on impacts.[51]

While providing medical assistance in the immediate aftermath of a disaster is important, an equal if not greater amount of attention must also be given to improving the overall health of communities and the regular accessibility of public health services. Communities with sufficient health infrastructure, access to regular and quality medical care, and good levels of nutrition and vaccination are less likely to succumb to risky conditions brought about by the displacement caused by extreme weather events. This is why those in the public health sector are

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48 Mochizuki & Naqvi, *supra* note 33 at 997.

49 *Id.*

50 *Id.*

51 *Id.* at 997-98. (citing United Nations Office for Disaster Risk Reduction, Disaster Risk Management for Health: Safe Hospitals, Prepared for Emergencies and Disasters, *available at* https://www.undrr.org/publication/disaster-risk-management-health-safe-hospitals-prepared-emergencies-and-disasters (last accessed July 20, 2021) [https://perma.cc/V2VA-WARW]; John T. Watson, et al., *Epidemics after Natural Disasters*, 13 EMERGING INFECTIOUS DISEASES, 1, 1-5 (2007); Junko Mochizuki, et al., *Revisiting the 'Disaster and Development' Debate – Toward a Broader Understanding of Macroeconomic Risk and Resilience*, 3 CLIMATE RISK MGMT. 39, 39-54 (2014); & Miguel Antonio Salazar, et al., *Post-Disaster Health Impact of Natural Hazards in the Philippines in 2013*, 9 GLOBAL HEALTH ACTION 1 (2016)).

advocating for more sustainable and less reactive health services in relation to disaster management.[52]

In the Philippines, the quest to build healthier communities has been frustrated by rampant corruption. "In 2005, a Philippine Center for Investigative Journalism report estimated that up to 70[%] of local health funds are lost to corruption; there is little reason to suppose that much has changed since."[53] In a study conducted on 80 municipalities "to assess the impact of corruption in local governments on health outcomes,"[54] researchers found that "corruption [undermined] the delivery of health services in the Philippines."[55]

The corruption in the public health sector discourages people from seeking treatment or even appearing for regular check-ups. Those who do go to public health clinics find it difficult to access quality treatment. Additionally, people are also forced to shoulder the burden of corruption in health when scarcity in medicines force them to either ration their supply or buy from private sources. These and other health-related factors go into compromising the health of persons, increasing their vulnerability to the risks which natural hazards bring with them.

6. Governance

While health, education, and income/resource availability can all be connected to governance in some way, the Author carves out this section specifically for the problems corruption causes in the enforcement of regulations or the implementation of projects related to land and infrastructure. This includes enforcement of building regulations and protection of forest lands. The Author identifies these aspects of governance because they are highly illustrative of the negative effects corruption can have on the impacts of extreme weather events.

In a risk analysis study undertaken by Verisk Maplecroft, countries which were found to be in the "extreme risk" category of its Corruption Risk Index also scored poorly on its Infrastructure Fragility Index.[56] This

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[52] *See* John R. Lindsay, *The Determinants of Disaster Vulnerability: Achieving Sustainable Mitigation through Population Health*, 28 NATURAL HAZARDS 291, 291 (2003).

[53] Gideon Lasco, *Corruption in the Health Sector*, PHIL. DAILY INQ., Oct. 25, 2018, *available at* https://opinion.inquirer.net/116986/corruption-in-the-health-sector (last accessed July 20, 2021) [https://perma.cc/GX8N-BYH5].

[54] Omar Azfar & Tugrul Gurgur, *Does Corruption Affect Health Outcomes in the Philippines?*, 9 ECON. GOV. 197, 241 (2008).

[55] *Id.*

[56] Pia Ranada, *More Corruption in PH Means More Deaths from Disasters – Study*, RAPPLER, Mar. 10, 2015, *available at* https://www.rappler.com/nation/corruption-casualties-natural-disasters (last accessed July 20, 2021) [https://perma.cc/Y93A-

is because corruption allows government officials to ignore or subvert building codes or required standards on the quality of infrastructure. In turn, according to the UN Office of Disaster Risk Reduction, "[p]oor building standards and fragile infrastructure that result from such practices lead to higher number of casualties [during disasters]."[57] One observer noted for example that real estate developers were able to use political connections to subvert limitations on land use, building "housing on dry river beds and landslide prone areas."[58]

In the aftermath of Typhoon Haiyan, a representative from one of the international organizations engaged in aid delivery noted that "[p]etty corruption in urban areas means that building inspections don't happen and building codes are not enforced."[59] This consequently resulted in the destruction of many residential structures within Tacloban, the province most affected by Haiyan.

While corruption can lead to sub-standard infrastructure, there are other instances where it results in a lack of infrastructure of any kind. Commenting on the aftermath of Typhoon Haiyan, one observer noted that "the horrific quality of infrastructure in the Philippines ... certainly has made these storms deadlier. Because the Philippines is one of the most unequal and corrupt countries in Asia, funds for housing projects, roads, and seawalls and other public monies routinely vanish into the pockets of political dynasties[.]"[60] The lack of roads was highly noticeable in the aftermath of Haiyan, making it difficult for people to evacuate.[61]

Corruption can also affect the implementation of environmental regulations, particularly those related to deforestation, logging, and mining. The Philippine government's corruption has allowed mining companies to evade government regulations, which has resulted in large-

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VGEH]. Notably, the Verisk Maplecroft study classified the Philippines as one of 10 countries under the extreme risk category. *Id.*

57 *Id.*

58 Raissa Robles, Changing Attitude, *available at* https://www.dandc.eu/en/article/philippines-paradigm-shift-regard-disaster-preparedness (last accessed July 20, 2021) [https://perma.cc/NSC2-736T].

59 Associated Press, *Philippine Corruption Magnifies Effects of Typhoon*, SPOKESMAN-REVIEW, Nov. 18, 2013, *available at* https://www.spokesman.com/stories/2013/nov/18/philippine-corruption-magnifies-effects-typhoon (last accessed July 20, 2021) [https://perma.cc/A5EZ-8JCZ].

60 Joshua Kurlantzick, Typhoon Haiyan, *available at* https://www.cfr.org/blog/typhoon-haiyan (last accessed July 20, 2021) [https://perma.cc/S67U-ZLED].

61 Associated Press, *supra* note 59.

scale deforestation, flattened mountaintops, and water pollution.[62] Illegal loggers have also contributed to large scale deforestation, owing to "long-term forestry corruption."[63] One broader study which has looked at different countries, including the Philippines, found a positive correlation between corruption and deforestation.[64] The study found that corruption explained deforestation more than population growth, and emphasized that any analysis of deforestation must take into account the adverse effects of corruption.[65]

Forests provide natural protection from flash floods and landslides. When they are decimated due to a combination of corrupt practices and bad policies, surrounding communities suffer the consequences through an increase of their vulnerability to natural disasters.[66]

III. Disaster Response in the Philippines: An Examination

There is no question that accounting for both human and natural factors of vulnerability is integral to an effective disaster response system. Understanding vulnerability allows for both building resilience pre-disaster and developing more appropriate methods of delivering post-disaster aid. A truly effective disaster response system may even avert the transformation of a natural hazard to natural disaster completely. The following Section provides a look into the formulation and implementation of the Philippines' disaster response regime, with the above criteria in mind.

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62 GAN, The Philippines Corruption Report, *available at* https://www.ganintegrity.com/portal/country-profiles/the-philippines (last accessed July 20, 2021) [https://perma.cc/55GW-VLM3].

63 Debra J. Callister, Corrupt and Illegal Activities in the Forestry Sector: Current Understandings, and Implications for World Bank Forestry Policy, at 23, *available at* http://www.lfpdc.lsu.edu/UneceFaoIufro/responsible_trade/documents/2003-2006/rt03_043.pdf (last accessed July 20, 2021) [https://perma.cc/ZC73-98P2]. *See also* Jan van der Ploeg, et al., *Illegal Logging in the Northern Sierra Madre Natural Park the Philippines*, 9 CONSERVATION & SOC'Y. 202, 203-09 (2011).

64 Cuneyt Koyuncu & Rasim Yilmaz, *The Impact of Corruption on Deforestation: A Cross-Country Evidence*, 42 J. DEVELOPING AREAS 213, 220 (2009).

65 *Id.*

66 Zafar Iqbal, Deforestation and Mining Blamed for Philippines Disaster, *available at* https://www.eurasiareview.com/23122011-deforestation-and-mining-blamed-for-philippines-disaster (last accessed July 20, 2021) [https://perma.cc/GFB8-WULH].

A. Old and New Perspectives in Philippine Disaster Response

Before the DRRM Act was passed, the Philippines had Presidential Decree No. 1566 (P.D. No. 1566), entitled Strengthening the Philippine Disaster Control, Capability and Establishing the National Program on Community Disaster Preparedness.[67] P.D. No. 1566 established the National Disaster Coordinating Council (NDCC), composed of secretaries of 13 executive departments, among others.[68] The NDCC was tasked to be the president's advisory council regarding disaster preparedness and relief operations. Notably however, P.D. No. 1566 put the onus of disaster relief mainly on local governments, with the national government only acting as support for their operations. There is even a specific provision enjoining affected areas to utilize their own resources before requesting assistance from neighboring areas or higher authorities.[69]

P.D No. 1566 contained no definition of terms. Thus, what constitutes a disaster and what factors must be considered in preparing for it are not statutorily determinable. The law itself is largely empty, containing little by way of policy direction or specific standards for the preparedness plans local governments and agencies were expected to make. A reading of its provisions together would also reveal that P.D. No. 1566 considered disasters and their impacts unavoidable.[70] As a consequence, it established a highly reactive framework for disaster relief.[71]

The distinction Greg Bankoff and Dorothea Hilhorst draw in their studies on disaster management between seeing natural disasters as events or processes captures the state of P.D. No. 1566 well.[72] For P.D. No. 1566, disasters are events that happen to a population, and not a process in which authorities can intervene to prevent or mitigate

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67 Strengthening the Philippine Disaster Control, Capability and Establishing the National Program on Community Disaster Preparedness, Presidential Decree No. 1566 (1978). Prior to this, the Philippines had the Civil Defense Act of 1954 and related administrative regulations. This law, however, dealt with provision of protection and welfare during war or other national emergencies and did not specifically tackle natural disasters. An Act to Provide for the Civil Defense in Time of War and Other National Emergency, Creating a National Civil Defense Administration, and for Other Purposes [Civil Defense Act of 1954], Republic Act No. 1190 (1954).

68 Presidential Decree No. 1566, § 2.

69 *Id.* § 1 (b).

70 Environmental Science for Social Change, Inc., Shifting Paradigms in Philippine Disaster Response, *available at* http://essc.org.ph/content/archives/7151 (last accessed July 20, 2021).

71 *Id.*

72 Greg Bankoff & Dorothea Hilhorst, *The Politics of Risk in the Philippines: Comparing State and NGO Perceptions of Disaster Management*, 33 DISASTERS 686, 688 (2009).

damage.[73] Disaster relief was therefore focused on "morning-after" measures. "The idea was that little could be done to prevent disasters, so policymakers' job was to deliver relief fast after a disaster struck."[74] Not surprisingly, this conception of disasters seems to solely take into account natural factors when assessing the impact and not human factors.

P.D. No. 1566 was highly ineffective, failing to establish a working system of disaster relief. This was perhaps most evident in 2009, when tropical storm Ketsana (local name Ondoy) wrought havoc on a large part of Luzon, including Manila, the Philippines' capital. As the country sought to pick itself up from the aftermath of Ketsana, a great deal of scrutiny was directed at the government, and how it seemed ill-prepared for the effects of Ketsana, even as there were many signs to expect the devastation which happened in Metropolitan Manila[75] —

> [M]any in the country are pointing fingers at its politicians for failing to predict the scale of the disaster or lessen the damage it caused. Manila, they say, was always bound to face such catastrophe, and more should have been done to help its millions of residents prepare. A recently published study by the Economy and Environment Program for Southeast Asia (EEPSA), a research group based in Singapore, ranked metropolitan Manila as one of the provinces in Southeast Asia most vulnerable to flooding. The capital region is perched on a marshy isthmus that is crisscrossed with streams and rivers. An ever-growing population — Manila is now a sprawling mega-city of some 12 million people, larger still when factoring in the day-worker population — and the lack of infrastructure to accommodate it left swaths of the city exposed.[76]

Ketsana highlighted the need for the Philippines to develop more long-term solutions for the impacts of extreme weather events. It also pushed the country to rethink what it meant to address the problem of natural disasters. Thus, in 2010, the country passed the DRRM Act, with hopes that, with its expanded and more nuanced understanding of disaster relief, it would help the country progress towards more resilience against natural hazards and less vulnerability.

The title of the DRRM Act is the first indication of the law's change in perspective. The law emphasizes risk reduction, which "is about decreasing the vulnerabilities and boosting capacities of the communities concerned."[77] The UN Office for Disaster Risk Reduction's definition of risk reduction, which the DRRM Act adopts, is as follows —

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73 Environmental Science for Social Change, Inc., *supra* note 70.

74 Robles, *supra* note 58.

75 Ishaan Tharoor, *The Manila Floods: Why Wasn't the City Prepared?*, TIME, Sept. 29, 2009, *available at* http://content.time.com/time/world/article/0,8599,1926646, 00.html (last accessed July 20, 2021) [https://perma.cc/3K7B-DEZW].

76 *Id.*

77 Robles, *supra* note 58.

> Disaster risk reduction is the concept and practice of reducing disaster risks through systematic efforts to analy[z]e and reduce the causal factors of disasters. Reducing exposure to hazards, lessening vulnerability of people and property, wise management of land and the environment, and improving preparedness [and early warning] for adverse events are all examples of disaster risk reduction.[78]

In addition to risk reduction, the DRRM Act also highlights disaster management, which it defines as "the systematic process of using administrative directives, organizations, and operational skills and capacities to implement strategies, policies[,] and improved coping capacities in order to lessen the adverse impacts of hazards and the possibility of disaster."[79] The idea of disaster management corresponds with Bankoff and Hilhorst's concept of disasters as processes, not just events. As processes, the appropriate method of addressing them should likewise consist of measures at every phase. According to the Global Development Research Center, the disaster management cycle consists of four steps: mitigation, preparedness, response, and recovery.[80] Most of these concepts are likewise defined in the DRRM Act and made integral in the framework it establishes.[81]

The DRRM Act also defines vulnerability. Notably, it states that vulnerability "may arise from various physical, social, economic, and environmental factors."[82] Also recognized are groups who may be particularly vulnerable such as women, children, and ethnic minorities.[83] The DRRM Act's shift away from the viewpoints espoused by the old law is also reflected in the way it defines a disaster. According to Section 3 (h) of the law, a disaster is —

> [A] serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, *which exceeds the ability of the affected community or society to cope using its own resources.* Disasters are often described as a result of *the combination of: the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences*. Disaster impacts may include loss of life, injury, disease and other negative effects on human, physical, mental[,] and social well-being,

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78 United Nations Office for Disaster Risk Reduction, What is Disaster Risk Reduction?, *available at* https://eird.org/esp/acerca-eird/liderazgo/perfil/what-is-drr.html (last accessed July 20, 2021) [https://perma.cc/6RPN-29UG]. *See also* Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (n).

79 Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (o).

80 Corina Warfield, The Disaster Management Cycle, *available at* http://www.gdrc.org/uem/disasters/1-dm_cycle.html (last accessed July 20, 2021) [https://perma.cc/GNV5-BL59].

81 *See* Philippine Disaster Risk Reduction and Management Act of 2010, § 3.

82 Philippine Disaster Risk Reduction and Management Act of 2010, § 3 (nn).

83 *Id*. § 3 (oo).

> together with damage to property, destruction of assets, loss of services, social and economic disruption and environmental degradation.[84]

Two things are important to highlight in this definition. First, something being a disaster is conditioned on a weather event's impact exceeding a community's resources and capacity to cope. This subtly hints at the more proactive stance which the law is taking, given that it now considers disasters avoidable if certain conditions are met. Second, the law expressly recognizes disasters as products of "conditions of vulnerability[,]"[85] aside from just the bare exposure to hazards. This further displays the expanded stance the DRRM Act is taking on what determines the impact of natural disasters, and their relationship to the human factors in vulnerability.

The DRRM Act also establishes the Disaster Risk Reduction and Management Council (DRRMC) to replace the NDCC.[86] The DRRMC's membership has been expanded to reflect the new more holistic approach of the law. Aside from department secretaries, the DRRMC includes representatives from the climate change commission, social security system, civil society organizations, and the commission on women, among others.[87] The functions of the DRRMC are also better defined, compared to those previously listed in P.D. No. 1566, which mostly consisted of department secretaries organizing "disaster control groups" within their specific jurisdictions.

Some of the functions of the DRRMC which seem to be informed by the DRRM Act's emphasis on risk reduction and management rather than simply post-disaster relief delivery include "[developing] appropriate risk transfer mechanisms that shall guarantee social and economic protection and increase resiliency in the face of disaster;"[88] and "[formulating] a national institutional capability building program for disaster risk reduction and management to address the specific weaknesses of various government agencies and LGUs, based on the results of a biennial baseline assessment and studies."[89] The DRRM Act also calls for the creation of the National DRRM Framework and the National DRRM Plan. The NDRRM Framework "provides for comprehensive, all hazards, multi-sectoral, inter-agency and community-based approach to disaster risk reduction and management."[90] The NDRRM Plan meanwhile is a

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84 *Id.* § 3 (h) (emphases supplied).

85 *Id.*

86 *Id.* § 5.

87 *Id.*

88 Philippine Disaster Risk Reduction and Management Act of 2010, § 6 (f).

89 *Id.* § 6 (l).

90 *Id.* § 3 (y).

"document to be formulated and implemented by the Office of Civil Defense (OCD) that sets out goals and specific objectives for reducing disaster risks together with related actions to accomplish these objectives."[91]

The NDRRM Plan is further evidence of the new perspectives embodied in the DRRM Act. It notes that —

> [at] the heart of disaster risk reduction is addressing the underlying cause of people's vulnerabilities — social, economic, physical[,] and environmental. More efforts are needed in identifying ... factors which contribute to people's exposure to disasters, incorporating risk analysis in development plans, building people's capacities towards sustainable livelihood options, to name a few. ... [M]ore resources and initiatives must be given to disaster risk assessments, mainstreaming DRR into development plans ... to address the underlying cause of people's vulnerabilities, and provision of different sustainable livelihood options for vulnerable sectors of society.[92]

The NDRRM Plan also introduces the concept of DRR mainstreaming, which integrates DRRM measures into the country's broader sustainable development plans. Special emphasis is given to "policy formulation, socioeconomic development planning, budgeting and governance particularly in the area of environment, agriculture, water, energy, health, education, poverty reduction, land-use, and urban planning, and public infrastructure and housing, among others."[93]

Recognizing the multi-stakeholder nature of disaster relief, the law has also made provisions for accrediting, mobilizing, and protecting civil service organizations, disaster volunteers, and other members from the private sector who wish to assist in the government's relief operations.[94] A provision recognizing the need to develop a mechanism for the receipt of international humanitarian assistance was also added, and it is followed by a list of prohibited acts which deal generally with misappropriation or diversion of aid received.[95] Finally, the law also provides for the declaration of a state of calamity upon recommendation to the President by the NDRRMC. It also details measures to be taken, such as price ceilings, when a state of calamity is put into effect.[96]

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91 *Id.* § 3 (z).

92 National Disaster Risk Reduction and Management Council, National Disaster Risk Reduction and Management Plan (NDRRMP) 2011-2028, at 9, *available at* https://ndrrmc.gov.ph/attachments/article/41/NDRRM_Plan_2011-2028.pdf (last accessed July 20, 2021) [https://perma.cc/Q7SJ-KXJ2].

93 *Id.* at 14.

94 Philippine Disaster Risk Reduction and Management Act of 2010, § 13.

95 *Id.* §§ 18-19.

96 *Id.* §§ 16-17.

The NDRRM Act is a marked improvement from the Philippines' previous law. On paper, it introduces a more robust system for addressing disasters for both the short and long term. Furthermore, it has a more comprehensive understanding of what constitutes vulnerability and commits itself to addressing vulnerability's socio-economic causes. Finally, it creates a clear allocation of duties and better organizes the different levels and agencies of government in order to efficiently pursue actions in furtherance of the law's objectives.

Whether the NDRRM Act is effective in practice however is another matter.

B. Disaster in Practice

This Subsection tackles the implementation of the DRMM Act and examines in part the extent of its success in establishing an effective disaster response regime in the Philippines. This Subsection will go into a selection of the law's shortcomings insofar as they are reflective of the failure of the law to carry out a more progressive and comprehensive DRRM scheme, which acknowledges the importance of the human factors of vulnerability in addressing natural disasters.

The latter half of this Subsection also discusses how the current system of disaster relief is hampered by corruption, setting the premise for the argument that the current system perpetuates a cycle of corruption in disaster response, from which the Philippines must free itself.

1. Back and Forth on the DRRM Act

As far as establishing a better framework for disaster response, the DRRM Act is an improvement from its predecessor. Experience with natural disasters post-enactment of the DRRM Act, however, have shown that it still falls short of a fully effective disaster response regime. As some researchers have pointed out —

> [S]ince the implementation of the [DRRM Act] in 2010, the impacts of typhoons in the country are still enormous. Typhoons Washi in 2011, Bopha in 2012[,] and Haiyan in 2014 caused severe damage and unimaginable casualties. With this, it can be inferred that the implementation of the policy is poor, and the performance of the Philippine government is ineffective.[97]

While there are a number of reasons for the law's shortcomings, the Author argues in this Article that part of it is due to the law's failure to internalize and implement the broader policy direction towards disaster

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97 Hazel Jovita, et al., *Why Does Network Governance Fail in Managing Post-Disaster Conditions in the Philippines?*, 10 JAMBA, J. DISASTER RISK STUD. 1, 2 (2018).

and vulnerability, even as it appears to have acknowledged such a policy direction on its face.

A major struggle in implementing the DRRM Act and the corresponding NDRRMP lies with the functions and mandate of the NDRRMC.[98] The NDRRMC's mandate is to act through cooperation of its component executive departments.[99] It is not a stand-alone department, nor is it primarily staffed by its own personnel or supported by an independent budget. Rather, it relies heavily on the human resources of member-departments and carries out disaster response through these departments' own projects.

On its face, the structure of the NDRRMC looks promising. It has four committees each dealing with a specific theme: prevention and mitigation, preparedness, response, and rehabilitation, with each being staffed by the appropriate executive departments. While the structure of the NDRRMC appears to be capable of delivering comprehensive disaster response, the reality is that these networks can and often do become inefficient. The volume of roles outlined in the NDRRMP "mask a stringent bureaucratic turf-war."[100] Because the NDRRMC is mainly an advisory and coordinating body, there is no central policy directive nor a clear chain of command.[101] Departments may carry out their own projects, with actual coordination being a considerable obstacle, especially when considering the arrival of other entities such as international and local aid groups.[102] When Haiyan struck, the general chaos which characterized the disaster sites was amplified by there being no clear chain of command or uniform action plan involving each department.[103]

This lack of cooperation is similarly reflected in some local and regional counterparts of the NDRRMC. As one study puts it, while "most agencies in collaborative efforts appreciate the advantages of

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98 Lin, *supra* note 25.

99 Philippine Disaster Risk Reduction and Management Act of 2010, § 6.

100 Lin, *supra* note 25.

101 *See* Ayee Macaraig, *COA: Yolanda Relief 'Chaotic, Crazy'*, RAPPLER, Mar. 17, 2014, *available at* https://web.archive.org/web/20181122125253/https://www.rappler.com/nation/53201-coa-yolanda-aid-chaos-crazy (last accessed July 20, 2021) [https://perma.cc/8PK4-VU4S].

102 *See generally* Laura Laguna Salvadó, et al., Towards More Relevant Research on Humanitarian Disaster Management Coordination, *available at* https://pdfs.semanticscholar.org/0923/ac23f18b95c80253a1e216099aba943fd4c1.pdf (last accessed July 20, 2021) [https://perma.cc/X9CM-WZSP].

103 Aries Rufo, *NDRRMC: Too Many Cooks Spoil the Broth*, RAPPLER, Nov. 30, 2013, *available at* https://www.rappler.com/newsbreak/44956-ndrrmc-assessment-disaster-management (last accessed July 20, 2021) [https://perma.cc/M542-WS2L].

collaboration[,] ... only a few are actually willing to collaborate."[104] "Weak collaboration ... [results] in minimal information sharing and [ineffective] ... disaster response."[105]

The same study found that the success in DRRM of different local councils depended highly on whether trust and interdependencies were developed between representatives of different agencies, with some areas suffering as a result.[106] Additionally, the primacy which the DRRM Act places on local governments to address disasters within their area, while beneficial in some aspects, disadvantages poorer regions, which are also those most vulnerable to extreme weather events.

This failure in collaboration signals the absence of a cohesive plan of action for DRRM in the Philippines. While the NDRRMC is set up to coordinate agencies in order to address different aspects of vulnerability, the reality is that DRRM as practiced has yet to display a true working relationship between these agencies, especially as they move away from traditional post-disaster response and into the newer areas of risk reduction and resiliency building. The government has yet to apply the DRRM Act or the NDRRMP in a way that shows that it understands the complex dynamic of vulnerability and natural disasters. Consequently, it is doubtful whether the government truly grasps the roles each agency must play at all stages of DRRM.

Another issue with the system established by the DRRM Act pertains to funding. Sections 21 and 22 of the DRRM Act establishes both local and national DRRM funds. Of this amount, 30% is to be allocated to Quick Response Funds or those set aside for immediate disaster relief. The remaining funds are supposed to be used for disaster risk reduction and resilience building. This allocation, however, has not always been followed. "For example, in 2013[,] out of the [₱]3.7 [Billion] DRRM fund released, [₱]3.69 Billion have been for the Quick Response Fund (QRF)."[107] In a case study done three years later on the implementation of DRRM in Iloilo province, it was found that funds were highly concentrated on/limited to relief goods for evacuees. "Very minimal

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104 Jovita, et al., *supra* note 97, at 8.

105 *Id.*

106 *Id.*

107 Alexander Pama, Philippines: National Progress Report on the Implementation of the Hyogo Framework for Action (2013-2015) (A National HFA Monitor Update], at 7, *available at* https://www.preventionweb.net/files/43379_PHL_NationalHFA progress_2013-15.pdf (last accessed July 20, 2021) [https://perma.cc/9P5T-S43P].

amount was spent for other preparedness activities and needs like information education, [etc.]"[108]

Monitoring the release and exact use of funds has also proved challenging. "There is [ ] some difficulty in tracking the resources that fall under different names or categories but can actually be considered for 'disaster risk reduction and management (DRMM).'"[109] One study conducted by the Ateneo School of Government during the DRRM Act's sunset review revealed that there was great confusion with regard to the generation and use of DRRM funds[110] —

> Many [local government unit] officials are unclear on how they can access these funds, and when. The Commission on Audit has found a huge divergence in the understanding of what initiatives constitute acceptable programs within the various thematic areas (prevention and mitigation, preparedness, response, and recovery and rehabilitation). This misunderstanding is a critical gap[.][111]

The report elaborated that a local government's "inability to use funds *before* the occurrence of hazards increases the risk" that these hazards turn into full blown disasters.[112] This reflects a problem already present under the previous disaster response regime, where "many local officials [were] not aware that [local calamity funds could] be used for pre-disaster activities."[113]

One danger in this confusion with fund utilization is that government units, especially at the local level, may disproportionately favor conventional reactive measures, which are more recognizable by constituents, audit authorities, and other stakeholders as forms of disaster response. While aid and relief services during the aftermath of an extreme weather event are crucial, emphasis on these types of responses defeat the more proactive and comprehensive policy direction which the DRRM Act is supposed to champion.

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[108] Victoria D. Jurilla, *A Case Analysis of Disaster Risk Reduction Preparedness of Iloilo Province: Basis for A Comprehensive Intervention Program*, 4 ASIA PAC. J. MULTIDISCIPLINARY RES. 150, 158 (2016).

[109] Pama, *supra* note 107, at 8.

[110] Tony La Viña & Joyce Melcar Tan, *It's Time to Reform Our Disaster Law*, RAPPLER, Nov. 7, 2015, *available at* https://www.rappler.com/thought-leaders/112048-reform-ph-disaster-law (last accessed July 20, 2021) [https://perma.cc/LHS7-TCPA].

[111] *Id.*

[112] *Id.*

[113] Philippines: A Country In-Depth Review Report, at 15, *available at* https://www.preventionweb.net/english/hyogo/gar/background-papers/documents/Chap5/in-depth-reviews/Phillippenes.doc (last accessed July 20, 2021) [https://perma.cc/6YEA-E4QW].

In fact, a review of many of the developments which have followed the enactment of the DRRM Act have presented a strange in-between when it comes to progressive disaster response. The measures which different agencies and local government units adopt are proactive, in a sense that they aim not only to deliver aid after a disaster has occurred, but seek to mitigate damage which could be caused, hopefully averting the transformation of a natural hazard into a disaster.

Many of these measures, however, still center around the occurrence of the natural hazard itself (e.g., preparation of evacuation routes, stocking of relief goods, building or fortifying buildings to be used as evacuation centers, enhancing methods of signaling and communication, and mapping out residential areas which are at risk). They do not address more substantial questions of vulnerability or development. In a sense, they are still reactive, even though they are done prior to the occurrence of an extreme weather event. The end-goal is, yes, to prevent loss of lives and property, but it is also to be able to return things to the status quo as soon as possible after the disaster. It is a limited view which fails to get to the heart of vulnerability and builds only a temporary resilience. It asks, for example, how to better evacuate people from at-risk residential areas, but not why those people keep returning in the first place.

If this is the way government agencies and local government units seek to principally implement the DRRM Act, then it would fall short of a truly progressive disaster response mechanism. Bankoff and Hilhorst provide interesting perspective on how to characterize this tendency of the Philippine government to straddle this midway between a reactive and proactive approach to disaster response. They theorize that there is a fundamental difference between how those within government see disasters and how those outside do.[114] Whereas civil society may see disasters as aggravating already problematic conditions, governments see them as disruptions to a normal and productive state of affairs. Thus,

> [t]he way governments mainly see a disaster, whether it is at the provincial, national or even international level, has its origins within a western cultural perspective of how the physical and social world is constructed. According to this notion a disaster is an abnormal event: it implies acknowledgement that an unforeseen event or accident has taken place, an unforeseen process is set in motion, that matters are out of human control ... The problem having been defined in these terms, the appropriate measures can then be instituted to restore normalcy[ ]—[ ]the myth of a secure and productive 'ordinary life' that is itself a construct of western social science. Normalcy, in this context, implies restoring a certain set of social, economic and political relations commensurate with the social order prior to an event. It is an inherently conservative attitude towards disaster risk response that does not see anything amiss with the

[114] Bankoff & Hillhorst, *supra* note 72, at 687.

> existing social structures that might have rendered people vulnerable in the first place.[115]

While Bankoff and Hillhorst were writing about the state of affairs pre-DRRM Act, what they have pointed out still finds some applicability in the current situation. While ostensibly, the legal framework has moved on from being reactive, and has attempted to forward a view of disasters not as inevitable, but as processes which can be mitigated and even stopped, the failure to look past the disaster itself, into existing social conditions is still present.

Building resilience around the idea of the extreme weather event, without investigating the deeper socio-economic and environmental vulnerabilities extant regardless of natural hazards, will not lead to effective disaster response. As one scholar, writing far more recently, observed, "[r]esilience strategies that resurrect pre-disaster inequalities and vulnerabilities, or even create new ones, are not resilient at all."[116]

2. Corruption on the Other End

In this Article, the Author has so far focused on how corruption impacts vulnerability, and how consideration of vulnerability is a key component in effective disaster response regimes. However, this is not to forget that corruption is still very much a problem in post-disaster aid delivery. In fact, the dominant narrative when thinking about the relationship between corruption and natural disasters seems to be that corruption, particularly in the Philippines, is most problematic when it obstructs systems of aid delivery post-disaster. The discourse surrounding the botched relief efforts and the still pending housing situation for those affected by typhoon Haiyan evidences this.

The DRRM Act[117] did not have specifically for its object the elimination of corruption from the disaster relief system. In that sense, the presence of corruption within the Philippines' disaster response system is not strictly a shortcoming on the law's part. To the extent however that corruption frustrates the goal of creating an efficient system which adequately serves the needs of the public, it must be taken into account in any evaluation of the law.

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[115] *Id*. at 695 (citing Gregory Bankoff, *Living with Risk; Coping with Disasters, Hazard as a Frequent Life Experience in the Philippines*, 12 EDUC. ABOUT ASIA, 26, 26-29 (2007); GREGORY BANKOFF, CULTURES OF DISASTER: SOCIETY AND NATURAL HAZARD IN THE PHILIPPINES 158-62 (2003); & KENNETH HEWITT, INTERPRETATIONS OF CALAMITY 22 (1983)).

[116] Pauline Eadie, *Typhoon Yolanda and Post-disaster Resilience: Problems and Challenges*, 60 ASIA PAC. VIEWPOINT, 94, 99 (2019).

[117] Philippine Disaster Risk Reduction and Management Act of 2010.

This Subsection reviews corruption on the other end of the spectrum. Specifically, it will offer brief discussions on how corruption impedes the delivery of aid and how the current disaster response system creates opportunities and even incentives for corrupt practices.

a. The Desirability of Disaster

There are a number of factors which make disaster situations especially prone to corruption. Primarily, it is the urgent need to deliver aid which prompts break downs in accountability and monitoring systems.[118] "With enormous pressures to deliver relief quickly, the risks of corruption increase[.]"[119] A disaster site will likely be chaotic, and relief workers must constantly negotiate the tension between delivering aid as swiftly as possible and following procedure in order to enforce "zero-tolerance approaches to corruption and fraud."[120] Thus, the nature of relief operations themselves as being urgent and demanding creates an opening for corruption.

This frantic situation is aggravated in cases where government bodies like the NDRRMC are unable to coordinate agencies effectively and establish a clear chain of command known to the affected population. This creates information asymmetry which only heightens both frustration and desperation from those affected. People are unaware of the proper procedures for aid distribution and are made more vulnerable to extortion or abuse because of it. The "chaos and breakdown of oversight, coupled with the dependence of victims on the resources, coordination, and capabilities of those in a position to provide relief creates a power imbalance that increases opportunities for corrupt actors."[121]

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[118] Anna Nadgrodkiewicz, *Tackling Corruption in Disaster Relief Efforts*, THOMSON REUTERS FOUNDATION NEWS, Dec. 9, 2013, *available at* http://news.trust.org//item/20131208224327-ykbwh (last accessed July 20, 2021) [https://perma.cc/5PG4-5XGT].

[119] Transparency International, Corruption in Humanitarian Aid: A Double Disaster, *available at* https://www.transparency.org/news/pressrelease/20060806_corruption_in_humanitarian_aid_a_double_disaster (last accessed July 20, 2021) [https://perma.cc/V7UX-6PY2].

[120] Barnaby Willitts-King & Paul Harvey, Managing the Risks of Corruption in Humanitarian Relief Operations, at 7, *available at* https://cdn.odi.org/media/documents/1977.pdf (last accessed July 20, 2021) [https://perma.cc/4ZPR-EYLS].

[121] Beatriz Paterno, Learning from Disaster: Corruption and Environmental Catastrophe, *available at* https://globalanticorruptionblog.com/2014/11/07/learning-from-disaster- corruption-and-environmental-catastrophe/ (last accessed July 20, 2021) [https://perma.cc/2WNC-4UPJ].

In places like the Philippines, where the occurrence of natural hazards-turned-disasters are recurring events,[122] there are also opportunities for corrupt actors to plan their actions and adapt their methods, especially if they are familiar with the community involved. The frequency of natural disasters opens up the opportunity for the development of systems of corruption which take advantage of the weak legal regimes which are supposed to address these events.

Finally, another factor which creates opportunities for corruption in disaster relief is the influx of aid, both local and international, into administrative infrastructures not equipped to handle them. As one scholar put it, "[f]oreign aid is associated with rent-seeking activities and therefore with high corruption levels."[123] The most vulnerable communities are usually those which have governance systems which either do not function well or are small and easily overwhelmed. The sheer amount of aid and human resources which can arrive in the aftermath of a disaster worsens the risk of a failure of accountability measures, and makes the very same aid susceptible to misappropriation and diversion.

IV. On the Cycle of Corruption and a Tenuous Road to Resilience

Both corruption and natural disasters are serious issues in the Philippines. They are destructive and significantly hinder development and progress. Together, they probably account for a significant portion of the grievances of the Filipino people. Particularly marginalized sectors — the poor, children, indigenous peoples, farmers, and fisherfolk — often bear the brunt, to a disproportionate degree, of their effects.

While corruption is a problem in the Philippines, regardless of whether there is an impending natural hazard, its presence before, during, and after such hazard serves to aggravate the latter's effects, contributing to the hazard's evolution into a disaster. Corruption's effect on disasters is multi-dimensional. On one hand, corruption obstructs the timely and efficient delivery of post-disaster relief, often turning aid operations into opportunities for politicking and consolidating personal power. Corruption also hampers many of the rebuilding and restoring efforts of governments and civil society, leaving communities displaced and unable to carry on with their lives for prolonged periods.

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[122] *Id.*

[123] Yamamura, *supra* note 26, at 387.

On the other hand, corruption affects how vulnerable communities and individuals are to extreme weather events in the first place. The shift of the Philippine disaster response system from its originally reactive approach to a more proactive one elucidates this particular aspect of corruption's effects. A truly proactive approach sees disaster as avoidable and works to address a community's vulnerability in order to reduce the risks it is exposed to. Addressing vulnerability in turn entails a recognition that it is not determined merely by the kind of natural hazard approaching. Rather, addressing vulnerability necessitates the recognition of socio-political, economic, and even physical conditions and qualities within communities and individuals themselves. Put another way, reducing risk must consider many things about people and the society — quality of life, income and education, health, quality of governance, and level of development, among others.

Corruption affects all these things — especially in a country such as the Philippines, which, by all accounts, has been continuously plagued by entrenched corruption. While sufficient efforts must be directed at stemming the corruption which affects post-disaster aid operations, an equal, if not greater, amount of effort must be given to understanding and addressing the way corruption creates and sustains the very vulnerability which the DRRM Act was enacted to address. As this Article has argued, there is a direct link between corruption and disaster, and it runs through vulnerability.

Any system with a view to effective disaster response and broader societal development must account for this link.

The Philippines is trapped in a cycle of corruption's making. As debilitating corruption aggravates the vulnerability of communities, placing them under more physical and economic burden and routinely obstructing government from offering appropriate public goods and services, the likelihood of natural hazards escalating into disasters heightens. Subsequently, in the urgency and confusion created by the disaster, opportunities for corruption present themselves. Disasters effectively incentivize corruption because of the influx of money coming both from the government's disaster funds and from international aid, as well as the diminished systems for monitoring their disbursement and expenditure. Correspondingly, disasters create a disincentive for corrupt politicians to commit themselves to DRRM, as this more substantial approach to addressing disasters will not be to their personal benefit.

Where does this leave the current DRRM Act? It is important to note that not all of the DRRM Act's shortcomings are attributable to corruption. Rather if the country is to move forward to a truly effective system of disaster response, corruption as a major factor in the DRRM dialogue cannot be overlooked. Nor can the DRRM system in the

Philippines continue to maintain structures which perpetuate corruption. Addressing corruption is not the be all end all of establishing a progressive disaster response regime in the Philippines, but it is an integral component.

The DRRM Act in theory lays a good foundation for acknowledging the role corruption can play in impacting vulnerability. In practice however, the DRRM Act, or the way it has been put into effect by government is inadequate for establishing a truly progressive system of relief. Efforts at risk reduction have not gone far enough and still center around conventional perceptions of disaster response. Measures are often still limited to the immediate impacts of natural hazards, and preventing them from escalating into disasters is attempted through actions that take a narrow view of vulnerability — a view which does not address the deeper socio-political and economic reasons for vulnerability's continued and expanding existence.

In relation to corruption, the effect is clear. By acknowledging the importance of a nuanced definition of vulnerability but at the same time putting into practice measures that only cater to a narrow part of this definition, the DRRM Act creates a blind spot to corruption. This limited view of vulnerability further serves to obscure the link between corruption and disaster, complicating attempts at guarding against all the effects of corruption in relation to DRRM systems. In a country where corruption is highly entrenched, and where development has been identified as key in reducing vulnerability in order to mitigate disasters, a state of affairs that overlooks how corruption impedes development cannot be sustained.

Where then does the Philippines go from here? Whatever the name, whether it be resilience, development, progress, or even prosperity, the end goal of any DRRM system must be the diminution of vulnerability. To do this, the State must look beyond the surface and push our understanding of disaster response beyond the goal of restoring the *status quo*. It is not enough to survive a disaster if communities have to return to their previous states of affairs where they are similarly barely surviving. The State must construct a comprehensive DRRM system that takes into account various indicators of development as they relate to vulnerability. It must meet corruption not only at the onset of a disaster but confront it as it exists in the day-to-day lives of the population. The possibility for disasters begins long before any extreme weather event is detected. A truly proactive DRRM system must recognize this and address this reality accordingly.

This could mean amending the DRRM Act, enacting a new one, or developing a restructured NDRRMP. Whatever the method, it is clear that the government needs to find better ways to integrate the concepts

of development, vulnerability, and anti-corruption into an already robust system of disaster response, which features routines agencies may not so easily separate themselves from. There needs to be a stronger effort on the part of the government to infuse the more nuanced and comprehensive discourse of DRRM within the operations of its component agencies, learning from the past years of success and failure with the current DRRM Act.

V. Conclusion

Despite what may have been discussed in this Article, the DRRM Act's story is not one of complete failure. Rather, it should be seen as a step, an important one, but not the final one, in the long process of developing a fully comprehensive, responsive, and effective system of disaster response. Disaster response itself is but one component in a larger push for prosperity and development in the Philippines — one that is constantly hampered by corruption, and the different areas which it negatively affects. The fight for better disaster systems is therefore also a fight against corruption, and a fight for larger progress for the country.

What the situation with the current DRRM Act presents is more than just a question of failure or success. It is an opportunity. Improving the DRRM system in a manner that accounts for corruption both in relation to vulnerability and also in post-disaster relief operations opens up a new avenue for combatting corruption itself. By effectively addressing concerns with the DRRM Act and the Philippine's disaster response system, the State could be finding an alternative space for combatting corruption, complementary to its other mainstream efforts.

To be sure, corruption, disaster, vulnerability, resilience, and development — these are all broad and challenging concepts which will take no small effort to combat, address, or achieve. For a country like the Philippines which has routinely been through typhoons, earthquakes, and other disasters, however, it is surely possible.

PHILIPPINE MINING POLICY: A CRITIQUE

Romeo T. Cabarde, Jr.[*]

I. Introduction

As stewards of the environment, Catholics are invited to care for the world as their common home.[1] Pope Francis' *Laudato Si*'[2] echoes this challenge to listen to "the cry of the earth and the cry of the poor."[3]

Despite the role that minerals play in national industrialization, the current policy on mining in the Philippines is biased towards the mining industry[4] and prejudicial to the Filipino people and the planet.[5]

In this context, a campaign must be launched for the revocation of Executive Order (E.O.) No. 130, Series of 2021,[6] which was signed by President Rodrigo R. Duterte on 14 April 2021 to lift the moratorium on mining applications.[7] This revives the same issues surrounding the attempt to fully implement Republic Act (R.A.) No. 7942, or the Philippine Mining Act of 1995.[8] The issuance of E.O. No. 130 makes possible the

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1 Encyclical *from* Pope Francis, Head of the Catholic Church, *to* the Church (June 18, 2015) (on file with the Author) [hereinafter Laudato Si'].

2 *Id.*

3 *Id.* ¶ 49.

4 *See* David Wurfel, *Mining and the Environment in the Philippines: The Limits on Civil Society in a Weak State*, 54 PHIL. STUD. 3, 10 (2006).

5 *See* Jee Y. Geronimo, *Gina Lopez: Philippine Mining Act an 'Unfair' Law*, RAPPLER, July 12, 2016, *available at* https://www.rappler.com/nation/gina-lopez-philippine-mining-act-unfair (last accessed July 20, 2021) [https://perma.cc/J6C2-HHL7].

6 Office of the President, Amending Section 4 of Executive Order No. 79, s. 2012, Institutionalizing and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Executive Order No. 130, Series of 2021 [E.O. No. 130, s. 2021] (Apr. 14, 2021).

7 *Id.* § 1.

8 An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942 (1995) & Carmela Fonbuena, Lifting of Mining Ban Revives Calls for Better

destruction of humanity's common home through unjust legislation.[9] Therefore, in addition to the revocation of E.O. No. 130, there should likewise be a repeal of R.A. No. 7942[10] and the legislation of an alternative minerals management bill in Congress.[11]

This Article seeks to guide members of the Davao Association of Catholic Schools, Inc. (DACS) and their community partners in understanding the legal context behind the Philippine Mineral Extractive Industry and the alternative policy framework in a perspective that would fully guarantee the exploration, management, and utilization of natural and mineral resources that is in accordance with the harmony and rhythm of nature and that is most beneficial for the Filipino people.

In the hopes of educating various communities and advocating for constituencies to support the call for both (1) the revocation of E.O. No. 130, and (2) the repeal of the Philippine Mining Act of 1995, this Article should be read by teachers, students, community leaders, and advocates.

II. Mining and the Catholic Faith

A. Catholic Social Teachings on Mining

There are eight ethical principles that may serve as guide in caring for the common home, as articulated in various Catholic social teachings.[12] These include "stewardship, [the] precautionary principle, common good,

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Revenue-Sharing Scheme, *available at* https://pcij.org/article/4960/lifting-of-mining-ban-revives-calls-for-better-revenue-sharing-scheme (last accessed July 20, 2021) [https://perma.cc/57YG-Y6NX].

9 *Id.*

10 *See* An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, S.B. No. 353, explan. n., 18th Cong., 1st Reg. Sess. (2019).

11 *Id.* § 1.

12 Sylvia Miclat, Catholic Social Teaching and Mining in the Philippines, *available at* https://www.ecojesuit.com/catholic-social-teaching-and-mining-in-the-philippines (last accessed July 20, 2021) [https://perma.cc/YEN4-JNGK] (citing Society of Jesus Social Apostolate (SJSA) Philippine Province of the Society of Jesus, The Golden Mean in Mining: Talking Points, *available at* https://jjcicsi.org.ph/talking-points/349-2 (last accessed July 20, 2021) [https://perma.cc/5YH7-TW7P]).

subsidiarity, preferential option for the poor, dignity of labor, association, and respect for human life."[13]

> Under the principle of stewardship, the health of the environment is a key concern identified and that 'in all stages of the mining process, from exploration to extraction, attention must be given to promote both natural and human ecology.' No-go areas, environmental and social impact assessments, vulnerability to disasters, and global best practices must be considered in deciding to pursue mining.
>
> In addressing health and environmental risks, the precautionary principle is called for when available scientific information and data are inadequate or contradictory, and prudent policies must be applied 'based on a comparison of the risks and benefits foreseen for the various possible alternatives, including the decision not to intervene.' With this, ... all [Catholic] institutions [are encouraged] to build the capacity to gather and assess relevant information that can assist the discussions on mining.
>
> The common good is exhorted and quote[d] from John Paul II[,] who states, '[T]he right to the common use of goods is the first principle of the whole ethical and social order[,]' and '[T]hat the 'universal destination of goods' must be preserved in the mining process, for all wealth is under a 'social mortgage.'
>
> The principle of subsidiarity insists that activities that smaller and subordinate organizations can do should best be left [to] these organizations[. The principle] is applied in understanding the roles and responsibilities of national government, local government units, mining corporations[,] large and small, mining-affected communities, especially indigenous peoples. Along with other stakeholders, subsidiarity challenges all in observing the rule of law and avoiding corruption.
>
> Preferential option for the poor entails adjusting profit margins and revenues to ensure that mining benefits and transforms communities[;] that there is community involvement in mining operations[;] that the welfare and safety of host communities are looked after[;] that special attention to indigenous peoples is provided so that their integrity, systems, and leadership are not destroyed as they respond to mining interests[;] that guidance and assistance is provided to small-scale miners to shift them to more responsible mining[;] and that there is rehabilitation of post-mining areas where the host communities, usually the poor, will continue to live.
>
> The dignity of labor must be ensured through respecting and protecting labor rights in the workplace. Dehumanizing, degrading, and dangerous work conditions, including children who work in [ ] mines, cannot continue. Safe practices and better working conditions are imperative and the rights of workers to organize themselves must be respected.
>
> Association in civil society and [ ] dialogue in good faith are understood as needed 'checks and balances' that are always good and helpful. Government and the mining industry are asked to be receptive to civil society concerns and inputs[,] and to institutionalize social venues and mechanisms where dialogue can take place.

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13 *Id.*

> Respect for human life is the most basic principle of Catholic social teaching. Mining operations must aspire [for] this[,] and [ ] human rights and freedom from fear must be ensured.[14]

1. *Laudato Si'* on Mining

At least three sections of *Laudato Si'* point directly to the ills of mining.[15]

First, sacred to human existence is the right to water, which is a social asset and inextricably essential to the right to life.[16]

> Underground water sources in many places are threatened by the pollution produced in certain mining, farming[,] and industrial activities, especially in countries lacking adequate regulation or controls. It is not only a question of industrial waste. Detergents and chemical products, commonly used in many places of the world, continue to pour into our rivers, lakes and seas.[17]

Mining has produced an ecological debt owed by developed countries to developing countries, from which the former have plundered resources to feed the voracious appetite of wealthy consumers in a globally capitalist market.[18] "The export of raw materials to satisfy markets in the industrialized north has caused harm locally, as for example in mercury pollution in gold mining or [sulfur] dioxide pollution in copper mining."[19]

Mining generally has displaced indigenous communities and has destroyed their sacred spaces, threatening the survival of their culture and identity.[20]

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[14] *Id.* (citing PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 469 (2004); JOHN PAUL II, LABOREM EXERCENS ¶ 19 (1981); JOHN PAUL II, SOLLICITUDO REI SOCIALIS 42 (1987); & POPE PIUS XI, QUADRAGESIMO ANNO 79 (1931)) (emphases omitted).

[15] Laudato Si', ¶¶ 29, 51, & 146.

[16] U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

[17] Laudato Si', ¶ 29.

[18] *See* AGUILLON, ET AL., NO MORE LOOTING AND DESTRUCTION! WE THE PEOPLES OF THE SOUTH ARE ECOLOGICAL CREDITORS 66 (2003). ("[E]cological debt [is] an obligation owed by economic and political actors to society or sections of it for conscious acts on their part that lead to [ ] damage of the environment and impair[ ] its ability to support life or regenerate itself.") *Id.*

[19] Laudato Si', ¶ 51.

[20] Rina Chandran, Driven from Home, Philippine Indigenous People Long for their Land, *available at* https://www.reuters.com/article/us-philippines-landrights-

> [I]t is essential to show special care for indigenous communities and their cultural traditions. They are not merely one minority among others, but should be the principal dialogue partners, especially when large projects affecting their land are proposed. For them, land is not a commodity but rather a gift from God and from their ancestors who rest there, a sacred space with which they need to interact if they are to maintain their identity and values. When they remain on their land, they themselves care for it best. Nevertheless, in various parts of the world, pressure is being put on them to abandon their homelands to make room for agricultural or mining projects which are undertaken without regard for the degradation of nature and culture.[21]

2. Pope Francis' Message on Mining

Amplifying the calls in *Laudato Si'*, Pope Francis is saddened that the "economic powers continue to justify the current global system where priority tends to be given to the pursuit of financial gain, which fail[s] to take the context into account, let alone the effects on human dignity and the natural environment."[22]

a. Mining and Indigenous Communities

Where the effects of mining on the rights of indigenous communities are concerned, Pope Francis advocated caution, consent, and care for cultural traditions.[23] He further advised that

> mining, like all economic activities, should be at the service of the entire human community, and should involve local communities in every phase of mining projects. In this regard, he urged special care for indigenous communities and their cultural traditions, saying they are a vulnerable minority who should be the principal dialogue partners, especially in large projects affecting their land.
>
> However, the Pope noted that in various parts of the world, [indigenous peoples] are being pressured into abandoning their homelands to make room for mining projects which are undertaken 'without regard for the degradation of nature and culture.' [He likewise 'urge[d] everyone to respect the fundamental human rights and voice of the persons in these beautiful yet fragile communities.'[24]

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crime-idUSKBN1HQ034 (last accessed July 20, 2021) [https://perma.cc/ATN5-RE2V].

21 Laudato Si', ¶ 146.

22 Robin Gomes, Pope: Mining Activities Should Ensure Integral Sustainable Human Development, *available at* https://www.vaticannews.va/en/pope/news/2019-05/pope-francis-mining-indigenous-rights-development-common-home.html (last accessed July 20, 2021) [https://perma.cc/EH88-A29V] (citing Laudato Si', ¶ 56).

23 *Id.*

24 *Id.*

b. Centrality of the Human Person

Pope Francis also encouraged that the mining industry serve humanity and preserve human dignity —

> The Argentine Pope also urged that mining be at the service of the human person and his or her inalienable fundamental human rights, and not vice versa. 'We need to ensure that mining activities lead to the integral human development of each and every person and of the entire community.'[25]

c. "Circular Economy"

Pope Francis also endorsed a "circular economy"[26] as a solution to "extractivism,"[27] which aims "to extract the greatest amount of materials in the shortest possible time for conversion into products and services that result in further pollution and waste."[28]

> Indicating that [ ] industrial system[s have] not developed the capacity to absorb and reuse waste and by-products, the Pope said, 'We need to denounce and move away from this throwaway culture.' The promotion of a circular economy and the 'reduce, reuse, recycle' approach, he said, are very much in consonance with the 12th Sustainable Development Goal of the United Nations.
>
> Moderation, he said, is vital to save [humanity's] common home[, pointing] out that religious traditions have always presented temperance as a key component of responsible and ethical lifestyle.
>
> The Pope hoped that the meeting [would] be able to discern what appropriate or inappropriate extractive activities are and then help propose and plan policies and strategies for the purpose of achieving the common good and genuine human development that is integral and sustainable.[29]

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[25] *Id.*

[26] *Id. See also* Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living Well, Within the Limits of Our Planet', annex, ¶ 1, 2013 O.J. (L354) 171, 176 (Dec. 28, 2013) (EU). (In a circular economy, "nothing is wasted," and "natural resources are managed sustainably[.]") *Id.*

[27] Kristina Dietz & Bettina Engels, *Contested Extractivism, Society and the State: An Introduction*, *in* CONTESTED EXTRACTIVISM, SOCIETY AND THE STATE: STRUGGLES OVER MINING AND LAND 2 (Bettina Engels & Kristina Dietz eds., 2017). "Extractivism is generally defined as a national, growth-orientated development pathway based on ... the large-scale, exploitation, production[,] and exportation of raw materials." *Id.*

[28] Gomes, *supra* note 22.

[29] *Id.*

II. Mining in the Philippines

A. Legal Basis of Large-Scale Mining in the Philippines

Article XII, Section 2 of the 1987 Constitution[30] and the Philippine Mining Act of 1995 govern the "exploration, development, and utilization and conservation of [mineral] resources" in the Philippines.[31] Under the fundamental law, "the State owns all mineral resources."[32] The State may, however, "enter into agreements with private contractors for the exploitation of mineral resources through a Financial and Technical Assistance Agreement (FTAA), Mineral Production Sharing Agreement (MPSA), Co-Production Agreement (CPA)[,] and Joint Venture Agreement (JVA)."[33] The Philippine Mining Act of 1995 and its Implementing Rules and Regulations[34] define such arrangements,[35] map out different mining rights recognized in the local legal system,[36] and establish the requirements for their acquisition.[37]

The Constitution provides that "[a]ll lands of the public domain, water, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State."[38] The "exploration, development, and utilization of [these] natural resources [are also] under

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30 PHIL. CONST. art. XII, § 2.

31 PHIL. CONST. art. XII, § 2. *See also* Philippine Mining Act of 1995, § 2.

32 Davao Association of Catholic Schools, Inc., A Primer on the Tampakan Mines and the Mindanao Ecology, at 1, *available at* http://dacsceapxi.org/wp-content/uploads/2021/03/Tampakan-2021-Primer.pdf (last accessed July 20, 2021) [https://perma.cc/6RXE-PMFD] (citing PHIL. CONST. art. XII, § 2).

33 Davao Association of Catholic Schools, Inc., *supra* note 32, at 1.

34 Department of Environment and Natural Resources, Providing for a Consolidated Department of Environment and Natural Resources Administrative Order for the Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995", Administrative Order No. 2010-21 [A.O. No. 2010-21] (June 28, 2010).

35 Davao Association of Catholic Schools, Inc., *supra* note 32, at 1. *See also* A.O. No. 2010-21, § 5.

36 Davao Association of Catholic Schools, Inc., *supra* note 32, at 1. *See also* A.O. No. 2010-21, ch. iii-iv.

37 Davao Association of Catholic Schools, Inc., *supra* note 32, at 1. *See also* A.O. No. 2010-21, ch. v-xi.

38 PHIL. CONST. art. XII, § 2, para. 1.

the full control and supervision of the State."[39] However, the State has the option of entering into "co-production, joint venture, or production-sharing agreements with [Philippine] citizens, or [Philippine] corporations or associations[.][40] "[A]t least [60%] of [the] capital [of a corporation or association must be] owned by [Philippine] citizens"[41] before it can be considered as a Philippine corporation or association.

As an exception to this nationality requirement, the Constitution authorizes the President of the Philippines to "enter into agreements with foreign-owned corporations involving either technical or financial assistance for [the] large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils[.]"[42]

Other Philippine laws also govern investments in the Philippine mining industry, with one example being Executive Order No. 79.[43]

B. Propriety of Large-Scale Mining in the Philippines

Large-scale mining is dangerous to the Philippines' archipelagic composition.[44] An island-ecosystem is highly vulnerable to man-made and environmental destruction caused by extractive activities,[45] especially considering the "dense, localized[,] and interconnected[ ]" population of people, plants, and animals.[46] "Following the ridge-to-reef management system, human activities in the uplands and upstreams will impact the

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39 PHIL. CONST. art. XII, § 2, para. 1.

40 PHIL. CONST. art. XII, § 2, para. 1.

41 PHIL. CONST. art. XII, § 2, para. 1.

42 PHIL. CONST. art. XII, § 2, para. 4.

43 Office of the President, Institutionalizing and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Executive Order No. 79, Series of 2012 [E.O. No. 79, s. 2012] (July 6, 2012).

44 *See* Healthy Options, Irresponsible Mining Damages the Environment, *available at* https://www.healthyoptions.com.ph/newsdigest/strong-immunity/irresponsible-mining-damages-the-environment (last accessed July 20, 2021) [https://perma.cc/WS93-R8KC].

45 *See* Mike Puia, *'They Failed Us': How Mining and Logging Devastated a Pacific Island in a Decade*, GUARDIAN, May 30, 2021, *available at* https://www.theguardian.com/world/2021/may/31/they-failed-us-how-mining-and-logging-devastated-a-pacific-island-in-a-decade (last accessed July 20, 2021) [https://perma.cc/G3NX-3LYC].

46 Davao Association of Catholic Schools, Inc., *supra* note 32, at 4.

lowlands and downstream communities[,]unlike [in] the central plains of Australia, Canada[,] or China[,] where mining tenements are located ... far [away] from human settlements and rich vegetation."[47]

Furthermore, "[t]he entire Philippine archipelago is also one huge watershed system."[48] The framework requires "high[ ]priority problems within hydrologically-defined geographic areas [to be addressed], taking into consideration both ground and surface water flow."[49] Water, however, is more critical for survival than minerals.[50]

C. Standing Against Mining in the Philippines

Although the mining industry contributes to the development and breakthroughs in technology,[51] mining should be undertaken only in countries where people, nature, and other populations will not be adversely affected and harmed.[52]

A stance must be taken against mining in the Philippines, considering the nation's geographic and topographic vulnerabilities. Defense of the environment and ecology must take precedence over mineral extraction.[53] Furthermore, the Philippines generates a significantly high amount of technological waste.[54] Wastes should be recycled and reinvented into

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47 *Id.* at 4. *See also* DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, SUSTAINING OUR COASTS: THE RIDGE-TO-REEF APPROACH: A COMPILATION OF TECHNICAL AND POLICY PAPERS: NATIONAL INTEGRATED COASTAL MANAGEMENT PROGRAM (NICMP) v (2013). The "ridge-to-reef" approach entails sustainable management and development of coastal resources by "addressing threats in the uplands, lowlands[,] and coastal areas in an integrated [manner.]" *Id.*

48 Davao Association of Catholic Schools, Inc., *supra* note 32, at 4.

49 *Id.*

50 *Id.*

51 NATIONAL RESEARCH COUNCIL, EVOLUTIONARY AND REVOLUTIONARY TECHNOLOGIES FOR MINING 10 (2002).

52 *See* Reda M. Hicks, et al., *Crafting a Sustainable Mining Policy in the Philippines*, 27 NAT. RESOURCES & ENV'T 1, 1 (2013).

53 *See* Puia, *supra* note 45.

54 Department of Environment and Natural Resources, EMB: National Policy, Regulatory Framework Already in Place for E-Waste MNGT, *available at* https://www.denr.gov.ph/index.php/news-events/press-releases/1918-emb-national-policy-regulatory-framework-already-in-place-for-e-waste-mngt (last accessed July 20, 2021) [https://perma.cc/5QNW-LMHK].

minerally-dependent products to avoid further extraction and environment degradation.[55]

D. Attracting Investments

Investments are not to be equated with benefits. Of the multi-billion dollar investments, only a pittance inures to the benefit of the Filipino people.[56] Although "the project cost appears in billions," such costs are mainly used to purchase equipment and machinery, to process ores outside the Philippines, and to pay foreign consultants.[57] "[T]he largest share of the value of output accrues to operating surplus, amounting to 43%[.]"[58] This indicates that it is investors, or a small sector of society, who primarily benefit from mining.[59]

E. Economic Benefits

Mining contributed only an average 0.91% to Philippine Gross Domestic Product (GDP) from 2000 to 2009,[60] peaking in 2007 at only 1.4%.[61] The same can be said for the regions in the Zamboanga Peninsula, at 1.06%; Northern Mindanao, at 0.66%; Southern Mindanao, at 3.97%; SOCCSKSARGEN, at 0.14%; and CARAGA, at 6.38%.[62] In comparison,

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55 THEO HENCKENS, GOVERNANCE OF THE WORLD'S MINERAL RESOURCES: BEYOND THE FORESEEABLE FUTURE 382 (2021).

56 *See* Philippine Extractive Industries Transparency Initiative, Overview, *available at* https://eiti.org/es/implementing_country/2 (last accessed July 20, 2021) [https://perma.cc/A99H-GQQ7].

57 Romeo T. Cabarde, Jr., UPPER RIGHT HAND: Decreeing Falsehoods in Mining, *available at* https://www.mindanews.com/mindaviews/2021/06/upper-right-hand-decreeing-falsehoods-in-mining (last accessed July 20, 2021) [https://perma.cc/D6AV-WGQZ].

58 CIELITO F. HABITO, AN AGENDA FOR HIGH AND INCLUSIVE GROWTH IN THE PHILIPPINES 55, app. 1 (2010).

59 *Id.*

60 Maita Gomez, Transparency Issues in the Philippine Mining Industry, at 10, *available at* https://www.aer.ph/taxjustice/wp-content/pdf/Mining.pdf (last accessed July 20, 2021) [https://perma.cc/M7R3-PLYF].

61 *Id.*

62 The Abundance and Poverty Paradox: Empirical Analysis on Resource Curse in Philippine Mineralized, *available at* https://meongrtcj.wixsite.com/bluegreenpolitix/single-post/2018/08/16/the-abundance-and-poverty-paradox-empirical-analysis-of-resource-curse-in-philippine-mine (last accessed July 20, 2021) [https://perma.cc/V6LP-GRF2] [hereinafter Abundance and Poverty Paradox].

agriculture, fishery, and forestry account for approximately 15% of the Philippine GDP.[63] From 2000 to 2009, total mining exports averaged just 4%.[64] As the data shows, the economy can still survive without the mining industry.

F. Job Creation

The mining industry, on average, contributed 0.376% to total employment from 2000 to 2009.[65] The Oyu Tolgoi mine in Mongolia, for instance, forecasts U.S.$100 billion in earnings[66] over a potential mine life of 40 years[67] as the world's "third largest copper mine."[68] It generated 11,400 jobs ("half Mongolian, half foreign") during its construction,[69] but only 3,500 jobs will be eventually be made permanent.[70] Therefore, employment may be intensive during the initial stage, but labor absorption is likely to gradually decline through the adoption of labor-saving technology.[71] Agriculture, however, "accounts for [almost] ... two-fifths or 40% of jobs in the [country]."[72]

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63 HABITO, *supra* note 58, at 35.

64 Abundance and Poverty Paradox, *supra* note 62 (citing Leilani Chavez, *FAST FACTS: Mining in the Philippines*, RAPPLER, Sept. 7, 2012, *available at* https://www.rappler.com/business/industries/fast-facts-mining-philippines (last accessed July 20, 2021) [https://perma.cc/9DP3-X53G]).

65 Gomez, *supra* note 60.

66 The Business Times: Energy & Commodities, Mongolia's Giant Oyu Tolgoi Mine Gets US$4b Financing, *available at* https://www.businesstimes.com.sg/energy-commodities/mongolias-giant-oyu-tolgoi-mine-gets-us4b-financing (last accessed July 20, 2021) [https://perma.cc/PJ2M-S27Y].

67 Mining Technology, Oyu Tolgoi Gold and Copper Project, Mongolia, *available at* https://www.mining-technology.com/projects/oyu-tolgio (last accessed July 20, 2021) [https://perma.cc/UZX7-WUXR].

68 Carolyn O. Arguillas, Gomez: Mining Industry has Minimal Contribution to Mindanao Regions, *available at* https://www.mindanews.com/environment/2012/01/gomez-mining-industry-has-minimal-contribution-to-mindanao-regions (last accessed July 20, 2021) [https://perma.cc/9UBK-8WLH].

69 *Id.*

70 *Id.*

71 HABITO, *supra* note 58, at 55.

72 *Id.* at 35 (citing Rolando D. Ty, Closing the Productivity Gap in Agribusiness (A Paper Presented at a Conference Sponsored by World Bank), at 2, *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.559.5780&rep=rep1&type=pdf (last accessed July 20, 2021) & Bruce Tolentino, et al., *Strategic Actions to*

G. Increasing Government Revenue

In 2007, Angelo Reyes, then Secretary of the Department of Environment and Natural Resources (DENR), "affirmed that the profit-sharing scheme under [DENR Administrative Order No.] 99-56[73] [was] disadvantageous to the State."[74] According to Reyes, the probability of the government receiving an additional and fair share of its mineral from the mining companies was nil.[75] From 2000 to 2009, mining contributed only 1.7% to the excise taxes of the country.[76]

Under the Philippine Mining Act of 1995, mining companies enjoy several forms of tax holidays.[77] Deduction of all exploration and development costs from taxable income from start of commercial operations is authorized by law.[78] In such cases, the government cannot even collect withholding taxes until costs have been fully recovered. Despite these advantages, mining has only contributed 4% to national revenues,[79] implying that although foreign mining corporations view the Philippines as a milking cow, the actual owner of the natural wealth only gets dog food.[80]

H. Development and Progress of Local Communities

No local mining site has resulted in economic development in the lives of residents therein.[81] In fact, mining communities are often among, if not

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Rapidly Ensure Food Security and Rural Growth in the Philippines, *in* ACTION FOR ECONOMIC REFORMS AND THE INSTITUTE FOR PUBLIC POLICY (2001)).

73 Department of Environment and Natural Resources, Guidelines Establishing the Fiscal Regime of Financial or Technical Assistance Agreements, Administrative Order No. 99-56 [DENR A.O. No. 99-56] (Dec. 27, 1999).

74 HABITO, *supra* note 58, at 56.

75 ROBERT GOODLAND & CLIVE WICKS, PHILIPPINES: MINING OR FOOD? INTRODUCTION & CHAPTERS 1 to 7 32-33 (2008).

76 Gomez, *supra* note 60, at 19.

77 Philippine Mining Act of 1995, §§ 81, 92, & 93.

78 *Id.* § 93.

79 Andrew Bauer, Revenue Watch Institute, *Philippine Mineral Wealth for Development?*, Presentation at the Conference on Mining in Mindanao (Jan. 26, 2012).

80 Geronimo, *supra* note 5.

81 *See* Wurfel, *supra* note 4, at 8.

the most, impoverished communities.[82] For example, poverty incidence increased in Region 13 (CARAGA) from 46% in 2002 to 49% in 2007, which was attributed to increased mining in the region.[83]

I. Environmentally Sound and Socially Responsible Mining

There is no such thing as responsible mining for an archipelagic state like the Philippines. Open-pit mining, which was previously outlawed in industry-heavy nations including Canada and the United States,[84] is a serious source of environmental destruction.[85] Smelters and waste generated by mining activities can also cause acid rain "as a result of sulfuric acid mist ... [permeating] the atmosphere."[86] Further,

> [t]ailings run-offs can contaminate nearby water sources with heavy metal pollutants such as cadmium, mercury, sodium cyanide, and zinc, which renders them useless as sources of food, water and livelihood. An estimated 16,000 tons of mine tailings find their way into rivers, lakes and irrigation systems. The 1996 Marcopper tragedy in Marinduque should not be forgotten.[87]

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82 Catherine S. Valente, *'Mining Did Not End Poverty' — Lopez*, MANILA TIMES, Feb. 25, 2017, *available at* https://www.manilatimes.net/2017/02/25/todays-headline-photos/top-stories/mining-not-end-poverty-lopez/314044 (last accessed July 20, 2021) [https://perma.cc/L73Y-CP75].

83 Gina Lopez, *I Am Not Saying All Mining is Bad*, PHIL. STAR, Mar. 11, 2012, *available at* https://www.philstar.com/lifestyle/sunday-life/2012/03/11/785578/i-am-not-saying-all-mining-bad (last accessed July 20, 2021) [https://perma.cc/MXY3-BDEM].

84 Contra Robson Fletcher & Jordan Omstead, Alberta Rescinds Decades-Old Policy that Banned Open-Pit Coal Mines in Rockies and Foothills, *available at* https://www.cbc.ca/news/canada/calgary/alberta-coal-policy-rescinded-mine-development-environmental-concern-1.5578902 (last accessed July 20, 2021) [https://perma.cc/3SN8-4BMS].

85 *See* Department of Environment and Natural Resources, Banning the Open Pit Method of Mining for Copper, Gold, Silver and Complex Ores in the Country, Administrative Order No. 2017-10 [DENR A.O. No. 2017-10], whereas cl. paras. 6-7 (Apr. 27, 2017).

86 Anderson Engineering, Mining, Smelters, Water Pollution, and Environmental Remediation, *available at* https://www.andersoneng.com/mining-smelters-water-pollution-and-environmental-remediation (last accessed July 20, 2021) [https://perma.cc/A5VE-3AK9].

87 HABITO, *supra* note 58, at 56.

J. The Insufficiency of State-of-the-Art Technology

While mining corporations claim to employ the best engineering equipment, technology often proves no match against the force of nature.[88] No amount of human ingenuity can withstand the power of nature in the form of typhoons, flooding, erosion, earthquakes, and even volcanic eruptions. Climate change has tragically increased the unpredictability of natural calamities.[89] Mining should not aggravate this. The Filipino people must heed the lessons from the Marcopper Mine Disaster[90] in Marinduque in 1996, as well as the Philex Padcal Mine spill in Benguet in 2012,[91] which practically killed the rivers and bodies of water around them.[92]

III. Critique of R.A. No. 7942

A. Legislative History

Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995, was enacted amidst the need for an impetus during the administration of then President Fidel V. Ramos.[93] The enactment was meant to meet the goal of making the Philippines a "Newly Industrialized Country (NIC)"[94] and for the nation to be afforded the moniker "Asia's Tiger Economy."[95] The liberalization of mineral extraction, development,

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88 EUROPEAN ENVIRONMENT AGENCY, EUROPE'S ENVIRONMENT: THE THIRD ASSESSMENT 213 (2003).

89 Miraç Tapan, The New Normal: Climate Change Fuels Natural Disasters, More to Come, *available at* https://www.dailysabah.com/feature/2019/01/03/the-new-normal-climate-change-fuels-natural-disasters-more-to-come (last accessed July 20, 2021) [https://perma.cc/VA7E-JGLK].

90 HABITO, *supra* note 58, at 56.

91 Veronica P. Migo, et al., *Industrial Water Use and the Associated Pollution and Disposal Problems in the Philippines*, *in* WATER POLICY IN THE PHILIPPINES: ISSUES, INITIATIVES, AND PROSPECTS 109-10 (Agnes C. Rola, et al. eds., 2018).

92 HABITO, *supra* note 58, at 56.

93 Abundance and Poverty Paradox, *supra* note 62.

94 Nimfa L. Bracamonte, Developing a Shared Agenda for Mining Development in the Philippines, at 20, *available at* https://www.im4dc.org/wp-content/uploads/2015/09/Bracamonte-combined.pdf (last accessed July 20, 2021) [https://perma.cc/KB68-BPV8].

95 *See id*.

and utilization catalyzed an influx of mining enterprises into the Philippines.[96]

Evidence shows that despite being in effect for 25 years, the Philippine Mining Act of 1995 has done too little to meet its desired objective of economic prosperity for the Filipinos.[97] A review of the Act reveals that there are limitations on the law's fiscal regime, general framework, and provisions on community participation, among others. The liberalization of the mineral extractive industry to lure foreign investors has resulted in irreparable damage to the environment and in disadvantage to the Filipino people.[98]

B. Other Policies

Policies directed towards liberalizing the extractive industry were implemented as early as 1986, when President Corazon C. Aquino assumed the presidency.[99] Today, a similar attempt has been made through the lifting of the moratorium on mining applications.[100]

1. Corazon Aquino Administration

As 11th President of the Philippines, Corazon C. Aquino issued Executive Order No. 279, Series of 1987[101] to privatize several hundred government institutions in an attempt to spark investment in mineral resource extraction.[102] This issuance authorized the Secretary of

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96 Mong Palatino, From Bad to Worse: The Philippines New Mining Law, *available at* https://thediplomat.com/2012/08/from-bad-to-worse-the-philippines-new-mining-law (last accessed July 20, 2021) [https://perma.cc/RC8F-DFVX].

97 Geronimo, *supra* note 5.

98 *Id.*

99 Abundance and Poverty Paradox, *supra* note 62.

100 E.O. No. 130, s. 2021, § 1.

101 Office of the President, Authorizing the Secretary of Environment and Natural Resources to Negotiate and Conclude Joint Venture, Co-Production, or Production-Sharing Agreements for the Exploration, Development and Utilization of Mineral Resources, and Prescribing the Guidelines for Such Agreements and Those Agreements Involving Technical or Financial Assistance by Foreign-Owned Corporations for Large-Scale Exploration, Development, and Utilization of Minerals, Executive Order No. 279, Series of 1987 [E.O. No. 279, s. 1987] (July 25, 1987).

102 Minerva Chaloping-March, *The Mining Policy of the Philippines and Resource Nationalism Towards Nation-Building*, 138-139 J. DE LA SOCIÉTÉ DES OCÉANISTES 93, 96 (2014).

Environment and Natural Resources to enter into joint ventures and production-sharing agreements on the country's behalf, thus increasing foreign-backed mining activity.[103]

2. Fidel Ramos Administration

Further expansion under former President Fidel V. Ramos' administration consisted in the enactment of the enabling law regulating the mining industry, which adopted a "neo-liberal framework to attract mining investors"[104] to speed up national industrialization.[105]

3. Gloria Macapagal-Arroyo Administration

Former President Gloria Macapagal-Arroyo issued Executive Order No. 270 in 2004 to revitalize mining in the country.[106] The issuance pronounced the state policy to "promote responsible mineral resources exploration, development[,] and utilization, in order to enhance economic growth,"[107] while also invoking sustainable development, justice, equity, cultural sensitivity, and respect for national sovereignty.[108] The issuance also acknowledged the potential of mining investments to alleviate poverty incidence.[109] Later that year, Executive Order No 270-A[110] was issued to encourage further investments and fast-tracking of mining applications and operations.[111]

4. Benigno Simeon Aquino III Administration

Former President Benigno Simeon Aquino III issued Executive Order (E.O.) No. 79 in 2012.[112] The Philippine government attempted to strike

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103 E.O. No. 279, s. 1987, § 1.

104 Abundance and Poverty Paradox, *supra* note 62.

105 *Id.*

106 Office of the President, National Policy Agenda on Revitalizing Mining in the Philippines, Executive Order No. 270, Series of 2004 [E.O. No. 270, s. 2004], § 1 (Jan. 16, 2004).

107 *Id.*

108 *Id.*

109 *Id.* whereas cl. para. 3.

110 Office of the President, Amending Executive Order No. 270, Executive Order No. 270-A, Series of 2004 [E.O. No. 270-A, s. 2004] (Apr. 20, 2004).

111 *Id.* § 1.

112 Office of the President, Institutionalizing and Implementing Reforms in the Philippine Mining Sector, Providing Policies and Guidelines to Ensure

a balance between regulating the mining industry, maximizing economic benefits, and protecting the environment.[113]

The goal of E.O. No. 79 was to promote responsible mining practices.[114] It affirmed the strict implementation of environmental standards in mining,[115] declared a moratorium on mineral agreements pending fiscal reforms in the mining sector,[116] mandated the production of a unified map on extractives and other land uses,[117] directed relevant government agencies to develop a roadmap on downstream linkages to increase value-added activities and industries,[118] and ordered the enhanced governance of small-scale mining.[119]

The issuance also proclaimed the country's commitment to participate in the Extractive Industries Transparency Initiative (EITI).[120] Moreover, E.O. No. 79 created an inter-agency oversight body of the government called the Mining Industry Coordinating Council (MICC),[121] which was to be co-chaired by the Secretaries of the Department of Environment and Natural Resources (DENR) and the Department of Finance (DOF).[122]

5. Rodrigo R. Duterte Administration

On 14 April 2021, President Rodrigo R. Duterte signed E.O. No. 130, Series of 2021.[123] The issuance effectively repealed E.O. No. 79,[124] which previously provided that before new mineral agreements could be entered, "legislation rationalizing existing revenue sharing schemes and

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Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Executive Order No. 79, Series of 2012 [E.O. No. 79, s. 2012] (July 6, 2012).

113 *Id*. whereas cl. paras. 1-8.

114 *Id*. whereas cl. para. 8.

115 *Id*. § 2.

116 *Id*. § 4.

117 *Id*. § 16.

118 E.O. No. 79, s. 2012, § 8.

119 *Id*. § 11.

120 *Id*. § 14.

121 *Id*. § 9.

122 *Id*.

123 E.O. No. 130, s. 2021.

124 *Id*. § 1.

mechanisms" had to take effect.[125] As a consequence, the Philippines opened applications for new minerals management agreements with interested investors.[126]

C. Why is R.A. No. 7942 a Bad Law?

The passage of the Philippine Mining Act of 1995 revitalized the Philippine mining industry, enforcing a shift in the government's policy from tolerance to the aggressive promotion of large-scale mining.[127] Its implication irrationally exploited our natural resources, retarded our national growth, and compromised the lives of the Filipino people.[128] Thus, the Mining Act of 1995 contains several inherent flaws —

(a) It promotes the exportation of raw minerals without maximizing the benefits of such resources for the Filipino people;
(b) It fails to take into consideration externalities or negative impacts, thus leaving the masses and the local government units (LGUs) to bear the brunt of the same;
(c) It prioritizes exploration, development, and utilization of resources over and above human rights, food security, and environmental conservation;
(d) It grants too much power for decision-making to the President when resources are the only heritage of the Filipino people, while disempowering local communities through lack of participatory mechanisms;
(e) The law is not consistent with sustainable development;
(f) It grants too many incentives for investments, including confidentiality of information, return of investments, and tax-breaks;[129]
(g) It lacks systems to ensure payment and compensation of affected communities and local government units;

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125 E.O. No. 79, s. 2012, § 4.

126 Madelaine B. Miraflor, *Mining Sector Cheers Over EO 130*, MANILA BULL., Apr. 15, 2021, *available at* https://mb.com.ph/2021/04/15/mining-sector-cheers-over-eo-130 (last accessed July 20, 2021) [https://perma.cc/KHD3-C5LM].

127 Philippine Mining Act of 1995, § 26. *See also* Teresita Asuncion M. Lacandula-Rodriguez, *Philippine Environmental Mediation in Mining Conflicts*, 61 ATENEO L.J. 555, 569 (2016).

128 Geronimo, *supra* note 5.

129 Philippine Mining Act of 1995, ch. XVI.

(h) It fails to provide for punishment and accountability for social impact, including human rights violations;
(i) It fails to provide rational and comprehensive benefit-sharing among stakeholders;
(j) It fails to consider the physical characteristics of the Philippines that are not conducive to industry, despite claims that the Philippines has rich mineral resources, when the country in fact is also rich in agricultural resources; and
(k) It permits 100% ownership and control of natural resources to foreigners.[130]

1. Beneficiaries under R.A. No. 7942

In principle and policy, the Philippine Mining Act of 1995 gives away the nation's minerals to foreigners.[131] Particularly, Section 18 thereof provides that "all mineral resources in public or private lands, including timber or forestlands as defined in existing laws, shall be open to mineral agreements or financial or technical assistance agreement applications."[132]

This is a treacherous provision of law that renders fragile the archipelagic ecology, including local communities that are vulnerable to environmental plunder and irreversible disaster.[133] The law permits foreign corporations to embark on treasure hunts on Philippine soil.[134] While the country can regulate the search, the law leaves the Philippines nothing but a destroyed local environment.[135] Environmental policy should be framed in a manner that declares all areas closed to mining except when allowed by the government.

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[130] Philippine Mining Act of 1995, § 56.

[131] *See* La Bugal-B'Laan Tribal Association, Inc. v. Ramos, G.R. No. 127882, 421 SCRA 148, 173 (2004).

[132] Philippine Mining Act of 1995, § 18.

[133] Geronimo, *supra* note 5.

[134] Katerina Francisco, *Green Groups Urge 'Zero Vote' vs Pro-Mining Bets*, RAPPLER, Mar. 1, 2016, *available at* https://www.rappler.com/nation/elections/green-groups-zero-vote-mining-candidates (last accessed July 20, 2021) [https://perma.cc/Y8UQ-XWK4].

[135] Geronimo, *supra* note 5.

Section 33 of the Act merely adds insult to injury.[136] The provision does not demand a citizenship requirement in applications for an FTAA.[137] This means that 100% foreign-owned and controlled corporations may operate large-scale mining projects in the country at the expense of Filipinos who are the real owners of these mineral resources.[138]

Notwithstanding the allowance provided to wholly foreign-owned mining corporations, local Filipino miners who control a majority of the country's resources also benefit exorbitantly from the extractive industry at the expense of Filipinos on the margins.[139] The inverted Philippine social strata push the underprivileged into even deeper poverty when the rich and powerful exploit the same natural resources on which the poor subsist.[140]

Filipino mining companies exacerbate the widening gap between the rich and the poor.[141] For example, Saggittarius Mines, Inc., based in Tampakan, South Cotabato, was obtained by the Alcantara Group of Companies in 2015 and is now a 100% Filipino corporation.[142] While Filipino, they too are responsible for both the actual and potential destruction of people and planet in Tampakan.[143]

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136 Philippine Mining Act of 1995, § 33. "Section 33. Eligibility. — Any qualified person with technical and financial capability to undertake large-scale exploration, development, and utilization of mineral resources in the Philippines may enter into a financial or technical assistance agreement directly with the Government through the Department." *Id.*

137 *Id.*

138 *See* La Bugal-B'Laan Tribal Association, Inc., 421 SCRA at 234.

139 Pia Ranada, *Neri Colmenares, Leody de Guzman Want Mining Act Repealed*, RAPPLER, Mar. 4, 2019, *available at* https://www.rappler.com/nation/elections/colmenares-de-guzman-want-mining-act-repealed (last accessed July 20, 2021) [https://perma.cc/UTT7-PNPA].

140 *Id.*

141 *Id.*

142 Lois Calderon, *Exclusive: Tampakan, Other Giant Mines Could Strike Gold in Wake of Duterte's New Order*, CNN PHIL., Apr. 26, 2021, *available at* https://www.cnnphilippines.com/news/2021/4/26/Exclusive--Tampakan--other-giant-mines-could-strike-gold-in-wake-of-Duterte-s-new-order.html (last accessed July 20, 2021) [https://perma.cc/6BY8-CMCE].

143 *See SC to Zambales Mining Firms: Prove You're Not Harming Environment*, RAPPLER, July 21, 2016, *available at* https://www.rappler.com/nation/supreme-court-writ-kalikasan-zambales-mining-companies (last accessed July 20, 2021) [https://perma.cc/AM88-VAPX].

2. Mining Tenements Granted Through the FTAA

The Act also allows a maximum of 16,200 hectares per contract to be mined with a term of 50 years.[144] Given that the entire country is an island ecosystem and a watershed, it is only logical that a new law protecting national patrimony and Filipino interest must be legislated.

3. Local Participation in the Approval of Mining Applications

The Philippine Mining Act of 1995 grants power over mineral governance almost exclusively to the President (upon recommendation from the DENR),[145] which dismisses the critical role of consent from LGUs and affected community stakeholders who stand to benefit or suffer from the intrusion of extractive industry.[146] Contracts are often entered into without the affected communities[147] being able to register their position.[148] Legal reforms are necessary to ensure greater participation of LGUs, civil society organizations, indigenous peoples communities, and other local communities in deciding whether or not to grant mining permits, akin to a Multi-Sectoral Mining Council.[149]

4. National Government Profit from Mining

The Philippine Mining Act of 1995 is also flawed for having a fiscal regime skewed in favor of foreign investors.[150] The primary taxes levied on the mining sector are only corporate income tax,[151] excise tax on

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144 A.O. No. 2010-21, § 18 (a) (2).

145 Philippine Mining Act of 1995, § 5.

146 *See* An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160, § 2 (c) (1991). "It is likewise the policy of the State to require all national agencies and offices to conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions." *Id.*

147 *Id.* (The definition does not even include downstream communities.).

148 *See* Carolyn O. Arguillas, Multisectoral Council, Not DENR, Should Decide to Allow or Not Allow Mining, *available at* https://www.mindanews.com/top-stories/2012/01/multisectoral-council-not-denr-should-decide-to-allow-or-not-allow-mining-2 (last accessed July 20, 2021) [https://perma.cc/TQY5-Q5CD].

149 *Id.*

150 *See* Francisco, *supra* note 134.

151 Philippine Mining Act of 1995, §§ 81 & 83.

minerals,[152] and royalties on mineral reservations.[153] There is no mandate on royalty fees[154] or benefit sharing arrangements other than those covered as mineral reservations.[155] Moreover, there is not even a fair share from the income generated directly from these minerals.

At best, the country generates revenue from the extraction of metallic minerals through the excise tax pegged at a very minimal rate of "two percent (2%) based on the actual market value of the annual gross output"[156] pursuant to Section 80 of the Philippine Mining Act of 1995, in reference to R.A. No. 7729,[157] which amended Section 151 (a) of the National Internal Revenue Code.[158] This fiscal regime makes it highly attractive to foreign investments. Therefore, a new and genuinely rationalized mining fiscal regime that favors the Philippine economy must be articulated.

The insinuation by E.O. No. 130 that the Tax Reform for Acceleration and Inclusion Law (TRAIN Act) has rationalized the revenue sharing scheme and mechanism of mining under the Philippine Mining Act[159] is preposterous and totally misleading. Increasing the excise tax from 2% to 4% does not in itself rationalize the fiscal regime, as it leaves many other economic provisions of the mining law heavily favored towards investors instead of towards the local economy.

5. Entitlements of Mining Companies Under the Law

The contractors in mineral agreements and in FTAAs have been given fiscal and non-fiscal incentives that are much too generous. In the end, this does more harm than good for the Philippine economy. Incentives

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[152] *Id.* § 84.

[153] *Id.* § 5.

[154] *But see id.* §§ 17 & 19.

[155] *Id.* § 5.

[156] An Act Reducing the Excise Tax Rates on Metallic and Non-Metallic Minerals and Quarry Resources, Amending for the Purpose Section 151 (a) of the National Internal Revenue Code, as Amended, Republic Act No. 7729, § 1 (1994).

[157] Philippine Mining Act of 1995, § 80.

[158] *Id.*

[159] E.O. No. 130, s. 2021, whereas cl. para. 5.

provided under Executive Order No. 226, or the Omnibus Investments Code of 1987,[160] include:

(a) Incentives for Pollution Control Devices;[161]
(b) Income Tax-Carry Forward of Losses;[162]
(c) Income Tax-Accelerated Depreciation;[163] and
(d) Investment Guarantees.[164]

The contractor is also entitled to the following basic rights and guarantees recognized by the government:

(a) Repatriation of investments;[165]
(b) Remittance of earnings;[166]
(c) Foreign loans and contracts;[167]
(d) Freedom from expropriation;[168]
(e) Requisition of investment;[169]
(f) Tax holidays;[170] and
(g) Confidentiality.[171]

During this time of crisis, too many incentives are given to mining investments to the prejudice of the national economy. A new law must limit the incentives to only pollution-control devices and equipment, as

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160 The Omnibus Investments Code of 1987 [OMN. INVESTMENTS CODE], Executive Order No. 226 (1987).

161 KIYOSHI NAKAYAMA, ET AL., PHILIPPINES: TECHNICAL ASSISTANCE REPORT ON ROAD MAP FOR A PRO-GROWTH AND EQUITABLE TAX SYSTEM 50, tbl. 21 (2012) (citing Mines and Geosciences Bureau, Financial or Technical Assistance Agreement, ¶ 10.3, *available at* https://mgb.gov.ph/attachments/article/79/PFC_FTAA.pdf (last accessed July 20, 2021) [https://perma.cc/AN48-LP9C] [hereinafter Financial or Technical Assistance Agreement]).

162 *Id*. (citing Financial or Technical Assistance Agreement, *supra* note 161, ¶ 10.4).

163 *Id*. (citing Financial or Technical Assistance Agreement, *supra* note 161, ¶ 10.5).

164 *Id*. (citing Financial or Technical Assistance Agreement, *supra* note 161, ¶ 10.7).

165 OMN. INVESTMENTS CODE, art. 38 (a).

166 *Id*. art. 38 (b).

167 *Id*. art. 38 (c).

168 *Id*. art. 38 (d).

169 *Id*. art. 38 (e).

170 *Id*. art. 39 (a).

171 OMN. INVESTMENTS CODE, art. 81.

well as to the establishment of downstream industries. The confidentiality provision should be removed for transparency and access to information, as well as that providing for tax breaks.

D. National Benefit as a Consequence of the Moratorium from 2012 to 2020

It is also deceiving to believe that mining will help in the recovery of the Philippine economy. The fact remains that the mining industry has only contributed an average of 0.91% to Philippine Gross Domestic Product (GDP).[172] From 2013 to 2018, mining's share in the national revenue averaged at a mere 1.54%,[173] while only contributing 5.65% to total Philippine export.[174] These figures mirror the same data from 2000 to 2009, peaking only in 2007 at 1.4% in contribution to revenue shares.[175] This proves only one thing — before or during the imposition of the moratorium, mining's contribution was close to nil.

E. Actual Public Benefit Under the Philippine Mining Law of 1995

It is illusory to believe that the Philippine Mining Law of 1995 benefits Filipinos apart from the richest Filipino corporations engaged in mineral extraction. While this may benefit the upper elite Filipinos, the exploitative condition of mining renders the poor and marginalized communities vulnerable to displacement, loss of their source of living, and worsening conditions of poverty.[176]

The export-oriented character of the local mining industry[177] results in the failure to maximize the benefits of natural resources for the Filipino people, especially the poor.[178] National policy prioritizes exploration,

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[172] Gomez, *supra* note 60.

[173] Cabarde Jr., *supra* note 57.

[174] *Id.*

[175] Gomez, *supra* note 60.

[176] *See* Pia Ranada, *Duterte to 'Confront' Congress on Need to 'Close Mining Industry'*, RAPPLER, Sept. 17, 2018, *available at* https://www.rappler.com/nation/duterte-confront-congress-close-mining-industry (last accessed July 20, 2021) [https://perma.cc/8BHQ-T9W2].

[177] Cai U. Ordinario & BusinessMirror, *Maids Contribute More to PH Economy than Mining*, ABS-CBN NEWS, Mar. 15, 2012, *available at* https://news.abs-cbn.com/business/03/15/12/maids-contribute-more-ph-economy-mining (last accessed July 20, 2021) [https://perma.cc/2GVZ-7YVW].

[178] Geronimo, *supra* note 5.

development and utilization of resources over and above human rights, food security, and environmental conservation, making this law inconsistent with sustainable development of which the country is a prime supporter.[179]

IV. Pushing for an Alternative Law

A. Alternative Policy Suggestions

In early 2012, civil society organizations pushed for the passage of an Alternative Minerals Management Bill (AMMB),[180] which was championed by then Senator Sergio R. Osmeña III in the Senate,[181] and by Representatives Lorenzo R. Tañada III, Kaka J. Bag-ao, Teddy Brawner Baguilat, Jr., Walden F. Bello, Rufus B. Rodriguez, Maximo B. Rodriguez, Carlos M. Padilla, and Roilo S. Golez, among others, in the lower house.[182] Recently, following the issuance of E.O. No. 130, Representative Lawrence Fortun of One Butuan Party List filed anew the AMMB, which seeks to rationalize mineral extraction in the country.[183]

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[179] *See* United Nations Philippines, Our Work on the Sustainable Development Goals in Philippines, *available at* https://philippines.un.org/en/sdgs (last accessed July 20, 2021) [https://perma.cc/UA7Q-SQ8K].

[180] Yahoo! News, Alternative Mineral Management Bill Pushed, *available at* https://ph.news.yahoo.com/alternative-mineral-management-bill-pushed-112719412.html (last accessed July 20, 2021) [https://perma.cc/387J-ZMUG].

[181] *See* An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, S.B. No. 3126, 15th Cong., 2d Reg. Sess. (2012).

[182] *See* An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, H.B. No. 206, 15th Cong., 1st Reg. Sess. (2010) & An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, H.B. No. 3763, 15th Cong., 1st Reg. Sess (2010).

[183] Jonathan L. Mayuga, *Lawmakers, Groups Pitch for 'Alternative' Mining Law in Place of Palace Moratorium*, BUSINESSMIRROR, Apr. 28, 2021, *available at* https://businessmirror.com.ph/2021/04/28/lawmakers-groups-pitch-for-alternative-mining-law-in-place-of-palace-moratorium (last accessed July 20, 2021) [https://perma.cc/X7GH-EV2P] & An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the

The Makabayan bloc in Congress also filed their version of the AMMB called the "People's Mining Act."[184] The spirit and intent of the People's Mining Act is similar to AMMB.[185]

B. Policy under the Alternative Minerals Management Act

The Alternative Minerals Management Act (AMMA) of 2019 aims to regulate the rational exploration, development and utilization of mineral resources and ensure the equitable sharing of benefits for the State, indigenous peoples and local communities and for other purposes.[186] AMMA covers "ownership, management[,] and governance" of offshore and onshore ore minerals; quarry resources; sand and gravel; guano; and gemstones.[187] The bill excludes offshore mining and other resources, such as petroleum, coal, natural gas, radioactive materials, and geothermal energy, which are governed by special laws.[188]

The bill considers decades-long issues, experiences, and analyses of different individuals, organizations, and communities affected by local mining.[189] The bill seeks to elevate marginalized and impoverished communities to the level of big businesses (in terms of political power) by forcing the government, transnational corporations, international finance corporations, and other countries to address the loopholes in the law and to stop unjust mining regimes and practices in the Philippines.[190]

Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, H.B. No. 112, 18th Cong., 1st Reg. Sess. (2019).

184 An Act Re-Orienting the Philippine Mining Industry, Ensuring the Highest Industry Development Standards, and for Other Purposes, H.B. No. 4315, 15th Cong., 1st Reg. Sess. (2011).

185 *Id*. explan. n.

186 An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, S.B. No. 353, 18th Cong., 1st Reg. Sess. (2019).

187 *Id*. § 8.

188 *Id*.

189 *Id*. explan. n.

190 *Id*.

1. Non-Negotiable Principles in an Alternative Mining Law

As such, any law that will replace the Philippine Mining Act of 1995 must

> guarantee that the exploration, development[,] and utilization of mineral resources will primarily benefit the Filipino people; [prioritize more viable and more] sustainable livelihood choices for communities[, giving] utmost importance to food security and livable conditions for the people; [ensure] that the gains from the mining industry would be maximized while preventing or mitigating its adverse effects; [recognize] that the issue of environment and sustainable development is local ... [; prioritize] local participation in decision[-making] surrounding mining; [ensure] the protection of human rights of communities and individuals; and [impose corresponding] penalties for violations [thereof].[191]

2. Founding Principles

The Dapitan Initiative of 2002[192] advocated several principles to constitute the foundation of reforms in mining law, which include the need to

1. uphold indigenous people's rights and achieve a more ecologically sound, gender-fair, equitable system of resource management;
2. [guarantee that] everyone [shall] share in the burden of satisfying resource needs primarily through reusing and recycling existing mineral products;
3. [ensure that] in land and water use, the concerns of food security, which includes food free from pollution, livelihood production, ecological balance, equity, and social justice should always be the priority;
4. [ascertain that] only resources that are necessary for domestic use and national industrialization should be utilized. … [; and]
5. [prohibit any] compromise on human rights, dignity[,] and collective identities.[193]

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191 *Id.*

192 Alyansa Tigil Mina, *The Alternative Mining Bill*, MANILA TIMES, May 9, 2010, *available at* https://www.manilatimes.net/2010/05/09/news/top-stories/the-alternative-mining-bill/752522 (last accessed July 20, 2021) [https://perma.cc/X8LU-NPR4] (citing MAC, Dapitan Declaration on Mining, *available at* http://www.minesandcommunities.org/article.php?a=1879 (last accessed July 20, 2021) [https://perma.cc/9WN7-5C9F]).

193 *Id.*

3. Salient Features

a. Conservation of Mineral Resources

Use of minerals must take into consideration the allocation needed to be used by future generations.[194] Prioritization of recycling remaining available minerals,[195] as well as the rehabilitation of old abandoned mines, must be ensured.[196] If to be used by the present generation, it would only be under a rational needs-based utilization and domestic-use-oriented framework,[197] with actual mineral extraction further weighed against the ecological and social benefits and costs from other land uses.[198]

b. For the Benefit of the Filipino People

The exploration, development, and utilization of mineral resources are primarily for the benefit of the Filipino people.[199] It will be geared towards an ecologically-sound national industrialization and modernization of agriculture.[200] Towards this end, the State shall build the domestic processing capacity for industrial metals and other labor-intensive downstream industries.[201] Only mineral resources needed for local industries shall be mined.[202]

c. Minerals Utilization Framework

This will be formulated to support plans for national development based on the principle of sustainable development.[203] This framework will define the kind and amount of minerals to be extracted in a given

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194 *See* An Act to Regulate the Rational Exploration, Development and Utilization of Mineral Resources, and to Ensure the Equitable Sharing of Benefits for the State, Indigenous Peoples and Local Communities, and for Other Purposes, H.B. No. 984, § 5, 16th Cong., 1st Reg. Sess. (2013).

195 H.B. No. 984, § 13.

196 *Id.* § 14.

197 *Id.* § 4 (a).

198 *Id.* § 16.

199 *See id.* § 12.

200 H.B. No. 984, §§ 4 (m) & 17.

201 *Id.* § 17.

202 *Id.* § 34

203 *Id.* § 17.

timeline.[204] The Mines and Geosciences Bureau (MGB) will be transformed into a purely scientific research institution.[205] The State, through the Bureau, shall be in charge of the exploration of strategic minerals.[206] The MGB shall come up with an inventory of mineral resources,[207] identify strategic minerals needed for national development,[208] demarcate mineral areas,[209] and build baseline information on watershed continuums.[210]

d. Multi-Sectoral Mineral Councils (MMMC)

A Multi-Sectoral Mineral Council will be created in each watershed continuum area[211] and will have the authority to allow extraction and processing of minerals in its area[212] and to approve mineral agreements.[213] Affected local communities and local government units are defined as those which will be potentially impacted by mining activities located in relation to a watershed continuum[214] — an area consisting of a watershed and the interconnection from the headwater to the reef.[215]

e. Ownership of Indigenous Peoples

"[M]ineral resources within ancestral domains/ancestral lands are the collective private property of the indigenous cultural communities/ indigenous peoples (ICCs/IPs)[.]"[216] Further, "[n]o mining activity shall be conducted within the ancestral domains[ ] of ICCs/IPs without their free,

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204 *Id.*

205 *Id.* § 19.

206 H.B. No. 984, § 24.

207 *Id.* § 33.

208 *Id.* § 34.

209 *Id.* § 35.

210 *Id.* § 36.

211 *Id.* § 38.

212 H.B. No. 984, § 39 (a).

213 *Id.* § 39 (c)

214 *Id.* § 37.

215 *Id.* § 20 (ooo).

216 *Id.* § 27.

prior and informed consent (FPIC)" that is based on their respective traditional consent processes.[217]

f. No-Go Zones

There will be areas closed to mining operations,[218] which will include, among others, critical watersheds,[219] geo-hazard areas,[220] small island ecosystems,[221] lands covered by the Comprehensive Agrarian Reform Law,[222] and key biodiversity areas.[223] Furthermore, mineral extraction will not be allowed in areas more beneficial to other land uses.[224] Priority will be given to more viable and more sustainable livelihood choices for communities,[225] with utmost importance given to food security and livable conditions for peoples.[226]

g. Mineral Agreements

"Mineral resources development, utilization and processing shall be reserved for Filipino citizens and for Filipino corporations."[227] Financial and Technical Agreements (FTAAs) and other agreements granting foreign corporations full access and ownership to explore or extract mineral resources will not be allowed.[228] "[T]he contract area per agreement shall not exceed [500] hectares,"[229] and the maximum allowable total contract area for any person in any given watershed area will be [750] hectares.[230] The term for a mineral agreement will be the

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217 *Id.* § 28.

218 H.B. No. 984, § 41, para. 4.

219 *Id.* § 41, para. 4 (e).

220 *Id.* § 41, para. 4 (h).

221 *Id.* § 41, para. 4 (i).

222 *Id.* § 41, para. 4 (l).

223 *Id.* § 41, para. 4 (p).

224 H.B. No. 984, § 41, para. 5.

225 *Id.* § 76.

226 *Id.* § 4 (f).

227 *Id.* § 12.

228 *Id.* § 46, para. 2.

229 *Id.* § 56.

230 H.B. No. 984, § 56.

mine life plus five years for rehabilitation, which, in total, should not exceed 15 years.[231]

h. Maximizing Gains and Preventing or Mitigating Adverse Effects

Corporate transparency and accountability will be established.[232] Before actual operations, contractors shall submit their Environmental and Social Impact Assessment and Mitigation Plan (ESIAMP),[233] which will also contain a Social Development Plan.[234] Mandatory consultations with affected communities shall be undertaken in each phase of the mining operation,[235] and free prior and informed consent of indigenous peoples at each mining phase shall also be required.[236] Human rights protection will be prioritized,[237] and penalties shall be imposed for violations thereof.[238] Open-pit mining methods for extraction of mineral ores shall be prohibited.[239]

i. Equitable Sharing

Aside from fees and taxes, the "[g]overnment shall have ... a share equivalent to [at least] [10%] of the gross revenues from the development and utilization of mineral resources that are owned by it[.]"[240] "In case of mineral operations within ancestral domains, the contractor shall pay at least [10%] of the gross revenues as royalty to the ICC/IPs.[241] Community development programs shall not be considered as royalty payment."[242] The shares of LGUs will also be directly paid based on their respective LGU classification, vulnerability, and human development index from the net income of the mining project.[243]

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231 *Id.* § 57.

232 *See id.*, §§ 49 & 144.

233 H.B. No. 984. § 49, para. 1 (l).

234 *Id.* § 50.

235 *Id.* § 42 (citing LOCAL GOV'T CODE, § 26 & 27).

236 H.B. No. 984, § 28.

237 *Id.* § 137.

238 *Id.* § 157.

239 *Id.* § 58.

240 *Id.* § 99.

241 *Id.* § 100.

242 H.B. No. 984, § 100.

243 *Id.* § 103.

V. Conclusion

A. Demand from the Government

Given the foregoing evaluation of the current mining policies in the country, it is urged *first*, that President Rodrigo revoke E.O. No. 130, Series of 2021; *second*, that he reinstate E.O. No. 79, Series of 2012; and *third*, that during the pendency of the moratorium, Congress pass an alternative law based on the principles discussed in this Article.

B. Legislative Guidance

Leaders should be guided and enlightened by the instructive words of the Supreme Court in *Oposa vs. Factoran, Jr.*,[244] to wit —

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation[,] ... the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. … [They are reflected in the Constitution to highlight] their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second[. T]he day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.[245]

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[244] Oposa v. Factoran, Jr., G.R. No. 101083, 224 SCRA 792 (1993).

[245] *Id*. at 804-05.

HOW IGNATIAN DISCERNMENT AND NEURO-LINGUISTIC PROGRAMMING TECHNIQUES HELP MEDIATORS RESOLVE CONFLICT

Vergenee Marree A. Abrenica-Orillosa[*]

I. Introduction

Both at the international and domestic levels, mediation is widely accepted as a mode of dispute resolution because of its advantages, "including time and cost efficiency, confidentiality[,] and its non-confrontational character [ ] as opposed to litigation and arbitration [ ]."[1] With the pressing trend of resolving disputes outside of court litigation comes also the serious need to educate people about the skills needed for a purposive and successful mediation.

This Article begins with the insights on the Singapore Convention and how mediators can reconcile the science of neuro-linguistic programming (NLP) and the Ignatian Spiritual Exercise of *discernment* in resolving disputes through mediation. Mediators as key players must be discerning, mindful, and proactive leaders in the settlement of disputes using shared values. They should not merely act as third-party observers and facilitators. Mediators can make use of the process of *Ignatian discernment* to lead parties to arrive at a voluntary resolution of their disputes.

II. The Mediator under the Singapore Convention

On 20 December 2018, the United Nations (UN) General Assembly adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation, which is known as the Singapore

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[1] Hassan Faraj Mehrabi & Hosna Sheikhattar, The Singapore Mediation Convention: A Promising Start, an Uncertain Future, *available at* https://leidenlawblog.nl/articles/the-singapore-mediation-convention-a-promising-start-an-uncertain-future (last accessed July 20, 2021) [https://perma.cc/K8JF-7NHN].

Convention on Mediation.[2] In adopting the Singapore Convention, the UN General Assembly emphasized the value of mediation in the context of cross-border commercial relations and the need to have an international framework for enforcement and recognition of international settlement agreements resulting from mediation.[3] The Singapore Convention serves as the model law for those States without domestic laws on mediation.[4]

The Singapore Convention does not explicitly impose who may qualify as a mediator, except that the mediator must be a third party who "lack[s] the authority to impose a solution [to] the parties[.]"[5] Some States during the working group discussions argue that the mediator need not be absolutely impartial or neutral, and parties do not need to appoint an independent person.[6] These States are of the opinion that a mediator does not have to be impartial in the same way that a judge or an arbitrator should be since parties may choose whomever they deem best to assist or persuade them to come into an agreement, and they can even withdraw from the mediation if they believe that they are not being treated fairly.[7]

To arrive at a compromise, the Singapore Convention provides narrow grounds to deny the reliefs sought based on the mediator's misconduct.[8] The competent authority of a State party may refuse reliefs on the basis of the mediated international settlement agreement when there is causal link between the mediator's serious breach of the applicable standards (agreed upon by the parties prior to the mediation) and the party's agreeing to sign the settlement agreement.[9] Another ground is when

> [t]here [is] failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence[;] and such

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2 United Nations Convention on International Settlement Agreements Resulting from Mediation, G.A. Res. 73/198, U.N. Doc. A/RES/73/198 (Dec. 20, 2018) [hereinafter Singapore Convention].

3 *Id.*

4 *See id.*

5 Singapore Convention, *supra* note 2, art. 2, ¶ 3.

6 Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 50 (2019) (citing United Nations, (Arbitration and Conciliation), 64th session — 04/02/2016, *available at* https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/83bbcdba-28c4-4368-bab6-e8d17b3fbcb6 (last accessed July 20, 2021) [https://perma.cc/2ZAQ-PXNZ]).

7 *Id.*

8 *See* Singapore Convention, *supra* note 2, art. 5.

9 *Id.* art. 5 (1) (e).

> failure to disclose had a material impact or undue influence on a party[,] without which failure that party would not have entered into the settlement agreement.[10]

The Singapore Convention, as the model law for mediation of cross-border commercial transactions, does not make a mediator's neutrality or impartiality as a condition precedent before beginning the mediation process.[11]

Although awaiting signatures and ratification of States, the Singapore Convention gives deference to the process of mediation in the settlement of international commercial disputes and grants privileged treatment to mediated settlement agreements that must be enforced and recognized by State parties.[12] With this recent development in international conciliation of cross-border commercial disputes, the mediator is placed in a position of legal power and influence to settle disputes and keep the commercial relations of the conflicting parties.[13] Hence, a mediator, although lacking the authority to impose a solution upon the parties to the dispute,[14] is not reduced to the role of a secretary or a stenographer who would simply take down notes on what transpired during the parties' conferences and meetings.

III. The Mediator under Philippine Law

Under Philippine law,[15] the mediator conducts the mediation,[16] "facilitates communication and negotiation, and assist[s] the parties in reaching a voluntary agreement regarding a dispute."[17] A mediator assumes a proactive role and is not a mere spectator during the conciliatory process. Mediators must become more mindful of what they

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10 *Id*. art. 5 (1) (f).

11 *See id*.

12 Schnabel, *supra* note 6, at 11.

13 Schnabel, *supra* note 6, at 2 (citing United Nations, UNCITRAL, 48th Session - 02/07/2015, *available at* https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/f3e4531b-7187-411c-a063-27bb8e1bc546 (last accessed July 20, 2021) [https://perma.cc/6P7V-EVEX]).

14 Singapore Convention, *supra* note 2, art. 2, ¶ 3.

15 An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004).

16 Alternative Dispute Resolution Act of 2004, § 3 (r).

17 *Id*. § 3 (q).

can contribute to the process of resolving the dispute in terms of their presence,[18] especially when the parties personally chose them.

As a subset to the mediator's mindfulness, mediators must also be *intentional*, which requires them to be deliberate and purposive.[19] Intentionality in mediation does not violate neutrality. Rather, intentionality is consistent with the purpose of the law and puts teeth to the State's mandate to "encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets."[20]

In litigation and arbitration, judges and arbitrators have unique trial techniques adopting rules of procedure, substantive law, and jurisprudence that enable them to render a judgment or arrive at an arbitral award on the conflicting claims of the parties. Similarly, mediators need tools to enable them to perform their role well and become deliberate in leading the parties during the mediation process, without necessarily imposing a solution upon them.[21] This does not mean, however, that the mediator will leave the parties without any direction. Mediators are required to lead and guide the parties towards arriving at a mutually acceptable solution to their own problems.[22]

To carry out mediation, the mediator needs skills and tools, without being bound by substantive or procedural rules. Although commonly seen as a legal process, mediation may adopt scientific standards to unravel communication patterns to help parties orchestrate their personal solutions to their disputes.[23] Mediators can adopt techniques not found in law, but in other disciplines. Since conflicts often result from differences in perceptions and miscommunications, mediators may look into Neuro-Linguistic Programming (NLP) techniques and behavioral perspectives[24] and observe Ignatian values to assist parties in finding their solutions[25] to the conflict.

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18 Anet Kate, Intentionality in Mediation, at 1, *available at* https://www.academia.edu/10235564/Intentionality_in_Mediation (last accessed July 20, 2021) [https://perma.cc/778F-4LQL].

19 *Id.*

20 Alternative Dispute Resolution Act of 2004, § 2.

21 *See* Singapore Convention, *supra* note 2, art. 3.

22 *See* Alternative Dispute Resolution Act of 2004, § 3 (q) & (r).

23 Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 NEGOTIATION J. 321, 324 (1993).

24 Archie Zariski, *A Theory Matrix for Mediators*, 26 NEGOTIATION J. 203 (2010).

25 *See* Jim Manney, An Ignatian Framework for Making a Decision, *available at* https://www.ignatianspirituality.com/making-good-decisions/an-approach-to-

A. NLP and Ignatian Discernment

At its core, NLP involves the process of communication involving the *mind* serving as the processing unit; *language* conveying and receiving the information; and *repetitive behavioral patterns* responsible for forming perceptions and conveying notions.[26] NLP works on the fundamental presumption that perceptions of ourselves, and the environment are formed through the faculties of the senses.[27] The ability to perceive is in reality an activity of the senses. In NLP, the modalities that create the reality are "[o]lfactory (smell)[,] [g]ustatory (taste)[,] [a]uditory (hearing)[,] [v]isual (sight)[,] [k]inesthetic (physical), and [now d]igital (facts, figures, and logic),"[28] that altogether are represented from internal sensory experience to external communicated expressions through language. Hence, the way that each person perceives the world differs and creates the conflict. NLP then makes use of the same modalities that cause the dispute to resolve it.[29]

NLP is the study of persons' use of language to themselves and towards others to attain a certain purpose.[30] It has a system to untie the knots in human expressions and remove blocks in conflict resolution.[31] By loosening the deeper patterns in a person's language, NLP examines how people effectively "think (neuro), ... communicate (linguistic)[,]" and behave towards themselves and others (programs), and empowers people to take stock of their actions and to be responsible for their results.[32]

NLP gives people the ability to transcend themselves and their old thought patterns, speech, and actions and understand the vicious cycle involved in conflicts.[33] Instead of sticking to one's position, NLP opens understanding of the other's side as NLP clears biases and perceptions

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good-choices/an-ignatian-framework-for-making-a-decision (last accessed July 20, 2021) [https://perma.cc/53KV-G6TK].

26 Ahsan Bashir & Mamuna Ghani, *Effective Communication and Neurolinguistic Programming*, 6 PAK. J. CO. SOC. SCI. 216, 216 (2012) (citing JOSEPH O' CONNOR & IAN MCDERMOTT, WAY OF NLP 14 (2001)).

27 *See* Natural Hypnosis, What is Neuro Linguistic Programming (NLP) Hypnosis Style, *available at* https://www.naturalhypnosis.com/blog/what-is-neuro-linguistic-programming-nlp-hypnosis-style (last accessed July 20, 2021) [https://perma.cc/HJD4-YT6V].

28 *Id.*

29 *Id.*

30 *See* Sue Brereton, NLP – Its Application in the Resolution of Workplace Conflict, *available at* https://www.nlpcoaching.com/nlp-coaching/nlp-application-resolution-workplace-conflict (last accessed July 20, 2021) [https://perma.cc/4NPL-YUFX].

31 *Id.*

32 *Id.*

33 *Id.*

and releases the accumulation of negative emotions. NLP allows individuals to process their thoughts, feelings, and actions and to assume personal responsibility in finding solutions to their own problems.[34] With NLP, the challenge for the mediator is leading the parties to speak the same language and incorporate the same mind in order to achieve the common goal of resolving their conflicts.[35]

This ability to transcend the self in NLP is akin to the Ignatian principle of *indifference,* the movement from the personal space towards a posture that is free of inclinations.[36] The Ignatian Spiritual Exercises bring the individual to a plane of detachment with the quieting of the thoughts, emotions, and will to become more aware of what truly matters.[37] This process of becoming aware and moving away is the *discerning* process.

Ignatian discernment accounts for the circumstances, issues, merits, concerns, and values at stake.[38] "What do I desire?"[39] Introspect and ask difficult questions before taking any election or choice. According to St. Ignatius, the election of a choice on how to proceed with resolving disputes must coincide with God's will.[40] Ignatian discernment enables one to be conscious of how to respond to feelings of desolation and consolation while going through the process[41] of negotiation.

The role of the mediator then is to lead the parties to that safe space where they quiet their biases. With NLP and Ignatian discernment, the mediator assists parties towards mindfulness and awareness of the many

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[34] *Id.*

[35] *Id.*

[36] *See* Debra Mooney, Introduction to Inspired Decision-Making: Personal and Communal Discernment, *available at* https://www.xavier.edu/jesuitresource/taking-time-to-reflect/inspired-decision-making1/intro-to-decision-making (last accessed July 20, 2021) [https://perma.cc/6CTU-U8TN].

[37] Patrick Nullens, *From Spirituality to Responsible Leadership: Ignatian Discernment and Theory-U*, *in* LEADING IN A VUCA WORLD 198 (Jacobus (Kobus) Kok & Steven C. van den Heuval eds., 2019).

[38] Mooney, *supra* note 36, at 18.

[39] *Id.*

[40] Ma. Christian A. Astorga, *Ignatian Discernment: A Critical Contemporary Reading for Christian Decision Making,* 32 HORIZONS 72, 87 (2005).

[41] Mary Elizabeth Kostelac, B.A., Ignatian Discernment as Seen in Shakespearean Tragedy, at 54 (Mar. 25, 2013) (unpublished M.A. thesis, Georgetown University) (on file with the Georgetown University Library, Georgetown University) (citing LOUIS J. PUHL, S.J., THE SPIRITUAL EXERCISES OF ST. IGNATIUS: BASED ON STUDIES IN THE LANGUAGE OF THE AUTOGRAPH 176 (1968)).

other possibilities beyond their own positions[42] and for them to accept that there is an abundance of ways towards reconciliation.

IV. Implications to Manipulation and Hypnosis

There are critics who oppose the use of discernment and NLP techniques when mind control and consciousness become associated with brainwashing[43] and hypnosis, which have been raised before American courts. These cases show people's fear in adopting NLP techniques in hypnosis and how it makes people act without volition.

D.K. Snider v. K.D. Grey[44] mentions NLP as hypnotic and manipulative.[45] In this case, husband and wife, Snider and Grey, entered into an agreement on the custody of their only son John, which was incorporated in their divorce decree.[46] Upon divorce, Snider, as father, was granted the custody of their only son John, while the mother Grey was granted visitation rights.[47] Grey, however, later asked the divorce court to modify the custody arrangement as Snider's continuous custody of John would not be in the child's best interest.[48] According to its jury, there were material changes in the circumstances since the entry of the prior custody order, hence, retention of Snider as custodial parent "would be injurious to the welfare of the child[.]"[49] Grey convinced the divorce court that her appointment as new custodial parent "would be a positive improvement for the child."[50] Grey listed 16 specific instances of material change that she felt were harmful to John's overall welfare.[51] First in the list was Snider's "use and practice of [NLP]."[52] According to Grey, "she underst[ood] NLP to be a very subtle form of mind control, involving some hypnotic techniques."[53] Grey raised the concern that both Snider and his

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42 Nullens, *supra* note 37, at 199.

43 *See* DANIEL SMITH, BANNED MIND CONTROL TECHNIQUES UNLEASHED: LEARN THE DARK SECRETS OF HYPNOSIS, MANIPULATION, DECEPTION, PERSUASION, BRAINWASHING AND HUMAN PSYCHOLOGY (2014).

44 D.K. Snider v. K.D. Grey (Flores), 688 S.W.2d 602 (Tex. App. 1985) (U.S.).

45 *Id*. at 608.

46 *Id*. at 604.

47 *Id*.

48 *Id*.

49 *Id*. at 605.

50 *Snider*, 688 S.W.2d at 605.

51 *Id*. at 607.

52 *Id*.

53 *Id*. at 608.

new wife were trained in NLP, which Grey believed "[could] be used without [the] person's knowledge, particularly with [the] child."[54] Grey testified that the practice of NLP was detrimental to the child (John) because certain ideas were "implanted in [the child]'s mind in a manipulative manner[.]"[55] A psychotherapist also testified that NLP had "the potential for abuse of power in a therapy [session]" when used on a child.[56] The court granted the modification of the custody arrangement in favor of the mother since the jury was able to confirm that both the father and his new wife were "pursuing their interests and involvement in a therapy known as [NLP]."[57] The court found that the father and his new wife could possibly use NLP to hypnotize and manipulate the child since John was already saying many things and acting differently against Grey based on what Snider told and molded the child to say and do.[58] Indeed, this was a material change of circumstance injurious to the child's welfare.[59]

In *Duffy v. The State*,[60] the defendant contended that the words used in the closing argument of the trial prosecutor came from cleverly crafted NLP techniques designed to suggest to the jury the shift of the burden to prove his innocence rather than the prosecution's duty to prove guilt.[61] The defendant objected to the use of NLP, as it causes closing arguments to be suggestive to the jury of his guilt rather than on the presumption of his innocence.[62] According to the defendant, NLP techniques adopted suggestive language that strongly influenced the jury and should be disallowed in a criminal process.[63] The Court of Appeals of Georgia rejected the defendant's opposition and pointed out that what was prohibited was arguing on extrinsic and prejudicial matters that had no basis in evidence.[64] The court in *Duffy v. State* did not entertain any general objection to the use of suggestive language brought about by NLP technique in a jury trial, provided that the language was not prejudicial and had proper basis.[65]

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54 *Id.*

55 *Id.*

56 *Snider*, 688 S.W.2d at 608.

57 *Id.* at 611.

58 *Id.*

59 *Id.*

60 Duffy v. The State, 610 S.E.2d 620 (Ga. Ct. App. 2005) (U.S.).

61 *See id.* at 621.

62 *Id.* at 623.

63 *Id.*

64 *Id.* at 622 (citing Fann v. State, 331 S.E.2d 547 (Ga. Ct. App. 1985) (U.S.)).

65 *See id.*

In *Lampon-Paz v. Department of Homeland Security, Department of Justice, Social Security Administration, and State of New Jersey*,[66] Lampon-Paz filed a complaint for damages against federal defendants for using electronic methods, including "electromagnetic waves, ultrasonic messaging, and 'brain mapping' against him."[67] He further alleged that federal defendants "used [ ] mind-control techniques [like NLP] to prevent him from 'whistleblowing' on misbehavior by other federal employees[,] ... [and a]s a result ... there was invasion of [his] privacy[.]"[68] The district court of New Jersey dismissed the complaint and found the allegation of mind control through NLP as insubstantial in nature of which the court did not have subject matter jurisdiction.[69] The New Jersey Court of Appeals affirmed the dismissal and emphasized that for the court to have jurisdiction over the case, the allegations in the complaint must plead sufficient facts, and not mere speculations.[70] According to the New Jersey Court of Appeals, Lampon-Paz cannot raise for the first time on appeal that the use of NLP as a mind control technique caused him harm.[71] In *Lampon-Paz*, the court required factual proof to show that NLP involves mind-control techniques.[72] Absent such proof, the negative impression on the use of NLP as a form of mind control is insubstantial in nature and speculative.[73]

Ladd Herbert House III v. State of Mississippi[74] has already declared that hypnotically refreshed testimony is not per se inadmissible.[75] Rather, the court must go into the weight and credibility of the testimonial evidence and comply the minimum safeguards, and there must be corroborating testimony or physical evidence which substantiates the hypnotically enhanced statements.[76]

The criticisms on NLP techniques as adopting hypnosis or mind control seem to put emphasis on conscious volition, which under the laws on contracts, is enshrined in the fundamental principle of party autonomy. Under Philippine ADR law, it is even declared as "the policy

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66 Lampon-Paz v. Department of Homeland Security, et al., 612 Fed. Appx 73 (U.S. Ct. of App., 3d Cir. 2015).

67 *Id.* at 74.

68 *Id.*

69 *Id.*

70 *Id.* at 75.

71 *Id.*

72 *Lampon-Paz*, 612 Fed. Appx at 74.

73 *Id.*

74 House v. State of Mississippi, 445 So. 2d 815 (1984) (U.S.).

75 *Id.* at 824.

76 *Id.*

of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes."[77] At the very core of settlement agreements resulting in mediation as a form of negotiated contract, parties must have both the freedom to contract and the freedom of contract. However, with existing case law, American courts do not seem to recognize a causal link between NLP techniques and the loss of a person's free will.

Contrary to these criticisms in American jurisprudence on NLP techniques, the Ignatian discernment is far from hypnotism or manipulation. Rather, the Spiritual Exercises encourages every mediator to take on the trait of the Great Mediator who wants all persons to have "*immediacy of ourselves to ourselves in consciousness*."[78]

Instead of manipulating others to take on one's position, Ignatian discernment rather promotes "self-mediation,"[79] where one gives attention to personal experiences with efforts to self-understand and self-correct.[80] The mediator can guide the parties' move from self-awareness to self-understanding to self-correcting, and then to finally arrive at self-appropriation[81] when one takes ownership of the decision. Consistent with the NLP process of unblocking biases, Ignatian discernment makes every party aware that resolving disputes can be an ongoing method, moving from one sphere to another with the goal of arriving at a mutually acceptable solution.

"[E]very successful negotiation involves extensive and painstaking planning."[82] To plan is to be mindful and tactical on how to encourage parties to control their emotions and to transcend their thoughts in order to arrive at a mutually acceptable resolution to their disputes and conflicting interests. Thus, a mediator has the freedom to use various methods to assist the parties in arriving at their own settlement agreement, provided that the mediator remains to be without authority to impose solutions upon the parties.[83]

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77 Alternative Dispute Resolution Act of 2004, § 2.

78 Patrick H. Byrne, *Discernment and Self-Appropriation: Ignatius of Loyola and Bernard Lonergan, S.J.*, 76 FASC. 1399, 1402 (2020).

79 *Id*. at 1403.

80 *Id*. at 1403-04.

81 *Id*.

82 Becky L. Jacobs, *Teaching and Learning Negotiation in a Simulated Environment*, 18 WIDENER L.J. 91, 97 (2008).

83 *See* Singapore Convention, *supra* note 2, art. 2, ¶ 3.

A. NLP Positioning and Ignatian Values

Developed as a science, NLP obviously has "a value system, a methodology, and [analysis] of techniques."[84] Adopting NLP techniques in mediation raises the question, "How far can a mediator use NLP techniques without breaching the principles of autonomy, neutrality, and impartiality?" These NLP techniques embody as well the Ignatian basic attitudes necessary to keep the freedom and integrity of the mediation.[85]

One of the tiers in this Ignatian discernment and NLP is *positioning*,[86] where parties see a conflict from different angles. This is where the mediator has to encourage the parties to take on the first Ignatian attitude of *openness*.[87] Everyone must approach the process free from "a pre-conceived outcome based on [ ] self-will, biases, and what Ignatius calls '*attachment*[.]'"[88] It is the role of the mediator to uproot the parties from the attitude of "My mind is made up of what I want to get from this conflict" and arrive at the stage of freedom where there are no limits[89] to the possibilities of resolving the dispute.

The mediator has to guide the parties to take various viewpoints and see conflicts from many perspectives. The *first NLP point of view* is the associated position, where "[parties] see things from [their] own point of view."[90] As an example, a child custody dispute happens when the mother who works overseas wants to remove the child from the custodial father who has remarried, but the father wants to keep sole custody. The mediator may ask the mother, "Why do you want to have custody of the child when you know that you will eventually go abroad to work?" The question to the father may be, "Why should the child stay with you now that you have a new family?" The mediator can assure the parties that both sides are considered. This point of view even highlights the mediator as a leader who communicates well, and not as a mere facilitator.

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84 Cristi Berea, *Neuro-Linguistic Programming Principles in Negotiations*, 16 OVIDIUS U. ANNALS ECON. SCI. SER. 279, 279 (2016).

85 Rev. Warren Sazama, S.J., Some Ignatian Principles for Making Prayerful Decisions, *available at* https://www.marquette.edu/faith/ignatian-principles-for-making-decisions.php (last accessed July 20, 2021) [https://perma.cc/PTP5-SX76].

86 *See* NLP Techniques, NLP Technique | Perceptual Positions, *available at* https://www.nlp-techniques.org/what-is-nlp/perceptual-positions (last accessed July 20, 2021) [https://perma.cc/TE3J-3N2Q].

87 Sazama, S.J., *supra* note 85.

88 *Id*.

89 *Id*.

90 NLP Technique, *supra* note 86.

The *second NLP position* is dissociation from the party's own position and seeing the conflict from the point of view of the other.[91] This takes on the Ignatian attitude of *generosity*[92] in thoughts of reaching towards the interests and position of others. When there is generosity, one gains freedom to choose what is right without being tainted of personal leanings and fondness.[93]

The mediator can ask the mother, "how do you think the father will feel when after you take the child to your home, the child will soon be with a nanny since you are leaving to work abroad?" The question can also be posed towards the father, "how do you think the child's mother feels about the child being reared by another woman?" The parties have to answer the questions through the lens of the other. Any answer is acceptable since the questions inquire more about feelings.

These first two positionings are consistent with the facilitative approach in mediation, wherein the mediator helps the parties arrive at "a mutually agreeable result."[94] "[A] skilled mediator applying a facilitative approach engages in a highly active and integrative process that involves gaining trust[.]"[95]

However, in facilitation, the mediator may adopt a hands-off approach and merely "[shuttle] demands and offers back and forth between the parties," which often lead to deadlocks and stalemates without arriving at acceptable terms.[96] Although the mediator has to avoid bargaining for the parties and endeavor to always remain neutral in helping the parties negotiate, acting as a mere facilitator often leads to an impasse which makes the mediator possess a passive personality in the entire mediation process.[97] If this is the scenario, then there is really no need for a mediator. The parties would merely need to get an observer who can merely record the entire process, contrary to the letter of Philippine ADR law and the mandate of the Singapore Convention.

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91 *Id.*

92 Sazama, S.J., *supra* note 85.

93 David L. Fleming, S.J., Ten Elements of Ignatian Spirituality, *available at* https://www.ignatianspirituality.com/what-is-ignatian-spirituality/10-elements-of-ignatian-spirituality (last accessed July 20, 2021) [https://perma.cc/59FD-H7SQ].

94 Doug de Vries, Mediation: Three Ways of Getting To Yes, *available at* https://www.plaintiffmagazine.com/recent-issues/item/mediation-three-ways-of-getting-to-yes (last accessed July 20, 2021) [https://perma.cc/BL7Y-KSMD].

95 *Id.*

96 *Id.*

97 *Id.*

A mediator, then, must go beyond facilitation, and adopt the evaluation approach, with the *third NLP positioning* of the independent, neutral, and third-party observer. At this stage, the mediator shows the Ignatian attitude of *courage*.[98] "To be that open and generous takes courage."[99]

In this third NLP positioning, the mediator encourages the parties to see the interactions between the first and second NLP positioning techniques and assess the dispute outside of their viewpoints.[100] For example, the mediator may say to the father, "Assuming that your child and your former wife are not involved in this dispute, what will be your advice to the father?" For the mother, the mediator may ask, "If you were not the mother of the child, assume that you are looking at the situation as unrelated to him, can you say that the father is doing a good job in raising and taking care of the child even if he has remarried?"

The objections to the use of NLP in conflict resolution happens at the fourth and fifth NLP positions, wherein the *fourth NLP position* would allow one to observe how the third NLP position relates to the people it is observing.[101] At the fourth position, the parties will then evaluate how they behaved and how neutral they were as third-party observers.[102] Here, the mediator may ask, "as you see yourself looking into the situation where you and your former wife are fighting over the custody of your child, how do you think will the outsider handle the father and the mother as they fight over the child?" "How do you think the outsider will relate to the child who is caught in the middle of the parent's custody battle?" Here, the parties would reflect and discern more deeply.

At the fourth NLP position, the mediator's goal is to help the parties achieve *interior freedom*[103] and remove external distractions. This interior freedom will allow the parties to transcend, evaluate themselves, and explore many possible solutions that are inherently good and acceptable.[104] In the Spiritual Exercises, St. Ignatius de Loyola expresses

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98 Sazama, S.J., *supra* note 85.

99 *Id*.

100 *See* NLP Techniques, *supra* note 86.

101 *Id*.

102 *Id*.

103 Sazama, S.J., *supra* note 85.

104 *See id*.

that any potential solution must be "either indifferent or good in themselves"[105] and must be done "properly and with due order."[106]

The *fifth NLP position* is wherein the parties observe "how [they] relate to [themselves] as [the] observer."[107] In other words, the parties advise themselves using the perspective of the neutral observer. The mediator leads the parties to self-talk and say, "Now, as you are able to evaluate your conflict outside of your own positions and see it objectively, what will you tell yourself and how will you assess your own claims?" Whatever the responses of the parties may be are acceptable. As self-reflection and self-evaluation happens, there is no mind control from an external body, but "a path toward living a life of freedom and integrity, especially when our lives are lived in the complex world of the law."[108]

The fourth and fifth NLP positions gravitates towards controlling thought processing. When the mediator merely guides the parties to discern and adopt various NLP perspectives, the mediator is not imposing a solution. Rather, the mediator must shift from bridging differences to emphasizing *shared values*[109] that may be secular[110] (e.g., due process, equity, justice, fairness) or spiritual[111] (e.g., love, forgiveness, sacrifice, forbearance) to get better results. These methods do not actually make the mediator support a particular party, but instead, lead the parties to transcend and separate themselves from the dispute. The Spiritual Exercises also emphasize objectivity, and the need to guide parties in detaching from emotions, personalities, and preferences in resolving the disputes.[112]

Every mediator must maintain "balance [and] equilibrium without leaning to either side[.]"[113] St. Ignatius teaches that the ultimate desire in the amicable settlement of any dispute should be the desire to do God's

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105 ST. IGNATIUS OF LOYOLA, THE SPIRITUAL EXERCISES 170 (Louis J. Puhl, S.J. trans., 2021).

106 *Id.* at 173.

107 NLP Technique, *supra* note 86.

108 Gregory A. Kalscheur, S.J., *Ignatian Spirituality and the Life of the Lawyer: Finding God in All Things - Even in the Ordinary Practice of the Law*, 46 J. CATH. LEG. STUD. 7, 17 (2007).

109 F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695, 1703-04 (2000) (citing Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 6 AM. U. J. GENDER & L. 269 (1996)).

110 *Id.*

111 *Id.*

112 Sazama, S.J., *supra* note 85.

113 *See* ST. IGNATIUS OF LOYOLA, *supra* note 105, at 179.

will.[114] At the fifth NLP position, St. Ignatius recommends the method of *examen* to reflect on what truly matters.[115] Through positioning and discernment, each party becomes confident of their mutual choices and are able to say —

> After I have gone over and pondered in this way every aspect of the matter in question, I will consider which alternative appears more reasonable. Then I must come to a decision in the matter under deliberation because of weightier motives presented to my reason, and not because of any sensual inclination.[116]

Mediation is an area where there can be "contemplative practice within law."[117] The mediator must not end the discussions with the information processed through NLP techniques, but must obtain corroborating information through external or physical evidence to substantiate whatever may have been obtained through any of the NLP methods.[118] This then calls for mediator creativity and proactiveness in resolving the conflict. Mediation then becomes both a science (when adopting NLP) and an art.[119]

B. The NLP Meta Model of Chunking in Conflict Resolution

There is a famous NLP axiom that states, "[t]he map is not the territory[.]"[120] Simply, the mind's representation of the world is not the world itself. Often, the meta model of all the mental representations becomes the root of conflict.[121] Among the applications of the meta model in NLP is chunking.[122]

A "chunk" is "a unit of information retained in the memory [which can] easily [be] recalled."[123] "[T]he formation of chunks[ ] or groups of items that go together[ ] until there are few enough chunks so that [all of the

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[114] *Id*.

[115] Kalscheur, S.J., *supra* note 108 at 24-25 (citing HARVEY D. EGAN, S.J., IGNATIUS LOYOLA THE MYSTIC 63 (1987)).

[116] ST. IGNATIUS OF LOYOLA, *supra* note 105, at 182.

[117] Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 1, 2 (2011).

[118] *See id*. at 49.

[119] *See* Menkel-Meadow, *supra* note 23, at 324.

[120] Edward F. Vinyamata Tubella, *The Neuro-Linguistic Programming Approach to Conflict Resolution, Negotiation, and Change*, 2 J. CONFLICTOLOGY 1, 2 (2011).

[121] *Id*.

[122] *Id*.

[123] Merriam-Webster Dictionary, Definition of Chunk, *available at* https://www.merriam-webster.com/dictionary/chunk (last accessed July 20, 2021) [https://perma.cc/5MH6-TW2L].

items are recalled]" makes the process of memorizing simple.[124] More specifically, in NLP, chunking deals with putting the size of information to a particular level or direction, either vertically or horizontally.[125] In NLP, ideas are chunked up and down, and sideways.[126]

Mediators, using this NLP meta model of chunking, can enrich the parties' maps and their representations of their conflicting worlds.[127] Chunking up an idea means to move it to its perceived purpose — providing a broader, higher, or bigger picture or meaning.[128] The higher level must cover positive intentions and make parties feel good.[129] For example, in the child custody battle, actual custody of the child can be chunked up to mean more mother-child bonding time, exercise of the maternal preference rule, more concrete expression of motherhood, best interest of the child, women empowerment, gender sensitivity, or whatever abstract level of information that may be thought of.[130]

A conflict may be chunked down by identifying its component details and finding the main barriers that currently affect the resolution of the problem or the achievement of the outcome.[131] When the barriers are established, a leverage point will be identified.[132] "A leverage point is 'the one thing which, if it were resolved, would have the effect of negating the impact of all the other barriers'[.]"[133] In chunking down, the question to ask is what stops this conflict from being resolved.[134] Following the child custody dispute, the father may chunk down by saying, "*I do not want my child to be left being cared by an absentee mother*" or "*I do not want to miss significant stages in my child's life*."

Within the context of conflict resolution, communicating on a meta level of information makes arriving at an agreement achievable.[135] Chunking up becomes not only a starting point, but is used to lead the mediation process towards further settlements.[136] On the other hand,

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[124] *Id.* (citing Marilyn S. Sternglass, *Sentence-Combining and the Reading of Sentences*, 27 C. COMPOSITION & COMM. 325, 326 (1980)) (emphasis omitted).

[125] Tubella, *supra* note 120, at 2.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See id.*

[131] Tubella, *supra* note 120, at 3.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

chunking down is very useful in complex disputes when a party needs to look for a leverage and a breakthrough.[137] The NLP meta model structure may observe the following steps:

1. Build the desired state first (chunking up);
2. Find a leverage state from the present state (chunking down); and
3. Close by choosing and agreeing on a new goal.[138]

In *Ignatian Spirituality*, this meta-process of chunking puts weight to each party's words of voluntary commitments. In mediation, "[n]o idle word should be uttered."[139] Hence, a negotiated agreement is a "useful purpose ... meant to serve the good of one's own soul or that of another, of the body or of tempora[ry] possessions."[140]

The mediator should be mindful in making the most out of chunking as a technique. The mediator does not become biased by allowing the parties to bring up to a higher level their own interests and positions. Rather, the mediator helps the parties approach the conflict towards their positive intentions. The mediator also does not violate the ethic of neutrality by finding leverage and chunking down since the parties themselves are the ones who identify their own barriers. Being neutral does not mean adhering to the non-interventionist approach during the mediation process.[141] Skilled mediators are proactive in their efforts[142] to assist parties to understand their conflicts, untie their barriers, seek positive intentions, and arrive at mutually acceptable solutions.

V. Conclusion

Mediation is a process of creative problem-solving, and requires not only spontaneity, but also a complex functioning of performance techniques.[143] Mediation is then a "hybrid art form" since its significance is within a legal framework.[144] Mediation as a process is built on

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137 Tubella, *supra* note 120, at 3.

138 *Id*.

139 ST. IGNATIUS OF LOYOLA, *supra* note 105, at 40.

140 *Id*.

141 Kevin Gibson, et al., *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality*, 12 NEGOTIATION J. 69, 70-71 (1996).

142 *Id*.

143 Rumani Kaushal Sheth, *Making Mediators Better Performers – Use of Neuro Linguistic Programming and Improvisation Theatre for Creative Results*, *in* 2 CONTEMPORARY ISSUES IN MEDIATION 79 (Joel Lee & Marcus Lim eds., 2017).

144 *Id*. at 79-80.

structures, and mediators must have a strong grasp of these structures (e.g., stages, elements of negotiations, representation systems, etc.) so that they become more creative.[145] Within these structures, the mediators must be skillful in assisting the parties in mapping-out their realities during mediation.[146]

The NLP techniques become very useful since this science focuses more on patterns of communications at a meta-level. NLP techniques such as positioning and chunking work around pattern recognition to construct and deconstruct situations in conflicts.[147] These NLP techniques provide ways to understand the deletions, distortions, and generalizations in the communication patterns of conflicting parties, and mediators skilled in NLP may use their understanding to elaborate more on the party's assumptions and check them with realistic solutions.[148]

The core rules of the NLP communication model invite mediators to understand the dynamic process of conflict resolution and put emphasis on developing flexibility in communicating with the parties.[149] Underlying NLP is the understanding that language, concepts, and ideas fall within a spectrum of communication that is from specific to abstract pictures.[150]

The continuum proceeds with the assumption that when people express what they want, they are saying what they perceive as the way to satisfy a higher need.[151] Starting from this assumption, the mediator can assist by chunking up and identifying the higher need or purpose to expand space and create more flexibility in resolving the dispute.[152] Since there is often more than one way to satisfy a greater purpose, the mediator is expected to be creative in effectively inquiring with the parties to construct and deconstruct the parties' statements through the NLP technique of reframing the context of their disagreement.[153]

The Ignatian values and discernment process, together with the NLP techniques, are tools that the mediator must use to help the parties purify their intentions and make a good choice to solve conflicts amicably based on shared values. "[W]hatever I choose must help me to this end for which

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145 *Id*. at 82-83.

146 *Id*.

147 *See* Tubella, *supra* note 120, at 3-4.

148 *See id*. at 4.

149 *See id*.

150 *See id*.

151 *See id*. at 3.

152 *Id*.

153 *See* Tubella, *supra* note 120.

I am created."[154] A mediation anchored on Ignatian values and powered by NLP techniques promises the use of mediation as the mainstream and popular approach[155] rather than as an alternative to dispute resolution.

[154] ST. IGNATIUS OF LOYOLA, *supra* note 105, at 169.

[155] *See* Matthews-Giba, *supra* note 109, at 1709.

MEDIATION: A STRONGHOLD OF THE LEGAL PROFESSION THROUGH THE LENS OF IGNATIAN SPIRITUALITY

Ma. Carmela Francia T. Peña[*]

I. Introduction

Mediation is an open process of negotiation in the resolution of disputes; it involves a neutral third party, the mediator, that is well-versed in negotiations that allows those involved in a dispute a wide latitude on how they can arrive at a solution that would benefit each one.[1] The neutrality of the mediator, however, does not mean that the mediator is not known to the parties, but that the mediator does not have the power to compel the parties to a decision.[2] The mediator is only there to assist and facilitate the conduct of the negotiations.[3] The staple in mediation is that it allows direct involvement from individuals, with different needs and expectations, and gives them a level of control that proceedings in court can never provide.[4] In mediation, the solution arrived at falls squarely within the discretion of the parties and are achieved entirely according to what has been agreed upon by them.[5]

What is even more inviting for parties to resort to mediation is the level of confidentiality that the parties are afforded and bound to respect during the process. In fact, jurisdictions have enacted laws and directives[6]

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1 *See* Lim Lei Theng & Joel Lee, *A Lawyer's Introduction to Mediation*, 9 SING. ACAD. L.J. 100, 101 (1997).

2 Theng & Lee, *supra* note 1, at 101.

3 *Id.*

4 *Id.* at 102.

5 *Id.*

6 *See, e.g.*, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3; An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004); An Act to Promote, Encourage and Facilitate the Resolution of Disputes by Mediation and for Connected Purposes, and to Make Consequential and Related Amendments to Certain Other Acts [Mediation Act

that outline the need for the mediation process to maintain its confidentiality. This way, parties are free to share information that would normally be concealed from the other party in adversarial proceedings.[7] The steady stream of communication, without the fear of it being used by the other party in other fora,[8] results in a solution that best serves the interests of both parties, which is rarely the case in adversarial proceedings.[9]

This kind of dispute resolution, however, runs counter to the traditional way lawyering is done where one has to champion the client's cause and treat litigation as a kind of warfare.[10] The traditional lawyer is always viewed as someone who can articulate and advocate for a client's beliefs before the courts and cannot represent conflicting viewpoints within the same action.[11] They are always bound by the rules of procedure laid out by the judicial machinery in place and cannot submit to the authority of the client.[12] Of course, there is also the question of the financial implications of a quick, and much cheaper, mediation proceeding compared to the proceedings of a protracted full-blown trial.[13] Admittedly, on this note alone, some lawyers would greatly prefer to have their client's cause be heard before the courts and have it out against the other party in a trial.

Despite the differences in mediation and traditional lawyering, there have been significant changes in the way mediation is seen and practiced by the legal profession.[14] In the United States, a phenomena of declining trials in federal and state courts is being called the "vanishing trial"[15] and is being attributed to the recognition by litigants and lawyers of

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2017], No. 1 of 2017 (2017) (Sing.); Uniform Mediation Act (2001) (as amended) (U.S.); & Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, G.A. Res. 57/18, U.N. Doc. A/Res/57/18 (Jan. 24, 2003).

7 David A. Hoffman & Richard N. Wolman, *The Psychology of Mediation*, 14 CARDOZO J. CONFLICT RESOL. 759, 779 (2013).

8 *Id.*

9 Theng & Lee, *supra* note 1, at 114.

10 Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 320 (1990).

11 *See* Theng & Lee, *supra* note 1, at 114.

12 1997 RULES OF CIVIL PROCEDURE, rule 1, § 3.

13 Theng & Lee, *supra* note 1, at 118.

14 Dr. Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61, 61 (2008).

15 *Id.* (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004)).

alternative means of resolving conflicts.[16] This development is a welcome transition from the traditional adversarial system we are accustomed to, to an "open-minded listening"[17] that allows for a change of mind and of heart to what the other is saying.

II. Advantages of Mediation

Mediation proceedings are primarily chosen to do away with the adversarial nature and intimidating prospect of court litigation. Since it is done without the pomp of trial court hearings, parties come to be more relaxed and open with sharing information that would eventually lead the parties to a compromise.[18] Usually, when a litigant goes to court the influx of information is limited only to what is pertinent in the law, only the information that could help win the case must be offered before the court.[19] The same cannot be said about mediation — in mediation the more the parties know, the more likely it is for them to come to a solution that rests well with both parties.[20] Here, what is relevant is not what the law dictates nor what the lawyer calculates but what the parties believe to be relevant.[21] Going into mediation, the lawyer must be equipped with as much information as possible, while not necessarily needed in making a legal case, a steady stream of information, no matter how irrelevant it may seem, needs to be opened between the lawyer and the client.[22] That way, when parties go into mediation all issues would be resolved with all the necessary information needed in order to arrive at an informed and satisfactory solution.

When you have a steady stream of information between the parties, it allows them to understand the other more than they care to know in adversarial proceedings. Once you reach a level of familiarity you tend to understand where the other is coming from, you come to the exercise of putting yourself in the other's shoes[23] and start to appreciate that the differences of opinion can be resolved through meaningful dialogue. Seeing the other's point of view does not necessarily mean you agree with

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16 Galanter, *supra* note 15, at 514.

17 Jonathan R. Cohen, *Open-Minded Listening*, 5 CHARLOTTE L. REV. 139, 145-46 (2014).

18 *See* Macfarlane, *supra* note 14, at 67.

19 Macfarlane, *supra* note 14, at 64.

20 *Id.*

21 *Id.* at 67.

22 *Id.*

23 ROGER D. FISHER & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN 16 (Bruce Patton, ed. 1991).

it, but it does offer a new perspective that could help revise one's opinion on how to go about resolving the conflict.[24]

In adversarial proceedings, the main goal is to be heard. You must ensure that you give the court the essential information it needs to rule in your favor, never mind what the other side is saying so long as the judge hears you and sides with your version of the story. In mediation, it is important to be heard and to listen, not simply listen but to listen with an open mind.

In his article, Open-Minded Listening, Jonathan R. Cohen outlines four benefits in listening with an open mind: *first*, when you listen, you learn something you would not have known before.[25] You find that another's experience is far different from yours, that your sensibilities are different, and the values you hold might not mean the same for others. The important thing is that you learn something new when you listen with an open mind. *Second*, it helps you to address issues and resolve conflicts.[26] When you listen, you can identify what matters to the other party, and when you get a grasp of what matters to the other, you can easily come to solution that would align with what matters to both of you. *Third*, you foster relationships.[27] When you listen and the one talking knows that you are listening, you forge and develop a relationship that is best suited for arriving at solutions for both parties. You not only arrived at a solution but also gained the gratitude, if not the respect, of the other party. It can also repair existing relationships that was weakened because of the conflict that has ensued between the parties. *Lastly*, when one listens, the individual grows to be a better person[28] not only for his or her benefit, but for the society's as well. When a person starts to listen, he or she overcomes the notion that self-interests are above others and recognizes that there is still work to be done and that there is room for improvement.[29]

Taking into account these benefits as one walks into mediation proceedings, the combative armor is shed in favor of a more personal skin that tends to benefit the client's interests and welfare more than the adversarial system does.

Mediation also upends the typical lawyer-client relationship where the lawyer usually dictates what courses of action to take while the client listens carefully and rely entirely on what the lawyer advises. For

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24 *Id.* at 17.

25 Cohen, *supra* note 17, at 147.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

mediation to work, lawyers must strike a partnership with their clients. This shift of power, from one of the lawyers being in control to yielding the decision making to clients, benefits both the lawyer and the client.[30] Normally, when lawyers take up a client's cause, lawyers usually end up with sleepless nights worrying about problems not even their own.

However, when the lawyer cedes quite an amount of power and control over to the client, some of that pressure comes off and what is left is a partnership working towards the same goal.[31] It also serves as an incentive for the client to take active part in the process when given that much power and control over an outcome that essentially concerns them in the end. When clients participate directly in the negotiations, the responsibility now rests with both the client and the lawyer to achieve a compromise, and they would be much more contented with the outcome, having been that involved in process.[32]

Now, compared with court litigation, mediation proceedings take far less time and require none of the stringent rules the courts have.[33] A cunning and scheming lawyer can always find ways to bend the rules to extend court litigation, and while this practice is frowned upon, it may be done within the bounds of the law. This would leave litigants coming to court for years without the case progressing at all.[34] In mediation, the set-up would be left to the parties; they can choose when to meet and how often they can meet. This would dispense with the unnecessary court appearances that yield no results nor progress the interests of the parties. Because the parties have control over the proceedings of the mediation,[35] they can always choose to integrate court processes that prove to work in sorting out the differences of the parties.

Another crucial advantage mediation proceedings have is its confidential nature.[36] This highly prized feature in mediation allows parties to unreservedly divulge information, information that could not have been freely shared in court proceedings but would prove invaluable in mediation proceedings that result to appropriate and party-centered solutions.[37] Usually, when promised secrecy, the parties tend to offer colorful and crucial information that would not have been disclosed

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30 Macfarlane, *supra* note 14, at 66.

31 *Id*. at 73.

32 *Id*. at 72.

33 Theng & Lee, *supra* note 1, at 118.

34 *See* Supreme Court, Expeditious Disposition of Cases, Administrative Circular No. 04-1988 [SC Admin. Circ. No. 04-88], para. 1 (Sept. 22, 1988).

35 Theng & Lee, *supra* note 1, at 107.

36 Hoffman & Wolman, *supra* note 7, at 779.

37 *Id*.

ordinarily. These kinds of information naturally help the parties in better assessing the situation laid before them which, in turn, grants them the ability to craft decisions that would serve both parties' interests.[38]

One disadvantage that lawyers would definitely cite in mediation proceedings would be the financial impact it would have over the legal profession. Compared to the rigors of courtroom litigation, mediation proceedings are largely informal and have no need for the legal jargon of adversarial litigation.[39] The lawyer's legal prowess can easily be dispensed with, which greatly reduces the command in fees a lawyer can demand of a client.[40]

Another challenge would be that clients also view conflict resolution to be adversarial. They too dismiss the notion of mediation as a respectable means of resolving conflicts.[41] Clients often view mediation as ineffective and incapable of binding both the parties to what they want.[42] Think of justice and all they picture are lawyers battling it out articulately in court and a judge pounding the gavel for good measure. Sadly, there are times when the legal profession is reduced to the theatrics that movies portray the legal system to be. This is where lawyers must be trained, to adapt to the times whilst remaining loyal and focused on achieving the best possible outcome for their clients, absent the perceived fanfare of adversarial proceedings.[43]

It is really up to lawyers to put some sense into difficult and stubborn clients. They usually tend to listen when they feel heard and understood.[44] One effective way in mediation is the method of principled negotiation where issues are decided based on their merits[45] rather than the arduous process of determining and agreeing to what each party is willing to do or not to resolve the conflict. This method

> suggests that you look for mutual gains wherever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side. The method of principled negotiation is hard on the merits, soft on the people. It employs no tricks [ ] and no posturing. Principled

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38 *See* Theng & Lee, *supra* note 1, at 109.

39 *See* Jean Murray, How Does the Process of Mediation Work?, *available at* https://www.thebalancesmb.com/how-does-the-process-of-mediation-work-398344 (last accessed July 20, 2021) [https://perma.cc/XU4D-9DB8].

40 Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 49 (1982).

41 Norman Pickell, Reluctant to Mediate, *available at* https://www.mediate.com/articles/pickell2.cfm (last accessed July 20, 2021) [https://perma.cc/2XMF-KT3Y].

42 *Id*.

43 Hoffman & Wolman, *supra* note 7, at 783-84.

44 Cohen, *supra* note 17, at 143.

45 Fisher & Ury, *supra* note 23, at 6.

> negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who would take advantage of your fairness.[46]

Getting a client to agree with principled negotiation seems a tall task but, in the end, they are the ones who stand to benefit the most.

All in all, the advantages of mediation heavily bend toward keeping the interests of the parties on top of everything else.[47] While surely there can arise some disadvantages to such a set-up, the rewards to be reaped would far outweigh any perceive notions of vulnerability. As Judge John J. Parker wrote —

> The practice of the law is a profession — not a business or a skilled trade. While the elements of gain and service are present in both, the difference between a business and a profession is essentially this: the chief end of a trade or business is personal gain; the chief end of a profession is public service. ... This is the function of the lawyer, his reason for existence — not primarily to make money or to assist other men in their personal struggles or difficulties, but to give peace and order to society[.][48]

III. Mediation in the Philippines

Owing to the fact that the country has been westernized by colonial Spain and American rule, the Philippines was directed to a path that developed a western-type legal system where premium is given to adversarial litigation.[49] In turn, this fashioned how disputes are resolved in the Philippines, that is, to go through the hallowed halls of justice as the only avenue for dispute resolution. Being seen as the only viable way to resolve disputes, the courts are in a state of perpetual congestion.[50] Even the slightest of provocations and the pettiest of quarrels weigh down the halls of justice.[51] While we do not belittle these trifles, it must be understood that there are matters that are more important than others, matters that need attention more than others, and matters that need to be resolved by the courts to dispense justice. The growing reach of the use of mediation, before cases can be heard by the courts, is, therefore, a

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46 *Id.*

47 Theng & Lee, *supra* note 1, at 105.

48 Judge John J. Parker, *A Profession Not a Skilled Trade*, 8 S.C.L.Q. 179, 179 (1955).

49 George W. Pugh, *Aspects of the Administration of Justice in the Philippines*, 26 LA. L. REV. 1, 3 (1965).

50 *See* Jeffrey Falt, *Congestion and Delay in Asia's Courts*, 4 PAC. BASIN L.J. 90, 125-26 (1985).

51 *Id.* at 130.

phenomenon that is welcomed.[52] The heavily burdened court system is in desperate need of ways to ease the unceasing barrage of cases from all walks of life.[53]

To address the perpetual situation of clogged courts, the Supreme Court established the Philippine Mediation Center through a Resolution dated 16 November 1999 in Administrative Matter No. 99–6–01,[54] authorizing the pilot testing of court-referred mediation in the second level courts in Mandaluyong and Valenzuela through the auspices of the Judicial Reforms Office of the Philippine Judicial Academy.[55] Mediation is one surefire way of ensuring that litigants have a means to resolve their dispute without having the need to go through the rigorous, drawn out, and painstaking procedures that litigation entails.

To institutionalize mediation as a simplified and inexpensive procedure for the speedy disposition of cases, the Supreme Court issued Administrative Matter No. 11-1-6-SC-PHILJA,[56] consolidating and revising guidelines to implement the expanded coverage of court-annexed mediation and judicial dispute resolution.[57] It is aimed to terminate pending litigation through mediation resulting in parties' acquiescence to a compromise agreement.[58] It also empowers both parties to have power and authority in the resolution of their dispute, and the State is enjoined

> to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets.[59]

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52 *Id*. at 143.

53 *Id*. at 141-43.

54 Supreme Court, Amended Guidelines for the Implementation of Mediation/Conciliation Proceedings in the Pilot Areas of Mandaluyong City and Valenzuela City, Administrative Matter No. 99-6-01-SC [SC A.M. No. 99-6-01-SC] (Nov. 16, 1999).

55 *Id*.

56 Supreme Court, Consolidated and Revised Guidelines to Implement the Expanded Coverage of Court-Annexed Mediation (CAM) and Judicial Dispute Resolution (JDR), Administrative Matter No. 11-1-6-SC-PHILJA [SC A.M. No. 11-1-6-SC-PHILJA] (Jan. 11, 2011).

57 *Id*.

58 *Id*. ¶ 1.

59 An Act to Institutionalize the Use of An Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and For Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285, § 2 (2004).

It is worthy to note that court-annexed mediation proceedings are privileged and held in strict confidence.[60] Even the mediator is forbidden to record, in any manner, the proceedings that the mediator must preside over, even personal notes the mediator may have taken must be shredded and destroyed to ensure the confidentiality of the mediation proceedings.[61]

Nonetheless, the success of court-annexed mediation has seen a decline in recent years.[62] From the year 2002, of the 3,559 cases mediated a whopping 3,000 cases were successfully mediated for a success rate of 84.29%.[63] Subsequently, in the year 2005, of the 11,717 cases mediated only 7,626 cases were successfully mediated for an acceptable success rate of 65.08%.[64] Worryingly, in the year 2008, of the 45,684 cases mediated only 29,148 cases were successfully mediated for a success rate of 63.80%.[65] Though the decline can be associated to the increasing number of cases being referred to mediation, it must be considered that there are other factors that contributes to the decline of success in court-annexed mediation.

One observation would be that lawyers have been trained in the art of adversarial litigation. Even before entering the profession, law students are taught to reason and argue at all costs.[66] Some would even cite, as role models, lawyers who exude confidence in adversarial proceedings, those that have a developed knack for oration, and of course those with high profile cases and famous clients.[67] They are trained to think on their feet and advocate for a client's cause until the very end.[68] Being an effective lawyer is modeled after an advocate who can champion a client's rights, and detect and exploit the adversary's cause while divulging as little and quite possibly zero information as necessary.[69] Justifiably, a

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60 *Id.* § 9.

61 Ricardo Ma P.G. Ongkiko, et al., *Philippines*, GETTING THE DEAL THROUGH, 2013, at 73-74.

62 *Id.* at 74.

63 National Competitiveness Council, Updates on Judicial Sector Reforms that Impact on Enforcement of Contracts (with CAM Nationwide Statistical Report from Philippine Mediation Center Officer, Philippine Judicial Academy), at 14, *available at* www.competitive.org.ph/doingbusiness/reference/downloads/Summit/forupload/RDEC/EC_REFERENCE6_Key_Updates.pdf (last accessed July 20, 2021) [https://perma.cc/7W4R-SKEU].

64 *Id.*

65 *Id.*

66 *See* Theng & Lee, *supra* note 1, at 114.

67 Macfarlane, *supra* note 14, at 80.

68 *See* Theng & Lee, *supra* note 1, at 114.

69 Lawry, *supra* note 10, at 320.

survey of the courses, even electives, offered in law schools would reveal that mediation is not usually part of a law student's education.[70] In a profession where being right and winning is given exceptional reverence, it is understood that skills in mediation are not given much credence in law schools. Being ingrained with combative and adversarial skills, it is understandable that lawyers would dismiss the whole process of court-annexed mediation. More often than not, lawyers tend to tell clients to just attend the mediation proceedings because the case cannot proceed without having first gone through mediation. Clients, in turn, would just turn up without having any clue as to how and what the mediation proceedings entail, which would naturally result in failed mediation proceedings.

One way of addressing this situation would be to establish awareness within the legal profession starting with the system of our legal education, a "grassroots" of sorts, so that law students are trained, not only in the science of adversarial proceeding, but also in the art of mediation.

IV. The Lawyer as Mediator

Representing a client in mediation is already a far cry from the usual role a lawyer takes in adversarial proceedings. Being the mediator is understandably an even more alien concept to most lawyers.[71] Lawyers have always been trained in the tradition of advocating a client's cause, they are used to taking one side and staying on that side for the remainder of any proceeding.[72] Yet, because of the training of lawyers have undergone and the legal knowledge that they possess, none is probably better suited at serving as mediators.[73]

Having a lawyer serve as a mediator can have two advantages: first, the legal knowledge they possess can serve as an invaluable tool in helping the parties craft and execute legal documents based on what was agreed upon by the parties during mediation proceedings.[74] Although an agreement with language that can be easily understood by both parties is enough and advisable, the lawyer can assess whether the agreement can be enforced by the parties according to existing laws.[75] The lawyer can

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70 *See generally* Macfarlane, *supra* note 14, at 64.

71 Theng & Lee, *supra* note 1, at 114.

72 *Id.* at 114-15.

73 *Id.* at 115.

74 *Id.*

75 *Id.*

also straightforwardly detect existing legal issues that the parties need to address and deal with in order to reach an enforceable agreement.[76] Furthermore, the legal knowledge possessed by lawyers can also be used to predict outcomes if the conflict reaches the courts, by telling the parties of the possible outcomes, the lawyer as mediator paints a complete picture of what the parties can expect to happen if no agreement is reached between them during the mediation proceedings.[77]

Second, because of the difficulty it takes to be a lawyer, and considering the reputation of the profession, [78] lawyers command a level of respect and admiration from everyone. The difficulty in studying law, the brutal demands of passing the bar exams, and the condition of perpetual adherence to legal ethics contribute to this perception of lawyers as respectable members of society.[79] This level of respect and admiration given to lawyers definitely helps in lending legitimacy to the functions of a mediator.[80]

To successfully transition from a combative demeanor to that of an intermediary can be a tall order but with enough training and education,[81] preferably during law school, any lawyer can switch from being an advocate to a facilitator.

V. Mediation as a Staple in Mandatory Continuing Legal Education

Under Canon 5 of the Code of Professional Responsibility,[82] lawyers have an obligation to undertake a program of continuing legal education, such that a lawyer should "keep abreast of legal developments, [and] participate in continuing legal education[.]" Section 2 of Rule 139-A of the Revised Rules of Court[83] further states that "[t]he fundamental purposes of the Integrated Bar shall be to elevate the standards of the legal profession, improve the administration of justice, and enable the Bar to discharge its public responsibility more effectively."[84] In order for the Integrated Bar of the Philippines (IBP) to maintain the standards of the

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76 *Id.*

77 Theng & Lee, *supra* note 1, at 116-17.

78 Parker, *supra* note 48, at 180.

79 *See id.*

80 Parker, *supra* note 48, at 187.

81 Theng & Lee, *supra* note 1, at 116.

82 CODE OF PROFESSIONAL RESPONSIBILITY, canon 5 (1988).

83 1973 REVISED RULES OF COURT.

84 *Id.* rule 139-A, § 2.

legal profession, it is essential that lawyers undergo a program that would be conducted regularly to keep lawyers updated in all legal developments and to ensure continuing legal education.[85]

Though the legal profession has been present in the Philippines for a long time, it was only in the year 1997, during the National Convention of Lawyers, that then Associate Justice Hilario G. Davide, Jr. introduced the idea of requiring lawyers to undergo mandatory continuing legal education.[86] Still, it was only two years after having planted the seeds for its inception that the IBP Board of Governors passed a resolution adopting a draft of the rules for the proposed mandatory continuing legal education.[87] The IBP forwarded the draft to the Supreme Court which, in turn, sent it to the Philippine Judicial Academy for the latter to assess the merit of the draft and give its own recommendations.[88] Finally, after careful scrutiny by the Supreme Court Committee on Legal Education, chaired by Associate Justice Jose C. Vitug, the Supreme Court adopted Bar Matter No. 850,[89] which rationalizes that "[c]ontinuing legal education is required of members of the Integrated Bar of the Philippines (IBP) to ensure that throughout their career, they keep abreast with law and jurisprudence, maintain the ethics of the profession and enhance the standards of the practice of law."[90]

Subsequently, on 1 December 2001, the Court approved the Mandatory Continuing Legal Education (MCLE) Implementing Regulations which cemented continuing legal education for lawyers in the Philippines.[91] More importantly, of the 36 required hours of MCLE, at least five hours is to be devoted solely for alternative dispute resolution.[92] Though it has already specifically provided that five hours will be devoted to alternative dispute resolution, there still remains about six

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85 CODE OF PROFESSIONAL RESPONSIBILITY, canon 5.

86 Mandatory Continuing Legal Education, History/Background, *available at* https://mcle.judiciary.gov.ph/history (last accessed July 20, 2021) [https://perma.cc/QKX9-J64Y].

87 *Id.*

88 *Id.*

89 Supreme Court, Adopting the Rules on Mandatory Continuing Legal Education for Members of the Integrated Bar of the Philippines, Bar Matter No. 850 [B.M. No. 850] (Aug. 22, 2000).

90 *Id.* § 1.

91 Supreme Court, Rules and Regulations Implementing Bar Matter No. 850 (2001).

92 Supreme Court, Adopting the Revised Rules on the Continuing Legal Education for Members of the Integrated Bar of the Philippines, Bar Matter 850 [B.M. No. 850], rule 2, § 2 (c) (Oct. 2, 2001).

hours to such subjects that may be determined by the MCLE Committee.[93]

Under the Implementing Regulations, a continuing legal education activity must "have significant current intellectual or practical content, the primary objective of which is to improve the participant's professional competence and ethical behavior[ ]"[94] and it can be successfully argued that education activities on mediation have met this standard. Over time, as more cases are being referred to court-annexed mediation,[95] lawyers must adapt and learn to master the new landscape of resolving disputes. Lawyers are already facing "an era of 'vanishing trials' and civil justice reforms which favor the development of mandatory and voluntary settlement processes, effective negotiation and settlement skills are becoming increasingly central to the practice of law and occupy more of lawyers' real time and attention than adversarial trial lawyering."[96] If we are to transform the legal landscape to make use of the unique advantages of mediation, then legal education must commit to provide lawyers with constant instruction and training on mediation.

An anecdote from Professor Kenney F. Hegland of the University of Arizona Law School best describes what a typical lawyer expects when asked to resolve a dispute, he writes —

> In my first year Contracts class, I wished to review various doctrines we had recently studied. I put the following [—]
>
> In a long term installment contract, Seller promises Buyer to deliver widgets at the rate of 1000 a month. The first two deliveries are perfect. However, in the third month Seller delivers only 999 widgets. Buyer becomes so incensed with this that he rejects the delivery, cancels the remaining deliveries and refuses to pay for the widgets already delivered. After stating the problem, I asked 'If you were Seller, what would you say?' What I was looking for was a discussion of the various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. In short, I wanted the class to come up with the legal doctrines which would allow Seller to crush Buyer.
>
> After asking the question, I looked around the room for a volunteer. As is so often the case with the first year students, I found that they were all either writing in their notebooks or inspecting their shoes. There was, however, one eager face, that of an eight year old son of one of my students. It seems that he was suffering through Contracts due to his mother's sin of failing to find a sitter. Suddenly he raised his hand. Such behavior, even from an eight year old, must be rewarded.

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93 *Id*. rule 2, § 2 (g).

94 Rules and Regulations Implementing Bar Matter No. 850, § 7.

95 Asian Development Bank, Philippines: Governance in Justice Sector Reform Program, ¶ 14, *available at* https://www.adb.org/sites/default/files/project-documents/41380/41380-023-pcr-en.pdf (last accessed July 20, 2021) [https://perma.cc/KNP5-Z8SH].

96 Macfarlane, *supra* note 14, at 61 (citing Galanter, *supra* note 15).

'OK,' I said, 'What would you say if you were the seller?'

'I'd say 'I'm sorry'.'[97]

The simplest answers can sometimes be obscured by the complexities of having studied law and knowing the legal procedures that lead to court decisions. However, proper and constant education on mediation and the principles it entails in the legal profession would enable lawyers to think of it not as a mere process in adversarial proceedings but as a direct avenue in resolving conflicts.[98] If lawyers were given instruction during their days in law school, it would have ingrained an attitude that veers toward the settlement of cases without the need for court processes.[99] For one thing, lawyers would not solely rely on court-annexed mediation and may even advocate for mediation as the most practical means of resolving a dispute.[100]

VI. Mediation Through the Lens of Ignatian Spirituality

St. Ignatius of Loyola, the founder of the Jesuits, was a product of an era when monarchs were consolidating power in a central government by uniting provinces under the rule of one nation.[101] He was born in the castle of the noble family of Loyola,[102] and when he reached 15 years of age he was trained to be a courtier.[103] Living life at court, Ignatius was undoubtedly exposed to a life of loose morals and worldliness.[104] In his early life as a courtier, Ignatius lived for the glory of recognition and had a steady desire for adoration.[105] He loved attention and would right about do anything, whether reckless or daring to get the adulation he so

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97 Riskin, *supra* note 40, at 46 (citing Kenney Hegland, *Why Teach Trial Advocacy? An Essay on Never Ask Why*, *in* HUMANISTIC EDUCATION IN LAW 69 (J. Himmelstein & H. Lesnick eds., 1982)).

98 *See* Riskin, *supra* note 40, at 49-50.

99 Riskin, *supra* note 40, at 51.

100 *Id.*

101 IGNATIUS OF LOYOLA: THE SPIRITUAL EXERCISES AND SELECTED WORKS 10 (George E. Ganss, S.J. ed., 1991).

102 George Traub, S.J. & Debra Mooney, Ph.D., St. Ignatius Loyola: Founder of the Jesuits, at 1, *available at* https://www.xavier.edu/mission-identity/xaviers-mission/documents/1IgnatiusLoyola-RevisedText-June20151.pdf (last accessed July 20, 2021) [https://perma.cc/29BU-7E4X].

103 IGNATIUS OF LOYOLA: THE SPIRITUAL EXERCISES AND SELECTED WORKS, *supra* note 101, at 14.

104 *Id.*

105 *Id.*

craved.[106] He described himself as "a man given to the follies of the world, and what he enjoyed most was warlike sport, with a great foolish desire to win fame[.]"[107] That changed when he was severely injured and the bone in one of his legs was shattered by a cannonball.[108] While convalescing in Loyola, Ignatius had the chance to read about the life of Jesus Christ and the lives of saints.[109] This eventually put him on the path to his spiritual conversion.

Once Ignatius regained the use of his legs, he began his journey towards Jerusalem in the hope that he could "kiss the earth where our Lord had walked."[110] He recorded the experiences he had throughout his journey, which are now known to be his Spiritual Exercises.[111] These Spiritual Exercises begin with a presupposition that

> every good Christian ought to be more eager to put a good interpretation on a neighbor's statement than to condemn it. Further, if one cannot interpret it favorably, one should ask how the other means it. If the meaning is wrong, one should correct the person with love; if this is not enough, one should search out every appropriate means through which, by understanding the statement in a good way, it may be saved.[112]

This presupposition as laid out at the beginning of St. Ignatius' Spiritual Exercises[113] perfectly captures the attitude one must adopt in mediation proceedings. As previously discussed in this Article, taking the route of mediation entails a deeper understanding of the opposition. In fact, the whole point of mediation is to do away with the notion of the other party as an adversary.[114] There is no room for condemnation in mediation proceedings; that is left to the adversarial norm in courtrooms. Here, lawyers are urged by St. Ignatius to search for ways to understand the other and to exhaust all measures to maintain peace.

For St. Ignatius, words hold a special place in society — "words that benefit or are intended to benefit my own or another's soul, body, or

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106 *Id.*

107 *Id.* at 15.

108 *Id.* at 14.

109 IGNATIUS OF LOYOLA: THE SPIRITUAL EXERCISES AND SELECTED WORKS, *supra* note 101, at 15.

110 Traub & Mooney, *supra* note 102, at 2.

111 *Id.*

112 Holy Trinity Catholic Church, The Ignatian Presupposition, *available at* https://trinity.org/ignatian-spirituality/ignatian-spirituality-resources/the-ignatian-presupposition (last accessed July 20, 2021) [https://perma.cc/246R-9S6N].

113 IGNATIUS, THE SPIRITUAL EXERCISES OF ST. IGNATIUS OF LOYOLA (Fr. Elder Mullan, S.J., trans., 2017).

114 *See* Theng & Lee, *supra* note 1, at 101.

temporal goods are never idle. ... [and] there is merit if the words are ordered to a good end, and sin if they are directed to a bad end, or by one's talking uselessly."[115] While mediation proceedings do not take after the formalities attached in courtroom proceedings, parties are bound to communicate in transparency while still maintaining a decorum of respect and honesty.[116] The safeguards that protect the free flow of speech in mediation do not necessarily mean that parties can resort to inappropriate behavior or ill-chosen language. Indeed, St. Ignatius reminds everyone "not [to] say anything to harm the reputation of others or to disparage them[;]"[117] this would achieve nothing but engender contempt between the parties. This also strikes at the importance of confidentiality in mediation proceedings where none of the parties can use the information received from the proceedings and use them to advance their own cause at the expense of the other.[118]

Ultimately, the values that St. Ignatius inculcates in those who follow and practice his works are characteristics that perfectly fit the dynamics of mediation. They align carefully with the crucial elements that make mediation, not only as an alternative in dispute resolution but as a widely accepted means of arriving at solutions.

VII. Conclusion

To ensure a vibrant profession, all lawyers must be open to adapting to the changing landscape in the legal practice. A lawyer must refit the view of being superior to the client, of having the monopoly of legal knowledge, and always presuming to know what is best for the client.[119] Lawyers must soften to the notion, and eventually accept, that clients can be partners and that they must be empowered for them to actively participate in the resolution of their cases.

Lawyers must accept and be reminded repeatedly that winning court cases does not define them as a lawyer — positions of winning might not necessarily give the client what they want but what we clamor for in recognition and glory.[120] Lawyers must strive to unearth the real

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[115] IGNATIUS OF LOYOLA: THE SPIRITUAL EXERCISES AND SELECTED WORKS, *supra* note 101, at 133-34.

[116] Murray, *supra* note 39.

[117] IGNATIUS OF LOYOLA: THE SPIRITUAL EXERCISES AND SELECTED WORKS, *supra* note 101, at 134.

[118] Hoffman & Wolman, *supra* note 7, at 779.

[119] *See* Riskin, *supra* note 40, at 51.

[120] *See* Macfarlane, *supra* note 14, at 66.

interests of our clients, unveil their motivations, and understand where they are coming from because for every demand a client has, there hides a simple truth that only needs to be uncovered.[121]

In the end, the legal profession will always be a profession for public service,[122] and there can be no better way of serving the people than empowering them and making them partners in the determination of their own fates.

Transitioning to a practice of law that embraces mediation is never easy,[123] especially if it comes late in life amidst established norms and practices. However, St. Ignatius offers guidance and exults that "each one should desire and seek nothing except the greater praise and glory of God[.]"[124] It just takes courage and humility to dedicate one's life to the service of others and to the service of God for His greater glory.

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[121] *Id*. at 67.

[122] Parker, *supra* note 48, at 187.

[123] Theng & Lee, *supra* note 1, at 114.

[124] IGNATIUS OF LOYOLA: THE SPIRITUAL EXERCISES AND SELECTED WORKS, *supra* note 101, at 166.

OUTSOURCING STATE OBLIGATIONS UNDER THE 1951 REFUGEE CONVENTION TO A THIRD COUNTRY: ACCEPTABLE SOLUTION OR INHUMANE DEFLECTION

*Ismael Jose III V. Chan-Gonzaga, S.J.**

I. Introduction

A number of reasons force people to flee their home countries in search of a brighter future for themselves and their families. As found in Article 1 (A) (2) of the 1951 Refugee Convention,[1] refugees are those who escape or leave their countries of origin because of fear of discrimination and persecution for the mere color of their skin, what they believe in, their convictions and principles, as well as their association with a certain group or ideology.[2]

Economic factors are not the fundamental reason, and thus, are not protected for migration under refugee law.[3] A lot of people leave their countries for a better job elsewhere and they are permitted to do so. Refugees, on the other hand, do not simply desire to leave because of business affairs, but rather, because of the very threat to their persons and life for having core beliefs that do not reconcile with those in power of the country that they reside in. Changes in national governments' foreign policies and priorities are also prime reasons for people to leave. A culturally diverse country may see in their homeland the

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This Note was abridged by Francesca Tanya R. Borja, Dennis B. Flores, and Stephen Roy J. Pedroza, law students from Xavier University — Ateneo de Cagayan College of Law.

1 Convention Relating to the Status of Refugees art. 1 (A) (2), *signed* July 28, 1951, 189 U.N.T.S. 137.

2 *Id.*

3 *Id.*

discrimination of a group of people who suffer because of the ridicule and suspicion that they deal with. More often, culture has been a significant factor in forcing people to leave a place of origin as can be seen in the history of several countries divided by strife and armed conflict.[4] And so, when these people flee their beloved homes to try to reach another country where they hope to begin a better future for themselves and their families, they are most vulnerable because of the very setup of their situation. Many of them flee bringing almost nothing with them or having sold most of their belongings just so they can have the resources to leave.

82.4 million[5] — this staggering number is the latest official count of the office of the United Nations High Commissioner for Refugees (UNHCR) for persons in situations of displacement all over the world, the highest since the end of the Second World War.[6] 26 million of these persons are refugees.[7] Of this figure, around 11.8 million are from Asian countries, largely from Afghanistan and Syria.[8] The high percentage of the refugee movements in the Middle East is due to the armed conflicts that plague the region, resulting in persecution and threat to life.[9] Of the 11.8 million, 4 million are sheltered within neighboring and close Asian countries.[10] Closer to home, 1.4 million refugees are from Southeast Asia,

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4 *Id.* (The history of Rwandan Genocide, Cambodia's Pol Pot regime, Africa's apartheid — to name a few.).

5 United Nations High Commissioner for Refugees, Refugee Statistics, *available at* https://www.unhcr.org/refugee-statistics (last accessed July 20, 2021) [https://perma.cc/2UMF-ZHFQ].

6 Nick Cumming-Bruce, *Number of People Fleeing Conflict Is Highest Since World War II, U.N. Says*, N.Y. TIMES, June 19, 2019, *available at* https://www.nytimes.com/2019/06/19/world/refugees-record-un.html (last accessed July 20, 2021) [https://perma.cc/7QNV-M9J4]. (The reported number in this article has since increased.).

7 United Nations High Commissioner for Refugees, *supra* note 5.

8 *Id.* (This number is the sum of total Refugees under UNHCR's Mandate from both Asia, and the Pacific & Middle East based on the UNHCR'S Refugee Data Finder.).

9 United Nations High Commissioner for Refugees, Mid-Year Trends 2014, at 4-5, *available at* https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/Mid-Year_Trends_2014.pdf (last accessed July 20, 2021) [perma.cc/C4UP-NCPY].

10 United Nations High Commissioner for Refugees, *supra* note 5. (This number is the sum of total Refugees under UNHCR's Mandate from Asia and the Pacific who have Countries of Asylum in the same region, based on the UNHCR'S Refugee Data Finder.).

with 216,093 being aided by UNHCR.[11] Majority of this figure, or 1.1 million, are from Myanmar.[12]

The news of the Rohingya refugees on boats demonstrates the very real and human ordeal that refugees face.[13] The Rohingya are an indigenous tribe mainly living along the Myanmar side of the Myanmar-Bangladesh border.[14] The Myanmar government does not recognize them to be citizens of Myanmar and they have been discriminated for being Muslims.[15] Many of them have fled to neighboring countries while others pay to smuggle themselves and their families out of Myanmar.[16] During the journey, many women refugees end up raped by their smugglers while others get sick and are left to die in the jungles along the borders.[17] A crisis arose when coast guards of other Southeast Asian countries found boats full of Rohingya refugees near the Bay of Bengal, with neither food nor water.[18]

Cross-border people-smuggling and trafficking are reported to have increased in the past, and in 2019, migration in Asia grew to 65 million, representing a quarter of the global international migrant stock of 272

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11 *Id.* (This number is the total number of Refugees under UNHCR's Mandate from Asia, and the Pacific based on the UNHCR'S Refugee Data Finder, excluding nations outside Southeast Asia.).

12 *Id.* (This number is the total number of Refugees under UNHCR's Mandate who have Myanmar as their Origin Country based on the UNHCR'S Refugee Data Finder.).

13 Aisyah Llewellyn, *Months at Sea: Boat Carrying Rohingya Washes Up in Indonesia*, AL JAZEERA, June 5, 2021, *available at* https://www.aljazeera.com/news/2021/6/5/rohingya-refugees-arrive-on-uninhabited-island-in-indonesia (last accessed July 20, 2021) [https://perma.cc/39WF-S853].

14 *See* Erin Blakemore, Who are the Rohingya People?, *available at* https://www.nationalgeographic.com/culture/article/rohingya-people (last accessed July 20, 2021) [perma.cc/G5DE-FKDL].

15 *Id.*

16 Lucy Westcott, *Who are the Rohingya and Why are They Fleeing Myanmar?*, NEWSWEEK, May 11, 2015, *available at* http://www.newsweek.com/who-are-rohingya-and-why-are-they-fleeing-myanmar-330728 (last accessed July 20, 2021) [perma.cc/RV53-UPQQ].

17 Gianluca Mezzofiore, *Rohingya Refugees 'Gang-Raped at Thailand-Malaysia Camps'*, INT'L BUS. TIMES, June 2, 2015, *available at* http://www.ibtimes.co.uk/rohingya-refugees-gang-raped-thailand-malaysia-camps-1503951 (last accessed July 20, 2021) [perma.cc/K498-MEJF].

18 Gianluca Mezzofiore, *Bangladesh Wants to Cram 32,000 Rohingya Refugees on Hatiya Island in the Bay of Bengal*, INT'L BUS. TIMES, May 27, 2015, *available at* https://www.ibtimes.co.uk/bangladesh-wants-cram-32000-rohingya-refugees-hatiya-island-bay-bengal-1503176 (last accessed July 20, 2021) [perma.cc/RSJ6-PVL2].

million in the same year.[19] Cambodia, Vietnam, Malaysia, and Thailand deal with a dense movement of refugees, mostly from Myanmar, Bangladesh, and some Middle East countries such as Syria, Afghanistan, and Iraq.[20] These refugees are trying to reach destinations within the region and as far down as Australia.[21] Unfortunately, of these Association of Southeast Asian Nations (ASEAN) states, only Cambodia is a state party to the 1951 Refugee Convention,[22] meaning that many of these states generally do not have the obligation to provide refuge. When ASEAN was preparing for integration, human rights groups and international organizations raised the question of how the limbo status of a significant number of refugees will be addressed, or whether it will be addressed at all. The responsibility of refugee protection and the international regime of refugee protection must apply to third party states, but enforcement remains problematic.

In Southeast Asia, refugees from the mainland are increasingly moving to Australia,[23] which the Philippines ought to consider given that those who are pushed away from Australia's territorial waters are within the territorial waters of countries which are non-state parties to the 1951 Refugee Convention. The Philippines is the closest state party where they can seek refuge.[24] The Rohingya crisis and the Philippines' reiteration of its commitment to the 1951 Refugee Convention by inviting Rohingya refugees to seek refuge therein[25] may not be a hollow gesture given that Australia's pushing away of refugees in boats might necessitate a similar

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19 United Nations Economic and Social Commission for Asia and the Pacific, Asia-Pacific Migration Report 2020 Assessing Implementation of the Global Compact for Migration, at 7, *available at* https://reliefweb.int/sites/reliefweb.int/files/resources/APMR2020_Full%20Report.pdf (last accessed July 20, 2021) [https://perma.cc/X3EG-F6U7].

20 JRS ASIA PACIFIC, THE SEARCH: PROTECTION SPACE IN MALAYSIA, THAILAND, INDONESIA, CAMBODIA AND THE PHILIPPINES 5 (2012).

21 *Id.* at 26.

22 United Nations Treaty Collection, Chapter V: Refugees and Stateless Persons, *available at* https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (last accessed July 20, 2021) [perma.cc/UQ4Q-3LU7].

23 Paul Power, Hope in the Midst of Crisis: Opportunities for Improving Refugee Protection in South-East Asia, *available at* https://www.refugeecouncil.org.au/hope-midst-crisis-se-asia (last accessed July 20, 2021) [perma.cc/9ZEK-U9QF].

24 United Nations Treaty Collection, *supra* note 22.

25 Roger Arnold, UNHCR Welcomes Philippines' Commitment to Protect Rohingya, *available at* https://www.unhcr.org/ph/20879-un-general-assembly-president-duterte.html (last accessed July 20, 2021) [perma.cc/3MJP-3S8W].

or even heavier commitment from the Philippines to provide them refuge once they come into contact within Philippine territorial waters.

Australia has always been one of the top country destinations for refugees especially in the Asia-Pacific region.[26] And for years, Australia has opened its doors to these peoples seeking asylum in its lands.[27] As a party to the 1951 Refugee Convention,[28] Australia kept pace with the challenges of modern-day displacement brought about by the instability in other parts of the globe. However, in 2001, under the banner "Pacific Solution," Australia built offshore detention and processing camps both within and outside its territory.[29] It was an attempt to intercept refugees coming in on boats smuggled by human traffickers mainly from Asian countries.[30] The Australian government began to have a mandatory detention policy with regard to refugees and asylum seekers wanting to enter its territory.[31] The Nauru Detention and Processing Center was closed down in 2008 only to be reopened in 2012 with a fresh batch of asylum seekers brought in from Christmas Island.[32]

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[26] *Australia Fifth in List of World's Most Welcoming Refugee Destinations, Amnesty International Says*, ABC NEWS, May 19, 2016, *available at* https://www.abc.net.au/news/2016-05-19/australia-fifth-most-welcoming-to-refugees/7427956 (last accessed July 20, 2021) [perma.cc/D3C3-UETQ].

[27] Elibritt Karlsen, Refugee Resettlement to Australia: What are the Facts?, *available at* https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1617/refugeeresettlement (last accessed July 20, 2021) [perma.cc/49K6-6QDR].

[28] United Nations Treaty Collection, *supra* note 22.

[29] *See* Janet Phillips, The 'Pacific Solution' Revisited: a Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island, *available at* https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012-2013/pacificsolution (last accessed July 20, 2021) [perma.cc/2K6E-32NE].

[30] *Id.*

[31] Parliament of Australia, Chapter 10 — Pacific Solution: Negotiations and Agreements, *available at* https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/c10 (last accessed July 20, 2021) [perma.cc/VF6X-42K4].

[32] AAP, *Nauru Issues First Refugee Visas Since Detention Centre's Reopening*, HERALD SUN, May 22, 2014, *available at* https://www.heraldsun.com.au/news/national/nauru-issues-first-refugee-visas-since-detention-centres-reopening/news-story/9d5b68789a117d0e237b8c49aedc1c65 (last accessed July 20, 2021) [perma.cc/MK3V-PV].

As of March 2019, there were no more people held in the Nauru detention center, which had been closed.[33] The detention center in the Manus Island of Papua New Guinea had also been closed in 2017.[34] In contrast to the conditions of the facilities before their closure in 2008, the present conditions of these two offshore detention centers have been widely criticized by rights groups, especially in Australia, for being deplorable and subhuman.[35] Access by private individuals, especially members of the media, has been restricted and limited by the Australian government[36] and news from these sites are taken either through personal stories of refugees there or those who have left the centers voluntarily for another place. After the July 2013 violent riot in the Nauru detention center that heavily damaged the camp and caused injuries,[37] the media personnel were allowed to inspect the centers but had to pay for a "visitor's permit" from Nauru authorities which cost quite a fortune.[38]

The bigger problem is Australia's negotiated agreement with Cambodia to resettle refugees in its detention centers to Cambodia. On 4 June 2015, Cambodia received the first batch (of four) of "voluntary" refugees from the Nauru Detention Center.[39] In exchange for an economic stimulus,[40] Cambodia acceded to letting Australia deflect its own obligations to the 1951 Refugee Convention. What is alarming in the very

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[33] Australian Border Force, Operation Sovereign Borders Monthly Update: March 2019, *available at* https://newsroom.abf.gov.au/releases/operation-sovereign-borders-monthly-update-march-2019 (last accessed July 20, 2021) [https://perma.cc/AV6E-FXFX].

[34] *Id.*

[35] Gursimran Kaur Bakshi, Australia's Pacific Solution for Asylum-Seekers Neglects Human Dignity, *available at* https://blogs.lse.ac.uk/socialpolicy/2020/09/01/australias-pacific-solution-for-asylum-seekers-neglects-human-dignity (last accessed July 20, 2021) [perma.cc/QYC4-38EF].

[36] Michael Garcia Bochenek, Australia: Appalling Abuse, Neglect of Refugees on Nauru, *available at* https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru (last accessed July 20, 2021) [perma.cc/9VQM-K33C].

[37] *125 Asylum Seekers Charged Over Nauru Riot which Caused $60m Worth of Damage*, ABC NEWS, July 22, 2013, *available at* https://www.abc.net.au/news/2013-07-22/125-asylum-seekers-charged-over-violent-nauru-riots/4834098 (last accessed July 20, 2021) [perma.cc/6EGV-ANKD].

[38] *See* Michael Garcia Bochenek, *supra* note 36.

[39] *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, DW NEWS, June 4, 2015, *available at* https://www.dw.com/en/first-of-australias-outsourced-refugees-arrive-in-cambodia/a-18495988 (last accessed July 20, 2021) [perma.cc/Y44J-4HEJ].

[40] *Id.*

agreement is the indirect contravention of the very spirit of the Refugee Convention. Australia resettles its refugees to Cambodia and banners Cambodia's willingness, openness, as well as its readiness to allow integration of these refugees and yet, as late as May 2015, Australia's Foreign Affairs advisory categorizes Cambodia as volatile and issued a travel advisory to its citizens against visiting Cambodia.[41] The non-refoulement principle may be violated as it disallows sending a person to a place where his rights to life and other fundamental rights are likely to not be respected.[42]

The very action of "outsourcing" full responsibility for the lives of these refugees, as in the case of the Australia-Cambodia agreement, is clearly different from the outsourcing of processing centers in the case of the three offshore detention centers. The outsourcing of processing and detention in the first case of the offshore detention centers can genuinely be argued as simply part of Australia's process for refugee determination "into" its own territory and protection. However, to fully "transfer" responsibility for sovereign protection over refugees who have sought the country's protection to a third country who is itself struggling to keep its own citizens in a decent living condition, is a breach of the very trust and hope invested upon it by the refugees themselves and the international community as a whole.

Another argument put forth is the question of whether the "outsourcing" is in a sense just a different kind of "resettlement." A school of thought proffers that Australia's action of "transferring" refugees (who themselves voluntarily availed of the offer) to third countries is synonymous to resettlement and is therefore an accepted durable solution in international law.[43] However, what is missed out in this argument are two things. First, the UNHCR must also be included in whatever plan developed by the countries involved since the UNHCR is the international community's eyes and ears.[44] In this case, the UNHCR is kept in the dark

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41 Inside Story, Video, *Australia: Paying Off People Smugglers?*, AL JAZEERA, June 15, 2015, *available at* https://www.aljazeera.com/program/inside-story/2015/6/15/australia-paying-off-people-smugglers (last accessed July 20, 2021) [perma.cc/J8AS-ZCE9].

42 United Nations Human Rights Office of the High Commissioner, The Principle of Non-Refoulement under International Human Rights Law, at 1, *available at* https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf (last accessed July 20, 2021) [perma.cc/FU2L-94M2].

43 Inside Story, Video, *Outsourcing Refugees?*, AL JAZEERA, June 7, 2015, *available at* https://web.archive.org/web/20150726124316/http://www.aljazeera.com/programmes/insidestory/2015/06/outsourcing-refugees-150606192217479.html (last accessed July 20, 2021).

44 United Nations High Commissioner for Refugees Evaluation and Policy Analysis Unit, The Community Services Function in UNHCR: An Independent Evaluation,

and the welfare of the refugees is placed in the hands of a government that cannot even protect its own citizens. Second, and more importantly, the condition and capacity of the resettlement country must be adequate and livable.[45] Precisely, bringing UNHCR on board is important because the UNHCR, with its vast network, expertise, and most importantly, its mandate, is the only mechanism that can ensure the proper transfer and coordination expertise for such movement.[46]

In February 2002, a number of nations, especially those from Asia and the Pacific, came together in Bali, Indonesia to discuss the increasing phenomenon of refugee transit by human traffickers and smugglers along the waterways of South Asia all the way to Australia.[47] They came together and drew up an agreement on certain common matters of importance, especially in their quest to curb the increasing incidents of trafficking and human smuggling in the major territorial waters of South Asia.[48] Refugees in boats that reach Australia's territorial waters are most, if not all the time, brought by unscrupulous boat captains and crew who are paid huge sums of money just to smuggle these people to Australia.[49] Many times, they are left to fend for themselves without provisions, or even water, under the heat of the sun and in extreme weather conditions, overloaded and in inhumane conditions but still wanting to escape whatever horrors of their own strife-riddled countries. So, they risk literally everything just to reach the shores of better countries like Australia.

Because of the staggering increase of refugees pushing for Australia and the country's own hardline international policy, Australia looks to the other States that have signed the Bali Process to help in the owning of

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at 107, *available at* https://www.unhcr.org/3e2d233ba.pdf (last accessed July 20, 2021) [https://perma.cc/76FD-QV4T].

45 *See* United Nations Human Rights Office of the High Commissioner, *supra* note 42, at 1.

46 *See* UNHCR Resettlement Service, UNHCR-NGO Toolkit for Practical Cooperation on Resettlement. Community Outreach — Outreach to Host Communities: Definitions and FAQs, *available at* https://www.unhcr.org/protection/resettlement/4cd7d1509/unhcr-ngo-toolkit-practical-cooperation-resettlement-community-outreach.html?query=definitions (last accessed July 20, 2021) [perma.cc/J86X-5J5Z].

47 Co-Chairs' Statement, Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, at *1, *available at* https://www.baliprocess.net/UserFiles/baliprocess/File/BRMC1(1).pdf (last accessed July 20, 2021) [perma.cc/ZA9K-EDJC].

48 *Id.* at 17.

49 Cat Barker, The People Smugglers' Business Model, *available at* https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1213/13rp02 (last accessed July 20, 2021) [perma.cc/Y46P-N42X].

responsibility for these peoples. In a meeting of foreign ministers last March 2014, Australia made it clear that it was pushing through with its own foreign policy.[50] Australia challenged the other Asian countries, especially those in the ASEAN region, which are the busiest corridors of transit for refugees, to find proper solutions to the very problem of refugee protection.[51]

However, a major bind that skirts the issue is that these countries are not parties to the 1951 Refugee Convention. The Bali Process was attended by States who decided to cooperate to curb trafficking in ways to protect territorial sovereignty but deflected the issue of refuge.[52] Security and territorial integrity are the main concerns of the Bali Process, not refugee protection.[53] Again, the recent crisis is brought to the world's attention because of the ethnic Rohingyas trying to reach better off countries like Australia, and has shown that countries like Malaysia, Thailand, and Indonesia, who are signatories to the Bali Process, implemented the agreement of security control and protection of territorial integrity while pushing aside the tension of basic rights and humane treatment of these peoples who fall victim to human smuggling and trafficking.[54]

In May 2015, boats carrying ethnic Rohingyas appeared off the coasts of Indonesia and Malaysia, many of them simply given short term provisions and then pushed back to sea without care for their security, safety, or health even, especially of the children and women on those boats.[55] Similarly, compliance with refugee protection standards is not a momentous concern.

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50 Latika Bourke & George Roberts, *Immigration Minister Scott Morrison Acknowledges Asylum Boat Turn-Backs as UN Interviews Asylum Seekers*, ABC NEWS, Mar. 18, 2014, *available at* https://www.abc.net.au/news/2014-03-18/morrison-acknowledges-asylum-boat-turn-backs/5327802 (last accessed July 20, 2021) [perma.cc/YT4N-K378].

51 Department of Economic and Social Affairs, *supra* note 19, at 3.

52 Regional Support Office, Comprehensive Approaches for Addressing Irregular Movements of People by Sea, at 7, *available at* https://www.baliprocess.net/UserFiles/baliprocess/File/Facilitation%20Guide%20on%20Comprehensive%20Approaches%20for%20Addressing%20Irregular%20Movements%20of%20People%20by%20Sea_FINAL_101017.pdf (last accessed July 20, 2021) [perma.cc/V2M8-BYFK].

53 *Id.*

54 *See* United Nations High Commissioner for Refugees Staff, Abandoned at Sea, *available at* https://www.unhcr.org/news/stories/2015/8/56ec1eabd/abandoned-at-sea.html (last accessed July 20, 2021) [perma.cc/FXZ7-GJ3K].

55 Robin McDowell & Jocelyn Gecker, *US: Myanmar Should Share Responsibility for Rohingya Crisis*, AP NEWS, May 23, 2015, *available at*

In the past years, the global society saw a diverse movement of peoples brought about by different reasons — war, poverty, depression, and even regional instability. And at the end of 2020, UNHCR has recorded 82.4 million people forcibly displaced worldwide as a result of persecution, conflict, violence, human rights violations or events seriously disturbing public order.[56] With the population concerned and with such realities now facing the community of nations, the 1951 Refugee Convention and its 1967 Protocol have become more relevant.

Gray areas in the 1951 Refugee Convention and its 1967 Additional Protocol[57] started to emerge as such parameters of intent on the side of the refugee to choose his/her country of asylum vis-à-vis the country's own right to national security and domestic policies regarding whom to receive or refuse. Issues of whether the principle of non-refoulement will apply to "secondary movers" or if adequate protection also means allowing the refugee to refuse transfer to a country undesired were left unanswered. A number of nations in Europe tried to redefine their international policies regarding refugees in their countries and some have begun outrightly deflecting entry of such refugees by sending them to third countries for detention.[58] Countries have also begun not just deflecting detention and processing but completely offloading refugees bound for their territory to third countries via executive agreements.[59] These actions are alarming as basic human rights of the refugees might be compromised, like the right to choose and seek asylum from a country of choice. Such actions can be detrimental to the spirit of the 1951 Refugee Convention where the dignity of the person is held sacred to choose to live in peace and have a better life.[60]

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https://apnews.com/article/0011a7b5d825474c93edcb7152c21eff (last accessed July 20, 2021) [perma.cc/39UQ-8Z8N].

56 *See* United Nations High Commissioner for Refugees, Global Trends Forced Displacement in 2020, at 6, *available at* https://www.unhcr.org/60b638e37/unhcr-global-trends-2020 (last accessed July 20, 2021) [https://perma.cc/4GYM-2WBG].

57 Protocol Relating to the Status of Refugees, *signed* Jan. 31, 1967, 606 U.N.T.S. 267.

58 *EU Presents Strategy to Send Unauthorized Migrants Back*, DW NEWS, Apr. 27, 2021, *available at* https://www.dw.com/en/eu-presents-strategy-to-send-unauthorized-migrants-back/a-57355522 (last accessed July 20, 2021) [perma.cc/E344-4SJX].

59 *See Danish MPs Back Controversial Plan to Relocate Asylum Seekers Outside Europe*, FRANCE24, June 3, 2021, *available at* https://www.france24.com/en/europe/20210603-danish-lawmakers-approve-refugee-reception-centres-outside-europe (last accessed July 20, 2021) [perma.cc/B6ZQ-HGCN].

60 Convention Relating to the Status of Refugees, *supra* note 1, art. 26.

The agreement between Australia and Cambodia had already expired in September 2018[61] and only a few from the Nauru detention center voluntarily resettled in Cambodia.[62] Although no other State has adopted a similar system, this Note remains significant for state parties to the 1951 Refugee Convention, especially for the Philippines, because it discusses a popular and seemingly innocent mechanism that is being employed by States in trying to deflect State obligations.

A. Definition of Outsourcing

Outsourcing is that method or practice of passing on a certain responsibility or job to another player to lessen cost for production or simply to optimize production with least control upon the entire process.[63] It is both a cost saving mechanism as well as a liability-evading tool.[64] There are two types: (1) the outsourcing of certain tasks or merely a part of an entire production[65] and (2) the outsourcing of responsibility in its entirety to another, including the rights, obligations, protection, and security of the object.[66]

As to the first type, several economists and experts suggest that the concept of outsourcing began in the industrial revolution particularly during the boom of the publishing industry.[67] Publishers sought outside help for basic works like the compilation, printing, and packaging for its complete product.[68] Outsourcing was meant to cut financial losses and reduce the cost of adding manpower to a particular component in the

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61 David Boyle & Hul Reaksmey, *Australia's Cambodia Refugee Deal is Dead*, VOA NEWS, *available at* https://www.voanews.com/east-asia-pacific/australias-cambodia-refugee-deal-dead (last accessed July 20, 2021) [perma.cc/Q768-7PNJ].

62 University of New South Wales Sydney Andrew & Renata Kaldor Centre for International Refugee Law, Australia-Cambodia Agreement for Refugees in Nauru Factsheet, at 2, *available at* https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Factsheet_Cambodia_October2019.pdf (last accessed July 20, 2021) [perma.cc/5DUS-5FLY].

63 *See* Ionos, Outsourcing, *available at* https://www.ionos.com/startupguide/grow-your-business/outsourcing (last accessed July 20, 2021) [perma.cc/XP3B-PJJD].

64 *Id.*

65 *Id.*

66 *Id.*

67 Daya Mukherjee, A Brief History of Outsourcing, *available at* https://www.selfgrowth.com/articles/a-brief-history-of-outsourcing (last accessed July 20, 2021) [perma.cc/3JS4-DQ22].

68 *Id.*

assembly line when a specific job or task could be done by another at less cost and higher efficiency.[69]

Another view of outsourcing is that it was born from the pains and gains of war, more specifically World War II.[70] It no longer refers solely to the job or the part of the whole that can be delegated to another, but rather to the very process or strategy of passing on an entire responsibility.[71] Although it still has its roots and traces, outsourcing has gone beyond the business paradigm.[72]

The different paradigms have succeeded in redefining the word for use beyond the business scope to mean the very passing on of a certain part of a whole product or creative line. Most importantly, the passing on may no longer be a dependent part of a whole process or actuation but rather an end in itself of an entire program.

In this Note, outsourcing of responsibilities is that act of passing on a country's responsibility to another. Expanding beyond the scope of business, where the term outsourcing was first coined, includes the very act of shifting the burden of responsibility of accepting refugees to another country. In this modern definition, the act of passing on regardless of reason or extent is emphasized.

A popular example of outsourcing in today's world of commerce is "labor outsourcing." A common and simple definition provides that "Outsourcing occurs when a company retains another business to perform some of its work activities. These companies are usually located in foreign countries with lower labor costs and a less strict regulatory environment."[73]

This definition is on point as outsourcing becomes a method precisely for burden relief in purely economic terms. This transfer of labor is done in foreign countries, mostly developing countries where labor is cheap, now more commonly known as "offshore outsourcing."[74]

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69 Ionos, *supra* note 63.

70 Victor-Adrian Troacă & Dumitru-Alexandru Bodislav, *Outsourcing. The Concept*, 29 THEORETICAL & APPLIED ECON. 51, 52 (2012).

71 *See id.*

72 Interview *with* Mr. E. Patrick Salazar, Assistant Vice President, GENPACT (July 18, 2015). (Mr. Salazar is credited for being one of the pioneers of business process outsourcing in the country, having brought to the Philippines, world-renowned U.S. companies such as AT&T and IBM.).

73 Shawn Grimsley, What is Outsourcing? — Definition & Benefits, *available at* http://study.com/academy/lesson/what-is-outsourcing-definition-benefits-quiz.html (last accessed July 20, 2021) [perma.cc/F68U-54D5].

74 Outsource Accelerator, Different Types of Outsourcing that You Need to Know, *available at* https://www.outsourceaccelerator.com/articles/different-types-of-

Before such development, there used to be "contracting out."[75] At the onset of the advancement of technology, opportunities allowed or simplified the ability to shift burdens of an assembly line for a product to other players who will do it for very cheap considerations. An example of such production is today's mobile phone industry.[76] The many components and pieces of a mobile phone are produced via outsourcing in different third countries such as the Philippines, India, and even China.[77] Thus, a United States of America (U.S.) mobile phone company builds its own line of mobile phones and, though assembled to its final end product result in the company's main factory in the U.S., the many components and pieces of a mobile phone are produced via outsourcing in different third countries such as the Philippines, India, and even China. This is the "contracting out" of aspects of a general end product, which still ended with the main factory, under the full control and supervision of the U.S. company, having the final responsibility of assembling the end product mobile phone.

However, in recent years, "contracting out" gave way to pure "outsourcing." No longer were different parts of a product produced in different places, but the entire product was now "outsourced" to a different place. And so, using the same example of the mobile phone, the U.S. company simply "outsourced" the building of the phone unit to another company in another country and it is shipped to the U.S. in its end product form. A U.S.-based factory to consolidate and build the final product was no longer necessary since the entire product is built elsewhere. Together with this development is the passing on of the entire responsibility for the product's mass production, completion, and quality control, the full responsibility for the production no longer with the U.S. company, as it is "outsourced" completely, cheaply, and without responsibility falling upon the U.S. company for any problem arising from its production.[78]

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outsourcing-that-you-need-to-know/#6 (last accessed July 20, 2021) [perma.cc/J2M7-6HTG].

[75] Merriam-Webster, Contract Out, *available at* https://www.merriam-webster.com/dictionary/contract%20out (last accessed July 20, 2021) [perma.cc/7CYG-542F].

[76] Eulises Quintero, Top 10 Electronics Companies that Outsource Manufacturing in 2020, *available at* https://titoma.com/blog/companies-outsourcing-electronics-manufacturing (last accessed July 20, 2021) [perma.cc/K2UL-AQJX].

[77] *Id.*

[78] Interview *with* Salazar, *supra* note 72.

B. The Problem of "Outsourcing Responsibilities" to the Philippines by Forced Transfer of Refugees by Australia

For the past two decades, a protectionist shift in the policies of some countries, previously and traditionally considered refugee-destination states, has become a growing cause of concern for the United Nations (UN) and human rights advocates. Among other things, this shift has led to a new phenomenon whereby a developed country, even though a State party to the 1951 Refugee Convention, deflects refugee inflow by setting up offshore or third-country detention and processing (D&P) centers, and even offloading refugees to a third country altogether.[79]

The fact that destination States are asserting national security and public order in a wholesale fashion; the fact that the third countries being tapped to host offshore D&P centers (as well as to take in refugees for remuneration) are themselves State parties to the Convention; the fact that the Convention, one of the oldest UN covenants, is equivocal on some relevant points and silent on others — these are but some of the converging considerations that make the legal issue intricate and interesting. The fact that the Philippines itself has been approached to be part and parcel of this scheme[80] makes the legal issue relevant and exigent. This Note explores whether or not such "outsourcing of responsibilities," resulting in the forcible transfer of refugees, is defensible; and whether or not it is consistent with the spirit and letter of the 1951 Refugee Convention.

The wording of the 1951 Refugee Convention is unequivocal in its treatment of refugee protection and the adoption of the principle of non-refoulement. Article 33 (1) of the Convention explicitly prohibits "[expulsion] or return ... in any manner" and to any territorial frontier that may pose any danger to the life or liberty of the refugee or his/her family.[81] A State party's action of deflecting such responsibility falls within the category of outsourcing which can be considered a "manner" of expulsion or transfer of responsibility and security as contemplated in Article 33 (1) of the 1951 Refugee Convention and is a breach of international law, specifically Articles 26 and 27 of the Vienna Convention on the Law of Treaties (VCLT).[82] As such, a State may be held

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[79] *Danish MPs Back Controversial Plan to Relocate Asylum Seekers Outside Europe*, *supra* note 59.

[80] *Labor, Coalition Unite on Philippines Asylum Seeker Deal*, SBS NEWS, Oct. 28, 2015, *available at* https://www.sbs.com.au/news/labor-coalition-unite-on-philippines-asylum-seeker-deal (last accessed July 20, 2021) [perma.cc/DCF8-LFVD].

[81] Convention Relating to the Status of Refugees, *supra* note 1, art. 33 (1).

[82] Vienna Convention on the Law of Treaties arts. 26 & 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

accountable under Articles 12 and 15 of the Articles of State Responsibility.[83]

At the same time, there is no domestic law in the Philippines that deals with refugee inflow in large numbers. The country's legislation and policies affecting refugees are centered on a determination process for trickles of refugees entering the country with papers, even if some are incomplete or inauthentic.[84] Such a vacuum in the law becomes more noticeable given the number of refugee crises that have surfaced close to home. The ASEAN Integration 2015 preparations have not considerably discussed protection of refugees and those with pending asylum requests.[85] With the integration at hand, more open borders and a liberal migration policy will be adopted by ASEAN States. The Philippines, being the only other State party in ASEAN to the 1951 Refugee Convention aside from Cambodia,[86] must have proper domestic legislation in place for possible influx of migration. At the Catholic Bishops' Conference of the Philippines Episcopal Commission for the Pastoral Care of Migrants and Itinerant People (CBCP ECMI) meeting, government officials have conceded the absence of even the basic necessities for refugee protection so much so that basic human care for necessities such as housing, health and education are being shouldered by non-governmental civic institutions.[87] The very meeting itself with CBCP was an indirect request from these agencies to civic organizations to help out in the providing of basic needs for refugees (especially those who are indigent and lost) who apply for refugee status in the country. The government, together with the UNHCR, is closely monitoring the slow increase of refugees coming into the Philippines in bigger numbers yet poorer in terms of resources.[88] With no domestic legislation for care for these peoples, the country does

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83 Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, arts. 12 & 15, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

84 *See* International Catholic Migration Commission & Episcopal Commission for the Pastoral Care of Migrants and Itinerant People (ECMI) of the Catholic Bishops' Conference of the Philippines, Labor Migration Between Security and Vulnerability: A Voyage into Grey Zones, at 16, *available at* https://www.refworld.org/pdfid/57e925a54.pdf (last accessed July 20, 2021) [https://perma.cc/9QXF-HDJ8].

85 *See* ASEAN Secretariat, ASEAN Integration Report 2015, *available at* https://asean.org/wp-content/uploads/2021/09/2.-ASEAN-Integration-Report-2015.pdf (last accessed July 20, 2021) [perma.cc/43B8-XNDA].

86 United Nations Treaty Collection, *supra* note 22.

87 Fact Finding and Presscon of Deported Filipinos from Japan, *available at* http://www.pmrw.org.ph/2013/08 (last accessed July 20, 2021) [perma.cc/4HUW-T28L].

88 Laurice Peñamante, Nine Waves of Refugees in the Philippines, *available at* https://www.unhcr.org/ph/11886-9wavesrefugees.html (last accessed July 20, 2021) [perma.cc/JH6U-4UVW].

not meet the international standards of the international regime for refugee protection.[89] The country's resources and policies do not yet contemplate the migration flow that Australia is facing but data shows the great possibility for such in the near future. If the country does not act today, then it will see the very imbalance of its open invitation with its real situation and consequences.

II. Legal Framework for Refugee Protection

A. The 1951 Refugee Convention

The 1951 Refugee Convention is a product of one of the first conventions ever assembled by the UN.[90] It was convened primarily for the sake of addressing the displacement problem brought about by the world wars.[91] It was meant to protect those displaced from the exploitation that their situation may endanger them from.[92] The executive committee of UNHCR, through the years, has continually supervised the implementation of the agreement and observed the impact of the different dilemmas that countries face in the light of the influx of refugees as well as the impact on these refugees in their sojourn.[93] Annually, the executive committee of the UNHCR submits its report to the UN General Assembly updating what nation-parties to the convention are doing with the issue of refugees in their countries and regions.[94] These reports give snapshots of the different realities that unfold in each country and region where refugees are present.

To understand the mandate as well as the fundamental premise of the convention and for the ongoing supervision of the executive committee, it is pertinent to study the Universal Declaration of Human Rights by the United Nations (UDHR).[95] In Article 14 (1) of the UDHR, it is stated, "[e]veryone has the right to seek and to enjoy in other countries asylum

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89 Convention Relating to the Status of Refugees, *supra* note 1, art. 24.

90 *Id.* art. 46.

91 *Id.* art. 10.

92 *Id.*

93 United Nations High Commissioner for Refugees, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees EC/SCP/54, *available at* https://www.unhcr.org/excom/scip/3ae68cbe4/implementation-1951-convention-1967-protocol-relating-status-refugees.html (last accessed July 20, 2021) [perma.cc/L9GF-CNY2].

94 *See* Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), annex, ch. 2, § 10, U.N. Doc. A/RES/428 (V) (Dec. 14, 1950).

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

from persecution."[96] The devastation left by the two world wars forced nations into introspection about the difficulty it wrought. In agreement that peoples must be given a chance at a better life wherever they may choose to, this declaration as to a refugee's right became the driving force for the 1951 Refugee Convention.[97] This was the spirit behind the meeting of the plenipotentiaries as they began finishing the draft convention for ratification in 1951.[98] Though the immediate concern was the hundreds of thousands of displaced peoples after the conclusion of the Second World War, the adoption of the 1967 Additional Protocol[99] lifted the limitations of time and location to the coverage of the Convention, thus making the Refugee Convention applicable to all.[100]

With Article 14 (1) of the UDHR articulating that the fundamental human "right to a better life free from persecution" is at the core of the 1951 Convention,[101] it can be observed that most of the discussions and framing of the Convention revolved around the protection of these vulnerable people who cross states and state boundaries for a chance at a better life elsewhere. The Convention aimed to protect a person from the persecution both in his/her country of origin and in his/her country of destination (i.e., where they can start a new life in peace).[102] The Convention addresses the necessity of all acceding countries to respect and help in the responsibility to protect these vulnerable peoples because of inhumane reasons.[103] The 1967 Additional Protocol embodied the very development of the global scenario, taking into consideration the need to protect the movements of peoples because of necessity and survival. Nations have understood the dilemma faced by citizens of other nations who are forced to flee their countries of origin because of a clear and substantial threat to their lives or property simply for being different. Safety of refugees and asylum seekers are paramount in the convention and expressly expanded in this additional protocol. The additional protocol also, in a sense, warned countries not to close their doors to those seeking refuge, wherever they may be.[104]

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96 *Id*. art. 14 (1).

97 *See* United Nations High Commissioner for Refugees, The Refugee Convention at 50, *available at* https://www.unhcr.org/news/editorial/2001/7/3b4c06f0d/refugee-convention-50.html (last accessed July 20, 2021) [perma.cc/P3UX-AVUN].

98 *Id*.

99 Protocol Relating to the Status of Refugees, *signed* Jan. 31, 1967, 606 U.N.T.S. 267.

100 *Id*. art. 1 (2).

101 Universal Declaration of Human Rights, *supra* note 95, art. 14 (1).

102 *See id*.

103 Protocol Relating to the Status of Refugees, *supra* note 99, art. II.

104 *Id*.

B. Principle of Non-Refoulement

Enshrined in the 1951 Refugee Convention is the responsibility of a State party not to return a refugee to his/her country of origin when grave danger to life or liberty of such refugee is apparent or feared.[105] This is the principle of non-refoulement as stated in Article 33 of the Convention.[106] This principle safeguards any person fleeing his/her place of origin because of persecution, for whatever reason, and protects that person's right to seek asylum in another country and territory, including the right not to be returned to the place where they are fleeing from against his/her own will.[107] It protects the refugees from being returned to places where their life or liberty may be in danger.[108] Host countries have the very responsibility to make sure that persons seeking refuge or asylum in their territory are not endangered nor their liberty curtailed without cause.[109]

The principle of non-refoulement is observed in the international comity of nations as having reached customary recognition.[110] It is founded in the very basic human right principle of right to life, limb, and liberty as declared in the UDHR.[111] It is a principle also equally protected in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[112] The primacy of the security of life, limb, and liberty of the person is clearly established in the instruments of international law.[113] Whether nations are parties to the 1951 Refugee Convention or not, the principle of non-refoulement, having reached customary recognition,[114] cannot be overlooked. It has bound the international community in a unified stance against the very evil of subjecting humanity to the very situations of inhumane or subhuman conditions. Unjust, prolonged, and indefinite detention, for whatever purpose, is a violation of the essential human right to life and liberty

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105 Convention Relating to the Status of Refugees, *supra* note 1, art. 33.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 United Nations High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, at 15, *available at* https://www.unhcr.org/4d9486929.pdf (last accessed July 20, 2021) [perma.cc/6RT2-EM9Y].

111 Universal Declaration of Human Rights, *supra* note 95, art. 3.

112 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3 (1), *signed* Dec. 10, 1984, 1465 U.N.T.S. 85.

113 Universal Declaration of Human Rights, *supra* note 95, art. 3.

114 United Nations High Commissioner for Refugees, *supra* note 110.

protected in all its forms including the security not to be moved, transferred, or returned to places and situations that may present the threat to life, limb, and liberty.[115]

Persecution is the main dilemma that refugee protection addresses.[116] It may be in whatever form and though the 1951 Refugee Convention lists down the articulated grounds for persecution,[117] today's global society has also recognized new and relevant grounds from which persecution arises as needing the same degree of protection and refuge as the original reasons laid down in Article 1 (A) (2) of the Refugee Convention. This has allowed persons of interest who flee countries of origin because of that well-founded fear of persecution adequate protection under international law to seek asylum and refuge in friendlier States where they may have a chance at a better life for themselves and their family. This makes essential the very principle of non-refoulement.

C. UN Global Compact on Refugees

A recent development in international law is the UN Global Compact on Refugees (GCR) which was formulated and promulgated back on 17 December 2018.[118] It is a framework which provides all UN Member States a guide for a more organized and a more responsible handling of refugees[119] to give them better protection and assistance.[120] It is completely based on the New York Declaration for Refugees and Migrants which was adopted back in 2016.[121]

The UN GCR has four interlinked and interdependent objectives: to ease the pressures on host countries accepting the refugees; to enhance refugee self-reliance; to expand access to third-country solutions; and to support conditions in countries of origin for return in safety and dignity.[122]The UN ensures that these goals are obtainable by providing

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115 Convention Relating to the Status of Refugees, *supra* note 1, art. 33.

116 *Id.* art. 1 (A) (2).

117 *Id.*

118 United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees*, U.N. Doc. A/73/12 (Part II) (Sept. 13, 2018).

119 United Nations High Commissioner for Refugees, Global Compact on Refugees, at 2-3, *available at* https://www.unhcr.org/5c658aed4 (last accessed July 20, 2021) [https://perma.cc/H4CP-BFJQ].

120 *Id.*

121 Library of Parliament, Primer on the Global Compacts on Refugees and the Global Compact for Safe, Orderly and Regular Migration, *available at* https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201921E?fbclid=IwAR12CPiljHph5QoFXB0rUDrjLqhE0_1BeWNHJCVb2tKWhEsAqEFs5oFZciI#ftn6 (last accessed July 20, 2021) [https://perma.cc/ZT9K-ZXDR].

122 United Nations High Commissioner for Refugees, *supra* note 119.

for periodic review called the Indicator Framework for the GCR, which is presented during the Global Refugee Forum, in which all Member States participate.[123]

Recently, the first Global Refugee Forum happened on 16-18 December 2019 at Geneva, Switzerland, which was attended by 3,000 participants.[124]

With these objectives, the GCR has two parts in making sure that it is aligned and well-executed. The first is the Comprehensive Refugee Response Framework (CRRF).[125] The CRRF provides for a wide range of measures to be taken by the international community, both the Member States and stakeholders, in response to large-scale refugee situations.[126] This covers the whole cycle of displacement — admission of refugees and reception by host States and making sure that the needs of refugees are met while seeking solutions.[127] The second part is the Programme of Action which includes the arrangements for burden- and responsibility-sharing by Member States and the areas in need of support, and the solutions, which include voluntary repatriation of refugees, resettlement, and local integration.[128]

However, the limitation of the GCR is that it is not legally binding.[129] This may pose a challenge to non-parties to the treaty. Be that as it may, the GCR shows that the international community and the stakeholders *diplomatically recognize* the problem on refugees, finally putting it among issues that need to be *globally prioritized*. It further represents the political will of states regarding the issue.[130]

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[123] United Nations High Commissioner for Refugees, Global Compact on Refugees: Indicator Framework, at 15, *available at* https://www.unhcr.org/5cf907854 (last accessed July 20, 2021) [https://perma.cc/W54U-B6JY].

[124] United Nations High Commissioner for Refugees, 2019 Global Refugee Forum, *available at* https://www.unhcr.org/programme-and-practical-information.html (last accessed July 20, 2021) [https://perma.cc/ATG7-QE4U].

[125] United Nations High Commissioner for Refugees, *supra note* 122, at 2.

[126] United Nations High Commissioner for Refugees, The Global Compact on Refugees UNHCR Quick Guide, at 2-4, *available at* https://www.unhcr.org/5b6d574a7.pdf (last accessed July 20, 2021) [https://perma.cc/7LYE-GMQF].

[127] *Id*.

[128] United Nations High Commissioner for Refugees, *supra note* 123, at 6-40

[129] *Id*. at 33.

[130] *Id*. at 5.

D. Domestic Laws

In the Philippines, there are only two existing domestic laws that govern refugee protection — the Philippine Immigration Act of 1940[131] and Department of Justice Circular No. 58 (DOJ Circular No. 58).[132] The Immigration Act of 1940 has a very important landmark provision in Section 47 (b) where it states that the President of the Republic of the Philippines may "[f]or humanitarian reasons, and [not inconsistent with public safety and security, may admit aliens who can be considered] refugees for religious, political, or racial reasons."[133] It is significant to note that the Philippine Immigration Act of 1940 predates even the 1951 Refugee Convention and, noble it may seem that the country had the foresight and openness to include refugees (the definition in this Act existing even before the UN ever crafted the legal definition in 1951), the law is already outdated and there is no new legislation to properly address contemporary issues affecting refugees. The country is fortunate that the inflow of refugees to its territory only comes in trickles[134] and the government is able to handle their entry with just a Department Circular (DOJ Circular No. 58). But the country is not equipped to handle a large number of refugees if and when the time comes. DOJ Circular No. 58 deals with Refugee Status Determination (RSD) in a formal and process intensive format.[135] It is silent as to how to process if boatloads of refugees enter our territorial waters.

Both the Immigration Act of 1940 and the DOJ Circular No. 58 do not contain provisions for the care of refugees with pending applications for asylum. Both deal with determination of status but are silent as to the humanitarian provisions of indigent refugees, like those who come *en masse* after being pushed away from countries like Australia. And with the current refugee crisis in the region, the Philippines cannot afford not to revisit its domestic laws and policies.

In 2020, the Supreme Court established the Special Committee on Facilitated Naturalization for Refugees and Stateless Individuals which

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131 An Act to Control and Regulate the Immigration of Aliens into the Philippines [Philippine Immigration Act of 1940], Commonwealth Act No. 613 (1940).

132 Department of Justice, Establishing the Refugee and Stateless Status Determination Procedure, Department Circular No. 58 [Dept. Circ. No. 58] (Oct. 18, 2012).

133 Philippine Immigration Act of 1940, § 47 (b).

134 *See East Timorese Find Temporary Refuge in Philippine Cities*, UCA NEWS, Oct. 31, 1999, *available at* https://www.ucanews.com/story-archive/?post_name=/1999/11/01/east-timorese-find-temporary-refuge-in-philippine-cities&post_id=14728 (last accessed July 20, 2021) [perma.cc/TY5F-4LGK].

135 Dept. Circ. No. 58, § 6.

will lay the foundations for refugees and stateless persons to acquire Philippine citizenship. The Special Committee is tasked with enhancing and finalizing the draft rules developed by the Government's Access to Justice Cluster of the Inter-Agency Steering Committee on the Protection of Refugees, Asylum Seekers, and Stateless Persons not only to facilitate and expedite judicial naturalization for refugees and stateless people in the Philippines, but also to help them integrate and achieve long-term economic and social stability. As naturalized citizens of the Philippines, they will be able to practice their profession, own land, vote, and enjoy full legal protection.[136]

E. Refugee Status Determination and Rights of Asylum Seekers

There are two aspects to refugee status determination. The first is the procedural aspect.[137] It is more or less standard and uniform throughout the different regions. The basic standards observed in refugee status determination and detention may be summed to the following points as mandated by the UNHCR —

> Core Standards for Due Process in Mandate RSD
>
> Asylum seekers who approach UNHCR Offices should have appropriate access to UNHCR staff and RSD procedures, and should receive the necessary information and support to present their refugee claims.
>
> Procedures should be in place to identify and assist vulnerable asylum seekers.
>
> RSD [A]pplications should be processed on a non-discriminatory basis pursuant to transparent and fair procedures.
>
> RSD Applications should be processed in the most timely and efficient manner possible.
>
> Staff who are responsible for RSD procedures should have adequate qualifications, training[,] and supervision to effectively carry out their duties.
>
> Applicants should have an individual RSD Interview with a qualified Eligibility Officer.
>
> Rejected Applicants should have access to procedures for review of the RSD decision by an Officer, other than the Officer who decided the claim in the first instance.
>
> There should be organization-wide consistency on procedures that define substantive rights in the RSD process, including procedures affecting the

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136 United Nations High Commissioner for Refugees, UN Refugee Agency Commends The Philippines' Efforts to Accelerate Naturalization for Refugees and Stateless People, *available at* https://www.unhcr.org/ph/22285-un-refugee-agency-commends-the-philippines-efforts-to-accelerate-naturalization-for-refugees-and-stateless-people.html (last accessed July 20, 2021) [https://perma.cc/S7ZY-7P2R].

137 United Nations High Commissioner for Refugees, Procedural Standards for Refugee Status Determination under UNHCR's Mandate *available at* https://www.refworld.org/pdfid/42d66dd84.pdf (last accessed July 20, 2021) [https://perma.cc/57EE-HLHD].

> submission and receipt of applications, individual interviews, and the notification of UNHCR decisions.
>
> All aspects of the RSD procedures must be consistent with established UNHCR policies relating to confidentiality, standards of treatment of vulnerable asylum seekers, and gender and age sensitivity.[138]

The procedural aspect of refugee status determination is simply practical and uniform. Even the States that conduct their own refugee status determinations follow, more or less, the same format in terms of procedure. However, the substantive aspect of refugee status determination poses problems. In an ideal world, the substantive aspect should be the easiest and most unquestioned. But in a world beset by wars, violence, and intolerance and *xenophobia*, it is the substantive aspect that bears the brunt of the injustices committed and foregone. The UN Convention on the Rights of Children[139] is specific and clear in its insistence that no child should be detained, much less in a hostile, degrading and inhumane manner,[140] and yet refugee detention centers of different nations continue to house children in conditions far from ideal and humane. For example, in a report by the UNHCR Working Group on Arbitrary Detention who visited the detention centers of Australia in 2002, the conditions of the detention centers are described as not conducive especially for vulnerable groups such as children and the elderly.[141] In November 2013, UNHCR released another report after a visit to the Australian offshore detention and processing centers in Nauru and Manus Island and concluded that

> men, women[,] and children *continue to be held in arbitrary indefinite detention and conditions in both sites remain below international standards*. Of particular concern is the finding that, since the facilities re-opened in 2012, only one claim for refugee status had been fully processed in Nauru and none had been fully processed in Manus Island.[142]

This disturbing data shows the difficulty that refugees find themselves in, even after they are able to "supposedly" reach their country of destination. This also begs the question of Australia's "outsourcing" option[143] and whether it is an acceptable solution or an inhumane

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138 *Id.* at 1-2.

139 Convention on the Rights of the Child, *signed* Nov. 20, 1989, 1577 U.N.T.S. 3.

140 *Id.* art. 37.

141 Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Addendum: Visit to Australia*, ¶ 28, U.N. Doc. E/CN.4/2003/8/Add.2 (Oct. 24, 2002).

142 Refugee Council of Australia, Timeline, *available at* https://web.archive.org/web/20160519152735/http://www.refugeecouncil.org.au/fact-sheets/australias-refugee-and-humanitarian-program/timeline (last accessed July 20, 2021) (emphasis supplied).

143 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

deflection of its treaty obligations, not just to the 1951 Refugee Convention, but even also to the wider international law commitment given that the principles of basic human rights to life, liberty, and security are customary international law.[144] If Australia still holds responsibility over these offshore detention centers, then Australia must abide by international law as it is responsible under the VCLT and Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR).[145] Australia cannot raise the defense of a change in domestic law regarding foreign policy,[146] adapting a protectionist grounding of its arguments on national security since it also has a responsibility to the bigger community of humanity.

III. Analysis

There is fundamentally only one reason why people leave their countries of origin — the desire for a better life, for oneself or his/her loved ones. In today's global society and advanced interconnectivity, people leaving their countries of origin in search of a better life translates mainly to a search for economic prosperity. However, this is not the only case. We also now see that people leave home for a better life in a more primordial sense than just economics. For quite a significant number, it simply means survival. These are the peoples who not only leave their homes but are forced to flee their homes — forced by circumstances, by realities beyond their control.[147] These are the people whose very presence in their home countries is beset by discrimination and threat to life.[148] These are the people who risk all that they have just to flee the dangers of a constricted tomorrow. The community of nations saw the devastation to groups of people who were nearly exterminated just because they are of different skin color or belief.[149] The 1967 Additional Protocol to the 1951 Refugee Convention addressed precisely this concern.[150] And to address means to cooperate to make sure these vulnerable peoples are

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144 *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HUMAN RIGHTS: HANDBOOK FOR PARLIAMENTARIANS N° 26 121 (2016).

145 International Law Commission, *Report on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10 (2001).

146 Vienna Convention on the Law of Treaties, *supra* note 82, art. 27.

147 *See Myanmar Rohingya: What You Need to Know About the Crisis*, BBC NEWS, Jan. 23, 2020, *available at* https://www.bbc.com/news/world-asia-41566561 (last accessed July 20, 2021) [perma.cc/J6UH-DTLM].

148 *Id.*

149 *Id.*

150 Convention Relating to the Status of Refugees, *supra* note 1, art. 1 (A) (2).

protected.[151] Adhering to the Convention meant, for the parties, transcending their limited territorial security to allow legitimate refugees into their protection. It is a responsibility grounded on the very premise of humanitarian solidarity. It is a responsibility to provide, precisely, refuge.

A. Can Australia's Refugee Policy be Considered "Outsourcing?"

To zero in on the question of "outsourcing," it is prudent to look at the elements of the term as coined in today's practice. There is a need to evaluate clearly whether Australia's refugee policy is contracting out or outsourcing. The elements of the current practice shall be reviewed to see that Australia, analogically, arguably uses both methods. Australia's foreign policy for the past decade or so has always included the putting up of offshore detention centers, in foreign countries and run by foreign private security contractors.[152] Under the banner "Pacific Solution," Australia, for the past decade, has espoused the policy of making sure no illegal boats reach its shores.[153] It is a protectionist stance, upholding the primacy of internal security and territorial integrity over all else. Since 2001, refugees arriving at Australia's doorsteps have been transferred to offshore detention sites for processing and detention.[154] From 2014 to 2018, a bilateral agreement between Australia and Cambodia has opened the door for Australia to fully resettle refugees at its centers to Cambodia in exchange for purely economic considerations and without third party interventions.[155]

However, these sites continue to be funded by Australian taxpayers' money and are part of the entire immigration system and facilities of Australia.[156] On the other hand, Australia's bilateral agreement with Cambodia, perfected in September 2014, serves a different method altogether. The deal is for Cambodia to accept refugees in Australia's offshore detention center of Nauru in exchange for a country-to-country financial assistance.[157] Cambodia agrees to take in the refugees and take responsibility for them and their pending integration into Cambodian

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151 Protocol Relating to the Status of Refugees, *supra* note 99, art. II.

152 Karlsen, *supra* note 33.

153 Matt Siegel, *Australia Reveals over 600 Asylum Seekers Turned Back at Sea*, REUTERS, Aug. 6, 2015, *available at* https://www.reuters.com/article/uk-australia-asylum-refugees/australia-reveals-over-600-asylum-seekers-turned-back-at-sea-idUKKCN0QB0KS20150806 (last accessed July 20, 2021) [perma.cc/Q3LT-MBL4].

154 Karlsen, *supra* note 33.

155 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

156 Karlsen, *supra* note 33.

157 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

society.[158] For consideration, Cambodia agreed to take the burden off Australia for the full weight of State responsibility of refugee protection.[159]

In a logical sense, Australia did outsource, (i.e., passed on its burden, by paying Cambodia to take its responsibility to the international community).[160] It is not resettlement as used and approved as a durable solution in the international regime for refugee protection.[161] It does not pass through the UNHCR, the UN body mandated by the 1951 Refugee Convention to assist, monitor, and coordinate refugee movement.[162] So, the issue at hand is the very propriety of this method, with which the Author disagrees.

B. The Philippines and ASEAN

The Philippines' inaction and seeming disinterest to Australia's foreign policy may indirectly cause the ping-pong of these refugees to other places within the region. What has emboldened the smugglers who pass through our territorial waters are the inaction and incapacity to act regarding these asylum seekers traversing through boats to Australia from Asian countries. With no domestic legal structure for the country to intercept, such as rescue at sea principles and protection of territorial sovereignty, there is no full compliance with the Philippines' obligation under the 1951 Refugee Convention[163] and thus, the Philippines may even be held accountable under the Draft Articles of State Responsibilities.[164] Despite signing the Bali Process and recognizing the need to curb human smuggling,[165] refugee protection from inhumane treatment and trafficking at the hands of unscrupulous smugglers seem to be just an aftereffect. It was the security problem of human trafficking that was at the forefront of the Bali Process gathering[166] and not the welfare of the peoples, the victims, who are caught in the web of such illegal activities.

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158 *Id.*

159 *Id.*

160 *Id.*

161 Convention Relating to the Status of Refugees, *supra* note 1, art. 30 (1).

162 *See* Statute of the Office of the United Nations High Commissioner for Refugees, *supra* note 94.

163 Convention Relating to the Status of Refugees, *supra* note 1, art. 35 (2) (C) & 36.

164 *See* International Law Commission, *supra* note 145, art. 7.

165 The Bali Process, Membership, *available at* https://www.baliprocess.net/membership (last accessed July 20, 2021) [perma.cc/A528-W3XF].

166 Regional Support Office, *supra* note 52.

It is important to note that the impact of Australia's current foreign policy regarding refugees is threatening the international regime of refugee protection. The mere fact that there is no coordination with any UN body for such transfer and agreement[167] speaks of possible repercussions to the global community. Allowing Australia's hardline refugee rejection and the international community's inability to address the concern or our mere silence to it can in themselves be construed as an assent to such blatant human rights violation.

Australia's actions set a very dangerous precedent with global implications and direct consequences for the Philippines. As discussed in earlier Chapters, most movements of refugees are within the ASEAN waterways.[168] With only the Philippines and Cambodia as parties to the 1951 Refugee Convention in the ASEAN region,[169] the Philippines is directly affected by the seeming disregard by Australia of its own responsibility under the Convention.

First, the act itself can be considered as a violation of the principle of non-refoulement. The very outsourcing of Australia of its responsibility for refugees at its shores to Cambodia[170] is a cause for alarm as it does not bring the justified and proper end result that is protected by the international regime for refugee protection.[171] On the contrary, Australia's actions run counter to the principle of non-refoulement. Nations, which are parties to the 1951 Refugee Convention, have the responsibility to make sure that those people who seek refuge in their territory are protected properly from the very persecution they are fleeing and to preserve that protection and security for these refugees.[172] An essential part of this responsibility is making sure that whatever future is in store for these refugees, the safety and security of non-persecution be forever upheld by the country of refuge.[173] This means that if a country of refuge decides to transfer away from its territory and responsibility to a refugee, that country has the primary responsibility to the international community and to the refugee to make sure that the place of transfer is free of the possibility of persecution. The resettling country must be

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167 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

168 United Nations High Commissioner for Refugees, Refugee Movements in South-East Asia: 2018 – June 2019, at 7, *available at* https://www.unhcr.org/5d91e2564.pdf (last accessed July 20, 2021) [perma.cc/L52M-23EW].

169 United Nations Treaty Collection, *supra* note 22.

170 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

171 *See* Convention Relating to the Status of Refugees, *supra* note 1, art.1 (A) (2).

172 *Id.*

173 *Id.*

proved to be capable of at least the basic services and humane treatment.[174]

It is here that the Philippines and ASEAN may face a problem. The initial transfer of refugees under the Australia-Cambodia bilateral agreement is a total of seven voluntary refugees from Australia's Nauru offshore detention center to Cambodia.[175] Cambodia, a young country and still with a high record for inconsistency in both political and legal aspects of governance[176] and with a record for xenophobia given its scarred history[177] can hardly be considered a healthy country of final destination for refugees. Added to that complication may be the forced uncertainty that other refugees will undergo if they are kept in detention camps offshore to force them to assent (albeit indirectly) to going to another country rather than psychologically break down because of the insecurity of their futures. These conditions are ripe for possible unrest, as had happened already in the past in Australia's Nauru detention center,[178] and will definitely lead to a change in movement of refugees. When these movements happen, as they are already happening, the closest refuge for these peoples are countries that are parties of the 1951 Refugee Convention and in the region, the Philippines is one of only two.[179]

The Philippine framework leaves a huge gap in the law. DOJ Circular No. 58 is not legislation. Also, it only addresses refugees coming in and seeking asylum.[180] Both the circular and the 1940 Immigration Act are silent as to the in-between — from the time refugees arrive and their application for asylum. There is no mechanism of protection for them as they are in limbo. This is also made clearer in the most recent case of the

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174 *See* Convention Relating to the Status of Refugees, *supra* note 1, art. 33 (1).

175 University of New South Wales Sydney Andrew & Renata Kaldor Centre for International Refugee Law, Australia-Cambodia Agreement for Refugees in Nauru Factsheet, *available at* https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/factsheet_Cambodia.pdf (last accessed July 20, 2021) [perma.cc/PT4S-FRS3].

176 *See* David Chandler, Cambodia: A Historical Overview, *available at* http://asiasociety.org/cambodia-historical-overview?page=0,1 (last accessed July 20, 2021) [perma.cc/KFT3-ASLY].

177 Grant Peck, *Khmer Rouge Terror Rooted in Xenophobia, Paranoia*, AP NEWS, June 23, 1997, *available at* https://apnews.com/article/0d75832e67086f38754f1e15131640b7 (last accessed July 20, 2021) [perma.cc/4HZH-ERXE].

178 *Nauru Detention Centre Riot 'Biggest, Baddest ever'*, SYDNEY MORNING HERALD, July 20, 2013, *available at* http://www.smh.com.au/federal-politics/political-news/nauru-detention-centre-riot-biggest-baddest-ever-20130720-2qaok.html (last accessed July 20, 2021) [perma.cc/QWQ4-ZQJZ].

179 United Nations Treaty Collection, *supra* note 22.

180 Dept. Circ. No. 58, § 3 (e).

Rohingya boat refugees where Malaysia, Thailand, and Indonesia played a ping pong game in terms of responsibility to them as they floated off the Bay of Bengal.[181] If these countries were signatories to the 1951 convention, such action would be tantamount to violation of the principle of non-refoulement, but they are not.[182] This impacts the Philippines who is the closest Convention-signing country[183] and as refugees have increased dramatically the past year[184] and most are near the Philippines' doorsteps, there exists no domestic legal framework to deal with them. This lack of domestic legislation to truly provide for adequate protection upon possible arrivals either from countries forcing them out such as Australia[185] or others can truly spell harm for both the country and these refugees. Again, going back to the issue of the Rohingyas and possibly refugees pushed away from Australia that now float just outside Philippine territorial waters, there is no established protocol for rescue at sea principles that are basic and necessary for faithful compliance with the international regime for refugee protection. It is one thing to release an official press statement regarding openness to accept refugees[186] and another to truly have the domestic capacity and compliance mechanism to send out boats for rescue and bring to our shores these refugees.

Second, as one of the more senior Member States of the ASEAN, the Philippines' stance has always been held in high regard and esteem.[187] The commitment and showing of the country's sincerity to such commitment also positively influence other nations as observed by Mr. Bernard Kerblat, UNHCR's country representative to the Philippines.[188] He illustrated the point in a meeting called by the Catholic Bishops' Conference of the Philippines — Episcopal Commission on Migrants and

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181 Mezzofiore, *supra* note 18.

182 *See* United Nations Treaty Collection, *supra* note 22.

183 *Id*.

184 Migration Data Portal, Migration Data in South-eastern Asia, *available at* https://migrationdataportal.org/regional-data-overview/south-eastern-asia#recent-trends (last accessed July 20, 2021) [perma.cc/6YHJ-XPVQ].

185 Karlsen, *supra* note 33.

186 Darryl John Esguerra, *PH is Willing to Accept Refugees, Duterte Tells UN General Assembly*, PHIL. DAILY INQ., Sept. 23, 2020, *available at* https://globalnation.inquirer.net/191086/duterte-philippines-open-to-refugees (last accessed July 20, 2021) [perma.cc/Y4M2-SMGZ].

187 ASEAN Briefing, The Philippines' Relationship With ASEAN, *available at* https://www.aseanbriefing.com/news/philippines-relationship-asean (last accessed July 20, 2021) [perma.cc/C4XW-KCJQ].

188 UNHCR Philippines, UN Refugee Agency Applauds Philippine Supreme Court Decision Recognizing Foundlings as Citizens, *available at* https://www.unhcr.org/ph/10916-un-refugee-agency-applauds-philippine-supreme-court-decision-recognizing-foundlings-citizens.html (last accessed July 20, 2021) [perma.cc/KD4E-HZCD].

Itinerants (CBCP-ECMI) last 25 June 2015.[189] He told of the observation that after the Rohingya crisis exploded in the media and the three ASEAN countries (Malaysia, Thailand, and Indonesia) decided on a hardline stance of not aiding these refugees nor allow them to disembark in their territories, when the Philippines issued its statement of welcome for these refugees, adhering to the very fidelity of being signatory to the 1951 Refugee Convention but also more specifically adhering to the sovereign right of peoples to humane treatment and compassion,[190] the three nations thereafter eased their stance and allowed disembarkation of these refugees for humanitarian reasons and badly needed medical treatment and nourishment.[191] Adrift for months, these refugees were on the brink of death and our actions showed a deal of influence.

Third, Australia's action which has also left the UNHCR mainly in the dark about its exclusive bilateral agreement with Cambodia until late into the negotiations violates the mandate of UNHCR and the state-signatories' obligation to coordinate with UNHCR when it deals with refugees and cross countries movement.[192] Again, this dangerous precedent, and one in which no visible actions have been made by UNHCR indicates the loophole that countries do not need to connect with UNHCR even when dealing with refugees. The lack of safeguards in the Philippines' domestic interpretation of the Constitutional mandate for refugee protection[193] is also another problem. Section 47 (b) of the Immigration Act of 1940 authorizes the President, for humanitarian reasons, to protect refugees coming in[194] but this can also be a very politically charged provision, one that may give incumbent governments to abuse our own commitment to the 1951 Convention.

The ASEAN, in 2012, came up with its own regional declaration of human rights.[195] But the document is merely still a declaration, tailored after the UDHR.[196] The hope is that this declaration may be a start, in the region, for a more mature approach and recognition of the necessity

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189 United Nations High Commissioner for Refugees (UNHCR), *supra* note 5.

190 UNHCR Philippines, *supra* note 188.

191 Hurights Osaka, New Boat People: The Rohingyas (Newsletter of the Asia-Pacific Human Rights Information Center), *available at* https://www.hurights.or.jp/archives/focus/section1/Focus82.pdf (last accessed July 20, 2021) [https://perma.cc/G28C-ELBE].

192 Convention Relating to the Status of Refugees, *supra* note 1, art. 35.

193 *See* PHIL. CONST. art. II, § 2.

194 The Philippine Immigration Act of 1940, § 47 (b).

195 ASEAN, ASEAN HUMAN RIGHTS DECLARATION AND THE PHNOM PENH STATEMENT ON THE ADOPTION OF THE ASEAN HUMAN RIGHTS DECLARATION (AHRD) (2013).

196 *Id*. princ. 10.

to put into writing the different problems that hound the region today. However, in the ASEAN, only Cambodia and the Philippines are parties to the 1951 Refugee Convention.[197] Australia's deal with Cambodia impacts the country directly since as discussed, the ASEAN waterways are the busiest channel for refugee movement.[198] Maps shown by the UNHCR reveal that the main end country for these refugees (mostly from Asia) is Australia.[199] With Australia's hardline policy[200] and the other ASEAN countries having no international legal obligations, not being parties to the 1951 Refugee Convention themselves,[201] a heavy burden is placed upon the Philippines to step up with regard to the international regime of refugee protection. The Philippines is on course to becoming a next alternative given its own declarations of welcome and protection assurance. But to this day, there is no legal mechanism nor domestic legislation addressing mass refugee protection. DOJ Circular No. 58 outlines the process for determination and processing of status of refugees[202] but it does not contain mandates to specific organizations and agencies regarding the welfare and well-being of these vulnerable people that might enter our territory.

Given the trend of refugee movement and the ongoing persecution and poverty forcing these peoples to flee their homes, and seeing a first country's refusal and hard, unethical treatment of asylum seekers,[203] the Philippines is going to have to play a bigger role in this region. The risk and dilemma of these refugees passing through the territories of countries not parties to the 1951 Refugee Convention are enormous and unchallenged. Immediately, here, there is already a problem. Even when refugees are still on mainland Asia, as they try to find their way out of their countries of persecution, their vulnerability to human traffickers and smugglers are high. Most of them find themselves in countries not party to the 1951 Refugee Convention and when caught are detained in inhumane border detention camps like those along the Thailand-Malaysia and Thailand-Cambodia borders.[204] For the others who are able

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197 United Nations Treaty Collection, *supra* note 22.

198 United Nations High Commissioner for Refugees , *supra* note 168, at 7.

199 Kris Janowski, UNHCR Criticises Australia for Turning Boat People Away, *available at* https://www.unhcr.org/news/latest/2003/11/3fb119524/unhcr-criticises-australia-turning-boat-people.html (last accessed July 20, 2021) [perma.cc/6FPQ-AWST].

200 Karlsen, *supra* note 33.

201 *See* United Nations Treaty Collection, *supra* note 22.

202 Dept. Circ. No. 58, §§ 6-18.

203 Janowski, *supra* note 199.

204 Samantha Hawley, *Death in the Jungle: Silence, Fear and the Stench of Disease Haunt Abandoned People-Smuggling Camp on Thailand-Malaysia Border*, ABC NEWS, June 11, 2015, *available at* http://www.abc.net.au/news/2015-06-

to set sail on boats, legitimate or not, the journey to seeking refuge in a country that is hospitable will find them traveling as far down to Australia as possible.[205] Along the ASEAN waterway corridor, many in boats will risk pursuing reaching Australia as it is the closest developed country party to the 1951 Refugee Convention. However, more often than not, unscrupulous boat captains prey on desperate refugees who simply wish to escape their countries of persecution without thought to where they would end up.[206] These are the refugees that are most vulnerable and their numbers the past few years have rocketed especially within the territories of Asia and the ASEAN region.[207]

If Australia pushes them back, they cannot seek shelter in these non-obligated countries. Again, the Philippines is the only one in the region, aside from Cambodia, who can step in.[208] Cambodia's acceptance of refugees for monetary consideration[209] is a detrimental action in the long run. It poses the problems of integration given that the country itself is still adjusting to provide for its own citizens.[210] It has bypassed the existing process of refugee determination in Cambodia that has been in existence since after the Pol Pot regime.[211] Cambodia, as a nation, is still in its birthing stage and the risks posed to these refugees being transferred there are more real than is talked about.[212] And in terms of government-to-government agreements, the "burden sharing" ideally looked at and more appropriate is negated and economic reasons become the focal point for agreements.[213] This twists the very spirit behind the

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11/rohingya-muslims-trafficking-thailand-people-smuggling-torture/6537352 (last accessed July 20, 2021) [perma.cc/484B-MKMF].

205 Adeline Tinessia, Refugees in Southeast Asia: Avenues for Action in ASEAN and Australia, *available at* https://aasyp.org/2019/07/24/refugees-in-southeast-asia-avenues-for-action-in-asean-and-australia (last accessed July 20, 2021) [perma.cc/N9A6-MZBW].

206 Wendy Fry, *A Boat Packed with 32 People Shows How Migrant Smugglers Shifted to the Sea*, SAN DIEGO UNION TRIBUNE, May 3, 2021, *available at* https://www.sandiegouniontribune.com/news/border-baja-california/story/2021-05-03/boat-crash (last accessed July 20, 2021) [perma.cc/HX85-FF9W].

207 Migration Data Portal, *supra* note 184.

208 *See* United Nations Treaty Collection, *supra* note 22.

209 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

210 *See* Elaine Pearson, Cambodia Is Not Safe For Refugees, *available at* https://www.hrw.org/news/2014/05/22/cambodia-not-safe-refugees (last accessed July 20, 2021) [perma.cc/6V2Z-E3QE].

211 Sub-decree on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia [Sub-Decree No. 224 of 2009], Royal Government N° 224 (2009).

212 Pearson, *supra* note 210.

213 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

1951 Refugee Convention that saw nations come together in good faith and deep respect for each other, aware of the need to come together as a community of nations working together for the protection of these vulnerable peoples.[214] To begin putting economic considerations betray this fundamental principle of international comity.

The same concern may be raised in the Philippines. Like Cambodia, it is a third world country, struggling with its own poverty issues.[215] However, unlike Cambodia, the Philippines is better off in terms of human rights record when it comes to refugee protection, having a history of welcoming those seeking asylum in its territory.[216] Yet again, this open arms policy[217] may also send a wrong signal in the overtaking of the country's own internal status determination process for those who have already sought asylum and awaiting decisions. The country's domestic laws are wanting in detailed and logistical as well as legal considerations for better and more comprehensive refugee protection capabilities but not doing anything would be tantamount to indirectly supporting Australia's inhumane deflection of its refugee obligations and an injustice to the people whose lives are compromised because of its inaction.

IV. Conclusions and Recommendations

Australia's action of entering into a bilateral agreement with Cambodia in order to transfer refugees in its offshore detention centers to Cambodia[218] is clearly outsourcing as discussed in this Note and is arguably an unacceptable solution to its refugee dilemma. Article 26 of the Vienna Convention on the Law of Treaties is univocal in its holding of parties to treaties responsible for whatever is agreed upon.[219] It is not a whimsical or outdated principle, but rather one that is important and necessary in order to keep nations true to their commitment for peace and a better humanity. The principle of *pacta sunt servanda* is enshrined in order to bind nations to their commitment for the greater good and for the

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214 Convention Relating to the Status of Refugees, *supra* note 1, pmbl.

215 World Population Review, Third World Countries 2021, *available at* https://worldpopulationreview.com/country-rankings/third-world-countries (last accessed July 20, 2021) [perma.cc/N3YP-M3MA].

216 Alexander T. Magno, *UN Official Praises Philippines for Willingness to Take in Refugees*, CNN PHIL., May 19, 2015, *available at* https://cnnphilippines.com/news/2015/05/19/Philippines-praised-for-openness-to-refugees.html (last accessed July 20, 2021) [perma.cc/NV2H-V2VM].

217 *See id*.

218 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

219 Vienna Convention on the Law of Treaties, *supra* note 82, art. 26.

bigger human community.[220] To trivialize or circumvent it in order to accommodate a nation's differing or changing stance proves to be very destructive and will cause a dangerous precedent. Then it may open the argument not to respect decades long agreements entered for the greater good. Even in its present execution, Australia's conduct has already affected a number of movements.[221] Fear grips so many refugees that they end up dealing with unscrupulous smugglers and traffickers just to reach shores of refuge and hope.[222] With Australia's policy,[223] countries like the Philippines, a party to the 1951 Refugee Convention,[224] must brace themselves for an increase in asylum seekers. The Philippines, as a party to the Convention,[225] must be ready to begin receiving.

A. Addressing Treaty Obligations

As pointed out in the preceding Chapters, Australia's action of "outsourcing" its responsibility to the international regime for refugee protection is arguably a breach of international law. The principle of non-refoulement is absolute and the wording of the 1951 Refugee Convention is univocal in its treatment of refugee protection against violation of the principle of non-refoulement.[226] Article 33 (1) of the Convention explicitly prohibits "[expulsion] or return ... in any manner" and to any territorial frontier that may pose any danger to life or liberty of the refugee or his/her family.[227] A state party's action of deflecting such responsibility falls within the category of outsourcing which can be considered a "manner" of expulsion[228] or transfer of responsibility and security as contemplated in Article 33 (1) of the 1951 Refugee Convention and is a breach of international law, specifically Articles 26 and 27 of the Vienna Convention on the Law of Treaties and held accountable under Articles 12 and 15 of the Draft Articles of State Responsibility.

The very action of outsourcing by Australia of its responsibility to the international regime for refugee protection is a violation of customary law and its bilateral agreement with Cambodia for the transfer of these

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220 *Id.*

221 *See* Aulden Warbrooke, *Australia's 'Pacific Solution': Issues for the Pacific Islands*, 1 ASIA & PAC. POL'Y STUD. 337, 337 (2014).

222 Fry, *supra* note 206.

223 Karlsen, *supra* note 33.

224 United Nations Treaty Collection, *supra* note 22.

225 *Id.*

226 Convention Relating to the Status of Refugees, *supra* note 1, art. 33 (1).

227 *Id.*

228 *See id.*

refugees[229] directly affects the Southeast Asian region, the heaviest migration corridor in the world,[230] and especially the Philippines, being the only other country in the region, aside from Cambodia, who is a state party to the 1951 Refugee Convention.[231] Although the ASEAN countries have expressed concern about the Rohingya people, they have overlooked migration as a key flow in the region in the 2015 ASEAN Integration.[232] The issue of refugee protection cannot remain overlooked. There must be a proper and clear mechanism in order that the ASEAN countries who are not bound by the 1951 Refugee Convention and even those that are, like Cambodia and the Philippines, can be held accountable and responsible to adhere to the necessity of basic human rights as part of the international regime for refugee protection.

B. Addressing our Responsibility to the International Community

Internationally, the Philippines might want to offer an additional protocol to the 1951 Refugee Convention strictly defining the parameters of regional cooperation and burden sharing to balance the need to protect these refugees but also protecting host-states' own security as well as cultural and political interests. And in this light, albeit carefully and discerningly, the Philippines may have to begin considering Australia's communication regarding becoming a possible country of resettlement[233] but not for economic bilateral agreement but rather in fidelity to our commitment to the 1951 Refugee Convention and under the supervision of the UNHCR. If such a scenario unfolds again, the Philippines, as a nation, must be ready and new parameters and safeguards must be in place for our refugee determination process taking into consideration the manner of their transfer to our shores. It is inconsistent to keep harping in the international press about having open door policies for refugee protection[234] and yet in the quiet of diplomatic communications, the government refuses refugees from countries like Australia, even if they

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229 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

230 International Labour Organization, Labour Migration in Asia and the Pacific, *available at* https://www.ilo.org/asia/areas/labour-migration/lang--en/index.htm (last accessed July 20, 2021) [perma.cc/LC6F-2GG5].

231 United Nations Treaty Collection, *supra* note 22.

232 Syed Munir Khasru, Migration -- the Forgotten Part of ASEAN Integration, *available at* https://asia.nikkei.com/Opinion/Migration-the-forgotten-part-of-ASEAN-integration (last accessed July 20, 2021) [https://perma.cc/UH2Y-X8FX].

233 Daniel Hurst & Ben Doherty, *Australia Seeking Refugee Resettlement Deal with Philippines, Say Reports*, GUARDIAN, Oct. 8, 2015, *available at* https://www.theguardian.com/australia-news/2015/oct/09/australia-seeking-refugee-resettlement-deal-with-philippines-say-reports (last accessed July 20, 2021) [perma.cc/M2NH-XZA2].

234 Magno, *supra* note 216.

may be in breach of their own obligations.[235] In order to truly protect the welfare of these peoples, if they are at risk of forcible transfer to a country that does not have adequate protection for them in the long run or future, then the Philippines will have to be ready to walk the talk.

For decades, it has been the Philippine government's stance to adopt only two measures of durable solution — voluntary repatriation and local integration.[236] There has been no venture into resettlement, the third measure of durable solution, since after being made a temporary transit country for the Vietnamese refugees in the 1970s.[237] Again, today's refugee landscape may encourage the reconsideration of the third measure, allowing our country to be a resettlement country itself or allow temporary refugees in our land, awaiting possible resettlement elsewhere, cooperating with the UNHCR for this measure as was done numerous times in the past.[238] Adhering to two aspects of the customarily accepted durable solution with regard to refugee protection,[239] the Philippines opened doors to local assimilation and processed voluntary repatriation of those who eventually returned to their country of origin. However, the country is yet to be comfortable or open to the idea of being asked to be a resettlement country.[240] In light of recent events of Australia's agreement with Cambodia, it was discussed that the Philippines was also originally approached but ultimately refused.[241] If the country is to remain true to the 1951 Convention, the Philippines should be ready and willing to host refugees without economic deals and the like. This is a tricky situation to find ourselves in, but the reason the Convention was signed more than 50 years ago was precisely to protect people.

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235 Simone Orendain, *Philippines Rejects Permanent Resettlement of Refugees from Australia*, VOA NEWS, Oct. 27, 2015, *available at* https://www.voanews.com/east-asia/philippines-rejects-permanent-resettlement-refugees-australia (last accessed July 20, 2021) [perma.cc/BW7F-U6Y2].

236 Executive Committee of the High Commissioner's Programme, *UNHCR Activities Financed by Voluntary Funds: Report for 1993-1994 and Proposed Programmes and Budget and 1995*, ¶¶ 2 & 9, U.N. Doc. A/AC.96/825/Part II/9 (Aug. 16, 1994).

237 Agreement under the Programme of the United Nations High Commissioner for Refugees Philippines, Phil.-UNHCR, Nov. 12, 1979, 79/PC/PHI/MA/1/CON.

238 *See id*.

239 Executive Committee of the High Commissioner's Programme, *supra* note 236, ¶¶ 2 & 9.

240 Orendain, *supra* note 235.

241 *See generally* Madeline Gleeson, Migration Policy Institute, The Australia-Cambodia Refugee Relocation Agreement Is Unique, But Does Little to Improve Protection, *available at* https://www.migrationpolicy.org/article/australia-cambodia-refugee-relocation-agreement-unique-does-little-improve-protection (last accessed July 20, 2021) [perma.cc/N87E-2QEX].

C. Addressing the Domestic Policies and its Implications

The implications of States' "outsourcing" their treaty obligations, like in Australia's case,[242] are daunting. For one, to allow such action is in a way to allow States to water down the very importance of treaties. Allowing States to commit breach of State obligations just because they have the means and capacity to do so is to concede the very dream and spirit of coming together as a community of nations. The Philippines' own domestic policies became relative since a part of its commitment to the international community was to enshrine in the country's own Constitution, admitting into the law of the land, generally accepted principles of customary international law.[243] The lack of safeguards, though, in the domestic interpretation of the Constitutional mandate for refugee protection is a major problem. Section 47 (b) of the Immigration Act of 1940 authorizes the President, for humanitarian reasons, to protect refugees coming in[244] but this can also be a very politically charged provision, one that may allow incumbent governments to abuse our own commitment to the 1951 Convention.

The Philippine Immigration Act was passed in 1940, 11 years before the 1951 Refugee Convention.[245] It does not recognize the role of a UNHCR in its terms as the UNHCR was created only in the 1951 Refugee Convention. DOJ Circular No. 58 discusses status determination for refugees to the Philippines,[246] in a sense, channeling the responsibility of determination upon the country's sovereign domestic laws. When there are UNHCR assisted refugees entering the Philippines, the Philippines still requires these refugees to undergo the proper procedures as mandated in DOJ Circular No. 58.[247] But what happens if there are multitudes of refugees in boats, for example, that will seek entry to the country only to realize that there is no domestic legislation or executive policies to properly address such magnitude? UNHCR Philippines has been working hard to ensure that during distressing times, the agency's emergency transit mechanism would be efficiently functioning.[248] This mechanism was put in place within the operational guidelines of the UNHCR believing that, at least from the UN agency's standpoint, refugees who arrive in large numbers from wherever and have undergone

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242 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

243 PHIL. CONST. art. II, § 2.

244 The Philippine Immigration Act of 1940, § 47 (b).

245 *See id*.

246 Dept. Circ. No. 58, § 8.

247 *Id*. §§ 6-18.

248 UNHCR, UNHCR Global Report 2013: The Philippines, at 1, *available at* https://www.unhcr.org/539809fdb.pdf (last accessed July 20, 2021) [https://perma.cc/H9FT-6TX3].

the Emergency Transit Process may be considered "mandate refugees" who do not need to undergo the country's procedure of determination under DOJ Circular No. 58.[249] This mechanism was used during the Vietnam Crisis in the 1970s[250] but has not been tested fully in recent years, especially not after the promulgation of DOJ Circular No. 58.

It is high time that the Philippines reviews once more its domestic policies regarding refugees and asylum seekers. The Immigration Act of 1940 does not mention any proactive measure on the part of the government to adapt internationally recognized principles such as rescue at sea or even adequate protection once they reach our shores. Even this newest circular by the Department of Justice, DOJ Circular No. 58, only pertains to the refugee determination status of those seeking refuge in our territory and begins the process only when such refugee step forward.[251] The Philippines practices the "no detention" principle regarding asylum seekers[252] but does not have any further mechanism to aid such persons of interest while their asylum cases are pending. Philippine domestic regulations are bereft of such proactive, humane policies. The absence of an updated legislation pertaining to refugee protection has to be addressed. With no legislation up to today, concerned government agencies are unable to perform their obligations to the full extent as such absence brings with it the inability to access public funds and budget.

Time and again, the Philippines has insisted on its commitment to the 1951 Refugee Convention and willingness to shelter those refugees pushed away by other countries.[253] To truly be faithful to the Convention, then it is recommended that an amendment to the Immigration Act of 1940 be submitted to Congress. An amendment that would include a proactive approach to those who may find themselves in Philippine territorial waters, whether being smuggled elsewhere or en route to Philippine shores. Better still, it is highly recommended to revisit the proposed Philippine Immigration Act of 2009[254] which was shelved during the change of political regime in the country.[255] It is proper, especially in today's context, to specifically include in the domestic law the necessary

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[249] *See* United Nations High Commissioner for Refugees, UNHCR's Mandate for Refugees, Stateless Persons and IDPs, *available at* https://emergency.unhcr.org/entry/55600/unhcrs-mandate-for-refugees-stateless-persons-and-idps (last accessed July 20, 2021) [perma.cc/CC4V-TK5S].

[250] *See* Peñamante, *supra* note 60.

[251] Dept. Circ. No. 58, § 8.

[252] *Id.* § 3 (b).

[253] Magno, *supra* note 216.

[254] Philippine Immigration Act of 2009. S.B No. 3404, 14th Cong., 2d Reg. Sess. (2009).

[255] *Id.*

intervention by our coast guards or vessels to protect these refugees entering our waters. The Filipino people can truly, as a nation, do better.

D. Recommendations for the Republic of the Philippines

Today is the best time to revisit the Philippine Immigration Act of 1940. Amidst the growing concern for refugee protection all over the world and the increasing number of forcibly displaced people,[256] the country must rethink its own domestic capacity to engage the refugee crisis that is slowly creeping up our doorstep. An integration to the country's domestic laws on refugee protection must be proposed. The Philippines must be prepared to consider its initial commitment and create avenues or responses that will allow its domestic capacity to engage the refugee dilemma within the region. There are no social programs in place for possible aid to refugees seeking refuge in the country. Even the basic health care services to refugees in our country who might need them would be at the mercy of charitable institutions[257] as there is no government allocation for this. The country must set in place proper logistical mechanisms, mandated by law, appropriate and capable to address sudden influx of migrations and territorial security and integrity. The trend of migration clearly points to a future of more peoples searching for refuge in Southeast Asia from neighboring regions and countries.[258] The Philippines, being archipelagic, has been spared the traffic so far but soon, the problem will be right before its shores.

This Note recommends two possible amendments. First, Congress must review the proposed Philippine Immigration Act of 2009 that was shelved during the change of administration in 2010[259] and update the proposed legislation to include a mechanism for an inter-agency cooperation to provide for at least the basic necessity of people seeking asylum in the country. The existing laws do not mention how the government can assist the asylum seekers as they await the processing of their refugee status determination (RSD). Indigent asylum seekers must not be forced to be a burden upon society and so a mechanism must be added in which they can be assisted in the period of their waiting for their RSD approval.

Second, Congress must amend the Philippine Immigration Act of 1940 to specifically include mechanisms for large-scale refugee inflow. If scenarios of boatloads of refugees entering the country's territory happen,

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256 INTERNATIONAL ORGANIZATION FOR MIGRATION, WORLD MIGRATION REPORT 2020 10 (2019).

257 *See* DR. MANUEL M. DAYRIT, ET AL., THE PHILIPPINES HEALTH SYSTEM REVIEW 24-25 (2018).

258 INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 256, at 75.

259 S.B No. 3404.

like those of Australia or the recent Rohingya crisis in the Bay of Bengal,[260] the Philippines would have no capacity to assist or address. The country has long closed its refugee camps in Palawan and Bataan[261] and would not be ready to engage in refugee crisis management of such magnitude. There is already a vacuum in the country's domestic policies for refugee protection so much so that religious and charitable non-governmental institutions are relied upon to provide for the basic necessities of refugees entering and seeking asylum in the country.

Lastly, in light of the development of Special Committee on Facilitated Naturalization for Refugees and Stateless Individuals outlining an expedited naturalization process for the refugees, this Note recommends that unnaturalized refugees and asylum seekers be allowed, in an amendment to the Philippine Immigration Act, to practice their profession in the Philippines in order to help them attain some economic stability while staying in the country.

E. Recommendations for the Association of Southeast Asian Nations

The principle of non-refoulement is a customary international law principle that encompasses all nations.[262] With the current trend of massive refugee movement within the ASEAN region's own corridors and territorial seas,[263] it is important for the ASEAN as a regional association to reiterate its commitment to the promotion of the basic human rights of life, security, and liberty. The ASEAN must show the world that it holds dear the very fundamental principles that make us one global community amidst our differences. The refugee crisis is not an isolated crisis, it is one that affects the entire community of nations, in all the regions of the world.[264] It is also an opportunity for the ASEAN to consolidate its core principles and policies. Out of the 10 ASEAN nations, only the Philippines and Cambodia are State parties to the 1951 Refugee Convention.[265] When the ASEAN integration takes effect, and if the other ASEAN countries refuse to allow these refugees as recognized by Cambodia to their territories, the Philippines cannot fall back to the same argument.[266] The Philippines is the only other country in the region that will have to allow

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[260] *See* Mezzofiore, *supra* note 18.

[261] Shirin Bhandari, The Last Remains of Viet Ville, *available at* https://roadsandkingdoms.com/2018/the-last-remains-of-viet-ville-pho-in-a-ghost-town (last accessed July 20, 2021) [perma.cc/EZ8F-LVFT].

[262] United Nations High Commissioner for Refugees, *supra* note 110.

[263] INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 256, at 75.

[264] *Id.* at 21-24.

[265] United Nations Treaty Collection, *supra* note 22.

[266] Convention Relating to the Status of Refugees, *supra* note 1, art. 33 (1).

these refugees entry. Australia's deal with Cambodia[267] indirectly affects the Philippines way closer than it seems. Refugee status and papers must be accepted by the Philippines, but the same imposition cannot be given to the other countries in the region as they are not bound by the Refugee Convention.

As such, when these people do come to the Philippines as part of the open border agreement of ASEAN integration,[268] does the country have domestic laws and adequate protection legislation in place for the protection of this group of people? Do the domestic laws allow entry for peoples with only "refugee status" documents and without passports?

The other countries in the region must decide to either discuss a regional approach to the migration and refugee problem or show their goodwill by signing and assenting to the 1951 Refugee Convention and its 1967 Additional Protocol. Refugee protection needs to be strengthened in the region. With the current agreement of Australia and Cambodia,[269] these refugees' future in the ASEAN integration is uncertain as the other countries are simply third parties to the Refugee Convention. Also, if Australia continues with its current trend of pushing back refugees in boats from its shores, the waterway route covers the ASEAN region[270] and if all the rest except the Philippines are third party States, then the Philippines must play an active role in rescue at sea scenarios.

With regional cooperation and communal territorial protection of ASEAN waters, the Philippines will be gravely affected by the migration movement of refugees given it is a country that has state responsibility to the 1951 Refugee Convention.[271]

As Member States of the UN, ASEAN is also covered by Global Compact on Refugees (GCR) adopted by the UN in 2018. Although the GCR is a non-binding framework, it serves as a policy which UN Member States can adopt in handling and sharing responsibility with regards to refugees.

This Note recommends that the ASEAN releases an additional declaration of principles based on the 2018 GCR and specifically reiterating its commitment to respect the customary principle of non-refoulement, condemning any form or method that may prove contrary to this principle. A regional treaty or agreement may still be a difficult

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267 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

268 ASEAN Secretariat, *supra* note 85, ¶ 2.86.

269 *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

270 United Nations High Commissioner for Refugees, *supra* note 168, at 7.

271 United Nations Treaty Collection, *supra* note 22.

objective to reach but to have at least a declaration to the principle's commitment is a huge step in the right direction.

F. Recommendations for UNHCR

The UNHCR must continue to protest the Australian policy of outsourcing its responsibility to the international regime for refugee protection[272] unless and until it serves notice and allows UNHCR to engage and assist it in its refugee crisis. UNHCR must not approach Australia in an antagonistic manner but rather try to bring to the table valid international instruments that Australia seems to have conveniently forgotten. UNHCR must proactively find better alternatives and support mechanisms for countries of refuge like Australia and how to properly diffuse the staggering number of refugees in transit.

G. Recommendations for Australia

As a primary destination for refugees, Australia must learn and accept that it needs help from neighboring countries in its own foreign policy regarding refugees. It has to engage countries in a more open and transparent manner and course actions through the UN-mandated agency, UNHCR. It has to stop its current foreign policy of "outsourcing" refugees to third countries that do not have a clear destination and program for refugees.[273] To be faithful to its responsibility to the 1951 Refugee Convention, Australia must show its goodwill in at least trying to allow proper processing of migrants coming in who may validly be refugees. Australia has to allow international organizations to assist it in addressing the migration dilemma but at the same time taking care of its responsibility for the security of its citizens.

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[272] Statement *by* UNHCR, *UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation* (Sept. 26, 2014) (*available at* https://www.unhcr.org/news/press/2014/9/542526db9/unhcr-statement-australia-cambodia-agreement-refugee-relocation.html (last accessed July 20, 2021) [perma.cc/UQ98-T5XP]).

[273] Karlsen, *supra* note 33 & *First of Australia's 'Outsourced' Refugees Arrive in Cambodia*, *supra* note 39.

LEGAL EDUCATION IN A GLOBAL PANDEMIC: PERSPECTIVE OF AN ATENEO LAW SCHOOL AS AN IGNATIAN INSTITUTION

Ma. Luisa Rose P. Caybot[*]
Gil E. Garcia II[**]

I. Introduction

The 2019 novel coronavirus was confirmed to have reached Philippine shores when the first case was confirmed on 30 January 2021.[1] The country remained unfazed, it seemed, until over a month later.[2] What began as an outlandish rumor from a distant city became real and almost tangible. On 8 March 2020, a public health emergency was declared[3] after

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1 ABS-CBN News, *Philippines Confirms First Case of New Coronavirus*, ABS-CBN NEWS, Jan. 30, 2020, *available at* https://news.abs-cbn.com/news/01/30/20/philippines-confirms-first-case-of-new-coronavirus (last accessed July 20, 2021) [https://perma.cc/BW3C-TXHB].

2 *See* Cristina Eloisa Baclig, *TIMELINE: One Year of Covid-19 in the Philippines*, PHIL. DAILY INQ., Mar. 12, 2021, *available at* https://newsinfo.inquirer.net/1406004/timeline-one-year-of-covid-19-in-the-philippines (last accessed July 20, 2021) [https://perma.cc/FBG8-6D2A].

3 Office of the President, Declaring a State of Public Health Emergency Throughout the Philippines, Proclamation No. 922, Series of 2020 [Proc. No. 922, s. 2020], § 1 (Mar. 8, 2020).

the Department of Health (DOH) confirmed the first case of local transmission in the country.[4]

In response to the guidelines issued in Davao City[5] a few days later, a memorandum[6] was issued declaring the immediate suspension of classes in all levels due to the emergence of new coronavirus cases in the city. The day following its issuance, the Ateneo community came to a halt.[7] As if the clamor for a little break got too loud, the wish was granted in the blink of an eye. Students were sent home, while some of the workforce remained to prepare for what was to come.

To provide a glimpse of what has happened since then, this Essay examines the perspectives of students, professors, and heads of the Ateneo de Davao University College of Law (AdDU Law) on the global pandemic and its effects on them as individuals and members of a Jesuit community. It seeks to highlight the story of St. Ignatius in their testimonies and to revisit the Ignatian values that are most relatable to them. The Essay also attempts to address issues surrounding academic freedom in relation to Ignatian education during this pandemic. Finally,

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4 Ted Cordero, *DOH Recommends Declaration of Public Health Emergency After COVID-19 Local Transmission*, GMA NEWS, Mar. 7, 2020, *available at* https://www.gmanetwork.com/news/news/nation/728715/doh-recommends-declaration-of-public-health-emergency-after-covid-19-local-transmission/story (last accessed July 20, 2021) [https://perma.cc/2E3T-QX99].

5 Office of the City Mayor of the City of Davao, Davao City Government Guidelines No. 7 for Corona Virus Disease (COVID-19) (Mar. 12, 2020).

6 Official Statement *from* Fr. Joel Tabora, S.J., President of the Ateneo de Davao University, *to* the University Community (Mar. 12, 2020) *available at* https://www.addu.edu.ph/blog/2020/03/12/ateneo-de-davao-suspends-classes-due-to-the-corona-virus-disease (last accessed July 20, 2021) [https://perma.cc/L5P3-SUMN]).

7 Essay *by* Evanne Maliones, *An Essay on My Online Law School Experience During the Pandemic* (on file with Author).

> Early January of 2020, news broke out that a deadly virus had entered the country. For a time, many ignored the information, and the school went on as per usual. However, on March 12, 2020, a memo was sent by Fr. Joel Tabora declaring immediate suspension of classes in all levels due to the emergence of Coronavirus cases in the city.
>
> On March 13, 2020, the Ateneo community, including law school, went to a halt.

Id.

it aims to instruct readers in applying Ignatian values while navigating the pandemic as individuals and as a community.

II. The Cannonball That Changed Everything

The pandemic was a cannonball[8] launched at the law school community.

The days following the start of the lockdown emptied the halls of Dotterweich building (D-building), where the College of Law was housed. Most of the employees were forced to work from home.[9] Some students flocked to terminals to get to their provinces, while some stayed in the city to continue their education via online channels.[10]

Thinking that the online setup would be a breeze was an easy trap to fall into. How hard could it be having more time for loved ones, dealing less with traffic and the risk of being late, as well as not needing to wear formal clothes from the waist down? It was easy to think about the good things only because the unfortunate ones were unprecedented.

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8 SAINT IGNATIUS OF LOYOLA, THE AUTOBIOGRAPHY OF ST. IGNATIUS 20 (John Francis Xavier O'Conor, S.J. ed., 1900). (This is in reference to the symbolic cannonball that struck St. Ignatius of Loyola.).

> Ignatius so persuaded the commander, that, against the views of all the other nobles, he decided to hold the citadel against the enemy. ... After the walls were destroyed, Ignatius stood fighting bravely until a cannon ball of the enemy broke one of his legs and seriously injured the other.

Id.

9 *See* Maliones, *supra* note 7, at 1.

10 *Id.*

> Law students were finally able to get what they always wanted [—] time off from school, but at the expense of overwhelming fear of an unknown enemy lurking around the city. Days later, these students flocked to terminals to get to their provinces, while some had to stay in the city to continue their education via online channels.

Id.

A. Students' Transition into Online Learning

The "new normal" created new problems. This was a realization for Mariel, a fourth-year law student from Davao City, who said that the change has only brought about constant and overwhelming stress.[11] She shared, "[t]o say that the past year has been challenging is an understatement. The pandemic served as a trigger to the realities that many of us have shut off from our minds."[12] What was once a "peaceful bubble" has since "popped, and [she is] now faced with challenges that [she had] brushed off before."[13]

Outside the city, students from different provinces deal with similar problems. Jurilex, a fourth-year law student from Surigao del Sur, said, "[t]he pandemic was a huge transition because I had to move back to the province and encountered problems that I do not typically experience in face-to-face classes. These resulted in unusual levels of anxiety that affected my studies."[14]

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[11] Essay *by* Mariel Q. Baruis, *Of Moving Forward and Going On...* (on file with Author).

[12] *Id.* at 1 (on file with Author).

[13] *Id.*

> To say that the past year has been challenging is an understatement. All of us experienced challenges that changed our lives. The pandemic served as a trigger to the realities that many of us have shut off from our minds. It made me more aware of what was going on outside the peaceful bubble I kept to myself. Suddenly, the bubble popped and I am now faced with challenges that I have brushed off before. Things that used to be at the end of my priorities are now at the mainstream. Stressors continued to appear and then I was overwhelmed.

Id.

[14] Essay *by* Jurilex A. Maglinte, *Answers to Guide Questions* (on file with Author).

> The pandemic was a huge transition because I had to move back to the province and encountered problems that I do not typically experience in face-to-face classes. These resulted in unusual levels of anxiety that affected my studies. I had to undergo cognitive restructuring to adjust a mindset that will help me cope while protecting my mental health. The difficulties forced me to re-assess and re-affirm my purpose of being in law school. I had to remind myself constantly why I need to keep going.

Other students have also experienced more difficulty in focusing at home than while in Davao City. Evanne, a fourth-year law student from North Cotabato, thought that the atmosphere was simply counterproductive.[15] She shared, "I used to be able to finish my readings a week or three days before an exam, but nowadays, I grapple with finishing my readings right before an exam."[16] Also, neighbors singing until the wee hours of the night and the occasional ruckus happening just outside her bedroom door keep her from focusing entirely on her readings.[17]

Evanne added that some household members could not easily relate to the amount of time required of her for studying.[18] She shared, "while my classes are at night, I have to utilize the day and the weekends to study or attend makeup classes. I sometimes get bombarded with errands[ ] even on the day of an exam."[19]

There are problems, however, that one can only hope will not arise, especially during exams, quizzes, or recitations. Jurilex recalled the countless nights of power outages during which she had to study using her rechargeable lamp.[20] She remembered thinking, "How will I get

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Id. at 1.

15 Maliones, *supra* note 7, at 2.

> I somehow found it more difficult to focus at home than when I was in Davao. There is something about the atmosphere at home that is very counterproductive. I used to be able to finish my readings a week or three days before an exam, but nowadays, I grapple with finishing my readings right before an exam.

Id.

16 *Id.*

17 *Id.*

18 *Id.*

> Moreover, sometimes my family members could not understand my schedule as a student, especially the time I need for studying. It was difficult to explain that while my classes are at night, I have to utilize the day and the weekends to study or attend makeup classes. I sometimes get bombarded with errands, even on the day of an exam.

Id.

19 Maliones, *supra* note 7, at 2.

20 Maglinte, *supra* note 14, at 1.

through this? I'm so tired."[21] On the other hand, Evanne had to prepare multiple gadgets to use as an alternative in case of such occurrence.[22] She also had to "load prepaid [Wi-Fi] and mobile data on top of a wireless local area network as a precaution" for intermittent connection.[23] Despite these preparations, panic was unavoidable whenever sudden power outages occurred, especially in the middle of tests, which ultimately affected her performance.[24]

> Student representatives had to organize and create online groups for students in every subject, figure out an online platform that would be sufficient for online learning, and test each platform to determine which one could withstand a one to two-hour class with recitations. Moreover, they had to answer hundreds of questions their classmates bombarded them [with] on how the school would go about [—] a question they also had no clue how to answer.[25]

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[21] *Id.*

> Looking back, I can't believe I had so much resiliency to surpass all the challenges. I had countless nights studying in my rechargeable lamp due to brownout, asking myself, 'How will I get through this? I'm so tired.' But in the end, I got through it all. I experienced God at work through the people who encouraged me to keep going, to the people who support me through it all, and how favorable circumstances outweigh the inconveniences I experienced.

Id.

[22] Maliones, *supra* note 7, at 2.

[23] *Id.* at 1.

[24] *Id.* at 1-2.

> Another difficulty was power outages, especially the unscheduled ones that occurred on important days such as exams and recitations. With the ease of simply leaving an online meeting, it is probable for anyone, including professors, to assume that a student has merely left an online meeting to get out of a difficult situation. While some students perhaps do this, it is unfortunate that this presumption of intentionally leaving the online meeting also occurs when an actual power outage occurs. To prevent or mitigate this occurrence, some have multiple gadgets prepared and use an alternate when the power outage does occur. However, despite these mitigators, it is unavoidable to panic whenever sudden power outages occur, especially in the middle of tests.

Id.

[25] *Id.* at 1.

B. Transition of the Faculty and Staff

The professors and staff on the other side of the computer monitor are similarly situated in this dilemma.

"The finals of the [fourth] year class were about to be done. The teachers in the lower year levels were advised to finish their classes and schedule their finals[,]"[26] recalled Dean Manuel P. Quibod. The school is still using the June-to-May school calendar, so the second semester of the College of Law was still about to end when the lockdown was announced in March 2020.[27] At that time, the administrators had formulated plans on the premise that the lockdown would only last for a short while.[28]

However, it was not long until COVID-19 was declared a pandemic.[29] Dean Manuel P. Quibod stated that "[COVID]-19 will be here for a long haul. So even during lockdown[,] administrators continue to meet virtually and prepare for the online platform or remote learning in delivering classes from [ ]basic education to higher education. ...

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[26] Essay *by* Manuel P. Quibod, *Answer to the Guide Questions* (on file with Author).

[27] *Id.* at 1.

> When the pandemic was building up in early March 2020, the [College of Law (COL)] was about to end its second semester since Ateneo de Davao is still using the June to May school calendar. The finals of the 4th year class were about to be done. The teachers in the lower year levels were advised to finish their classes and schedule their finals.

Id.

[28] *Id.*

> Prior to the lockdown in March 2020, sometime in February 2020[,] the administrators of [AdDU] have met and discuss [sic] already where this [COVID]-19 would be going. Administrators were already planning to end the school year early, the graduation would be virtual, classes during summer and the incoming school year would be online. We thought [COVID]-19 will be there for a short haul.

Id.

[29] World Health Organization Regional Office for Europe, WHO Announces COVID-19 Outbreak A Pandemic, *available at* https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic (last accessed July 20, 2021) [https://perma.cc/DFS9-C2QM].

Everybody had no choice but to shift and learn remote and online learning."[30]

The administrators realized that the lockdown could go on for an indefinite amount of time.[31] They had to make the necessary preparations to continue providing quality education.[32] As the unit head, Dean Quibod had to prepare the staff to do most transactions online, to communicate through e-mail, and to adopt technology in legal education.[33] On top of these, he also had to consider their mental health and their connectivity issues.[34]

It was a herculean task, as almost no one knew how to navigate online learning on such a large scale.[35] It was a new concept for everyone — the law school community, most especially. Terms like "synchronous" and "asynchronous" were new.[36] Platforms like Moodle, Google Classroom, Google Meet, and Zoom were worlds different from an actual classroom.[37]

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[30] Quibod, *supra* note 26, at 1.

> But when the lockdown came, [COVID-]19 was indeed a pandemic. [COVID]-19 will be here for a long haul. So even during lockdown[,] administrators continue to meet virtually and prepare for the online platform or remote learning in delivering classes from the basic education to higher education. The administrators of the different units as well as their faculty have to deal with it. Everybody had no choice but to shift and learn remote and online learning.

Id.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1-2.

[34] *Id.* at 2.

> As the unit head, these were the challenges [confronted — preparing] your staff that most of the transactions are to be done online, communications have to be done by [e-mail], preparing your faculty to adopt and use technology in legal education, mental health issues not only of the staff[,] but also the faculty and students, connectivity, among others.

Quibod, *supra* note 26, at 1-2.

[35] *See* Meg Adonis, *PH Lags Behind in Acting on Remote Learning Problems Amid Pandemic*, PHIL. DAILY INQ., Apr. 13, 2021 (last accessed July 20, 2021) [https://perma.cc/8LL4-NCAZ].

[36] Quibod, *supra* note 26, at 1.

[37] *Id.*

The faculty had to be virtually trained as to online education.[38] Technical assistance had to be extended to those having difficulties.[39] Some had to be allowed to come to school in order to get connectivity good enough to conduct their online classes and to accomplish their tasks online.[40]

Then, the next school year was fast approaching. The administrators had to change the system of enrollment, as well as address the issues raised concerning the conduct of online classes and tests.[41] The decision was to do the enrollment process online and to waive the admission exams for incoming first year students.[42] The teachers set up their virtual classrooms on Moodle and Google Classroom.[43] Students were provided with home-prepaid Wi-Fi.[44] Faculty meetings and student orientations were done via Zoom.[45] From then on, classes were conducted in a synchronous, asynchronous, or blended manner.[46]

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38 *Id*.

39 *Id*.

40 *Id*.

> The COL extended virtual training for its faculty on the delivery of online education. New terms were learned like 'synchronous' and 'asynchronous[.'] Learning platforms like [M]oodle, [G]oogle [C]lassroom, [Z]oom, [G]oogle [M]eet, [etc.] were introduced. Those having technical difficulty on these platforms were assisted and technical personnel are provided to help them, and allowed them to hold their online classes at the COL office where there is good connectivity.

Id.

41 Quibod, *supra* note 26, at 1.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*.

46 *Id*.

> Enrollment was done online[;] the admission/entrance exams were waived[;] freshmen orientation was done [virtually;] teachers [set] up their virtual classrooms[;] faculty meetings [were conducted] via [Z]oom[;] home prepaid [Wi-Fi] (HPW) [was provided] to students[;] and classes [were] done online-synchronously and [sometimes asynchronously] or blended.

Quibod, *supra* note 26, at 1.

Dean Quibod expressed that as the Dean, he had to deal with the new normal.[47] He shared, "[o]bserving and following health protocols, I had no choice but to adopt technology on managing the affairs of the school."[48]

Meanwhile, Atty. Jazzie Sarona-Lozare, who was appointed as Assistant Dean during the pandemic, expressed that her appointment could not have been timelier.[49] She shared, "[w]hile I cannot say that I am savvy with the present technology, I think my previous experience as a computer programmer has helped me a lot in handling a number of situations we have encountered in [l]aw [s]chool."[50] Although she no longer writes codes anymore, it made her "more open for learning and ... more inquisitive."[51] This has helped her in learning the new platforms, while also extending help whenever she can, especially in the online enrollment process.[52]

Unfamiliarity with the technology was not the only concern. Some were also worried about the dilating gap between the students and the

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47 Quibod, *supra* note 26, at 1.

48 *Id.* "There is no doubt the pandemic has changed our way of life. As Dean of the College of Law, I have to deal with the new normal. Observing and following health protocols, I had no choice but to adopt technology on managing the affairs of the school." *Id.*

49 Essay *by* Jazzie M. Sarona-Lozare, *Perspectives of an Atenean Law School in a Global Pandemic: Student, Professor, Assistant Dean & Dean* (on file with Author).

50 *Id.* at 3.

51 *Id.*

52 *Id.*

> During the sharing, there is that recognition that we are called where we are needed. This has quite an impact on me as an Assistant Dean. As I have mentioned earlier, my experience as such for the past year was essentially virtual. While I cannot say that I am savvy with the present technology, I think my previous experience as a computer programmer has helped me a lot in handling a number of situations we have encountered in Law School. Although I do not make computer programs nowadays (and I do not actually remember how to do it anymore), my past work experience has made me more open for learning and to be more inquisitive.
>
> With the pandemic, the Law School Office had to contend with a lot of adjustments especially with the enrollment process. Whenever I am able to help, I get to appreciate that my appointment was in God's perfect timing.

Id.

professors. One professor, Atty. Jessielle Fabian, liked to get immediate feedback from her students through their reactions during her lectures.[53] She expressed, "[w]e used to see their faces and their reactions while we teach. ... In the process, we were able to build good relations with them. But the pandemic changed all of that."[54]

The loss of personal connection with her students has made it difficult for Atty. Fabian to assess her students' learning.[55] She shared, "[u]sing Zoom to conduct our classes has made our lectures more impersonal and detached. As a consequence, we're unable to determine if our students are learning or not."[56]

Moreover, preparations for lectures have become more time-consuming and mentally exhausting for her, as she had to create videos and PowerPoint presentations for her students.[57]

Similarly, Atty. Sarona-Lozare, who is also teaching some classes, despite having to teach essentially the same topics, had to make several adjustments in delivering them.[58] She has been teaching for the past 10

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53 Essay *by* Jessielle Ann C. Fabian, *Answers to Guide Questions* (on file with Author).

54 *Id.* at 1.

> Pre-pandemic, teachers used to lecture our students in person. We used to see their faces and their reactions while we teach. As a teacher, I liked getting immediate feedback from our students through their laughter or questions. In the process, we were able to build good relations with them. But the pandemic changed all of that. Using Zoom to conduct our classes has made our lectures more impersonal and detached. As a consequence, we're unable to determine if our students are learning or not. Worse, we lose connection with them [on] a personal level that makes teaching more difficult.

Id.

55 *Id.*

56 *Id.*

57 Fabian, *supra* note 53, at 1.

> Teaching during the pandemic was a grueling task for us teachers. We were demanded to put in more time and effort in preparing for our lectures, [as well as in] specially creating videos and Power[P]oints for our students. It was not only time intensive[,] but also mentally exhausting.

Id.

58 Sarona-Lozare, *supra* note 49, at 1.

years and has personally preferred to prepare PowerPoint presentations only for the review classes she is handling.[59] Now, she opted to make them, fearing that her students were less likely to focus on her classes without them.[60] She shared, "with online classes, students can easily be distracted. I cannot monitor what they are looking at while I am discussing in class, which is clearly different [from] face[-]to[-]face classes. I hoped that with my PowerPoint [l]ectures, my students would be less distracted."[61] Atty. Sarona-Lozare added that she also has to record her asynchronous lectures every now and then, which is not an easy feat.[62]

C. Problems with Integrity and Quality

On top of these challenges is the need to preserve integrity and quality of education. While problems such as power outages and intermittent internet connections are real, some students have made use of these acknowledged possibilities to their own advantage. Evanne had noticed this, saying, "With the ease of simply leaving an online meeting, it is probable for anyone, [especially] professors, to assume that a student has

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[59] *Id.*

[60] *Id.*

[61] *Id.*

> While the topics I discuss [are] essentially the same, I had to make some changes on how to deliver [them]. Prior to the pandemic, I rarely prepare [PowerPoint l]ectures, except for Review classes. Personally, I preferred this before because I want the students to focus on me and the student reciting during the class and not [on] what they see on the screen (and this is a personal preference). However, with online classes, students can easily be distracted. I cannot monitor what they are looking at while I am discussing in class, which is clearly different with [face-to-face] classes. I hoped that with my [PowerPoint l]ectures, my students would be less distracted.

Id.

[62] *Id.*

> Preparing for classes [is] also quite different as I have to prepare my [PowerPoint l]ectures. I also have to record for my asynchronous lectures every now and then, which is not an easy feat. With all the applications and platform [sic] available, I had to learn how to use them along the way.

Sarona-Lozare, *supra* note 49, at 1.

merely left an online meeting to get out of a difficult situation."[63] This new behavior has tainted real misfortunes that others are experiencing.

Perhaps another effect is that added consciousness of what one does in front of the camera, for example, when taking exams. "Traditionally, gadgets had to be put away[.]"[64] However, "nowadays, an exam may require one to three devices [for monitoring], depending on the professor's preference."[65] Additionally, "mannerisms such as looking up, talking to themselves, [and] writing mnemonics on the sides of the exam paper" could easily be mistaken for dishonesty, no matter how unavoidable they are.[66]

Professors are very much aware of these circumstances. Unfortunately, however, there is no way to distinguish those who tell the truth from those who do not. For Atty. Sarona-Lozare, she has to balance being considerate with being wary of her students' actions.[67] She shared —

> While I would want all of my students to have their video on during the lecture, I have to be considerate and allow them to turn off their video unless they [are] asked to speak in class. I also had to deal with students getting cut-off during classes and exams due to connectivity issues and power outages. I have to be understanding[,] but at the same time, I also need some reassurance that what they tell me are true.[68]

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63 Maliones, *supra* note 7, at 1.

64 *Id.* at 2.

65 *Id.*

66 *Id.*

> The manner of conducting exams changed significantly. Traditionally, gadgets had to be put away, but nowadays, an exam may require one to three devices, depending on the professor's preference. There is also that added consciousness of what one does during an exam. Some students have mannerisms such as looking up, talking to themselves, [or] writing mnemonics on the sides of the exam paper [—] all of which can no longer be done in an online setup at the risk of being mistaken for as cheating [—] but [which] are sometimes unavoidable, as a force of habit.

Id.

67 Sarona-Lozare, *supra* note 49, at 1.

68 *Id.*

She finds it easier to determine the students' understanding while reciting in a face-to-face class.[69] Now, she has to be quicker on her feet.[70] Examinations are trickier because "there are a few students who resort to unauthorized external sources while taking the exam."[71] Considering her experience from the past year, she cannot help but express her difficulty in giving utmost trust to her students, even when she thinks that she has to, as their professor.[72]

On the other hand, there is just as much concern about the quality of education as there is for the preservation of integrity. Professors expressed their doubts as to whether their students have sufficiently learned from them.[73] Remote teaching has proved it difficult to interact with, and more so assess, their students appropriately.[74] To address this disconnect with her students, Atty. Fabian requires them to turn on their cameras in order to see their reactions to her lecture.[75] She even allows them to speak up during the lecture just like in an in-person class.[76] "This way, [she is] able to build interpersonal relationships that will strengthen the bond between student and teacher while [encouraging] group learning and teamwork."[77]

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69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

> Conducting recitations and examinations are[,] of course[,] not what they used to [be]. Honestly, it would be easier to determine the students' understanding while reciting during face to face classes. I have to be [quicker] on my feet as compared [to] before. Examinations are quite tricky. As a professor[,] I have to trust the students. But my experience for the past year tells me not to fully trust them as there are a few students who resort to unauthorized external sources while taking the exam.

Sarona-Lozare, *supra* note 49, at 1.

73 Fabian, *supra* note 53, at 1.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

> To avoid feeling isolated and disconnected, I try to require my students to turn on their cameras so that I can see their reactions to my lecture. I even allow them to speak up while I am lecturing just like an in-person class.

While professors are devising ways to deliver their lectures efficiently, Evanne has been constantly battling connectivity issues in order to learn from lectures fully.[78] For her, "[a]n intermittent connection was perhaps the most challenging of all."[79] She shared —

> While a good internet connection may experience one or two buffers, a slow internet connection may deliver no audio, a frozen screen, or worse; a student may not be able to join a [Z]oom session at all. This situation became very frustrating [for me, as I] intended to learn from the lecture but was prevented by external circumstances.[80]

She "would load prepaid [W]i-[F]i and mobile data on top of a wireless local area network as a precaution."[81] Meanwhile, some of her classmates addressed this "by braving the outdoors and going to coffee shops and internet cafes; however, stricter community quarantine restrictions abated this option."[82]

> This way, I am able to build interpersonal relationships that will strengthen the bond between student and teacher while [encouraging] group learning and teamwork.

Id.

78 Maliones, *supra* note 7, at 1.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

> An intermittent connection was perhaps the most challenging of all. While a good internet connection may experience one or two buffers, a slow internet connection may deliver no audio, a frozen screen, or worse; a student may not be able to join a [Z]oom session at all. This situation [has become] very frustrating to a student who fully intend[s] to learn from the lecture but [is] prevented by external circumstances. Some would address this by braving the outdoors and going to coffee shops and internet cafes; however, stricter community quarantine restrictions abated this option. Some would load prepaid [Wi-Fi] and mobile data on top of a wireless local area network as a precaution.

Id.

D. A Familiar Story

Even before the pandemic, there has always been the need to adapt in law school, with each semester being different from the previous one.[83] However, like soldiers defending the citadel of Pampeluna,[84] the people in law school had been fighting their own battles until a cannonball hit and crippled not their limbs, but their spirit.

The need to adapt has become greater, with the conventional concept of a classroom setting drastically changed. Aside from adapting to the school itself, everyone is also forced to adapt as a human.[85] Everyone is worried not only for his or her own endeavors in the academe, but also for his or her own well-being and those of others.

"In addressing or at least alleviating these concerns, nothing is more important than to practice discipline. ... To practice discipline is to remain steadfast amidst the health crisis."[86] While forced to remain at home, one cannot dispense with the need to move forward as a Jesuit community.[87]

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[83] Essay *by* Michael H. Delgado, *Answers to Guide Questions* (on file with Author). "As a law student before the pandemic, there is always the need to adapt. Each semester is different from the previous one." *Id.* at 1.

[84] SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 19-20.

[85] Delgado, *supra* note 83, at 1.

> Each semester is different from the previous one. This [was] all the more true when the conventional concept of a classroom setting [was] drastically changed since we had to abruptly exit the campus, go back to our homes, and wait for what is supposed to happen next. [Adaptation] is a constant in law school, but aside from adapting to the school itself, students are also forced to adapt as humans. Not only are students to worry about their exams and recitations, they are also pressed to concern about their health and the people surrounding them as well.

Id.

[86] *Id.*

[87] *Id.*

> Unlike in a physical classroom, students are learning in the four walls of their homes. Interactions with others are done virtually or [not] at all. To practice discipline is to remain steadfast amidst the health crisis. While we are forced to remain at home, this does not dispense with the truth that we must nevertheless move forward.

Id.

III. Reflecting on St. Ignatius' Story

The law school community is filled with passionate dreamers like Saint Ignatius of Loyola. His heart once desired worldly vanities, and once delighted at the thought of becoming a big name in the military.[88] It was because of this passion that he decided to fight bravely at the siege of Pampeluna, until a cannonball broke one of his legs and injured the other.[89] His injuries led him into convalescence.[90]

The story of St. Ignatius gives off the hasty impression that his change of heart happened in an instant. On the contrary, his conversion took much time and discernment, and his recuperation was only the start of this process. Wounded, he was forced to lie in bed and to read stories of saints.[91] His conversion did not happen overnight, as his thoughts drifted

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88 SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 19.

89 *Id.* at 19-20.

90 *Id.*

> Up to his 26th year, the heart of Ignatius was enthralled by the vanities of the world. His special delight was in the military life, and he seemed led by a strong and empty desire of gaining for himself a great name. The citadel of Pampeluna was held in siege by the French. All the other soldiers were unanimous in wishing to surrender on condition of freedom to leave, since it was impossible to hold out any longer; but Ignatius so persuaded the commander, that, against the views of all the other nobles, he decided to hold the citadel against the enemy.
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> When the day of assault came, Ignatius made his confession to one of the nobles, his companion in arms. The soldier also made his to Ignatius. After the walls were destroyed, Ignatius stood fighting bravely until a cannon ball of the enemy broke one of his legs and seriously injured the other.

Id.

91 *Id.* at 148.

away from holy things and back to his earthly desires.[92] It was only later that he finally decided to imitate the lives of St. Francis and St. Dominic.[93]

Similar to what St. Ignatius experienced, the pandemic is akin to the cannonball that forced the world into lockdown. Each day presents the unconscious choice of whether to limp away from the challenges or to transform into a better version of oneself.[94] Most of the time, the choice is not as obvious, and the amount of time at hand is not as much as what St. Ignatius had. Looking into the life of St. Ignatius, however, may be a means to slowly transform one's thoughts and actions, and to be more creative amidst the crippling changes.

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[92] *Id.* at 23-24.

> As Ignatius had a love for fiction, when he found himself out of danger he asked for some romances to pass away the time. In that house there was no book of the kind. They gave him, instead, 'The Life of Christ,' by Rudolph, the Carthusian, and another book called the 'Flowers of the Saints,' both in Spanish. By frequent reading of these books he began to get some love for spiritual things. This reading led his mind to meditate on holy things, yet sometimes it wandered to thoughts which he had been accustomed to dwell upon before.

SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 23-24.

[93] SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 25.

[94] Baruis, *supra* note 12, at 1.

> Similar to what St. Ignatius experienced, the pandemic is akin to the cannonball. It hit all of us and now we each have to decide how we are going to react. Do we limp from it, or do we transform ourselves into the better version of what we used to be?

Id.

A. Meaning of Ignatian Spirituality in Law School

Ignatian spirituality is a path carved out from the life of St. Ignatius,[95] but one does not have to be a soldier wounded from war to see this path. Whether one's path be around the citadel of Pampeluna, or along the halls of the law school, the invitation to walk on it, as St. Ignatius did, is the same. With the daily rigors in law school, one may easily walk on and stray from the path unconsciously. Here, the collaborators were asked to look into their lives as part of an Ignatian community and to describe Ignatian spirituality based on each of their accounts.

The brother of St. Ignatius and all those in the house witnessed the change in his soul, from the time he was confined up to the time of his recovery.[96] Similarly for Dean Quibod, the pandemic has only brought him closer to God.[97] He shared, "[w]hile I pray even before the pandemic, I have been more prayerful now at this time of the pandemic. I would listen more than asking. I acknowledged God's presence in my life as I witness the 'little miracles' around me."[98]

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[95] Joe Paprocki, What is Ignatian Spirituality?, *available at* https://www.loyolapress.com/catholic-resources/ignatian-spirituality/introduction-to-ignatian-spirituality/what-is-ignatian-spirituality (last accessed July 20, 2021) [https://perma.cc/PD7S-WUFC].

[96] SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 28.

> This privilege we may suppose from this fact to have been a divine gift, although we dare not state it, nor say anything except confirm what has been already said. His brother and all in the house recognized from what appeared externally how great a change had taken place in his soul.

Id.

[97] Quibod, *supra* note 26, at 2.

[98] *Id.*

> I would admit that the pandemic brought me closer to God. While I pray even before the pandemic, I have been more prayerful now at this time of the pandemic. I would listen more than asking. I acknowledged God's presence in my life as I witness the 'little miracles' around me. I am in good health physically and mentally, [as] concerns at school and on my practice are resolved, and material rewards also come. I know the Lord will not abandon me.

Id.

Ignatius' original intention was to become a military man, not a spiritual figure.[99] Yet, by God's grace, this changed, and for the better.[100] This is all familiar to Atty. Sarona-Lozare, who had never planned to teach in law school, more so to become an Assistant Dean.[101] With this, she views Ignatian spirituality as "the recognition of the gift of the spirit — that God is within us."[102] As St. Ignatius discovered ethereal pleasure in his newly found passion, Atty. Sarona-Lozare found happiness and contentment with teaching.[103] "I believed that it is the spirit within me who lets me continue in this path."[104]

As he lay in bed, Ignatius allowed his mind to wander beyond the pages he had read and beyond the walls of his room.[105] He wondered about spiritual matters, which eventually led him to seriously consider his past actions.[106] This is what Ignatian spirituality means for Atty. Fabian — a

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99 SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 19.

100 *Id.* at 26.

> When he thought of worldly things it gave him great pleasure, but afterward he found himself dry and sad. But when he thought of journeying to Jerusalem, and of living only on herbs, and [practicing] austerities, he found pleasure not only while thinking of them, but also when he had ceased.

Id.

101 Sarona-Lozare, *supra* note 49, at 2.

102 *Id.*

103 *Id.*

104 *Id.*

> For me, Ignatian spirituality is the recognition of the gift of the spirit [—] that God is within us. It was never a plan for me to teach in Law School. However, while waiting for the [B]ar, I applied to teach in [the] College. Thereafter, I was lucky enough to teach in law school as well. I never even dreamt to be an Assistant Dean. I was essentially happy and contented with teaching. And such contentment shows that even if this journey of mine was not planned at the beginning, I believed that it is the spirit within me who lets me continue in this path.

Id.

105 SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 148-49.

106 *Id.* at 26-27.

> He learned by experience that one train of thought left him sad, the other joyful. This was his first reasoning on spiritual matters. Afterward, when he began the Spiritual Exercises, he was enlightened, and understood what he afterward taught his children about the discernment of spirits.

"lens by which we view our lives. It demands us to look at life, its wonders and struggles, as a gift instead of a burden."[107]

Ignatius made use of his time recuperating to review his life. It was then that he realized that the pleasure brought to him by worldly things was merely temporary.[108] To become "more grounded, self-sufficient, and discerning[,]" one has to view his or her life through this "lens."[109] Atty. Fabian shared, "[w]e become more thankful to our [C]reator for all the things that we have in our life. It makes us appreciate not just the big things but also the small things in life. It makes us more contented with what we currently have instead of what we [do not]."[110]

Before his conversion, Ignatius was so enthralled by his dreams of becoming a renowned knight that he was ready to sacrifice his life in war for his honor, for his country, and for a beautiful noblewoman.[111] Years of meditation deconstructed these thoughts, as he shifted his focus unto

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> When gradually he recognized the different spirits by which he was moved, one, the spirit of God, the other, the devil, and when he had gained no little spiritual light from the reading of pious books, he began to think more seriously of his past life, and how much penance he should do to expiate his past sins.

Id.

[107] Fabian, *supra* note 53, at 2.

> Ignatian spirituality is a lens by which we view our lives. It demands us to look at life, its wonders and struggles, as a gift instead of a burden. By doing so, we become more thankful to our creator for all the things that we have in our life. It makes us appreciate not just the big things but also the small things in life. It makes us more contented with what we currently have instead of what we don't[, t]hus making us more grounded, self-sufficient, and discerning as[ ] individuals [sic].

Id.

[108] SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 26.

[109] Fabian, *supra* note 53, at 2.

[110] *Id.*

[111] SAINT IGNATIUS OF LOYOLA, *supra* note 8, at 24-25.

> He pictured to himself what he should do in honor of an illustrious lady, how he should journey to the city where she was, in what words he would address her, and what bright and pleasant sayings he would make use of, what manner of warlike exploits he should perform to please her.

Id.

others.[112] This selfless passion is also what fuels Jurilex in studying the law. For her, to practice Ignatian spirituality is "to practice becoming men and women for others or to become leaders in service."[113] This practice is fitting in law school because, as noble as it sounds, the study and practice of law is ultimately "not for ourselves, but [for] the service of others[,] so that in the future, we can defend our client in the best way possible."[114] Like Ignatius who had developed humility, Jurilex committed her life not to surviving a subject or to attaining mere prestige of title, but to "understanding [ ] the law [in order] to give hope and justice to others."[115]

The Ignatian way does not always mean similar experiences with St. Ignatius. It is not set in stone. It is only a means to an end, not an end to the means. Michael H. Delgado, a fourth-year law student, emphasized this when he said that "Ignatian spirituality transcends religion as a classification. Arguably, it all boils down to faith. It is a practice that affirms how our existence and daily actions are all for the greater glory of God."[116] He considers himself as a faithful person but not a religious one.[117]

Perhaps Jurilex would agree, being an agnostic, and Evanne, being a Protestant. Evanne mentioned not being hindered by her religion in

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[112] *Id.* at 25.

[113] Maglinte, *supra* note 14, at 1.

[114] *Id.*

[115] *Id.*

> Ignatian spirituality means finding Christ in all things and the process to practice becoming men and women for others or to become leaders in service. The practice of Ignatian spirituality also thrives in law school because we study the law, not for ourselves, but to be in the service of others so that in the future, we can defend our client in the best way possible. It is not intended for the sake of surviving a subject or prestige the title so provides but rather a deep understanding of the law to give hope and justice to others.

Id.

[116] Delgado, *supra* note 83, at 1.

[117] *Id.* at 2.

appreciating Ignatian spirituality because "[r]egardless of religion, the story of St. Ignatius and the values he taught applies [sic] to everyone."[118]

B. Ignatian Values During the Pandemic

The pandemic created new problems in an already-complex modern world. Living with this newness and uncertainty in a completely different era, one might find Ignatius' story merely as an old tale, and to relate to it would be a stretch. One may turn, however, to the values taught by St. Ignatius, and with them, create one's own modern tale.

[118] *See* Maliones, *supra* note 7, at 3. "My religion does not hinder me from appreciating Ignatian spirituality as a concept on its own. Regardless of religion, the story of St. Ignatius and the values he taught applies [sic] to everyone." *Id*.

1. *Magis* with Integrity

"*Magis*" is a term every Atenean is familiar with. St. Ignatius introduced the value of "*magis*," which translates to "more."[119] It does not necessarily mean to do more in quantity.[120] It means putting more quality in the things one does.[121]

Perhaps the living embodiment of this word at this time in law school could be the Deans, who carry on their shoulders the weight of everyone under their supervision. For Dean Quibod, St. Ignatius' story helped him deal with the pandemic in his aim "to give more than what [he used] to [— m]ore of time, attention, care, and compassion[; t]he openness of heart in [his] dealings with the faculty and students[;]" and acceptance and forgiveness.[122]

Motivated to continue with her mission in the academe, Atty. Fabian reminds herself that her service would benefit her "students, colleagues, and alma mater" — the greater good.[123]

The greater good could also refer to the well-being of others outside the academe. With the pandemic forcing her to reaffirm her purpose, Jurilex

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[119] James Martin, S.J., Magis, *available at* https://www.ignatianspirituality.com/magis (last accessed July 20, 2021) [https://perma.cc/2ZR4-4K4J].

[120] *Id.*

[121] *Id.*

[122] Quibod, *supra* note 26, at 2.

> St. Ignatius [has] made a great impact in my life[, considering] that my job as Dean is a 'life of service.' His story helped me deal with the pandemic[, teaching] that you are to give more than what you [used] to[— m]ore of time, attention, care, and compassion[; t]he openness of heart in your dealings with the faculty and students[; and t]o be able to accept and forgive.

Id.

[123] Fabian, *supra* note 53, at 2.

> So what resonated to me most was the value of '*Magis*', continuously reminding myself that what I do serves a greater good. My students, colleagues, and alma mater who would benefit from my service, was the greater good. This motivated and encouraged me to continue my mission in the academe.

Id.

has only become more passionate in her study. She expressed, "Why am I doing this when it is so hard? Who am I doing this for? '*Magis*' is easy to practice when one's purpose becomes clear. To survive online class is not merely to pass the subject. I had to reflect on my purpose of becoming a lawyer."[124]

For students like her, "more" could also mean better habits. The old study technique may not be suitable at this time. Thus, for Evanne, "to improve the quality of one's study, one must create a new study habit appropriate for the pandemic setup."[125] She shared, "[p]erhaps haphazard reading may no longer be effective. Thus, one may consider reading slowly instead and putting more effort into comprehending the text of legal theories."[126]

Better habits could extend outward and benefit others. "With what we are facing right now, we have to do more, to be a little extra. We have to be kinder, to be better people who look after each other."[127] Mariel adds

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[124] Maglinte, *supra* note 14, at 1.

> '*Magis*.' The difficulties of online learning forced me to re-assess and re-affirm my purpose of being in law school. Why am I doing this when it is so hard? Who am I doing this for? '*Magis*' is easy to practice when one's purpose becomes clear. To survive online class is not merely to pass the subject. I had to reflect on my purpose of becoming a lawyer.

Id.

[125] Maliones, *supra* note 7, at 3.

[126] *Id*.

> St. Ignatius introduced the value of '*Magis*,' which translates to 'more.' It does not necessarily mean to do more. However, it means putting more quality in the things one does. Perhaps the old study technique is not appropriate for online learning. Thus, to improve the quality of one's study, one must create a new study habit appropriate for the pandemic setup. Perhaps haphazard reading may no longer be effective. Thus, one may consider reading slowly instead and putting more effort into comprehending the text of legal theories.

Id.

[127] Baruis, *supra* note 12, at 1.

> '*Magis*' [is] a term every Atenean is familiar with. '*Magis*' means to do more. With what we are facing right now, we have to do more, to be a little extra. We have to be kinder, to be better people who look after each other. A personal take on *cura personalis*, to respect the children of God, we also have to learn to look after ourselves and to care for our well[-]being.

that it could also extend inward and benefit oneself, viewed as "[a] personal take on *cura personalis*[. T]o respect the children of God, we also have to learn to look after ourselves and to care for our well[-]being."[128]

Doing more could also mean doing things with integrity, as in giving answers based on honest efforts and leaving online tests with a clean conscience. In taking exams, law students have always been reminded of this, especially during Atty. Sarona-Lozare's online exams. Integrity is important, and she cannot stress this enough, sharing that

> [i]ntegrity has also been relevant to me in the sense that such be maintained despite these trying times. With the online learning, it is easier for students to be dishonest. On my part, I had to find ways [to preserve] the integrity of the exams and the whole experience of learning.[129]

She mentioned seeking reassurance while at the same time wanting to trust her students' motives.[130] In the end, it is not for her own benefit, but for them.

2. Finding God in All Things

St. Ignatius introduced to Ateneans the concept of "finding God in all things."[131] The phrase serves as an invitation to experience the presence of God in all events of one's life through constant personal discernment.[132]

Id. (emphasis supplied).

[128] *Id.* (emphasis supplied).

[129] Sarona-Lozare, *supra* note 49, at 2.

> Integrity has also been relevant to me in the sense that such be maintained despite these trying times. With the online learning, it is easier for students to be dishonest. On my part, I had to find ways [to preserve] the integrity of the exams and the whole experience of learning. I had to trust my students on one end, but I also had to ensure that they do not take advantage of the present situation.

Id.

[130] *Id.*

[131] Loyola Press, Finding God in All Things, *available at* https://www.loyolapress.com/catholic-resources/ignatian-spirituality/finding-god-in-all-things (last accessed July 20, 2021) [https://perma.cc/Q7NF-4HQ6].

[132] Creighton University School of Pharmacy and Health Professions, Ignatian Values, *available at* https://spahp.creighton.edu/about/student-support-and-

Many have probably ignored this invitation, but not Dean Quibod, who has sought and found reassurance in his life of service —

> Despite the pandemic and its hardships, I am grateful and blessed that the Lord has taken care of my health and well-being including that of my family and loved ones. I could still continue to assist and extend help to those in need relative to my profession as lawyer, and to be able to attend and serve to my faculty and students as their Dean.[133]

Constantly seeking God, however, is more challenging now, especially for Evanne who has found that there seems to be no one to turn to.[134] Fortunately, like Dean Quibod, she has also found reassurance in her life as a student of the law,[135] sharing that "there is meaning in everything [—] a meaning that only a more extraordinary being can explain, a meaning that can answer all the whys."[136]

Finding God could also mean embracing struggle despite not seeing light within that embrace. Evanne added that "in the event of a struggle to find positives amid overflowing negatives, one must remember that there is purpose so long as there is life."[137]

On the other hand, Mariel continued to actively seek God more in the little space that the lockdown has allowed, sharing that "[w]ith the pandemic forcing [everyone] to stay indoors, [she] tried to look for ways

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resources/chaplain-services/ignatian-values (last accessed July 20, 2021) [https://perma.cc/NP2S-2U2S].

133 Quibod, *supra* note 26, at 2. "I thank the Lord for fixing my schedules relative to my profession, my family, and my work in the College of Law. I thank the Lord for his protection during this time of the pandemic and keeping me from harm. With the Lord around me[,] I am assured." *Id.*

134 Maliones, *supra* note 7, at 3.

135 *Id.*

136 *Id.*

> [T]here is meaning in everything [—] a meaning that only a more extraordinary being can explain, a meaning that can answer all the whys. The fact that a person is still alive when many have perished due to the virus is proof enough that God is at work in people's lives. The gift of still living must mean there is still meaning in one's life. Because of this meaning, one can find the courage to move forward and adapt to the drastic changes caused by the pandemic.

Id.

137 *Id.*

to connect with [her] God."[138] She recounted the numerous instances of her encounter and expressed, "I try to see God in every situation, every face, and every chance I can get."[139]

Indeed, it is ever more important to find God when He feels far away. Mariel reflected, "When we are faced with challenges, who do we call on first? Our best friends? Our parents? ... To see God everywhere means at the first instance of fear, uncertainty, or adversary, we call on to God."[140]

3. Strong in Faith that Does Justice

Of course, the school's motto cannot be left out. It resonates in every corner and every beating heart in AdDU. In this pandemic, the call only rings louder.

Faith is also what keeps Michael going as an aspiring lawyer —

> In the study of law, one rarely asks the whys. Most of the time, it is always a discussion of what the law provides and how the law is applied. Because of this pandemic, the whys of the law become more manifest. This pandemic has taught us that the law is meant to protect the marginalized sectors of our society, following

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[138] Baruis, *supra* note 11, at 1.

> With the pandemic forcing us to stay indoors, I tried to look for ways to connect with my God. I saw God in my family and friends. I saw God in the face of my classmates and professors through the Zoom meetings we had. I saw God when I adopted stray cats. I saw God when opportunities came my way. I saw God when troubles came and problems arrived. I saw God when I was, and when I am, fighting my internal battles. I try to see God in every situation, every face, and every chance I can get. I recall in one eucharistic celebration, the priest said in his homily, crossroads are chances for us to get closer to God. This resonated with me. When we are faced with challenges, who do we call on first? Our best friends? Our parents? We live in a time when physically socializing is not feasible. Calling friends over to hangout is not possible. With this, we allow all the angst and anxiety to build up in our thoughts with no outlet of release. To see God everywhere means at the first instance of fear, uncertainty, or adversary, we call on to God.

Id.

[139] *Id.*

[140] *Id.*

> the social justice principle that those who have less in life should have more in law.[141]

Justice, then, has to come together with faith especially at this time. Since the pandemic has brought the world to its knees, it is important to remember that much of the population was already slumped to the ground.[142] The marginalized sectors, whom the law must serve more, have been brought even farther from the center.[143] "[A]ccess to justice should not cease during these times. In fact, there must be more emphasis on this under these circumstances as injustice never stops[,]" observed Atty. Sarona-Lozare in her private practice, in addition to her work in the academe.[144]

The cacophonous cry for justice grows, and that cry could be out of need or out of frustration. This should ignite, not put out, the flames in practicing, teaching, or studying law altogether. In fact, for Atty. Sarona-Lozare, "the present justice system should be a motivation to continue teaching students, who will hopefully become part of the solution of perennial problems when it comes to the justice system."[145] It is high time to remain steadfast in faith that does justice.

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[141] Delgado, *supra* note 83, at 1.

[142] *See* The World Bank, How COVID-19 Affected Low-Income Families in the Philippines (October 2020), *available at* https://www.worldbank.org/en/news/infographic/2021/04/22/how-covid-19-affected-low-income-families-in-the-philippines-october-2020 (last accessed July 20, 2021) [https://perma.cc/J8CT-4LWF].

[143] *Id*.

[144] Sarona-Lozare, *supra* note 49, at 2. "Aside from a professor and Assistant Dean, I am a private practicing lawyer. As such, I have observed that access to justice should not cease during these times. In fact, there must be more emphasis on this under these circumstances as injustice never stops." *Id*.

[145] *Id*.

> While there is some frustration as to how justice works here in our country, I do not think that it should be a reason to stop [practicing] law or [to] stop teaching altogether. On the other hand, the present justice system should be a motivation to continue teaching students, who will hopefully become part of the solution of perennial problems when it comes to the justice system.

Id.

4. Men and Women for Others

The moment Ignatius decided to think less about worldly vanities and more about the exigencies of others was the time he also introduced the value of being men and women for others. In these challenging times, one must exhibit empathy and understanding for the struggles of others, which may vastly differ from one's own struggles.

"We have to share our gifts and blessings to those who are in need," said Mariel.[146] These gifts need not be the material things. Teaching in the academe and carrying on with her practice during this time are Atty. Fabian's gifts to others.[147] She explained, "[b]eing a woman for others, I was able to dedicate myself to the academe. But it does not mean that I am free of my own troubles. ... It is through Him that I am able to continue my practice of law and service to the community."[148]

5. *Cura Personalis*

Thus, comes *cura personalis*, which means to care for the individual person, to respect each one as the child of God and as creations of God.[149] Mariel shared that "[a]s Christians, we have the duty to look after one

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[146] Baruis, *supra* note 12, at 1.

> If there are any Ignatian values that have become relevant this time, it is *magis, cura personalis,* and being men and women for others. St. Ignatius taught us that one of our duties as Christians is to be men and women for others. We have to share our gifts and blessings to those who are in need.

Id.

[147] Fabian, *supra* note 53, at 2.

[148] *Id.*

> Being a woman for others, I was able to dedicate myself to the academe. But it does not mean that I am free of my own troubles. Whenever I feel anxious, discontent, and insecure, I seek for God's grace and guidance to lift me up and free me from my thoughts. It is through Him that I am able to continue my practice of law and service to the community.

Id.

[149] *See* Creighton University, What Is a Jesuit Education?, *available at* https://www.creighton.edu/about/what-jesuit-education (last accessed July 20, 2021) [https://perma.cc/4WNA-83EN].

another. To be men and women for others does not call for a big event. Instead, it calls us to contribute in our own little ways."[150]

6. *Ad Majorem Dei Gloriam*

The slogan, "Everything is for the greater glory of God" is said to embody the Ignatian purpose, perhaps more aptly than others.[151] It is popular as it is relatable. Even Atty. Fabian got the words "for His greater glory" tattooed on her wrist.[152] However, it was only when she became an educator that she started to fully understand its meaning.[153]

> In times when I felt lost as to my sense of purpose, especially in the time of the pandemic when life was full of uncertainties, I was kept reminded by the values I held close to my heart; that everything I do, was for His greater glory. And I knew that by teaching, it fulfilled a greater purpose for the common good. So Ignatian value kept me hopeful, steadfast, and purposeful in my journey of teaching.[154]

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[150] Baruis, *supra* note 12, at 1.

> *Cura personalis* means to care for the individual person, to respect each one as the child of God and as creations of God. As Christians, we have the duty to look after one another. To be men and women for others does not call for a big event. Instead, it calls us to contribute in our own little ways.

Id.

[151] Loyola Press, Ad Majorem Dei Gloriam, *available at* https://www.loyolapress.com/catholic-resources/ignatian-spirituality/introduction-to-ignatian-spirituality/ignatian-inspiration-ad-majorem-dei-gloriam (last accessed July 20, 2021) [https://perma.cc/VQ3F-95RV].

[152] Fabian, *supra* note 53, at 1.

[153] *Id*.

> *Ad Majorem Dei Gloriam* or 'For the Greater Glory of God' has been my motto since I was a law student. I even got the words 'for His greater glory' tattooed on my wrist. However, it was [only] when I started the path of an educator that I fully realized its meaning.

Id. (emphasis supplied).

[154] *Id*.

IV. Academic Freedom in Relation to Ignatian Education at the Time of the Pandemic

The unprecedented strides made by AdDU Law in its peri-pandemic classes find legal mooring in the autonomy of universities and institutions of higher learning, otherwise known as institutional academic freedom.[155]

Set forth in Section 5 (2), Article XIV of the 1987 Constitution, academic freedom is enjoyed in all institutions of higher learning.[156] With this, a higher-learning institution is given the autonomy to decide its aims and objectives for itself, as well as how it is best to attain them.[157] They are "free from outside coercion or interference[,] save possibly when the overriding public welfare calls for some restraint."[158] This allows an institution of higher learning to "decide for itself who may teach[;] what may be taught[;] how it shall be taught[;] and who to admit[.]"[159]

However, while the autonomy given to higher-learning institutions is extensive, it is not absolute.[160] As stated earlier, overriding public welfare interests permit its restriction.[161] The State, too, in the exercise of its reasonable supervision and regulation over education, can impose minimum regulations.[162] Put simply, higher-learning institutions are not beyond reasonable State-imposed restrictions. With the country ravaged by a pandemic, State authorities lost no time in prohibiting close physical contact among its populace. Expectedly, face-to-face classes were

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155 Mercado v. AMA Computer College-Parañaque City, Inc., G.R. No. 183572, 618 SCRA 218, 236 (2010).

156 PHIL. CONST. art. XIV, § 5 (2).

157 *Mercado*, 618 SCRA at 236.

158 Garcia v. The Faculty Admission Committee, Loyola School of Theology, G.R. No. L-40779, 68 SCRA 277, 284 (1975).

159 Oscar B. Pimentel, et al. v. Legal Education Board, G.R. No. 230642, Sept. 10, 2019, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65751 (last accessed July 20, 2021).

160 *See Mercado*, 618 SCRA at 236.

161 *Mercado*, 618 SCRA at 236.

162 *Pimentel*, G.R. No. 230642.

forbidden.[163] To survive, higher-learning institutions faced only two options: step up or shut down.[164]

This Chapter discusses AdDU Law's perspective on academic freedom in the time of the pandemic, and how its recent reforms are underpinned by the following freedoms cognate to institutional academic freedom.

A. How It Shall Be Taught

The pandemic pushed law schools to innovate. Always at the forefront of educational reform, AdDU Law adopted remote learning as the only sustainable modality of instruction. Immediately, it equipped its instructors and students with the needed tools: a computer, a stable internet connection, and a working platform. Technology had to be embraced, willingly or otherwise.

Major changes had to be made on the delivery of the lectures. The Socratic Method, a staple in law schools, is now done virtually and mostly toned down. Quizzes, recitations, reporting, and exams are all done online. Instructors are advised to exercise more restraint and are encouraged to be more compassionate. Asynchronous sessions now dominate the cloud. These bold steps may seem harrowing (if not unthinkable) for law schools, instructors, and students who find it difficult to accept change. No objection can be raised against these reforms, however, for institutional academic freedom guarantees their legal viability.[165]

Are instructors also free to develop their own online teaching styles? Of course. "[A]cademic freedom clothes [instructors] with the widest latitude to innovate and experiment [with] the method of teaching which is most fitting to [their] students ... subject only to the rules and policies of the university."[166]

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[163] Department of Education, Official Statement, *available at* https://www.deped.gov.ph/2020/06/15/official-statement-5 (last accessed July 20, 2021) [https://perma.cc/2AFN-QZ94].

[164] *See* Jeremiah Joven B. Joaquin, *The Philippine Higher Education Sector in the Time of COVID-19*, FRONTIERS EDUC., Volume 5, Article 576371, at 2.

[165] *Pimentel*, G.R. No. 230642.

[166] Camacho v. Coresis, Jr., G.R. No. 134372, 387 SCRA 628, 637 (2002).

B. Who to Admit

In the context of professional growth, students took the biggest hit from the State's restrictive pandemic response. Law school applicants and students alike had to ensure that they were equipped to receive instruction online. This meant that even the most enthused and capable could not possibly enter (or survive) any law school if they lacked access to the needed equipment and infrastructure.

Can it be argued, however, that these requirements discriminate against those who cannot afford the added costs imposed by the law school, and, consequently, amount to a denial of the constitutional right to education?

Recent case law[167] answers this question in the negative. Section 1, Article XIV of the 1987 Constitution[168] states that "[t]he State shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such education accessible to all." The normative elements of the general right to education under Section 1, Article XIV, are to protect and promote quality education; and to take appropriate steps towards making such quality education accessible.[169] "[A]ccessible education means equal opportunities to education regardless of social and economic differences."[170] The element of accessibility "pertains to both the elimination of discrimination[,] especially against disadvantaged groups and to the financial duty of the State[.]"[171]

The foregoing discourse explains the general right to education and the State's correlative obligation to ensure its accessibility. The right to receive *higher* education, however, is qualified and nuanced. It is "not to be generally available, but accessible only on the basis of capacity."[172] The

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[167] *Pimentel*, G.R. No. 230642.

[168] PHIL. CONST. art. XIV, § 1.

[169] PHIL. CONST. art. XIV, § 1.

[170] *Pimentel*, G.R. No. 230642.

[171] *Id.*

[172] *Id.* (citing International Covenant on Economic, Social and Cultural Rights, art. 13 (2), *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3).

rule is that insofar as higher education is concerned, the authority to set the admission and academic requirements used to assess the merit and capacity of the individual to be admitted and retained in higher educational institutions lies with the institutions themselves in the exercise of their academic freedom.[173]

In other words, while there is a right to quality higher education, such right is principally subject to the broad academic freedom of higher educational institutions to impose fair, reasonable, and equitable admission and academic requirements. The right to receive education is not and should not be taken to mean an unqualified right to be admitted to educational institutions.

C. Who May Teach

The pandemic restrictions forced higher-learning institutions to implement measures that were difficult, if not impossible, for some instructors to undertake. Adaptability to technology, among other factors, suddenly became the metric. Schools had to survive under remote-learning conditions. Online learning requirements and infrastructure were made mandatory not only for students but also for instructors at the risk of losing their jobs. Can it be argued that such impositions undermine their right to security of tenure?

The Supreme Court, in *Son v. University of Santo Tomas*,[174] answers the question in the negative. "[T]he school's prerogative to provide standards for its teachers and to determine whether or not these standards have been met is in accordance with academic freedom that gives the educational institution the right to choose who should teach."[175]

The exercise of this prerogative, however, must not be arbitrary. "[A]cademic freedom has never been meant to be an unabridged license.[176] It is a privilege that assumes a correlative duty to exercise it responsibly."[177] Further, "[i]t is the prerogative of the school to set high

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[173] *Pimentel*, G.R. No. 230642.

[174] Son v. University of Santo Tomas, G.R. No. 211273, 862 SCRA 1, 12 (2018).

[175] *Id.*

[176] Cudia v. The Superintendent of the Philippine Military Academy (PMA), G.R. No. 211362, 751 SCRA 469, 531 (2015) (citing Isabelo, Jr. v. Perpetual Help College of Rizal, Inc., G.R. No. 103142, 227 SCRA 591, 596 (1993)).

[177] *Id.*

standards of efficiency for its teachers since quality education is a mandate of the Constitution. As long as the standards fixed are reasonable and not arbitrary, courts are not at liberty to set them aside."[178] Considering that State-imposed regulations currently prohibit face-to-face classes, schools imposing online-learning-exclusive mandates can hardly be faulted for adopting such extreme measures.

D. What May Be Taught

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."[179] Justice Frankfurter's words in his concurring opinion in *Sweezy v. New Hampshire*[180] endure today. Indeed, "institutions of higher learning are not mere walls within which to teach; rather, [they are places] where research, experiment, critical thinking, and exchanges are secured.[181]

AdDU Law ensures that, despite the exponential difficulty of studying the law under the circumstances, its students remain attuned to the Ignatian values of, among others, *magis* and *cura personalis*. Online instruction has not diminished the school's core mission of developing lawyers who find God in all things, who are men and women for others, and who remain strong in faith that does justice.

No valid objection can be raised against a higher-learning institution's adoption of its own pedagogies, norms, and values, considering that this is wholly justified by its institutional academic freedom. After all, academic freedom exists in an academic framework, a highly complex system that contains not only the functions of universities and their players, but also the factors that affect the successful execution of these functions toward the overarching goal of serving the nation and humanity.[182]

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[178] Peña v. National Labor Relations Commission, G.R. No. 100629, 258 SCRA 65, 67 (1996).

[179] Garcia, 68 SCRA at 285 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (J. Frankfurter, concurring opinion)).

[180] Sweezy, 354 U.S. at 263 (J. Frankfurter, concurring opinion).

[181] *Pimentel*, G.R. No. 230642.

[182] Arlyn VCD Palisoc Romualdo, What Is Academic Freedom and Why the Fuss?, *available at* https://up.edu.ph/what-is-academic-freedom-and-why-the-fuss (last

In closing, mention must be made of Fr. Pedro Arrupe's 1973 address[183] to a group of Jesuit high school alumni, whom he called to be *men and women for others* — a "resonance of an imperious call of the living God asking his Church and all men of good will to adopt certain attitudes and undertake certain types of action [which] will enable them effectively to come to the aid of mankind oppressed and in agony."[184] He exhorts that "Jesuit education needs to reeducate for justice so our students become agents for change."[185]

The purpose of academic freedom is to serve the common good. Consistent with Fr. Arrupe's call, law schools need to understand that this privilege comes at the price of molding lawyers who are not only learned in the law, but who are also capable of making the law work to "dismantle unjust social structures."[186] When these schools succeed in that endeavor, only then will the purpose of academic freedom be truly realized.

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accessed July 20, 2021) [https://perma.cc/7Q57-XJRB]. The Authors highlight specifically the words of Dr. Gisela Concepcion —

> Academic freedom ... exists in an academic framework, a highly complex system that contains not only the functions of universities and their players, but also the factors that affect the successful execution of these functions toward the overarching goal of serving the nation and humanity. [A]cademic freedom is ensured by external support, including support from the government, which provides the encouraging atmosphere for teaching, learning, inquiry, and discussion to thrive and flourish.

Id.

183 Pedro Arrupe, S.J., Superior General of the Society of Jesus, *Men for Others*, Address to Jesuit High School Alumni at the Tenth International Congress of Jesuit Alumni of Europe in Valencia, Spain (July 31, 1973).

184 *Id.*

185 Loyola University Chicago Faculty Center for Ignatian Pedagogy, What Is Ignatian Pedagogy?, *available at* https://www.luc.edu/fcip/ignatianpedagogy/whatisignatianpedagogy (last accessed July 20, 2021) [https://perma.cc/KM7S-374K].

186 MegAnne Liebsch & Doris Sump, How Can We Be People for Others in the Time of COVID-19?, *available at* https://www.jesuits.org/stories/how-can-we-be-people-for-others-in-the-time-of-covid-19 (last accessed July 20, 2021) [https://perma.cc/A2D6-37JG].

V. Conclusion

Contemplating on these perspectives, the succeeding Sections offer reflections on the life driven by the Ignatian way (1) as individuals in law school, and (2) as a community.

A. Modern Day Ignatius

Students and professors have been kept inside their rooms since the lockdown. They had to learn to adapt in order to continue to survive the challenges of the new normal. Adjusting one's mindset may help in coping. The difficulties forced everyone to reassess and reaffirm their purpose for being in law school, and to remember the reason to keep going.[187]

1. For Students

Although law school was already difficult, the transition resulted in new and external factors which caused heightened levels of anxiety and made studying more difficult. Giving up would be easy, but like St. Ignatius at his lowest point, students have also achieved a clearer understanding of their purpose. The drive to keep going is still strong, but adjustments are necessary to maintain academic performance and to protect their mental health.

It is fortunate to experience God at work through the support and encouragement of other people, as well as through some favorable circumstances that somehow outweigh the inconveniences.

This is an opportunity to be grateful for the privilege to continue learning despite the present state of education. The privilege of being able to choose whether to enroll or not has only become more meaningful now that many have been stripped of that choice. Hopefully, whatever will be learned during these times would also be more valuable to all students and be put to good use.[188]

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[187] Maglinte, *supra* note 14, at 1. "I had to undergo cognitive restructuring to adjust a mindset that will help me cope while protecting my mental health. The difficulties forced me to re-assess and re-affirm my purpose of being in law school. I had to remind myself constantly why I need to keep going." *Id.*

[188] Sarona-Lozare, *supra* note 49, at 4.

To walk with faith, as St. Ignatius did, is to carry on with the journey as students of law.[189] Although, with differing beliefs, one may not particularly think about his story, the value of faith alone cannot be overemphasized to keep one guided in his or her actions. "It offers people that sense of solace that all struggles always end in relief, regardless of the circumstance."[190]

2. Faculty and Staff

Professors have always been working to attain the school's pedagogical ideologies and aspirations, especially for the good of their students and of the community. One may even consider it as godly and doing so may also inspire others to godliness. Teaching others what is legally right from wrong is to "convince others to be morally upright."[191] To remain in the

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> In my classes, I have put greater emphasis that we all have to be grateful to be given this opportunity to continue learning despite the present circumstances, with the hope that whatever we learn, we put it into good use. While this is true even prior to the pandemic, I believe that this has more meaning with what we are all experiencing today. The students get to appreciate the fact that they had the choice whether to enroll or not. And such choice is not available to everyone.

Id.

189 Delgado, *supra* note 83, at 2.

> For Christ, the role of a law student is to remain guided by faith. While the study of the law is secular in nature, the life of a law student is nevertheless a journey of faith. Everyone should be reminded that our actions are not merely for our own sake, but ... directed all for the glory of God.

Id.

190 *Id.* at 1.

> Although St. Ignatius in particular was not a monumental part of my life as a student, his story is a reminder that nothing can bind and divide people together more than [F]aith. Faith is a value that cannot be overemphasized in a time of pandemic, as it offers people that sense of solace that all struggles always end in relief, regardless of the circumstance.

Id.

191 Fabian, *supra* note 53, at 2.

> I have dedicated myself to imparting knowledge to my students. And I think it is godly to do so[b]ecause we work for the betterment of our students and seek to inspire them to live a life of a law-abiding citizen, and in the process, live a life of righteousness. By teaching others what is

profession now is more important than ever, as lawlessness and chaos rise amidst the health crisis.

"We are called where we are needed."[192] With the pandemic, the law school had to make big adjustments, for which everyone has the chance to help using one's knowledge and skills. This opportunity to help is also an opportunity to appreciate God's perfect timing. Had the staff been hired, or had appointments been made, or had classes been assigned at a different time, the stories would have been "totally different."[193]

The school leaders and administrators, especially the Deans, have to remain strong in their "service to the Lord."[194] As leaders who also carry the burdens of their constituents, the job may often be overwhelming. "[T]o remain in Him and to trust Him [in] every step" will offer some reassurance in their decision-making.[195] It also helps to trust that this

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> legally right from wrong, we aspire to convince others to be morally upright as well. This is what I have done, what I am currently doing, and what I will still do in the future: to educate and inspire others to godliness.

Id.

[192] Sarona-Lozare, *supra* note 49, at 3. "During the sharing, there is that recognition that we are called where we are needed." *Id.*

[193] *Id.*

> With the pandemic, the Law School Office had to contend with a lot of adjustments especially with the enrollment process. Whenever I am able to help, I get to appreciate that my appointment was in God's perfect timing. Surely, if I would have been appointed as an Assistant Dean prior to the pandemic or when there was no pandemic, my experience would be totally different.

Id.

[194] Quibod, *supra* note 26, at 3.

> As Dean since 2008, my life in law school has been a life of service. Service to the faculty and students. Serving the Lord [through] my students and faculty. During this time, I would like the Lord to take charge of my life. I pray that the Lord stay deeply connected with me, help me to remain in Him and to trust Him from every step of my life. As Dean[,] I would like this spirituality to dwell in my law faculty and students. To bring my faculty and students closer to God and be his disciples. I would like Jesus also revealed to my faculty and students.

Id.

[195] *Id.*

spirituality likewise dwells in the hearts of the faculty and staff, and to trust that they are not alone in this fight. [196]

While there are losses, there were also gains during the pandemic — more time with loved ones; more time to do hobbies; more time to take care of and examine oneself; more time to realize mistakes and forgive others; and more time to seek peace and healing. Put simply, life does not slow down no matter how busy one gets. Life has to continue despite the hurdles.

B. Rising and Moving Forward as a Jesuit Community

For an Ignatian institution, it is important that the Ignatian values are more streamlined — "that while this pandemic [has] shifted the natural order of things, the role of faith would [still] be the foundation of every action and decision."[197] Just as misfortune did not stop St. Ignatius from leading a holy life, the pandemic should not be a deterrence from further learning and teaching as long as there are available means to do so.[198]

Although this pandemic is a collective experience, every circumstance varies. However, to move forward as a community in a pandemic setup, one need not face the struggles alone. Thus, practicing compassion and empathy are more important now than ever by providing the communication lines open, and by listening to and dialoguing with one another.[199] The University support, the willingness and collaboration of

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196 *Id.*

197 Delgado, *supra* note 83, at 2.

> The dynamics of law school have drastically changed, to say the least, on account of this pandemic. At the very minimum, actors in law school need to meet halfway, in order to find a middle ground that would maximize learning and minimize struggle. [For] an Ignatian institution, what is important is that the Ignatian values are all the more streamlined in the study of law [—] that while this pandemic [has] shifted the natural order of things, the role of faith would nevertheless be the foundation of every action and decision.

Id.

198 Sarona-Lozare, *supra* note 49, at 3. "I do agree that the pandemic should not deter us from further learning (and teaching for that matter), as long as there are available means to do so." *Id.*

199 Quibod, *supra* note 26, at 3.

the faculty, and the cooperation of the students ease the tension in the shift and transition from face-to-face to online learning. Many things will be achieved when people work together.[200] Only through this can actors work together and meet halfway, maximizing quality education and minimizing struggle.[201]

Indeed, caution must be observed in the exercise of academic freedom. However, Jesuit education must still thrive despite the changes, especially now that the call for justice is greater. To tread carefully as an institution, and not to stand still, is the way to address this call. To offer education to those who have the means does not necessarily mean to deprive others of such privilege, but it could be seen as a way to continuously serve justice to the oppressed. Who knows when the lockdown could be fully lifted? This is not a time to remain still while the majority of the world suffers to an end that could not be perceived.

Since the lockdown, the legal education system has lost much academically, psychologically, and perhaps financially. While there is always a choice to quit, there is also a choice to move forward and adapt to complex changes. Indeed, this pandemic eventually forced not only the law school but the world to stop and reflect on what was considered normal. Perhaps one has to stop first in order to move forward. Perhaps it was an invitation to pause and contemplate.

St. Ignatius instructed us to move forward despite the difficulties life throws at us, and we can do so by working together as students, professors, deans, and as a whole law school community.

> During this time of the pandemic, there are so many things the students, faculty, and the Dean can do together. Compassion and care by providing the communication lines open. The grace of listening to one another and to dialogue. Retreat for faculty and students to renew their relationship with the Lord.

Id.

200 *Id.* at 2 "The University support, the willingness and collaboration of the faculty to continue teaching under a new platform, the cooperation of the students, and the students and the faculty learning together ease the tension in the shift and transition from face to face to online learning. Many things will be achieved when people work together.".

201 Delgado, *supra* note 83, at 2.

A PICTURE OF THE WAR ON DRUGS IN THE PHILIPPINES

Rey David M. Lim[*]

I. Introduction

Illegal drugs pose a danger to oneself, to others, and to the community. It is a poison to the body, a knife against the family, and a weapon against society. There are abundant studies[1] which detail the severe medical detriments caused by chronic abuse of illicit substances. The said effects are not only limited to the affected individuals but also take an emotional toll on their family and loved ones.

Needless to say, these substances may also alter the state of mind of the user, which could cause the user to physically harm others. As such, widespread drug abuse tends to cripple society and is a menace to public safety and order.

The United Nations Office on Drugs and Crime (UNODC) reported that "[t]he global illicit trade involving the cultivation, distribution, manufacture, and sale of substances which [circumvent] drug prohibition laws is estimated to be a $32 billion industry."[2] According to the 2011 International Narcotics Control Board Report, the abuse of *shabu* or amphetamine-type stimulants in the region continues to increase.[3] In addition, "[i]nternational drug trafficking organizations continue to use

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1 *See, e.g.*, Jeanette Smith & Stephen Hucker, *Schizophrenia and Substance Abuse*, 165 BR. J. PSYCHIATRY 13 (1994); Guy A. Cabral, *Drugs of Abuse, Immune Modulation, and AIDS*, 1 J. NEUROIMMUNE PHARM. 280 (2006); & Nora D. Volkow et al., *Effects of Chronic Cocaine Abuse on Postsynaptic Dopamine Receptors*, 147 AM. J. PSYCHIATRY 719 (1990).

2 United Nations Office on Drugs and Crime, Drug Trafficking: A $32 Billion Business Affecting Communities Globally, *available at* https://www.unodc.org/southasia/frontpage/2012/August/drug-trafficking-a-business-affecting-communities-globally.html (last accessed July 20, 2021) [https://perma.cc/T7TC-5EQM].

3 *Id.* (citing INTERNATIONAL NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2011 72 (2011)).

South Asia as a base for [drug trafficking], largely because of the wide availability of precursor chemicals in the region."[4]

According to researcher Dahlia Simangan, "[n]arcotic addiction only emerged in the Philippines during the American period (i.e., 1901-1946) when American forces introduced opium alkaloids, coca plant[,] and hemp for medical reasons."[5] Apparently unregulated, this led to its cultivation and use for personal consumption.[6] Based on drug-related arrests made by the Philippine Drug Enforcement Agency (PDEA) in 2015, illegal drugs in the market are mainly methamphetamine hydrochloride, locally known as *shabu*, comprising 95.47% of the market, marijuana with 4.29% of the share, and other drugs, such as cocaine, ecstasy, etc.[7] *Shabu* is the primary drug of abuse reflecting 96.74% of the total cases followed by marijuana at 24.94% and cocaine with 1.11%.[8] These figures come from a 2015 survey of residential facilities for rehabilitation in the Philippines conducted by the Dangerous Drugs Board.[9]

II. Brief History of Popular Prohibited Substances

A. Opium and the Opium Wars

In a book by scientist Paul M. Gahlinger, it was stated that

> [o]pium was brought to China by Arabic traders over the Silk Route during the 8th-century T'ang dynasty. It was used mainly as a medicinal herb. By 1746, descriptions began to appear of smoking opium ... and accompanying alarms of addiction.
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> ...
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> In a three-way exchange, Britain sold manufactured goods to India, India exported opium and cotton to China, and China shipped tea to Britain. The arrangement worked well for Britain and India, but the Chinese were considerably less

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4 United Nations Office on Drugs and Crime, *supra* note 2.

5 Dahlia Simangan, *Is the Philippine "War on Drugs" an Act of Genocide?*, 20 J. GENOCIDAL RESEARCH 68 (2017) (citing Ricardo M. Zarco, *A Short History of Narcotic Drug Addiction in the Philippines, 1521–1959*, PHIL. SOCIOLOGICAL REV., Volume No. 43, Issue No. 1/4, 10-12).

6 *Id.*

7 Simangan, *supra* note 5 (citing PHILIPPINE DRUG ENFORCEMENT AGENCY, 2015 ANNUAL REPORT 14 (2015)).

8 *Id.* (citing Dangerous Drugs Board, 2015 Statistics, *available at* https://www.ddb.gov.ph/research-statistics/statistics/45-%20research-and-statistics/287-2015-statistics (last accessed July 20, 2021) [https://perma.cc/G4Q7-VXD3]).

9 Dangerous Drugs Board, *supra* note 8.

> enthusiastic. Their sale of tea to the British had brought in a net surplus, but soon it was no longer enough to balance the growing demand for opium. It was China's turn to face a loss of silver reserves, as money flowed out of the country to pay for the imported drugs.
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> ...
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> By the 1830s, the opium habit was associated with [a spike in] crime and corruption that the Chinese government [resorted to] banning its [sale,] use[,] and importation. Stores of opium were raided [and their items confiscated,] and warehouses were [shuttered, too]. [However, state-initiated] repression and public education were not enough to [cripple] the opium industry. By the end of the century, [an estimated] half of the adult male population of China was addicted[,] and the economy and morale of the country [were at its lowest].
>
> ...
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> The end of the Opium Wars led to a defeated and demoralized China and [with it,] an [uncontrollable] epidemic of opium addiction. By 1900, [it was said that roughly] 25[%] of China's population ... was addicted to opium.[10]

B. Marijuana was Used as Paper and Textile for Clothes

Cannabis has been around since the dawn of agriculture, as it was one of the earliest cultivated plants.[11] It originated in Central Asia, "where knowledge of its mind-altering properties has existed for more than tens of thousands of years."[12] Marijuana (referring to the dried leaves, flowers, stems, and seeds from the cannabis plant) was also a well-established herbal medicine in ancient China.[13] Gahlinger noted that in fact, "Marco Polo wrote of its use on his journey in the 15th century."[14] From East Asia, "the use of marijuana spread to West Asia and throughout Africa." Unsurprisingly, marijuana became common during the Medieval Period, when it was used both medicinally for a variety of bodily complaints, as well as for recreational purposes. In addition, "the need in Britain was so great that King Henry VIII issued a royal edict in 1533[,] commanding farmers to set aside part of their land to grow cannabis."[15] Gahlinger expounded on the history of cannabis' propagation and usage —

> [Still facing shortages, the British] turned to its overseas colonies for supply. [It] was first propagated in Canada in 1606, and Virginia in 1611. ... In 1761, King George III sent a proclamation requiring ... colonists to further increase their production of [marijuana]. By the time of its independence, about 90[%] of American clothing was made from cannabis, as were most other textiles and papers ... .

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10 PAUL M. GAHLINGER, ILLEGAL DRUGS: A COMPLETE GUIDE TO THEIR HISTORY, CHEMISTRY, USE, AND ABUSE 68 (2d ed. 2004).

11 *Id*. at 81.

12 *Id*.

13 *Id*.

14 *Id*. at 82.

15 *Id*. at 87.

> In the mid-19th century, cotton gradually began to replace [marijuana] for clothing. ... The end of the era of sailing ships and the advent of cotton as a preferred fabric gradually led to a reduced need for [marijuana] fiber and a decline in cannabis [farming], until the plant remained only as a widespread weed.[16]

C. Cocaine Built an Empire

Marshall University Latin American History Professor, Christopher M. White stated that "[c]ocaine is perhaps the drug most associated with the term 'War on Drugs.'"[17] In his book, he explained that "[c]ocaine is derived from the coca plant, which has been in use in the Andes region of South America for over 4,000 years" and that "[t]he [i]ndigenous Quechua, Aymara[,] and other Andean peoples use coca leaf for medicinal, cultural[,] and nutritional purposes."[18] Gahlinger noted that

> [k]nowledge of coca chewing was first brought to Europe by Amerigo Vespucci, the Italian explorer after [whom America was named after], who had found the mouth of the Amazon and determined that South America was a separate continent. On his second voyage in 1499, he described native Indians chewing a green leaf mixed with white powder. ... The white powder was made from ground seashells. Centuries later they discovered that the leaves contained cocaine and the shells provided lime to make the mixture ... .[19]

In 1886, a water-based syrup drink that contained extracts of coca leaves and flavoring from the kola nut was created, thus giving birth to the world's most popular non-alcoholic drink, "Coca-Cola."[20]

According to White, "[i]n the 1980s and 1990s, cocaine use and sale funded some of the most dangerous criminal enterprises in the world," and Pablo Escobar was widely considered as history's wealthiest outlaw.[21] Today, it has gained political and medical importance. The leaf's components were originally intended as a painkilling, numbing agent, important for eye and dental surgeries, however the drug quickly became popular for its stimulating effects, and soon rivaled opiates in its popularity by the turn of the century.[22] This became such a phenomenon that numerous documentaries were filmed, books were made, and even a

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16 GAHLINGER, *supra* note 10, at 88.

17 CHRISTOPHER M. WHITE, WAR ON DRUGS IN THE AMERICAS (2020).

18 *Id.*

19 GAHLINGER, *supra* note 10, at 104.

20 *Id.*

21 WHITE, *supra* note 17.

22 *Id.*

television series adaption was created based on the events of the illegal drug trade in Latin America and the life of Pablo Escobar.[23]

D. Methamphetamine (Shabu)

In 2016, the UNODC reported —

> Amphetamine-type stimulants (ATS) are synthetic drugs that, in principle, can be manufactured anywhere. Unlike ... cocaine, they do not depend on the extraction of active constituents from plants that have to be cultivated and require certain conditions to grow. Small-scale ATS manufacture using simple 'recipes' in so-called 'kitchen labs' to be sold and consumed locally, exists, but large[-]scale ATS manufacturers in clandestine laboratories with sophisticated [production] equipment that makes use of a range of precursor chemicals and synthesis routes also play an important role.
>
> ...
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> Although methamphetamine is a feature of ATS markets worldwide, methamphetamine is particularly dominant in East and South-East Asia and North America. Since 2009, [these regions] together have accounted for most of the methamphetamine seized worldwide. North America has consistently reported the largest amount of methamphetamine seized each year. Between 2009 and 2014, quantities of methamphetamine seized in East and South-East Asia almost quadrupled.
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> In ATS markets in East and South-East Asia, methamphetamine is available in the form of both crystalline methamphetamine and methamphetamine tablets. Methamphetamine … tablets are small tablets, typically of low purity and available in various shapes and [colors]. Methamphetamine tablets are mainly manufactured in the Mekong area in East and South-East Asia, and seizure reports indicate that such tablets are mostly intended for markets in that sub[-]region. Crystalline methamphetamine continues to be manufactured on a large scale in East and South-East Asia and is also trafficked from other [localities].
>
> ...
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> In 2014, crystalline methamphetamine was the primary drug of concern in Brunei Darussalam, Cambodia, Indonesia, Japan, the Philippines[,] and the Republic of Korea, while methamphetamine tablets were the main drug of concern in the Lao People's Democratic Republic and Thailand.[24]

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[23] *See Narcos* (Gaumont International Television Aug. 28, 2015).

[24] UNITED NATIONS OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2016 53 (2016) (citing UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE CHALLENGE OF SYNTHETIC DRUGS IN EAST AND SOUTH-EAST ASIA: TRENDS AND PATTERNS OF AMPHETAMINE-TYPE STIMULANTS AND NEW PSYCHOACTIVE SUBSTANCES (2015)).

III. International Conventions and the United Nations

A. Single Convention on Narcotic Drugs of 1961 (As Amended in 1972)

According to the UNODC,

> [the] Convention aims to combat drug abuse [through] coordinated international action. There are two forms of intervention and control that work together. First, it seeks to limit the possession, use, [and] trade in, distribution, import, export, manufacture[,] and production of drugs exclusively [for] medical and scientific purposes. Second, it combats drug[-]trafficking through [multi]national [action] to deter and discourage drug traffickers.[25]

The Philippines became a signatory of the Convention on 30 March 1961.[26]

This Convention eventually led to the creation of the United Nations Commission on Narcotic Drugs of the Economic and Social Council and International Narcotics Control Board.[27] Some other key features of the Convention are establishing limitations on production, manufacture, export and import of drugs,[28] the regulation of coca leaves, and permitted production and use as long as the alkaloids compounds will not be used for any illicit purposes,[29] the control of cannabis plant by mandating parties to "adopt such measures as may be necessary to prevent the misuse of, and illegal traffic in, leaves of the cannabis plant."[30] The Convention further requires Member States to mandate licenses for trade involving any of the substances named in the convention[31] and that party States "shall not permit the possession of drugs except under legal authority[,]"[32] thus, "any drugs, substances[,] and equipment used or intended for the commission of any of the offenses ... shall be liable for seizure and confiscation."[33]

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[25] UNODC, Single Convention on Narcotic Drugs, 1961, *available at* https://www.unodc.org/unodc/en/treaties/single-convention.html (last accessed July 20, 2021) [https://perma.cc/W8TL-USTS].

[26] United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs art. 51, ¶ 3, *signed* Mar. 30, 1961, 520 U.N.T.S. 151 [hereinafter Single Convention on Narcotic Drugs of 1961].

[27] *Id*. art. 5.

[28] *Id*. art. 21, § 1.

[29] *Id*. arts. 26-27.

[30] *Id*. art. 28, § 3.

[31] *Id*. art. 30, § 1.

[32] Single Convention on Narcotic Drugs of 1961, *supra* note 26, art. 33.

[33] *Id*. art. 37.

The principal mandate of the Convention calls upon the parties to "give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation[,] and social reintegration for all persons involved and thus shall coordinate efforts to these ends."[34]

B. Convention on Psychotropic Substances of 1971

According to the UNODC,

> [t]he Convention establishes an international control system for psychotropic substances. It responded to the diversification and expansion of the spectrum of drugs of abuse and introduced controls over a number of synthetic drugs according to their [propensity for] abuse ... on the one hand, and their therapeutic value on the other.[35]

The Philippines also became a signatory on 7 June 1974.[36]

This Convention also created and updated schedules, which are the classification and itemization of permissive quantity of drugs.[37] It also provides for special administration and regulation of drugs and substances.[38] The Convention also requires that each party take into account

> any relevant regulations or recommendations of the World Health Organization, such as directions for use, including cautions and warnings, to indicate such on the labels where practicable and in any case on the accompanying leaflet of retail packages of psychotropic substances, as in its opinions are necessary for the safety of the user.[39]

In addition, "[e]ach Party shall, with due regard to its constitutional provisions, prohibit the advertisement of such substances to the general public."[40] The key feature of the Convention on Regulation of Drug Trade

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[34] Protocol Amending the Single Convention on Narcotic Drugs, 1961 art. 15, *signed* Mar. 25, 1972, 976 U.N.T.S. 3.

[35] UNODC, Convention on Psychotropic Substances, 1971, *available at* https://www.unodc.org/unodc/en/treaties/psychotropics.html (last accessed July 20, 2021) [https://perma.cc/H5JX-RJ4K].

[36] Convention on Psychotropic Substances (with lists of substances) n. 1, *signed* June 7, 1974, 1019 U.N.T.S. 175.

[37] *Id*. art. 5.

[38] *Id*. art. 6.

[39] *Id*. art. 10, § 1.

[40] *Id*. art. 10, § 2.

is strengthened by the application of the current matrix of regulated drugs and substances.[41]

C. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

According to the UNODC,

> [t]his Convention provides comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of precursor chemicals. It provides for international cooperation through, for example, extradition of drug traffickers, controlled deliveries[,] and transfer of proceedings.[42]

The Philippines became a signatory on 20 December 1988 and ratified the Convention on 7 June 1996.[43]

The Convention's purpose is to

> promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.[44]

It also provides that "[e]ach Party shall adopt such measures as may be necessary to establish as criminal offen[s]es under its domestic law, when committed intentionally"[45] and "shall seek to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas co-operate, with a view to preventing unauthorized access to means of transport and cargo and to implementing appropriate security measures."[46]

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41 *Id*. arts. 12-13.

42 United Nations Office on Drugs and Crime, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, *available at* https://www.unodc.org/unodc/en/treaties/illicit-trafficking.html (last accessed July 20, 2021) [https://perma.cc/TV34-8BBT].

43 United Nations Office on Drugs and Crime, 19. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, at 3, *available at* https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VI/VI-19.en.pdf (last accessed July 20, 2021) [https://perma.cc/CND8-DDCB].

44 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 2, ¶ 1, *signed* Dec. 20, 1988, 1582 U.N.T.S. 95.

45 *Id*. art. 3, § 2.

46 *Id*. art. 15, ¶ 3.

One milestone of the effort on the war against drugs, in this particular Convention, is that "[t]he Parties shall afford one another ... the widest measure of mutual legal assistance in investigations, prosecutions[,] and judicial proceedings in relation to criminal offenses established [as mutual assistance]."[47] Upon request, the Parties shall also "facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings."[48] However, mutual legal assistance may be refused:

> (a) If the request is not made in conformity with the provisions of this article;
>
> (b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, [public order,] or other essential interests;
>
> (c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction; [and]
>
> (d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.[49]

D. United Nations Control Organs

According to the United Nations (UN), the Single Convention on Narcotic Drugs of 1961 (as amended in 1972), the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 "attribute important functions to the Commission on Narcotic Drugs and to the International Narcotics Control Board."[50]

1. The Commission on Narcotic Drugs (CND)

According to the UN Office on Drugs and Crime,

> [t]he Commission on Narcotic Drugs, composed of 53 Member States elected by the Economic and Social Council for a four-year term, is the central policy-making body with regard to drug-related matters, including the monitoring of the global trends of illicit drug trafficking and abuse. This functional commission of the Economic and Social Council adopts and recommends for adoption by the Council or to the General Assembly through the Council, resolutions on new concerted measures or agreed policies to better address the drug phenomenon. It decides whether new substances

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47 *Id.* art. 7, ¶ 1.

48 *Id.* art. 7, ¶ 4.

49 *Id.* art. 7, ¶ 15.

50 UN, Drug Trafficking, *available at* https://www.un.org/ruleoflaw/thematic-areas/transnational-threats/drug-trafficking (last accessed July 20, 2021) [https://perma.cc/EQ47-JYXX].

> should be included in one of the schedules of the conventions and if changes or deletions in the schedules are required.[51]

The mandate of the CND is to review and analyze the global drug situation, considering the interrelated issues pertaining to the prevention of drug abuse, rehabilitation of drug users, and the proliferation and trafficking of illicit drugs.[52] The CND Secretariat also "annually publishes updated publications relating to the international drug control conventions, as well as brochures on recent issues."[53]

With regard to meetings,

> [t]he CND meets annually when it considers and adopts a range of decisions and resolutions. Intersessional meetings of the CND are regularly convened to provide policy guidance to UNODC. Towards the end of each year, the CND meets at a reconvened session to consider budgetary and administrative matters as the governing body of the United Nations drug [program].[54]

Further, the Commission monitors all commitments on "strengthening actions at the national, regional[,] and international levels to accelerate the implementation of joint commitments to address and counter the global drug problem,"[55] as enshrined in the 2019 Ministerial Declaration, the outcome document of the General Assembly Special Session (UNGASS) on the said predicament, as well as the 2009 Political Declaration and Plan of Action and its 2014 review.[56]

2. International Narcotics Control Board (INCB)

The International Narcotics Control Board is described as

> a permanent and independent body, consisting of 13 members, who are elected for a five-year term by the Economic and Social Council on the basis of their competence and [who then] serve in their personal capacity. The Board monitors the implementation of the conventions and, where appropriate, makes

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51 UN Office on Drugs and Crime, Legal Framework for Drug Trafficking, *available at* https://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html (last accessed July 20, 2021) [https://perma.cc/R7AT-ES5B] [hereinafter UN Office on Drugs and Crime, Legal Framework].

52 UN Office on Drugs and Crime, United Nations Commission on Narcotic Drugs, *available at* https://www.unodc.org/unodc/en/commissions/CND/index.html (last accessed July 20, 2021) [https://perma.cc/2S8V-8HAZ] [hereinafter UN Office on Drugs and Crime, CND].

53 UN Office on Drugs and Crime, Policy on Drugs, *available at* https://www.unodc.org/unodc/en/commissions/CND/Mandate_Functions/policy-on-drugs.html (last accessed July 20, 2021) [https://perma.cc/G9YX-NZW8].

54 UN Office on Drugs and Crime, CND, *supra* note 52.

55 *Id.*

56 *Id.*

> recommendations to States. It also administers the statistical control of drugs on the basis of data supplied by [g]overnments and assesses world requirements of licit drugs with a view to the adaptation of production to those requirements. It gathers information on illicit trafficking, and submits an annual report on developments in the world situation to the Commission on Narcotic Drugs and to the Economic and Social Council.[57]

With regard to its mission,

> [t]he INCB is [to be an impartial] and quasi-judicial monitoring body for the implementation of United Nations international drug control conventions. It was established in 1968 in accordance with the 1961 Single Convention on Narcotic Drugs. It had predecessors under the former drug control treaties as far back as the time of the League of Nations.[58]

With regard to its function over the illicit manufacture of, trafficking in and use of drugs,

> [the] INCB identifies weaknesses in national and international control systems and contributes to correcting such situations. INCB is also responsible for assessing chemicals used in the illicit manufacture of drugs, in order to determine whether they should be placed under international control.[59]

In addition,

> [the] INCB is called upon to ask for explanations in the event of apparent violations of the treaties, to propose appropriate remedial measures to Governments that are not fully applying the provisions of the treaties or are encountering difficulties in applying them and, where necessary, to assist Governments in overcoming such difficulties. If, however, INCB notes that the measures necessary to remedy a serious situation have not been taken, it may call the matter to the attention of the parties concerned, the Commission on Narcotic Drugs and the Economic and Social Council. As a last resort, the treaties empower INCB to recommend to parties that they stop importing drugs from a defaulting country, exporting drugs to it or both. In all cases, INCB acts in close cooperation with Governments.[60]

3. United Nations Office on Drugs and Crime

The United Nations Office on Drugs and Crime has an essential role in assisting the CND, INCB, and other bodies in performing their treaty-based responsibilities, and in assisting State Parties in the implementation of their obligations and commitments enshrined in international drug control treaties.[61] The UNODC's mission is to

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57 UN Office on Drugs and Crime, Legal Framework, *supra* note 51.

58 International Narcotics Control Board, *available at* https://www.incb.org/incb/en/about/mandate-functions.html (last accessed July 20, 2021) [https://perma.cc/L64V-7WW5].

59 *Id*.

60 *Id*.

61 UN Office on Drugs and Crime, Legal Framework, *supra* note 51.

"contribute to global peace and security, human rights and development by making the world safer from drugs, crime, corruption[,] and terrorism. [Its strategy enables it] to deliver effectively, efficiently[,] and with accountability, elevating [their] support to Member States to build just, inclusive and resilient societies that leave [nobody] behind."[62] In addition, the United Nations, through the United Nations System Task Force on Transnational Organized Crime and Drug Trafficking, which are related offices of the UNDOC, "advocates a rebalancing of the international policy on drugs, to increase the focus on public health, prevention, treatment and care, economic, social[,] and cultural measures."[63]

Guided by the 2021-2025 Strategy of the United Nations, the expected key outcomes of the UNODC by 2025 is to have the following:

1. Improved monitoring and analysis of the world drug problem;
2. Improved quality and coverage of drug prevention treatment, care and rehabilitation services, with a focus on youth, women, and people in vulnerable circumstances;
3. Improved access to and use of controlled drugs for medical purposes, and prevention of diversion for nonmedical use;
4. Enhanced forensic capacities and early warning systems, especially those related to new psychoactive substances, in place;
5. Improved coverage of comprehensive evidence-based HIV prevention, treatment and care services for people who use drugs and for people in prisons and other closed settings;
6. Implementation of improved and better targeted alternative development program;
7. More effective criminal justice responses to counter drug trafficking and laundering of related proceeds; and
8. The Commission on Narcotic Drugs and its subsidiary bodies enhance international cooperation to discharge its normative functions under the three international drug control conventions.[64]

IV. A Picture of the Philippine "War on Drugs"

A. Brief History

According to the Dangerous Drugs Board —

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[62] UN Office of Drugs and Crime, UNODC Strategy 2021-2025, *available at* https://www.unodc.org/unodc/en/strategy/index.html (last accessed July 20, 2021) [https://perma.cc/G7G2-C6E8].

[63] UN, *supra* note 50.

[64] UN Office of Drugs and Crime, UNODC Strategy 2021-2025, at 18-19, *available at* https://www.unodc.org/unodc/en/strategy/full-strategy.html (last accessed July 20, 2021) [https://perma.cc/8KES-95Y7].

> In 1972, the drug problem was just at its incipient stage, with only 20,000 drug users and marijuana as the top choice among the users in the Philippines. This was the drug scenario when Republic Act [No.] 6425, otherwise known as the 'Dangerous Drugs Act of 1972' was approved on 30 March 1972.
>
> Following the proclamation of Martial Law and the promulgation of Presidential Decree No. 44, amending [R.A. No.] 6425, the late President Ferdinand E. Marcos, organized the Dangerous Drugs Board on 14 November 1972 under the Office of the President.
>
> ...
>
> In 1982, another procedural amendment to [R.A. No.] 6425 was made through Batas Pambansa [Blg.] 179[,] which itemized prohibited drugs and its derivatives. Narcotics preparations such as opiates, opium poppy straw, leaves or wrappings, whether prepared for use or not were classified as dangerous drugs.
>
> The number of methamphetamine hydrochloride or [*shabu*] users was also seen to have increased in this decade.
>
> ...
>
> In 1995, the DDB launched '*Oplan Iwas Droga*,' which has become the national flagship program on drug abuse prevention.
>
> ...
>
> In 1998, the five pillar global drug control approach — Drug Supply Reduction, Drug Demand Reduction, Alternative Development, Civic Awareness and Response, and Regional and International Cooperation — was adopted by the ASEAN and China Cooperative Operations in Response to Dangerous Drugs (ACCORD) in which the Philippines is a member during the UN General Assembly Special Session on Drugs.
>
> ...
>
> In 2002, Republic Act [No.] 9165 or the 'Comprehensive Dangerous Drugs Act of 2002' repealed [R.A. No.] 6425.
>
> [R.A. No.] 9165 expanded the membership of the Board to include the agencies such as the Department of the Interior and Local Government, Department of Labor and Employment, Department of Foreign Affairs, Commission on Higher Education, National Youth Commission, and the newly established Philippine Drug Enforcement Agency. The law also streamlined the functions of the Board and ushered in new programs and initiatives.[65]

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[65] Dangerous Drugs Board, History, *available at* https://www.ddb.gov.ph/about-ddb/history (last accessed July 20, 2021) [https://perma.cc/VT5T-HC42] (citing The Dangerous Drugs Act of 1972, Republic Act No. 6425 (1972); Amending Certain Sections of Republic Act No. 6425, Otherwise Known as the Dangerous Drugs Act of 1972, Presidential Decree No. 44 (1972); An Act Further Amending Certain Sections of Republic Act Numbered Sixty-Four Hundred and Twenty-Five, Otherwise Known as the Dangerous Drugs Act of 1972, Appropriating Funds Therefor, and for Other Purposes, Batas Pambansa Blg. 179 (1982); & An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Republic Act No. 6425, Otherwise Known as the Dangerous Drugs Act of 1972, as Amended, Providing Funds Therefor, and for Other Purposes [Comprehensive Dangerous Drugs Act of 2002], Republic Act No. 9165 (2002)).

B. Some Numbers and Statistics

According to The Asia Foundation,

> [t]he Philippines both consume[s] and produce[s] illegal drugs. In 2015, 27[%] of barangays … [or] more than 10,000 nationwide, were identified as [drug-infested]. The country has been identified as a [major] transshipment point and a destination for large shipments of methamphetamine, and it is also a center of money laundering for significant proceeds from international narcotics trafficking. President [Rodrigo R.] Duterte's public campaign against drugs has led to many killings of alleged drug dealers and users. According to the Philippine Drug Enforcement Agency's official numbers on the government's [anti-drug] campaign, 70,854 anti-drug operations were conducted between [1 July 1 2016 and 29 August 2017], with a total of 107,156 drug 'personalities' arrested and 3,811 killed.[66]

According to the Dangerous Drugs Board,

> [a]round 1.67 million or two out of [a] hundred Filipinos aged 10 to 69 are current users of drugs, according to the results of the 2019 National Household Survey on the Patterns and Trends of Drug Abuse, released by the Dangerous Drugs Board.
>
> The 2019 Drug Survey estimates the current user prevalence rate at 2.05[%], significantly lower than the 2018 global estimates of 5.3[%] published in the World Drug Report 2020.
>
> …
>
> Cannabis or marijuana (57%) was found to be the most commonly abused dangerous drug followed by methamphetamine hydrochloride or *shabu* (35%).
>
> For lifetime users, the average age when most of them started trying drugs is 22 years old. Of the current users, on the other hand, most belong to the age group of 18-59 years old.
>
> …
>
> In terms of the general public's awareness of dangerous drugs and substances, [*shabu*] was seen to be the most well-known at 47.9% followed by marijuana at 35%. When respondents were again asked about other dangerous drugs or substances that they may be aware of, they mentioned cocaine.[67]

C. Extrajudicial Killings — Only Small Fish are Caught and Killed

An investigatory document by Amnesty International titled, ""If You Are Poor You Are Killed": Extrajudicial Executions in the Philippines' 'War on Drugs'"[68] documents 33 cases that involved the killings of 59

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66 THE ASIAN FOUNDATION, THE STATE OF CONFLICT AND VIOLENCE IN ASIA 152 (2017).

67 Dangerous Drugs Board, 2019 Drug Survey Shows Drug Use Prevalence Rate Falls to 2.05%, *available at* https://www.ddb.gov.ph/newsroom/511-2019-drug-survey-shows-drug-use-prevalence-rate-falls-to-2-05 (last accessed July 20, 2021) [https://perma.cc/5NU8-4XM3].

68 *See* Amnesty International, "If You Are Poor, You Are Killed": Extrajudicial Executions in the Philippines' 'War on Drugs' (2017), *available at*

people in detail. According to Amnesty International, "[r]esearchers interviewed 110 people across the Philippines' three main geographical divisions, detailing extrajudicial executions in 20 cities across the archipelago. The organization also examined documents, including police reports."[69] The document also "details how the police have systematically targeted mostly poor and defenseless people across the country while planting "evidence[,]" recruiting paid killers, stealing from the people they kill[,] and fabricating official incident reports."[70]

The organization describes the situation the Philippine's situation in the following manner —

> The report documents how the police, working from unverified lists of people allegedly using or selling drugs, stormed into homes and shot dead unarmed people, including those prepared to surrender.
>
> Fabricating their subsequent incident reports, the police have routinely claimed that they had been fired upon first. Directly contradicting the police's claims, witnesses told Amnesty International how the police conducted late night raids, did not attempt an arrest, and opened fire on unarmed persons. In some cases, witnesses said, the police planted drugs and weapons they later claimed as evidence.
>
> …
>
> ['']The people killed are overwhelmingly drawn from the poorest sections of society and include children, one of them as young as eight years old.['']
>
> In the few cases where the police have targeted foreign meth gangs, they have demonstrated that they can carry out arrests without resort to lethal force. The fact that poor people are denied the same protection and respect has hardened perceptions that this is a war on the poor.
>
> …
>
> The police killings are driven by pressures from the top, including an order to 'neutralize' alleged drug offenders, as well as financial incentives [with which] they have created an informal economy of death, the report details.[71]

D. Drugs Amid the Pandemic

According to the Human Rights Watch,

> [t]he [human] rights situation in the Philippines worsened during the pandemic, as the government imposed strict lockdown measures that resulted in the arrest and

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https://www.amnestyusa.org/files/philippines_ejk_report_v19_final_0.pdf (last accessed July 20, 2021) [https://perma.cc/K2Z4-2TZ3].

69 Amnesty International, Philippines: The Police's Murderous War on the Poor, *available at* https://www.amnesty.org/en/latest/news/2017/01/philippines-the-police-murderous-war-on-the-poor (last accessed July 20, 2021) [https://perma.cc/A7CT-WVL7].

70 *Id.*

71 *Id.*

> incarceration of tens of thousands of Filipinos, in conditions that greatly increased their health risk. In the early days of the lockdown, police subjected curfew violators[,] including children[,] to abusive treatment.
>
> ...
>
> 'Drug war' killings in the Philippines in 2020 increased by more than [50%] during the early months of the pandemic. The police reported in November [2020] that since ... Duterte became president, nearly 8,000 alleged drug suspects had been killed during police operations. In June [2020], the United Nations Office of the High Commissioner for Human Rights validated many of these killings.[72]

Consuelo Marquez of the Philippine Daily Inquirer reported that

> [f]ive years since the [so-called] drug war began, [a total of] 273,014 suspects were detained in 188,603 anti-narcotics operations of [law-enforcers] in the country.
>
> [The] Philippine Drug Enforcement Agency also documented 10,959 [high-value] targets, 103 uniformed personnel, 368 elected officials, and 449 government employees [who] were arrested in the government's crackdown against illegal drugs.
>
> On the drug-clearing of barangays nationwide, PDEA noted that 20,946 out of 42,045 villages in the country were [declared as] drug-free. The government still needs to get rid of narcotics in 13,984 barangays.[73]

Ellie Aben of Arab News also reported that with the coming of coronavirus pandemic human rights groups and prison reform advocates called to release low-level offenders and sick and elderly prisoners after the Bureau of Jail Management and Penology (BJMP) inmates and officers contracted the disease.[74] According to Associate Justice M.V.F. Marvic Leonen, "the release of more inmates under the initiative depended on the outcome of court procedures."[75] Courts were also "monitoring the revised mechanisms to address the urgent needs of inmates, despite the courts being closed due to the pandemic."[76] In addition,

> [a]mong the new measures adopted [was] the use of video-conferencing to hear and resolve pressing matters filed by inmates in areas that remain under lockdown, or

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72 Human Rights Watch, Philippines: 'Drug War' Killings Rise During Pandemic, *available at* https://www.hrw.org/news/2021/01/13/philippines-drug-war-killings-rise-during-pandemic (last accessed July 20, 2021) [https://perma.cc/5SA6-FA95].

73 Consuelo Marquez, *Drug War Death Toll Reaches 6,011 as of December 2020 — PDEA*, PHIL. DAILY INQ., Jan. 30, 2021, *available at* https://newsinfo.inquirer.net/1390134/drug-war-death-toll-reaches-6011-as-of-december-2020-pdea (last accessed July 20, 2021) [https://perma.cc/H6ZB-T9D6].

74 Ellie Aben, *Philippines' Top Court Moves to Decongest Jails Across the Country Over COVID-19 Fears*, ARAB NEWS, May 2, 2020, *available at* https://www.arabnews.com/node/1668696/world (last accessed July 20, 2021) [https://perma.cc/Q2TS-UCGM].

75 *Id.*

76 *Id.*

> in detention facilities with reported cases of infections[,] ... online filing of cases and posting of bail requests, in addition to reducing the bail amount and authorizing the release of certain prisoners.[77]

E. Admissibility and Jurisdiction of the International Criminal Court (ICC)

Regarding the country's situation with regard to the War on Drugs, the ICC reported that

> [t]he preliminary examination of the situation in the Philippines was announced on [8 February 2018] and is on-going. It [analyzed] crimes allegedly committed since at least [1 July 2016], in the context of the 'war on drugs' campaign launched by the Government of the Philippines. Specifically, it has been alleged that since [the said date], thousands of persons have been killed for reasons related to their alleged involvement in illegal drug use or dealing. While some of such killings have reportedly occurred in the context of clashes between or within gangs, it is alleged that many of the reported incidents involved [extrajudicial] killings in the course of police anti-drug operations.[78]

In addition,

> [o]n [14 June 2021], the Prosecutor of the International Criminal Court ... publicly requested [authorization] from Pre-Trial Chamber I to initiate an investigation into crimes allegedly committed on the territory of the Philippines between [1 November 2011] and [16 March 2019] in the context of the Government of the Philippines' 'war on drugs' campaign.[79]

The Philippines deposited its instrument of ratification of the Rome Statute on 30 August 2011, granting the ICC jurisdiction over Rome Statute crimes committed on the territory of the Philippines or by its nationals from 1 November 2011 onwards.[80] The Philippines' withdrawal from the Rome Statute was notified on 17 March 2018 and became effective on 17 March 2019.[81] Pursuant to Article 127.2 of the Statute and based on prior ICC ruling in the situation in Burundi, the Court retains its jurisdiction over crimes committed during the time in which the State

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77 *Id.*

78 ICC, Preliminary Examination Republic of the Philippines, *available at* https://www.icc-cpi.int/philippines (last accessed July 20, 2021) [https://perma.cc/4PAZ-SAPD].

79 ICC, Information for Victims Republic of the Philippines, *available at* https://www.icc-cpi.int/pages/victims-info-page.aspx?for=%27philippines%27 (last accessed July 20, 2021) [https://perma.cc/4PST-TFJW].

80 Rome Statute of the International Criminal Court, art. 258, *opened for signature* July 17, 1998, 2781 U.N.T.S. A-36544.

81 *Id.*

was party to the Statute and may exercise this jurisdiction even after the withdrawal became effective.[82]

F. Laws on the Illegal Drugs and Substances in the Philippines

1. The Revised Penal Code (RPC)

The old Penal Code took effect in the Philippines on 14 July 1887 and was in force up to 31 December 1931.[83] The Revised Penal Code (RPC) was enacted and approved by legislature on 8 December 1930.[84] It took effect on 1 January 1932.[85] Title 5 of the RPC declares the crimes relative to opium and other prohibited substances.[86] It governed the punishment for illicit drug trade in the Philippines until the enactment of Republic Act No. 6425, otherwise known as "The Dangerous Drugs Act of 1972," which took effect on 30 March 1972.[87] It was amended by Presidential Decree No. 1683 and further amended by Republic Act No. 7659.[88]

2. Republic Act No. 9165, the Dangerous Drugs Act of 2002

Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002, which took effect on 4 July 2002, repealed R.A. No. 6425 and was further amended by R.A. No. 7659. It is now the current governing law on illegal drugs and substances.[89] Section 98 of the Act expressly states —

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82 ICC, ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law, available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1371 (last accessed July 20, 2021) [https://perma.cc/9W9H-FNBG] (citing ICC, Burundi, *available at* https://www.icc-cpi.int/burundi (last accessed July 20, 2021) [https://perma.cc/C7UU-2XF4]).

83 LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW BOOK ONE 22 (19th ed. 2017) (citing THE PENAL CODE OF 1887).

84 *Id.* (citing An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815 (1930)).

85 *Id.*

86 REV. PENAL CODE, tit. 5.

87 The Dangerous Drugs Act of 1972.

88 LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW BOOK TWO 309 (17th ed. 2008) (citing The Dangerous Drugs Act of 1972; Amending Certain Sections of Republic Act No. 6425, as Amended, Otherwise Known as The Dangerous Drugs Act of 1972 and for Other Purposes, Presidential Decree No. 1683 (1980); & An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Laws, as Amended, Other Special Penal Laws, and for Other Purposes, Republic Act No. 7659 (1993)).

89 Comprehensive Dangerous Drugs Act of 2002.

> Notwithstanding any law, rule[,] or regulation to the contrary, the provisions of the Revised Penal Code ... , as amended, shall not apply to the provisions of this Act, except in the case of minor offenders. Where the offender is a minor, the penalty for acts punishable by life imprisonment to death provided herein shall be *reclusion perpetua* to death.[90]

The acts punished by the Comprehensive Dangerous Drugs Act of 2002 are:

1. Importation of dangerous drugs and/or controlled precursors and essential chemicals;[91]
2. Sale, trading, administration, dispensation, delivery, distribution and transportation of dangerous drugs and/or controlled precursors and essential chemicals;[92]
3. Maintenance of a dangerous drug den, dive or resort;[93]
4. Being employees or visitors of a dangerous drug den, dive or resort;[94]
5. Manufacture of dangerous drugs and/or controlled precursors and essential chemicals;[95]
6. Illegal Chemical diversion of controlled precursors and essential chemicals;[96]
7. Manufacture or delivery of equipment, instrument, apparatus and other paraphernalia for dangerous drugs and/or controlled precursors and essential chemicals;[97]
8. Possession of dangerous drugs;[98]
9. Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs;[99]
10. Possession of dangerous drugs during parties, social gatherings or meetings;[100]

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90 *Id.* § 98.

91 *Id.* § 4.

92 *Id.* § 5.

93 *Id.* § 6.

94 *Id.* § 7.

95 Comprehensive Dangerous Drugs Act of 2002, § 8.

96 *Id.* § 9.

97 *Id.* § 10.

98 *Id.* § 11.

99 *Id.* § 12.

100 *Id.* § 13.

11. Possession of equipment, instrument, apparatus and other paraphernalia for dangerous drugs during parties, social gatherings or meetings;[101]
12. Use of dangerous drugs;[102]
13. Cultivation or culture of plants classified as dangerous drugs or are sources thereof;[103]
14. Failure to maintain and keep original records of transactions on dangerous drugs and/or controlled precursors and essential chemicals;[104]
15. Unnecessary prescription of dangerous drugs;[105] and
16. Unlawful prescription of dangerous drugs.[106]

3. Overview on the Rights of an Accused

The 1987 Philippine Constitution provides for the guarantee of certain rights to protect an accused from the arbitrary use and abuses of police power. Such guarantees are enshrined in Article III of the 1987 Philippine Constitution, also known as the Bill of Rights.[107]

Some notable provisions of the Bill of Rights are:

1. "Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."[108]
2. "Section 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized."[109]

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101 Comprehensive Dangerous Drugs Act of 2002, § 14.

102 *Id.* § 15.

103 *Id.* § 16.

104 *Id.* § 17.

105 *Id.* § 18.

106 *Id.* § 19.

107 PHIL. CONST. art. III.

108 PHIL. CONST. art. III, § 1.

109 PHIL. CONST. art. III, § 2.

3. "Section 11. Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."[110]
4. "Section 12.
   (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel."[111]
   "(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him."[112]
5. "Section 14. (1) No person shall be held to answer for a criminal offense without due process of law."[113]
   "(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused: Provided, that he has been duly notified and his failure to appear is unjustifiable."[114]
6. "Section 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies."[115]

The Judiciary strengthened the constitutional guarantees afforded to an accused by promulgating the Rules of Court, especially Rule 115 of the Revised Rules of Criminal Procedure.[116] The Rules of Court have the force and effect of law which in turn provides for statutory rights to the people seeking judicial relief.[117]

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110 PHIL. CONST. art. III, § 11.

111 PHIL. CONST. art. III, § 12 (1).

112 PHIL. CONST. art. III, § 12 (3).

113 PHIL. CONST. art. III, § 14 (1).

114 PHIL. CONST. art. III, § 14 (2).

115 PHIL. CONST. art. III, § 16.

116 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 115.

117 Shioji v. Harvey, 43 Phil. 333, 342 (1922).

Rule 115 of the Rules of Court provides that in all criminal prosecutions, the accused shall be entitled to the following rights:

(a) To be presumed innocent until the contrary is proved beyond reasonable doubt.
(b) To be informed of the nature and cause of the accusation against him.
(c) To be present and defend in person and by counsel at every stage of the proceedings, from arraignment to promulgation of the judgment. The accused may, however, waive his presence at the trial pursuant to the stipulations set forth in his bail, unless his presence is specifically ordered by the court for purposes of identification. The absence of the accused without justifiable cause at the trial of which he had notice shall be considered a waiver of his right to be present thereat. When an accused under custody escapes, he shall be deemed to have waived his right to be present on all subsequent trial dates until custody over him is regained. Upon motion, the accused may be allowed to defend himself in person when it sufficiently appears to the court that he can properly protect his right without the assistance of counsel.
(d) To testify as a witness [o]n his own behalf but subject to cross-examination on matters covered by direct examination. His silence shall not in any manner prejudice him.
(e) To be exempt from being compelled to be a witness against himself.
(f) To confront and cross-examine the witnesses against him at the trial. Either party may utilize as part of its evidence the testimony of a witness who is deceased, out of or cannot with due diligence be found in the Philippines, unavailable or otherwise unable to testify, given in another case or proceeding, judicial or administrative, involving the same parties and subject matter, the adverse party having the opportunity to cross-examine him.
(g) To have a compulsory process issued to secure the attendance of witnesses and production of other evidence [o]n his behalf.
(h) To have speedy, impartial[,] and public trial.
(i) To appeal in all cases allowed and, in the manner, prescribed by law.[118]

4. Issues and Problem Areas on the Legal Processes Relating to the Illegal Drug Trade

a. Capture and Arrest

Michael Joe Delizo of ABS-CBN News reported that

> [a]t least [eight] rights guaranteed by the Philippine Constitution have been violated by the enforcement of government policies in its intensified anti-drug campaign, [as] showed [by] a study by the [Ateneo de Manila University's Ateneo Human Rights Center (AHRC)] ... .
>
> In examining the legal framework of '*Oplan Tokhang*,' [(a portmanteau of the Sugbuanon words '*toktok*' meaning knock and '*hangyo*' meaning plead), the] government's controversial knock-and-plead crackdown on drug suspects, AHRC said authorities violate the rights to due process, equal protection of the law, unwarranted searches and warrantless arrest/arrest[s] without cause, the right against self-incrimination, right to counsel, presumption of innocence, information, and health.

[118] REVISED RULES OF CRIMINAL PROCEDURE, rule 115.

> ...
>
> Under the operation, police go [house-to-house] to 'knock and plead' to drug suspects to surrender. This was designed as a 'practical and realistic means of accelerating the drive against illegal drugs in affected barangays.'
>
> ...
>
> Despite not being in custody, *'Tokhang'* subjects were persuaded in assorted ways that flirt with dangers sought to be prevented by constitutionally guaranteed rights of those under custodial investigation, including the right to counsel. The [Philippine National Police (PNP)] Double Barrel Circular itself articulates the possibility of *'Tokhang'* subjects being 'referred/invited to the local police station for interview, documentation, and other alternative actions' if these subjects 'voluntarily surrender themselves to the visiting team.'
>
> ...
>
> 'Tokhang' is conducted by police officers without the need of a search or arrest warrant or to complete a case-build up required under the PNP Manual before anti-illegal drug operations can be executed. What the PNP circular merely requires prior to the house visit is the 'collection and validation' of information and proof on suspected illegal drug personalities.[119]

b. Planting of Evidence

There are many cases where the accused and detainees claim they were innocent but the apprehending authorities merely planted evidence to make them look guilty.[120] Republic Act No. 9165 explicitly prohibits the planting of evidence and if found guilty would be sentenced to the penalty of death.[121] Despite the prohibition of the law, there are still numerous claims that they have been apprehended either by planting of evidence or by getting caught by virtue of being in the wrong place at the wrong time, *nadamay lang*.[122]

According to the UN Office of the High Commissioner for Human Rights (OHCHR),

> [the Office] examined police reports on another 25 operations in which 45 people [were] killed in Metro Manila between August 2016 and June 2017. The police had referred to 34 of these killings as 'neutralization.' At all the crime scenes, the police claimed to have recovered [sachets] of methamphetamine and guns allegedly used

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[119] Michael Joe Delizo, *Know Your Rights: Ateneo Study Cites Rights Violated in 'Tokhang'*, ABS-CBN NEWS, Apr. 26, 2019, *available at* https://news.abs-cbn.com/spotlight/04/26/19/know-your-rights-ateneo-study-cites-rights-violated-in-tokhang (last accessed July 20, 2021) [https://perma.cc/8NBD-D4FW].

[120] U.N. High Commissioner for Human Rights, *Situation of Human Rights in the Philippines*, ¶ 24, U.N. Doc. A/HRC/44/22 (June 29, 2020).

[121] Comprehensive Dangerous Drugs Act of 2002, § 29.

[122] Amnesty International, *supra* note 68, at 34.

> by the victims to resist police officers. On the basis of these reports, OHCHR found that the police had repeatedly recovered guns bearing the same serial numbers from different victims in different locations. OHCHR identified seven handguns with unique serial numbers. Each handgun appeared in at least two separate crime scenes, while two reappeared in five different crime scenes. The pattern suggests planting of evidence by police officers and casts doubt on the [self-defense] narrative, implying that the victims were likely unarmed when killed.[123]

c. Excessive Force

Amnesty International reported that

> [i]n one case in Batangas City, a victim's wife described how the police shot dead her husband at close range as she pleaded with them for mercy. After her husband was dead, the police grabbed her, dragged her outside and beat her, leaving [her with] bruises.
>
> In Cebu City, when Gener Rondina saw a large contingent of police officers surround[ing] his home, he appealed to them to spare his life and said he was ready to surrender. 'The police kept pounding [and] when they go[t] in[,] he was shouting, 'I will surrender, I will surrender, sir," a witness told Amnesty International.
>
> The police ordered Gener Rondina to lie down on the floor as they told another person in the room to leave. Witnesses then heard gunshots ring out. A witness recalled them 'carrying him like a pig' out of the house and then placing his body near a sewer before eventually loading it into a vehicle.
>
> When family members were allowed back in the house six hours after Gener's death, they described seeing blood splattered everywhere. Valuables including a laptop, watch, and money were missing, and, according to family members, had not been returned or accounted for by police in the official inventory of the crime scene.[124]

d. Detention

In its effort to unclog the court dockets and provide speedy disposition of cases, the Supreme Court created in November 2001 the Task Force Katarungan at Kalayaan, "which was tasked to effectively monitor the status of cases and conditions of detainees to make sure they do not overstay in jails."[125] In addition, the Supreme Court issued a circular, which provided that "[t]he assistance of the local Bureau of Jail

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123 United Nations High Commissioner for Human Rights, *supra* note 120.

124 Amnesty International, *supra* note 70.

125 Edu Punay, *Supreme Court Initiates Reforms to Decongest Jails*, PHIL. STAR., Nov. 3, 2012, *available at* https://www.philstar.com/nation/2012/11/03/862766/supreme-court-initiates-reforms-decongest-jails (last accessed July 20, 2021) [https://perma.cc/3NQ7-CPZY].

Management and Penology [(BJMP)] and the Office of the Provincial Governor may be enlisted."[126]

e. Capacity of Facilities

The Philippines has the highest jail occupancy rate in the world, exacerbated by the Duterte government's "War on Drugs," in which hundreds of thousands of people have been jailed since July 2016.[127] In the same year, Philippine jails have accommodated a considerably higher number of inmates than the holding capacity of government jails, resulting in an overall 511.9% congestion rate.[128] In some jails, "[their] basketball court, chapel, classrooms and walkways bec[a]me sleeping areas for detainees." Data from the BJMP showed that "an average of six inmates occupy a space of 4.7 square meters, the space intended for one prisoner."[129] Further, "[o]ne Philippine prison officer watches over 63 prisoners on average, far from the stipulated one-to-seven ratio, and there are insufficient numbers of guards to escort suspects to court hearings."[130]

Human Rights Watch reported that

> [t]he 'war on drugs' has also worsened the already dire conditions of Philippine jail facilities, including inadequate food and unsanitary conditions. Government data indicate that the country's jail facilities run by the [BJMP], which have a maximum capacity of 20,399, currently hold nearly 132,000 detainees, an overwhelming majority of them awaiting trial or sentencing. The [B]ureau attributes the overcrowding to the arrest of tens of thousands of suspected drug users and dealers since the anti-drug campaign began.[131]

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126 Supreme Court, Guidelines for Decongesting Holding Jails by Enforcing the Rights of Accused Persons to Bail and to Speedy Trial, Administrative Circular No. 12-11-2-SC [SC Admin. Circ. No. 12-11-2-SC], § 15 (a) (Mar. 26, 2014).

127 Human Rights Watch, Philippines: Reduce Crowded Jails to Stop COVID-19, *available at* https://www.hrw.org/news/2020/04/06/philippines-reduce-crowded-jails-stop-covid-19 (last accessed July 20, 2021) [https://perma.cc/EKU2-RMXK].

128 Rappler, *PH Jail Congestion Rate Soars to over 500% Amid Drug*, RAPPLER, June 16, 2017, *available at* https://www.rappler.com/nation/philippines-jail-congestion-rate-soars-drug-war-coa (last accessed July 20, 2021) [https://perma.cc/2HF6-XQR3].

129 Neil Jerome Morales, *Jails, Justice System at Breaking Point as Philippine Drugs War Intensifies*, REUTERS, Sept. 1, 2017, *available at* https://www.reuters.com/article/us-philippines-justice-idUSKCN1BB39F (last accessed July 20, 2021) [https://perma.cc/P5RJ-SDS2].

130 *Id.*

131 Human Rights Watch, Human Rights Consequences of the "War on Drugs" in the Philippines, *available at* https://www.hrw.org/news/2017/07/20/human-rights-consequences-war-drugs-philippines (last accessed July 20, 2021) [https://perma.cc/C7TX-9FST].

However, Emmanual Tupas of the Philippine Star reported that in 2018,

> [BJMP] ... recorded a [34%] decrease in the congestion rate of its detention facilities[,] ... . 59,625 inmates were released after posting bail, dismissal of their cases and serving of sentences, especially those with jail terms of six years and below.
>
> ...
>
> The other factor that contributed to the decrease is the construction of more detention facilities in the country.
>
> With a budget of [₱]1.6 billion on infrastructure that year, the BJMP had at least 57 construction and renovation projects nationwide.[132]

f. Prosecution Plea Bargaining Now Allowed in Drug Cases

In *Daan v. Sandiganbayan*, the Supreme Court explained plea bargaining as thus —

> Plea bargaining in criminal cases is a process whereby the accused and the prosecution work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the [defendant] pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that for the graver charge.[133]

However, plea bargaining in drug cases was explicitly prohibited under Section 23 of R.A. No. 9165.[134]

Plea bargaining is now authorized under Section 2, Rule 116 of the Rules of Court.[135] It was in the landmark case of *Estipona, Jr. v. Lobrigo* that the Supreme Court *En Banc* declared Section 23 of R.A. No. 9165, prohibiting plea bargaining in drug cases to be unconstitutional[136] for being contrary to the rule-making authority of the Supreme Court under Section 5 (5), Article VIII of the 1987 Constitution.[137]

The Office of the Court Administrator (OCA) issued OCA Circular No. 90-18, adopting the Supreme Court *En Banc* Resolution dated April 10,

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[132] Emmanual Tupas, *BJMP: Jail Congestion Down by 34%*, PHIL. STAR, July 18, 2018, *available at* https://www.philstar.com/nation/2018/07/18/1834452/bjmp-jail-congestion-down-34 (last accessed July 20, 2021) [https://perma.cc/KXH8-APB2].

[133] Daan v. Sandiganbayan (Fourth Division), G.R. No. 163972-77, 550 SCRA 233, 240 (2008) (citing People v. Villarama, Jr., G.R. No. 99287, 210 SCRA 246, 251-52 (1992)).

[134] Comprehensive Dangerous Drugs Act of 2002, § 23.

[135] REVISED RULES OF CRIMINAL PROCEDURE, rule 116, § 2.

[136] Estipona, Jr. v. Lobrigo, G.R. No. 226679, 837 SCRA 160, 194 (2017).

[137] *Id.* (citing PHIL. CONST. art. VIII, § 5 (5)).

2018 or Adoption of the Plea Bargaining Framework in Drug Cases.[138] The Circular sets the limits to be observed in plea bargaining in drug cases including the specific violations subject of plea bargaining.[139] The Department of Justice (DOJ) also issued DOJ Circular No. 27 on 26 June 2018 or the Amended Guidelines on Plea Bargaining for R.A. No. 9165, to serve as an internal guideline for the prosecutors to observe before they give their consent to proposed plea bargains.[140]

The Supreme Court *En Banc* in the case of *Malampad vs. Xenos* ruled that DOJ Circular No. 27 is not inconsistent with OCA Circular No. 90-18.[141] It "merely serves as an internal guideline for the prosecutors to observe before they give their consent to the proposed plea bargains."[142] Since plea bargaining is a mutual agreement between parties, DOJ Circular No. 27 also serves as the counter-proposal of the prosecutor to the offer of plea of guilty to a lesser offense by the accused.[143]

g. Minority

Even children are not spared from the war on drugs. Human Rights Watch's 2018 Country Report of the Philippines reports that

> [t]he Philippine Drug Enforcement Agency (PDEA) announced in June [2018] that it was seeking to impose annual unannounced drug screening tests on teachers and schoolchildren starting in the fourth grade. PDEA sought to justify the move as an attempt to identify 10-year-old potential drug users so they 'can get intervention while they are still young.'
>
> Imposing drug testing on schoolchildren when Philippine police are summarily killing alleged drug users endangers children should they fail such a drug test. Mandatory testing may also violate children's right to bodily integrity, constitute arbitrary interference with their privacy and dignity, and may deter children from attending school for reasons unrelated to any potential drug use.
>
> Police have killed dozens of children since the start of the 'war on drugs' in June 2016, deaths which Duterte has dismissed as 'collateral damage.' In February, police

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138 Office of the Court Administrator, Plea Bargaining Framework in Drugs Cases, OCA Circular No. 90-18 (May 4, 2018).

139 *Id*. annex A, at 2-7.

140 Department of Justice, Amended Guidelines on Plea Bargaining for Republic Act No. 9165 Otherwise Known as the "Comprehensive Dangerous Drugs Act of 2002", DOJ Department Circular No. 27 [DOJ Dept. Circ. No. 27] (June 26, 2018).

141 Malampad v. Xenos, G.R. No. 244413, Feb. 18, 2020, at 17, *available at* https://sc.judiciary.gov.ph/12110 (last accessed July 20, 2021).

142 *Id*.

143 *Id*. at 16.

> arrested three police officers implicated in the execution-style summary killing of 17-year-old Kian Lloyd delos Santos in August 2017.[144]

In a Reuters article by Stephanie Nebehay, it was reported that

> [a]t least 129 children have been killed in the Philippines' four-year war on drugs, most by police or allied assailants, but they may only represent a fraction of the toll, activist groups [claimed].
>
> ...
>
> [I]nvestigations found that 38.5[%] of the documented child killings were carried out by policemen[,] while 61.5[%] were by unknown assailants, 'some of them with direct links to the police.['] The youngest victim was a 20-month-old girl.[145]

h. Still Detained in Adult Facilities

There are protocols for how children should be treated by the Philippine National Police (PNP). These are codified in the PNP Manual in Handling Cases of Children at Risk and Children in Conflict with the Law, adopted by the institution on October 2016.[146] Bringing minors into police stations should be the absolute last resort, acceptable only after options of counseling through parents, guardians, barangay officers have been exhausted.[147] Chapter 4, Section 6.2 of the manual states: "[children in conflict with the law (CICL)] shall never be detained in a police station lock-up, or referred to jails managed by BJMP or any law enforcement agency, provincial jails and other similar facilities."[148]

In a research paper-opinion piece contributed to ABS-CBN News by Clarissa C. David and Ronald U. Mendoza,

> [e]ven if it has been established that a legal violation may have been committed, children should never [ ] be placed in a detention facility along with adult inmates. Instead, they should be separated from offenders of the opposite sex. They are never to be handcuffed or restrained in similar manner, and should not be exposed to implements of physical violence (such as batons and guns). Children 15 years and below who are in [CICL] should not be in the custody of police for more than [eight] hours. They are to be turned over to local social workers or NGOs within [eight]

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144 Human Rights Watch, Philippines: Events of 2018, *available at* https://www.hrw.org/world-report/2019/country-chapters/philippines (last accessed July 20, 2021) [https://perma.cc/2YRT-XNSG].

145 Stephanie Nebehay, Scores of Children Killed in Philippines' War on Drugs: Report, REUTERS, June 29, 2020, *available at* https://www.reuters.com/article/us-philippines-rights-idUSKBN2401BZ (last accessed July 20, 2021) [https://perma.cc/9SX7-WG3S].

146 Philippine National Police, Manual in Handling CAR and CICL Cases [PNP-NSU-24-1-16] (2016).

147 *Id.* ch. 7.

148 *Id.* ch. 4, § 6.2.

> hours. When police officers are unsure about the exact age of a minor and no legal documents are readily available, the PNP manual states that 'in case of doubt as to the age of the child, the WCPD shall resolve the doubt in favor of the child's minority because CICL enjoy the presumption of minority.'[149]

i. Pregnant Women and Their Children

In a presentation to the International Corrections and Prisons Association, Chief Public Attorney Persida V. Rueda-Acosta stated —

> Some pregnant women are apprehended by reason of criminal charges. Women, whether pregnant or not[,] should be afforded with human rights in prisons and must be treated well considering their nature and vulnerabilities. More so, a pregnant woman requires special attention and care due to the unborn baby inside her womb to avoid any miscarriage or untimely maternal delivery.
>
> ...
>
> A certain study conducted by the PAO [(Public Attorney's Office)] showed that pregnant inmates were not treated differently from the rest of the inmates. Hence, they too suffer most of the prevailing prison conditions in the Philippines, which include among others, the following:
>
> (1) Problems regarding food rations and water supply;
> (2) Deficient health care services;
> (3) Medical negligence;
> (4) Congestion and its harmful effects to inmates [—]
> (a) Sleep deprivation[;] and
> (b) Lack of mobility.[150]

The United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) adopted by the UN General Assembly in 2010,[151] exhort the protection of the rights of women offenders and prisoners, explicitly addressing the different needs that women have and the different situations they come from. According to Penal Reform International, "[t]he Bangkok Rules [is] also the first international instrument to address the needs of children in

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149 Clarissa C. David & Ronald U. Mendoza, *Children and the Anti-Illegal Drugs Campaign: When the Cure is Worse than the Disease*, ABS-CBN NEWS, Sept. 13, 2018, *available at* https://news.abs-cbn.com/focus/09/13/18/children-and-the-anti-illegal-drugs-campaign-when-the-cure-is-worse-than-the-disease (last accessed July 20, 2021) [https://perma.cc/3XL4-JMBF].

150 Presentation *by* Persida V. Rueda-Acosta, Chief Public Attorney, Public Attorney's Office, Pregnant Inmates in Philippine Prisons: Securing and Saving Them with Gender-Sensitive Policy Reforms (Oct. 25-30, 2015), *available at* https://pao.gov.ph/UserFiles/Public_Attorney's_Office/file/ICPA%20PAPER%20-%202015.pdf (last accessed July 20, 2021) [https://perma.cc/3CA9-JGX3].

151 UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), G.A. Res. 65/229, U.N. Doc. A/RES/65/229 (Mar. 16, 2011).

prison with their parent."[152] In addition, "[t]he 70 Rules give guidance to policy[-]makers, legislators, sentencing authorities[,] and prison staff to reduce unnecessary imprisonment of women, and to meet the specific needs of women who are imprisoned."[153]

According to Acosta,

> [t]here is a Philippine jail which lives up to its name, the Ray of Hope Village. It currently houses 282 women inmates. Its 12 cottages [serve as] a home away from home, as well as hubs of learning which give [their residents] free schooling (where everyone is inspired to finish high school), livelihood training and other similar programs.
>
> [It is] a jail ... [facility] where the women inmates are [often] seen in friendly [chatter, doing gardening nearby or sewing.]
>
> [Since 93%] of the detainees are mothers, there is a breastfeeding room which also functions as a child visitation area. The detainees' children aged 15 and below are allowed to stay overnight with their mothers.
>
> ...
>
> It has also inspired the filing of House Bill No. 1397 (entitled, An Act Establishing a Correctional Nursery Program in All Correctional Institutions for Women, Appropriating Funds Therefor and for Other Purposes) [before the House of Representatives.]
>
> Once approved, this ... law aims to prove that even in detention, [mother-and-child bonding would be able to thrive,] and that a piece of humanity of the whole prison population can be kept alive.[154]

V. Pro Bono Perspective: Looking Into Things the Ateneo Way

A. Points to Ponder on Government and Society

We are treading on unprecedented times. We must question what is and where we are on the war on drugs. Is the drug problem and the problems associated with it more fiction than fact? If it is a reality, are we doing the right thing? Damage has been done and lives have been taken away. It has to stop. While the former can be undone slowly by improving our laws and its implementation, as well as building ties and strengthening relations within the country and with the international

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[152] Penal Reform International, UN Bangkok Rules on Women Offenders and Prisoners: Short Guide (2013), at 4, *available at* https://cdn.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf (last accessed July 20, 2021) [https://perma.cc/6KPN-AG4P].

[153] *Id*. at 6.

[154] Acosta, *supra* note 150, at 6-7.

community, the latter can never be recovered. We must make sure, with all honest effort, that lives will no longer be sacrificed and treated as mere collateral in skirmishes against illegal drugs. The war on drugs will continue to rage on and the government has no choice but to continue the fight because it is, in fact, an issue of public order and safety. We must acknowledge that it requires an inter-agency approach to solve the problem. Not to condone the acts done in the name of the war on drugs, however, we really cannot pinpoint it to one single entity as the drug problem has slowly been inculcated into our society. Therefore, we need a social reprogramming to win the war at the grassroots level.

We must hold our officials accountable to their oath to serve the people and keep them safe. They, in turn, must tirelessly form and reform policies to meet that end and to ensure the faithful execution of such — that no man will fall victim to injustice and oppression. It may be a mountain of a challenge, but nothing is insurmountable when we pursue the noblest goals to serve God and the people. Society must wake up as well; we as a people cannot be apathetic anymore. It is because of us having turned a deaf ear that the drug problem has ballooned to be a pandemic itself, and it is because of us having turned a blind eye that lives were lost. As responsible members of society, more is demanded from us. We must cooperate with the authorities pursuing legitimate peace and order operations but stake out, in the proper mediums, at injustices and condemn such actions. To how much is entrusted, much is demanded from. That holds true not only with our officials but to us as a people.

B. Atenean Attorney: An Agent of Change

Lawyers have a "fourfold duty to society, the legal profession, the courts[,] and their clients, and must act in accordance with the values and norms of the legal profession as embodied in the Code of Professional Responsibility."[155] The legal profession is imbued with public interest. As such, lawyers are charged with the duty to give meaning to the guarantee of access to adequate legal assistance under Article III, Section 11 of the 1987 Constitution[156] by making their legal services available to the public in an efficient and convenient manner compatible with the independence, integrity and effectiveness of the profession. As a way to discharge this constitutional duty, lawyers are obliged to render pro bono services to those who otherwise would be denied access to adequate legal services.[157]

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[155] Tejano v. Baterina, A.C. No. 8235, 748 SCRA 259, 266 (2015) (citing Del Mundo v. Capistrano, A.C. No. 6903, 669 SCRA 462, 469 (2012)).

[156] PHIL. CONST. art. III, § 11. "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."

[157] RULE ON COMMUNITY LEGAL AID SERVICE, A.M. No. 17-03-09-SC, § 2 (Sept. 3, 2019).

Pro Bono Legal Aid Service includes post-admission legal services in civil, criminal, and administrative cases to the indigent or pauper litigants and other persons or organizations with little or no means to pay for legal services[158]

In total, the noble profession of lawyering is to become "Agents of Change" and to hold faith that does justice. Attorneys are by no means pro forma people but the advocates of true justice. Much is demanded from the profession, and rightly so. Being a lawyer calls upon going the extra mile to see to it that the ends of justice are achieved. In the context of drug cases and criminal cases in general, there is a never-ending count of people who do not have anyone to protect them and guaranty their rights because of poverty. While it may seem like a thankless job, lawyers are called up to answer such disconnect with the justice system and the reality of things. Each person is worth it. God favors no man above the other and loves each and every person. As His agent, we must see to it that His will be done, that justice and mercy will be handed out to every single person, irrespective of their stature in life.

Ad Majorem Dei Gloriam. Let this resound in everything that we do. We must make a change, one where God and the future generations will be proud of. Even a drop creates ripples. Let us be the ones who inspire such change. Let us be the ones who go the extra mile. Let us be the ones to show that God does exist and loves each and every one of us. Let us not forget that we are here only for a minute amount of time and God has bestowed upon us a purpose and destiny within that period. We must fight this so-called war and the corruption it does to our society. We must change our mindset of wealth, that it is not mere money and economical gain but a state of wellbeing fulfilling an eternal purpose. *Ad Majorem Dei Gloriam*.

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[158] *Id.* § 4 (b) (1) (i).

RESTORING RELATIONSHIPS, REDEEMING INSTITUTIONS: REFLECTIONS ON THE LEGAL PROFESSION'S RESPONSE TO THE PAPAL CALL FOR UNIVERSAL LOVE IN FRATELLI TUTTI

Gerard Micael R. Oro[*]

St. Ignatius de Loyola's gradual conversion from soldier to saint, which began while recovering from a shattered leg in solitude after being struck by a cannonball at the Battle of Pamplona, led him to profoundly redirect his life towards generously devoting himself in service to others. Aligning with St. Ignatius de Loyola's transformative experience, this Essay seeks to provide a reflection of how the legal community, as a whole, can be similarly inspired to move forward towards greater service through actively participating in the papal call for universal love. This Essay also attempts to relate the professional and social duties of lawyers in Philippine society with insights found in the most recent social encyclical *Fratelli Tutti*.[1]

The latest papal encyclical recognizes persistent trends that hinder the development of universal fraternity all over the world, including severe divisions brought about by polarization in politics;[2] the discarding of persons deemed expendable;[3] the inequity of rights;[4] and the new forms of slavery found in the reality of migrants and laborers.[5] Furthermore, the eruption of the COVID-19 pandemic highlights humanity's continued fragmentation, which is evident in the lack of unity in responding to the

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1 Encyclical *from* Pope Francis, Head of the Catholic Church, *to* the Church (Oct. 4, 2020) (on file with Author) [hereinafter Fratelli Tutti].

2 *Id.* ¶ 15.

3 *See id.* ¶¶ 18-20.

4 Fratelli Tutti, ¶ 22.

5 *Id.* ¶ 24.

crisis.[6] The supposed hyper-connectivity brought about by globalization and advancements in technology expose false securities.[7] These obstacles demonstrate that "no one is saved alone[,]"[8] and the world has never been one as it is now in its need for healing, love, and unity.[9]

Pope Francis does not only endeavor to immerse humanity in the lived reality of its less fortunate brothers and sisters through this encyclical.[10] He also inspires readers to be more like his namesake, St. Francis of Assisi, who "sowed [the] seeds of peace [and justice,] and walked alongside the poor, the abandoned, ... and the outcast[s]" of society.[11] The Holy Father hopes that continued reflection moves the people to put forth a new vision for humanity.[12] His methodology not only teaches to recognize the brokenness and suffering of the world, but also encourages understanding through the lens of faith and challenges man to move and respond towards universal love with a sense of deep hope.[13]

The legal profession fits into this reflection, with *Fratelli Tutti* offering notable insight that can help guide legal professionals in the practice of law in the Philippines.

I. Becoming Neighbors to Those in Need

In the second chapter of the papal encyclical, the Holy Father explains in detail the Parable of the Good Samaritan.[14] This parable is initially

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6 *See* António Guterres, "Now is the time for unity", *available at* https://www.un.org/en/un-coronavirus-communications-team/%E2%80%9Cnow-time-unity%E2%80%9D (last accessed July 20, 2021) [https://perma.cc/A645-9SJF] & Nancy Brown, How unity and common purpose can help us defeat this virus, *available at* https://www.weforum.org/agenda/2020/05/we-will-defeat-this-virus-with-unity-and-common-purpose (last accessed July 20, 2021) [https://perma.cc/WD53-859F].

7 *Id*. ¶ 7.

8 *Id*. ¶ 32.

9 *See id*.

10 *See id*. ¶ 285.

11 Fratelli Tutti, ¶ 2.

12 *Id*. ¶ 6.

13 *See id*. ¶¶ 54-55.

14 Fratelli Tutti, ¶ 62.

introduced in the Gospel of Luke,[15] which narrates that a lawyer attempted to test Jesus by asking what needed to be done to inherit eternal life.[16] Jesus replied to the lawyer by asking, "[w]hat is written in the [l]aw? ... How do you read it?"[17] The lawyer replied, "[you shall l]ove the Lord your God with all your heart[,] with all your soul[,] with all your strength[,] and with all your mind; and ... your neighbor as yourself."[18] When Jesus confirmed this to be what was necessary for eternal life, the lawyer persisted, as if to justify himself, by asking "[W]ho is my neighbor?"[19] To this question, Jesus replied with a story —

> A [certain] man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him[,] and beat him[,] and departed, leaving him half dead. [B]y chance[,] a priest was going down that road[. W]hen he saw him[,] he passed by on the other side. [In the same way,] a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he journeyed, came to where he was[. W]hen he saw him, he had compassion. He went to him and bound up his wounds, pouring on oil and wine. [H]e set him on his own animal[,] and brought him to an inn[,] and took care of him. [T]he next day[,] he took out two denarii and gave them to the innkeeper, saying, 'Take care of him, and whatever more you spend, I will repay you when I come back.' [Now w]hich of these three, do you think, proved to be a neighbor to [him] who fell among the robbers? He said, '[t]he one who showed him mercy.' And Jesus said to him, 'You go, and do likewise.'[20]

Pope Francis invites readers to see elements of themselves in each and every character from this parable.[21] By looking into the conduct of the priest, the Levite, and the Good Samaritan, as well as in analyzing the participation of the innkeeper, perhaps the unique roles of lawyers, both as healers of society's woundedness and builders of strong and responsive institutions, can properly be derived.[22]

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15 *Luke* 10:25-37 (New International).

16 *Id*. at 10:25.

17 *Id*. at 10:26. The written law being that which is taken from the Book of Deuteronomy, the fifth book of the Torah which provides, "Hear, O Israel: The L[ord] is our God, the L[ord] alone. You shall love the L[ord] your God with all your heart, and with all your soul, and with all your might."

18 *Id*. at 10:27 (citing *Deuteronomy* 6:5 (New International) & *Leviticus* 19:18 (New International)).

19 *Luke* 10:29 (New International).

20 *Luke* 10:30–37 (English Standard).

21 Fratelli Tutti, ¶ 64.

22 *See id*. ¶ 66.

The two passersby in the story performed important functions in Jewish society at that time.[23] The priest did not merely concern himself with religious worship, but he also performed a public role as scriptural and legal authority.[24] The Levite, though less obvious in the parable, belonged to a class which necessarily participated in formal ceremonies conducted in the temple.[25] Both were considered religious and devoted their lives to the worship of God, yet they failed to act in accordance with what the written law demanded.[26] Their conduct teaches that it is not automatic that those who profess the law and proclaim God's mercy act in a manner that treats their neighbors as they would themselves.[27]

The Good Samaritan, on the other hand, belonged to a class of religious outcasts.[28] Samaritans were a people from Judea despised by the Jews for integrating with the Gentiles.[29] However, in this parable, it is the Good Samaritan who behaved with true compassion required by the law.[30] The Samaritan saw the wounded man and was moved with pity and compassion.[31] He thus proceeded to dress the victim's wounds, took the victim into an inn, and provided for all that was needed.[32] The Samaritan was under no illusion of importance and was plainly compelled by the

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23 *See* Britannica, Levite, *available at* https://www.britannica.com/topic/Levite (last accessed July 20, 2021) [https://perma.cc/7ZGC-V6RF] & Jonathan Stökl, Priests and Levites in the First Century C.E., *available at* https://www.bibleodyssey.org/en/passages/related-articles/priests-and-levites-in-the-first-century-ce (last accessed July 20, 2021) [https://perma.cc/AT8Y-3VMX].

24 *See* Stökl, *supra* note 23.

25 *1 Chronicles* 23:28-32 (New International).

26 *See* Fratelli Tutti, ¶ 74.

27 *Id*.

28 MAXWELL E. JOHNSON, THE VIRGIN OF GUADALUPE: THEOLOGICAL REFLECTIONS OF AN ANGLO-LUTHERAN LITURGIST 159 (2002).

29 Alyssa Roat, The Samaritans: Hope from the History of a Hated People, *available at* https://www.biblestudytools.com/bible-study/topical-studies/the-samaritans-hope-from-the-history-of-a-hated-people.html (last accessed July 20, 2021) [https://perma.cc/2TAL-7D7J].

30 *See* Fratelli Tutti, ¶ 67.

31 *Luke* 10:33 (New International).

32 *Id*. 10:34-34.

desire to act in service.[33] He undertook the responsibility of restoring the injured man's dignity, and acted as a true neighbor.[34]

It is important to note that the Samaritan was not alone in this effort. Before continuing with his journey, the Samaritan turned the victim over to the innkeeper so that his recovery could be sustained.[35] Through this, the need for unity and cooperation is highlighted.[36] Furthermore, the rigid structure of the inn can be interpreted to symbolize the need for institutions and systems embedded in our societies which fundamentally promote the welfare of the poor and disadvantaged.[37]

This analysis presents a series of questions for the whole legal community to reflect on. Where does it situate itself in light of this parable? Which character does it identify with? And unlike the lawyer who sought to justify himself by asking who his neighbor was, members of the legal profession are instead invited to alternatively ask the question of whom they are neighbors to.

Pope Francis encourages readers to follow the example of the Good Samaritan in directly involving themselves with the rehabilitation of a wounded society,[38] calling upon them to shatter the chains that isolate them and to build bridges among themselves.[39]

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[33] *See* Fratelli Tutti, ¶ 67.

> The parable shows us how a community can be rebuilt by men and women who identify with the vulnerability of others, who reject the creation of a society of exclusion, and act instead as [neighbors], lifting up and rehabilitating the fallen for the sake of the common good. At the same time, it warns us about the attitude of those who think only of themselves and fail to shoulder the inevitable responsibilities of life as it is.

Id.

[34] *Id*.

[35] *Luke* 10:35 (New International).

[36] Fratelli Tutti, ¶ 78.

[37] *See* LELAND RYKEN, ET AL., DICTIONARY OF BIBLICAL IMAGERY 423 (1998). "In the parable of the good Samaritan too we have the picture of the inn as a neutral place (as opposed to a private home) where food and lodging are paid for ... ." *Id*.

[38] Fratelli Tutti, ¶ 67.

[39] *Id*. ¶ 62 (citing Pope Francis, Address at the Meeting With Those Assisted by the Charitable Works of the Church (Sept. 25, 2018) (transcript *available at* https://www.vatican.va/content/francesco/en/speeches/2018/september/documents/

The Holy Father underscores the key idea that every human person is valuable and has the right to live with dignity.[40] This position is not new. The Church expressed this idea as early as Pope Leo XIII's landmark encyclical *Rerum Novarum*, which was issued in 1891,[41] and the United Nations upheld the same on behalf of the international community in the Universal Declaration of Human Rights (UDHR), which was published in December 1948.[42] The same idea is echoed throughout the 1987 Constitution, where the value of promoting human dignity is considered a matter of State policy,[43] and the "enactment of measures [to] protect and enhance the right of ... people to human dignity" becomes intimately tied with the nation's thrust for social justice and human rights.[44]

The building of a "just and humane society" resides at the core of the nation's collective aspirations as a people, and democracy is the tool through which to forge "a regime of truth, justice, freedom, love, equality, and peace[ ]" under the rule of law.[45] The rule of law therefore is the enabling condition which allows for the spirit of these ideals to be substantiated and enfleshed.[46] The need for upholding and protecting the rule of law is integral for society to function and flourish.[47]

While every citizen is charged with the responsibility to promote the rule of law,[48] the legal profession is uniquely situated at the forefront of

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papa-francesco_20180925_assistiti-tallinn-estonia.html (last accessed July 20, 2021) [https://perma.cc/CP3G-XNC7]).

40 Fratelli Tutti, ¶ 39.

41 Enrique M. Fernando, *Human Rights According to Pacem in Terris and the Constitution of the Philippines: A Life of Dignity for All*, 25 ATENEO L.J. 1, 1 (1980).

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

43 PHIL. CONST. art. II, § 11.

44 PHIL. CONST. art. XIII, § 1.

45 PHIL. CONST. pmbl.

46 *But see* 1 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 7, at 105 (1986).

47 Norman Marsh, *The Rule of Law in a Free Society*, 11 ATENEO L.J. 88, 88 (1961).

48 *See id*. at 89.

this mission.[49] No other profession is duty-bound to live in and by the law, and driven by the pursuit of justice for the betterment of society.[50]

The recognition of these duties found throughout the legal system and in the landscape of legal ethics compels lawyers to take a more active role in accompanying their less fortunate brothers and sisters through their plight and in steering the practice towards combatting the structural and institutional sources of society's woundedness as a response to the papal call for universal love.[51] To properly understand the role of lawyers through this lens is to encounter the true essence of the legal profession as a noble vocation and not merely as a money-making endeavor.

II. A Life of Service

Lawyers are put to task to live a life of service.[52] This begins before they are formally accepted into the profession, requiring them to profess an oath before the Court that voluntarily obligates them to "maintain allegiance to the Republic of the Philippines; ... support [the] Constitution[;] and obey [the] laws as well as the legal orders of the duly constituted authorities therein[.]"[53] These first few obligations contained

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49 Adama Dieng, *Role of Judges and Lawyers in Defending the Rule of Law*, 21 FORDHAM INT'L L.J. 550, 556 (1997). "Lawyers must be and remain crusaders in the field of the rule of law and human rights." *Id*.

50 *See* Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother*, 86 DENV. U. L. REV. 865, 866-67 (2009).

51 *See, e.g.*, Santosh Digal, *A Lawyer to the Poor*, PHIL. NEWS AGENCY, Mar. 10, 2019, *available at* https://www.pna.gov.ph/articles/1064137 (last accessed July 20, 2021) [https://perma.cc/26JS-SVHF]; An Act Providing a Mechanism for Free Legal Assistance and for Other Purposes [Free Legal Assistance Act of 2010], Republic Act No. 9999, § 2 (2010); & Bryan Horrigan, The War Against Poverty is Not Optional for Lawyers, *available at* https://www.monash.edu/law/news/articles/archive/the-war-against-poverty-is-not-optional-for-lawyers (last accessed July 20, 2021) [https://perma.cc/DL46-8T65].

52 Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 592 (1985) (citing ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 14 (1953)).

53 The Lawyer's Oath reads —

> I, _____ of _____, do solemnly swear that I will maintain allegiance to the Republic of the Philippines; I will support its Constitution and obey the laws as well as the legal orders of the duly constituted authorities therein; I will do no falsehood, nor consent to the

in the Lawyer's Oath highlight the role of lawyers as officers of the Court working on behalf of justice and the rule of law.[54] The succeeding obligations against instituting groundless, false, or unlawful suits, as well as participating in falsehood and dilatory schemes complete the duties of the lawyer condensed in the Oath.[55]

The Lawyer's Oath is not the only principal source of the ethical duties imposed on a lawyer. It is often read along with other sources of legal ethics, which include provisions in the Code of Professional Responsibility, the Canons of Professional Ethics, jurisprudence, and pertinent laws.[56] This portion of the Essay examines the four-fold duties of a lawyer — to society, to the profession, to the courts, and to the clients — as found in the Code of Professional Responsibility.[57] This part shall also attempt to connect these duties to the call for greater fraternity and social friendship in *Fratelli Tutti*.

A. Extending Mercy and Compassion

Considered as the most intimate of duties, the lawyer's duty to his client is deemed personal and fiduciary by nature.[58] The lawyer, when dealing with the client, is expected to be devoted to the latter's cause with utmost fidelity[59] and to exercise zeal in representing his client within the bounds provided for by law.[60] It is in this relationship that the lawyer is provided the opportunity to encounter the client in a state of

> doing of any in court; I will not wittingly or willingly promote or sue any groundless, false or unlawful suit, nor give aid nor consent to the same; I will delay no man for money or malice, and will conduct myself as a lawyer according to the best of my knowledge and discretion with all good fidelity as well to the courts as to my clients; and I impose upon myself this voluntary obligation without any mental reservation or purpose of evasion. So help me God.

RULES OF COURT, Appendix of Forms, Form 28, Attorney's Oath.

54 Jose L. Sabio, *The Lawyer's Oath: Its Significance and Importance*, 50 ATENEO L.J. 285, 288 (2005).

55 Reyes v. Chiong, Jr., A.C. No. 5148, 405 SCRA 212, 219 (2003).

56 RUBEN E. AGPALO, LEGAL AND JUDICIAL ETHICS 1 (8th ed. 2009).

57 CODE OF PROFESSIONAL RESPONSIBILITY (1988).

58 Ong v. Grijaldo, A.C. No. 4724, 402 SCRA 1, 4 (2003) & AGPALO, *supra* note 56, at 182.

59 CODE OF PROFESSIONAL RESPONSIBILITY, canon 17.

60 *Id*. canon 19.

vulnerability.[61] The lawyer's task is to use his knowledge of the law in a competent and diligent manner,[62] to understand the complex issues surrounding his client's case,[63] and to accompany the client through the difficult process of determining the proper remedy to be pursued.[64] In this encounter, the lawyer is not just tested in his mastery of the law, but also in his evaluation as to the best possible recourse which serves the interest of his client.[65]

The Catholic Church puts forth the idea that human beings live out their true essence by way of giving themselves to others.[66] Building on this idea, the lawyer's act of relating with the client and his assistance in the healing of strained relations are not only a fulfillment of a lawyer's professional obligation, but also an attempt at enriching his own human experience through the giving of himself.[67] Lawyers are indirectly responsible in tempering the attitudes of aggression, dispersing the animosity between and among parties, and encouraging them to sit together.[68] The practice involves itself with allowing the parties "to build bridges, to break down walls, [and] to sow [the] seeds of reconciliation."[69]

The Parable of the Good Samaritan offers basis from which to derive how a lawyer can potentially extend compassion and mercy towards those

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61 *See* AGPALO, *supra* note 56, at 185 (citing Hilado v. David, 84 Phil. 569, 579 (1949)). "The preservation and protection of [the attorney-client relationship] will encourage a client to entrust his legal problems to an attorney, which is of paramount importance to the administration of justice." *Id*.

62 CODE OF PROFESSIONAL RESPONSIBILITY, canon 18.

63 AGPALO, *supra* note 56, at 210 (citing CANONS OF PROFESSIONAL ETHICS, ¶ 8).

64 See AGPALO, *supra* note 56, at 210 (citing Periquet v. National Labor Relations Commission, G.R. No. 91298, 186 SCRA 724, 732 (1990)).

65 *Id*. at 214 (citing RULES OF COURT, rule 138, § 20 (c)). "[A lawyer] should make such defense only as he believes to be honestly debatable under the law." *Id*.

66 POPE PAUL VI, GAUDIUM ET SPES, ¶ 24 (1965).

67 *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1069-70 (1976).

68 *See* Leah J. duCharme, Mediator vs. Attorney: What's the Difference?, *available at* https://gjesdahllaw.com/blog/mediator-attorney-difference (last accessed July 20, 2021) [https://perma.cc/6ES2-4DJH].

69 Fratelli Tutti, ¶ 276 (citing Homily of His Holiness Pope Francis, *available at* https://www.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco_20150922_cuba-omelia-santiago.html (last accessed July 20, 2021) [https://perma.cc/E7FY-UKUC]).

injured by conflict and injustice. A lawyer must not only see the attorney-client relationship as a mere contract between two consenting parties,[70] but also recognize his unique position to share his gifts to those who authentically need it, especially the poor.[71] The Code of Professional Responsibility provides that a lawyer must not deny his services to those with genuine need for it.[72] This is why a lawyer cannot just decline any appointment as counsel *de officio* without serious or sufficient cause,[73] or refuse representation towards an indigent client without any impediment brought about by a conflict of interest.[74] Furthermore, a lawyer is expected to observe the same standards of conduct between paying and non-paying clients,[75] as this goes in line with the legal profession's character as a genuine form of public service.[76]

A lawyer's duties present many opportunities to foster an authentic bond and fraternity with the vulnerable.[77] A lawyer must remain mindful that similar to the example exhibited by the Good Samaritan, a predisposition towards sensitivity and compassion is necessary in the act of giving, especially in the giving of oneself.[78] Whenever the lawyer assesses the merits of a case or determines a particular cause of action, time and attention are devoted and shared. Oftentimes, in advocating on behalf of vulnerable groups and sectors, a lawyer concerns himself not only with the duty of giving his honest and candid opinion on the prospects of the case,[79] but also with weighing the risks that are to be assumed and resources to be expended by the client.[80]

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70 *See* JAMES E. MOLITERNO, PROFESSIONAL RESPONSIBILITY 69 (2010).

71 Horrigan, *supra* note 51.

72 CODE OF PROFESSIONAL RESPONSIBILITY, canon 14.

73 *Id*. rule 14.02.

74 *Id*. rule 14.03.

75 *Id*. rule 14.04.

76 Burbe v. Magulta, A.C. No. 99-634, 383 SCRA 276, 278 (2002).

77 *See, e.g.*, Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 191 & 204 (2004).

78 Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 24 (2008).

79 CODE OF PROFESSIONAL RESPONSIBILITY, rule 15.05.

80 *See* AGPALO, *supra* note 56, at 212 (citing CANONS OF PROFESSIONAL ETHICS, ¶ 31).

Navigating through the maze of remedies is a difficult ordeal, and the nature of the legal system provides many possible outcomes that entail varying degrees of success for the parties in conflict. Litigation is often a long and burdensome procedure.[81] Numerous initiatives have been pursued by the legislature and the judiciary to encourage alternative forms of resolving disputes without having to go through litigation. The lawyer, in fidelity to his client's cause, is expected not only to be familiar with these developments, but also to encourage the client to prefer them when the opportunity is available.[82]

B. Healing Broken Relationships

One example of an alternative form of dispute resolution pursued by the legislature was the institutionalization of the *Katarungang Pambarangay*[83] in the Local Government Code.[84] This reform facilitates conciliation or mediation, making the same accessible to the public at the most basic unit of government.[85] Another example is the Alternative Dispute Resolution Law,[86] which properly recognizes the freedom of parties to autonomously embark on the process of resolving their disputes as "an important means to achieve speedy and impartial justice and declog court dockets."[87] Additionally, the Labor Code also promotes

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81 Jemy Gatdula, *Judicial Delays: Costs and Causes*, BUSINESSWORLD, July 12, 2018, *available at* https://www.bworldonline.com/judicial-delays-cost-and-causes (last accessed July 20, 2021) [https://perma.cc/B5R6-U8WR].

82 *See* Julie Macfarlane, *The Evolution of the New Lawyer: How Lawyers Are Reshaping the Practice of Law*, 2008 J. DISP. RESOL. 61, 62 (2008) [hereinafter Macfarlane, *Evolution of the New Lawyer*].

83 An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160, § 415 (1991). "In all katarungang pambarangay proceedings, the parties must appear in person without the assistance of counsel or representative, except for minors and incompetents who may be assisted by their next-of-kin who are not lawyers." *Id*.

84 LOCAL GOV'T CODE, §§ 399-422.

85 Gil Marvel P. Tabucanon, et al., *Philippine Community Mediation, Katarungang Pambarangay*, 2008 J. DISP. RESOL. 501, 512 (2008).

86 An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes [Alternative Dispute Resolution Act of 2004], Republic Act No. 9285 (2004).

87 *Id*. § 2 (2004).

"voluntary arbitration, mediation, and conciliation as modes of settling labor disputes" in collective bargaining and negotiations.[88]

Simultaneously, the judiciary's attempt to develop, implement, and expand alternative dispute resolution procedures through the establishment of the Philippine Mediation Center brought about mechanisms such as Court-Annexed Mediation (CAM); Appellate Court Mediation (ACM); Judicial Dispute Resolution (JDR); Mobile Court-Annexed Mediation (MCAM); and eventually Court-Annexed Arbitration (CAA), which are embedded in procedural rules.[89]

These mechanisms that compel parties to come together in the peaceful settlement of their disputes are the means available to clients in cases that do not necessitate the engagement of a lawyer's full services in the ordinary course of litigation.[90] Through some of these mechanisms, a lawyer is merely invited to guide the client on which remedies can be properly availed of.[91]

Recently, developments in the Rules of Court in the form of the 2019 Amendments to the 1997 Rules of Civil Procedure have predisposed courts to mandatorily give way to court-annexed mediation after the pre-trial stage.[92] The amendments also leave room for judges to exercise their discretion in referring cases to other courts for the facilitation of judicial dispute resolution, upon the belief that the issues between parties remain ripe for settlement.[93] It can be gleaned that while these developments were made pursuant to the constitutional right to the speedy disposition of cases,[94] the focal point of these advancements is fundamentally

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88 A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Ensure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442, art. 211 (1974) (as amended).

89 Supreme Court, 2020 Guidelines for the Conduct of the Court-Annexed Mediation (CAM) and Judicial Dispute Resolution (JDR) in Civil Cases, Administrative Matter No. 19-10-20-SC [A.M. No. 19-10-20-SC] (Feb. 9, 2021).

90 Macfarlane, *Evolution of the New Lawyer*, *supra* note 82, at 62.

91 *See id*. at 73.

92 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 18, § 8.

93 *Id*. rule 18, § 9.

94 PHIL. CONST. art. III, § 16.

grounded on the hope that strained relations can be properly mended by harnessing humanity's good will.

C. Adapting to the New Normal

With respect to the duties of the lawyer to both the courts and the legal profession, greater sincerity is demanded of each lawyer to assist in molding the practice towards proactively responding to the evolving needs of society.[95] While the COVID-19 pandemic has significantly limited the public's mobility due to the implementation of strict quarantine protocols,[96] the courts, as well as the legal profession, have not wavered in their responsibility towards the ensuring access to justice.[97] The justice system continues to function during these difficult times.[98] Both the courts and the legal profession have adopted ways to remain effective in their mandate, using advancements in modern technology.[99]

The Supreme Court took a giant leap forward in ensuring the administration of justice during a public health emergency and amidst the physical closure of courts by institutionalizing the guidelines on the conduct of hearings by way of videoconferencing.[100] This builds on the developments previously initiated when the Supreme Court authorized the use of live-link television testimony for witnesses and victims under the Rule on Examination of a Child Witness,[101] as well as by the adoption

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95 *See* Karen L. Loewy, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869, 1871-72 (2000).

96 Lian Buan, *'The Digital Court is Not So Far Away'*, RAPPLER, May 10, 2020, *available at* https://www.rappler.com/nation/supreme-court-digital-coronavirus-pandemic (last accessed July 20, 2021) [https://perma.cc/3RQQ-VEAV].

97 Microsoft Philippines Communications Team, Supreme Court of the Philippines Unveils Virtual courtrooms During COVID-19 Community Quarantine, *available at* https://news.microsoft.com/en-ph/2020/05/15/supreme-court-of-the-philippines-unveils-virtual-courtrooms-during-covid-19-community-quarantine (last accessed July 20, 2021) [https://perma.cc/6DGA-2TL6].

98 Buan, *supra* note 96.

99 *Id*.

100 Supreme Court, Re: Proposed Guidelines on the Conduct of Videoconferencing, Administrative Matter No. 20-12-01-SC [A.M. No. 20-12-01-SC] (Dec. 9, 2020).

101 RULE ON EXAMINATION OF A CHILD WITNESS, A.M. No. 00-4-07-SC (Nov. 21, 2000).

of "the presentation of testimonial evidence by electronic means" brought about by the Rules on Electronic Evidence.[102]

Similarly, lawyers have observably adapted to the "new normal" by making use of online videoconferencing platforms to conduct meetings and client consultations.[103] Moreover, the Supreme Court's promulgation of the 2020 Interim Rules on Remote Notarization of Paper Documents enables lawyers to continue their notarial practice amid the quarantine restrictions.[104]

Noteworthy of mention among emerging trends is the authorization of the Revised Law Student Practice Rule,[105] which significantly empowers law students to work alongside with legal professionals in assisting the drafting of legal documents, the establishment of legal clinics, and in the representation of clients.[106] This development meaningfully provides law students with clinical legal experience and extends their ability to act as force multipliers for the legal profession.[107]

These institutionalized changes in the legal practice highlight the significance of enabling social structures in supporting agents and advocates committed to the realization of justice, peace, unity, and the healing of society. Looking back at the Parable of the Good Samaritan, the innkeeper played a significant role in restoring the injured man's dignity.[108] While the victim's road to recovery began with the compassion extended by the Good Samaritan upon initial contact, it was through the

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[102] RULES ON ELECTRONIC EVIDENCE, A.M. No. 01-7-01-SC (July 17, 2001).

[103] *See* David Saunders, INSIGHT: Zooming and Attorney-Client Privilege, *available at* https://news.bloomberglaw.com/us-law-week/insight-zooming-and-attorney-client-privilege (last accessed July 20, 2021) [https://perma.cc/F7CF-ZMKX].

[104] 2020 INTERIM RULES ON REMOTE NOTARIZATION OF PAPER DOCUMENTS, A.M. No. 20-07-04-SC, § 3 (July 14, 2020).

[105] RULE 138-A: LAW STUDENT PRACTICE, A.M. No. 19-03-24-SC (June 25, 2019).

[106] *Id*. §§ 1 & 4.

[107] *Id*. § 1.

[108] *See* Fratelli Tutti, ¶ 78.

innkeeper's participation that such recovery was sustained and completed.[109]

Similarly, while it can be said that the recognition of a lawyer's role as a healer of broken relationships is what moves the legal profession towards promoting universal love of neighbors and fellow men, what ultimately completes the transformation of society is the acknowledgment of the legal profession's role in aiding the nation by building strong and responsive institutions that concretely reflect the collective aspirations written in the Constitution.

This is why the lawyer's duties to both the courts and the legal profession are riddled with the obligations to extend "candor, fairness[,] and good faith" towards officers of the court and to his fellow members in the profession,[110] as well as to show deep respect and commitment "to assist in the speedy and efficient administration of justice."[111] To fulfill these obligations is to "uphold the integrity and dignity of the legal profession,"[112] and consequently inspire the public at large to greater confidence in the legal system and in the rule of law.[113]

D. Going Beyond and Expanding Horizons

The rights made available by the legal system to the rich and the poor, to the favored and the outcasts, to those who have much, and to those who have less are all rooted in the same source. The legal community's efforts, though significant and adaptive, remain insufficient to bridge the gap.[114] Though many strides have been made towards making justice swifter and more accessible, and while many members of the legal community are committed to working against marginalization, vulnerable victims of

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109 Bruce W. Longenecker, *The Story of the Samaritan and the Innkeeper (Luke 10:30-35): A Study in Character Rehabilitation*, 17 BIBLICAL INTERPRETATION 422, 428 (2009).

110 CODE OF PROFESSIONAL RESPONSIBILITY, canon 10.

111 *Id*. canon 12.

112 *Id*. canon 7.

113 AGPALO, *supra* note 56, at 100 (citing Rivera v. Angeles, A.C. No. 2519, 339 SCRA 149, 152-53 (2000)).

114 Eloisa Lopez, *'Decaying' Justice System Aiding Crime, Corruption in PH — lawyers*, RAPPLER, Mar. 9, 2018, *available at* https://www.rappler.com/nation/decaying-justice-system-crime-corruption-philippines-forum (last accessed July 20, 2021) [https://perma.cc/5MMR-8LPS].

unjust systems and conditions still exist,[115] and those who live in the fringes of society find the attainment of relief marred with many obstacles.[116]

In accepting these hard truths, another layer in the lawyer's role of building strong and responsive institutions is rediscovered. The advancements made in the legal system, as well as the improvement of justice networks within the profession have been mentioned, but an important component of the lawyer's many obligations formally contained in his four-fold duties is the lawyer's duty to society.[117]

Determining the extent of a legal professional's duty to Philippine society raises the question of what the practice of law entails. *Cayetano v. Monsod*[118] affirms that the practice of law is not limited to the traditional view involving the giving of legal advice, the conduct of cases, and litigation in court.[119] It involves "any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience.[ ]To engage in the practice of law is to perform those acts which are characteristics of the profession."[120]

It is clear from this progressive interpretation that the legal profession perceives itself as a peacemaking vocation engaged in the many facets of human affairs. Radically furthering this interpretation sufficiently responds to what Pope Francis calls all of humanity to participate in — the creation of paths for renewed encounters with one another,[121] reinvigorated by a deep and transformative desire for an authentic form of self-giving and universal love to be extended to all brothers and sisters,

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115 *See* Jose Manuel I. Diokno, *Now or Never: Judicial and Legal Reforms in the Philippines*, 63 ATENEO L.J. 1, 12-13 (2018).

116 Greg Joseph SJ Tiongco, A Rock and a Hard Place: Challenges of Free Legal Aid in the Philippines, *available at* https://www.trust.org/i/?id=da574ac4-780c-4e47-963b-c3680fb475f7#_ftn1 (last accessed July 20, 2021) [https://perma.cc/S8AY-BX28].

117 CODE OF PROFESSIONAL RESPONSIBILITY, ch. I.

118 Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210 (1991).

119 *Id*. at 213 (citing Philippine Lawyer's Association v. Agrava, 105 Phil. 173, 176-77 (1959)).

120 *Cayetano*, 201 SCRA at 214 (citing 111 A.L.R. 23).

121 Fratelli Tutti, ¶ 225.

particularly to those who do not have the relative privileges that others enjoy and sometimes take for granted.[122]

This vision does not reside in the realm of ideals. The Code of Professional Responsibility provides that a lawyer is expected to "participate in the development of the legal system by initiating or supporting efforts in law reform and in the improvement of the administration of justice."[123] To this endeavor, alternative law groups have evolved in taking on the challenge.[124] In the case of the Sumilao farmers' fight to obtain their lands, law groups like SALIGAN journeyed with their clients to not only accompany them in litigation, but also to spread awareness for their cause.[125]

Their experience illustrates the intersections that the legal practice could cross with policy advocacy and reform. Lawyers are given the chance not only to act as agents and advocates for the advancement of the marginalized sectors' causes; they themselves participate as actors exercising conscientious citizenship. The legal profession, in turn, also creates opportunities for the government, the religious sector, and civil society to connect with the spirit of the law, to foster greater appreciation for the legal system, and to participate in the reinforcement of the rule of law's foundations in the country.

Going back to the advancements made in legal procedure, the Revised Student Practice Rule has further encouraged and empowered law schools to establish law centers that not only focus on traditional forms of legal work, but also extend to policy advocacy and reform.[126] The Ateneo de Manila University School of Law's Human Rights Center, as well as Xavier University-Ateneo de Cagayan's Center for Legal Assistance, have incorporated policy advocacy and reform into their respective legal centers' activities, which allow for law students to take part in the process

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122 *See id*. ¶ 205.

123 CODE OF PROFESSIONAL RESPONSIBILITY, canon 4.

124 INTERNATIONAL COMMISSION OF JURISTS, ACCESS TO JUSTICE: HUMAN RIGHTS ABUSES INVOLVING CORPORATIONS — PHILIPPINES 39 (2010).

125 Lennart Niemelä, *WALK: Framing a Successful Agrarian Reform Campaign in the Philippines*, 58 PHIL. SOCIOLOGICAL REV. 49, 60 (2010).

126 RULE 138-A: LAW STUDENT PRACTICE, §§ 2 (c) & 4.

of recommending national and local policies which seek to improve the status quo.[127]

The legal community is enjoined to help build a better kind of politics in Philippine society which strives for the common good and fosters the growth and evolution of the legal profession. By working together, it can only be hoped that the collective aspirations contained in the Constitution can finally become more achievable and connected with reality.

III. Towards a More Open World

Through the lens of *Fratelli Tutti*, lawyers and the legal community are motivated to move with the rest of humanity towards a more open world and to realize a juridical, political, and social order that favors the development and protection of all people, in solidarity with one another, as brothers and sisters. It is clear that in order to achieve this, the legal profession must adopt a perspective that revolutionarily improves the way it deals with clients, with justice institutions and the practice, and with society as a whole.

Lawyers must affirm their commitment as healers of broken relationships and construct new paths for peace and reconciliation. The profession must radically see itself in service to universal love and fraternity in the world, and work towards rehabilitative and restorative justice. Perhaps when the practice collectively moves towards this direction, the hope put forward in the latest papal encyclical will not seem too distant to experience.

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[127] Ateneo Human Rights Center, Programs and Projects, *available at* https://ahrc.org.ph/what-we-do (last accessed July 20, 2021) [https://perma.cc/K7BD-39QP] & Xavier University-Ateneo de Cagayan, Legal and Policy Research, *available at* https://www.xu.edu.ph/services-xucla/legal-and-policy-research (last accessed July 20, 2021) [https://perma.cc/UB24-8ETA].

LIVING AND LEAVING A LEGACY: IGNATIAN SPIRIT IN THE PRACTICE OF LAW

Adriel Earl A. Toribio[*]

I. The Roots of Jesuit Law Schools

The Jesuits have been involved in the academe just a few years after St. Ignatius founded the Society of Jesus in 1540.[1] Through the Ateneo schools, they have pursued the path of forming men and women for others. As justice is a necessary aspect of a harmonious society,[2] the establishment of a law school could be seen as the Ateneo's contribution in ensuring such a society.[3] It had a mission founded on making the community a better place, a mission grounded in faith that does justice and forms agents of change.[4] In the Philippines, the first Jesuit Law School was established on 6 June 1936, at the Ateneo de Manila University, which produced its first batch of Ateneo lawyers in 1939.[5] This was followed by Xavier University in 1955[6] and then by Ateneo de Davao University in 1961.[7] It was only in 2011 that Ateneo de Zamboanga

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1 Amanda Onion, et al., Jesuit Order Established, *available at* https://www.history.com/this-day-in-history/jesuit-order-established (last accessed July 20, 2021) [https://perma.cc/Q8KD-JRN8].

2 *See generally* Dr. Shagufta Begum & Aneeqa Batool Awan, *Plato's Concept of Justice and Current Political Scenario in Pakistan*, 3 INT'L J. HUMAN. & SOC. SCI. 77 (2013).

3 *See* Jesuit Institute, The Characteristics of Jesuit Education, ¶ 12, *available at* http://jesuitinstitute.org/Resources/Characteristics%20of%20Jesuit%20Education.pdf (last accessed July 20, 2021) [https://perma.cc/B9N7-6NSU].

4 *See* Ateneo de Manila University, Mission-Vision of the Ateneo, *available at* https://www.ateneo.edu/admissions/ls-oaa/about-the-ateneo/mission-vision (last accessed July 20, 2021) [https://perma.cc/3S4U-RCFU].

5 Ateneo de Manila University, History of the Ateneo Law School, *available at* https://www.ateneo.edu/aps/law/about-law/history-ateneo-law-school (last accessed July 20, 2021) [https://perma.cc/P9NZ-G53Q].

6 Xavier University, Brief History of Xavier University, *available at* https://www.xu.edu.ph/aboutxavierateneo (last accessed July 20, 2021) [https://perma.cc/6NBT-DJEW].

7 Ateneo de Davao University, College of Law, *available at* https://www.addu.edu.ph/blog/2015/05/16/college-of-law (last accessed July 20, 2021) [https://perma.cc/2AZ4-TD2U].

University, in consortium with Xavier University, opened a College of Law. [8] This came to be known as the "Xavier University College of Law – Zamboanga."[9] Later, in 2018, it was officially recognized as the Ateneo de Zamboanga University College of Law. In 2017, Ateneo de Naga University joined with the rest of the Ateneo in establishing a law school.[10] The law schools of these five universities have come to be known as the "Jesuit Law Schools."[11] Together, true to the Jesuit tradition, they answer to the society's need for men and women for and with others, whose faith does justice.[12] It is an answer to the call of the times to be relevant and involved in the change envisioned and the society we live in. Ateneo has been and will always be true to the Ignatian Spirituality of *Contemplativus Simul in Actionem*,[13] envisioning and ensuring that the society has lawyers grounded in faith and exemplifying what a lawyer must be in the society —

> The [Jesuit] Law School, in its endeavor to offer the best legal education in the country, recognizes that the formation of the students as responsible men and women of the law is a conscious and progressive effort. [It] is aware that the task of a law school is not [merely] to produce ... excellent lawyers. Rather, [it] affirms that the task of a law school is to produce excellent lawyers who seek to influence change within society, guided by [Ignatian] values and human virtuosity.[14]

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8 Ateneo de Zamboanga University, The History of the Ateneo de Zamboanga University, *available at* https://www.adzu.edu.ph/history-2018 (last accessed July 20, 2021) [https://perma.cc/22JQ-APWA].

9 *Id.*

10 Our School and Us, Ateneo de Naga University, *available at* https://osau.com/schools/7572/ateneo-de-naga-university (last accessed July 20, 2021) [https://perma.cc/BD2M-FEKC].

11 *See* Ateneo de Manila University, Ateneo Law School Once More Named Among Top-Performing Schools in 2019 Bar Exams, *available at* https://ateneo.edu/aps/law/news/ateneo-law-school-once-more-named-among-top-performing-schools-2019-bar-exams (last accessed July 20, 2021) [https://perma.cc/C8PK-FSQ7].

12 Andrew F. Moore, *Contact and Concepts: Educating Students at Jesuit Law Schools*, 41 GONZ. L. REV. 459, 462 (2005-2006).

13 The Church of the Gesù, Status Update, Finding God in All Things — Fr. Arnel dC. Aquino, SJ, FACEBOOK, July 21, 2021: 5:00 p.m., *available at* https://www.facebook.com/GenerousHeartPH/posts/346807783786740 (last accessed July 20, 2021).

14 Ateneo de Manila University, The Ateneo Law School and the Ends of a Legal Education, *available at* https://ateneo.edu/aps/law/about-law/ateneo-law-school-and-ends-legal-education (last accessed July 20, 2021) [https://perma.cc/FA8R-WTJC].

This is aligned with the basic thrusts of the Code of Professional Responsibility[15] which lawyers are expected to comply with. The Jesuit Law Education in turn gives more emphasis on the importance of complying with the Code of Professional Responsibility to establish the very foundation and character that a Jesuit lawyer should exemplify in the society, legal profession, and the Courts.[16]

II. The Lenses of a Jesuit Law School

The admission to a Jesuit Law School is not a mere application process to be accepted, but a process that is grounded on the requisites and stern rules of legal ethics as a prelude to the admission to the bar.[17] Being a lawyer does not end in passing the bar, it is just the beginning of the journey forward, as these future lawyers become part of the bigger scheme of things.[18] To be admitted into a Jesuit Law School, one must demonstrate clarity of thought and knowledge of prevailing social issues — knowledge that is evident to articulate relevant thoughts, not just a battle to search for who knows what, but who has what it takes to be an Atenean Lawyer. For the Ateneo de Zamboanga College of Law, this is gauged through an interview with a panel composed of the faculty. Even more important is the applicant's manifestation of willingness to be trained; thus, a recurring question in the interviews is "[d]o you have what it takes to be a fertile seed capable of growth in the fertile grounds of the Jesuit Law School?"[19] Right at the admission stage, the Ateneo ascertains one's willingness to be trained as a lawyer imbued with Ignatian values.[20] In Jesuit Law Education, the belief is that emptying one's cup is essential not only as a manifestation of humility, but as an acknowledgement to allow the formation and character building as an Atenean to set in.

These questions are not asked to determine mere eloquence, but to determine the fitness of the person in terms of conduct. The first and primary rule in the Code of Professional Responsibility is that "[a] lawyer shall not engage in unlawful, dishonest, immoral[,] or deceitful

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15 CODE OF PROFESSIONAL RESPONSIBILITY (1988).

16 *See* Steven M. Barkan, *Jesuit Legal Education: Focusing the Vision*, 74 MARQ. L. REV. 99, 111 (1990).

17 *See id.*

18 *See* Moore, *supra* note 12, at 460.

19 *See* Jesuit Institute, Jesuit Pupil Profile, *available at* http://jesuitinstitute.org/Pages/JesuitPupilProfile.htm (last accessed July 20, 2021) [https://perma.cc/4ALM-82NH] (citing *Mark* 4:30-32 (New International)).

20 *See id.*

conduct."[21] Therefore, it is but important to ensure that the seed that will be embedded by the Jesuit Law Education is fertile enough for the growth of the lawyer that the society needs and envisions[22] — one of good heart and character, as defined in legal ethics.

The admission process is with the underpinning purpose of choosing the vanguards of law in the society. Thus, one's character is also a critical consideration in the said process.[23] It is important to consider a person who is guided by a purpose, aspires for growth, and shares the Ignatian values as a core manifestation in one's formation of being a lawyer.[24] It is not about being rich and intelligent; rather, it is about being honest and open to the Jesuit education and the rigors of the discipline that the Jesuit Law School has set. There is no use in building walls to seemingly protect one's turf when the guards handling the gates can be easily swayed. The same is true for the Jesuit Law School. It is not building the name but ensuring that character is instilled as the students grow to become the vanguards of the law.[25] The character of lawyers is of the same importance, if not more, of the competence expected.

III. The Ateneo Law Formation and Education

Like any other law school in the Philippines, Jesuit Law Schools offer the minimum courses required by the Legal Education Board. However, the training provided is *more* than what these basic courses do.[26] The *how* and the *what* are set by the Ateneo, consistent with the vision and mission of Jesuits and the clamor of the society have.[27] This brand of education is what makes Ateneo, the Ateneo. The lessons in the classroom would not be hollow words for memory, but building blocks in the foundation of being an Ignatian Lawyer. Atenean education instills in the students the passion for and excellence in the delivery of justice.[28] While an aspiring lawyer may find this to be strenuous and demanding, it is through this

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21 CODE OF PROFESSIONAL RESPONSIBILITY, rule 1.01.

22 *See* Characteristics of Modern-Day Jesuit Education, *available at* https://www.ateneo.edu/grade-school/characteristics-modern-day-jesuit-education (last accessed July 20, 2021) [https://perma.cc/Y4G7-J36F].

23 Interview *with* Rosendo U. Castillo, Jr., Dean, Ateneo de Zamboanga College of Law *through* Zoom (July 21, 2021).

24 *See* Ateneo de Zamboanga University, Formation, *available at* https://www.adzu.edu.ph/formation (last accessed July 20, 2021) [https://perma.cc/3N97-2GPQ].

25 *See generally* Jesuit Institute, *supra* note 3.

26 *See* Ateneo de Manila University, *supra* note 14.

27 *See* Jesuit Institute, *supra* note 3, ¶ 74.

28 *Id.* ¶ 57.

experience that he or she is able to fulfill better his or her role in a society where justice seems tenuous. This is what makes Jesuit Law School different from other law schools, at least in the Philippines. It aspires for excellence in every aspect, steering every student towards the goals of the profession.[29] It will impart knowledge, but also share realizations that will be the guide in reflecting when there are crossroads encountered. As an academic institution, its existence is founded upon the formation and the stretching of the character of every person to ensure that when they fly from the nest of the Ateneo, they will soar high.[30] Such is the Jesuit Law School as a legal education institution.[31]

Additionally, the Atenean legal education finds its core not only in the law and jurisprudence, but also in faith. A faith that does justice as students are taught to embed in the mission.[32] It includes "Theology and the Law — Social Teachings of the Church"[33] and "Ignatian Thought [and] Values"[34] in the curriculum. These are intended for the students to develop the Ignatian values such as *magis*, to focus on the depth of the profession;[35] and *cura personalis*, to remember the immensity of their role in bringing about justice, especially for those who do not have the means to secure it.[36] It begs to ask, why are lawyers doing what they are doing and for whom are all the efforts made? The answer must not and never be self-serving as "the thrust is for and with others." Foremost, it teaches students the values of humility and compassion, as exemplified by Fr. Joaquin G. Bernas, who was a lawyer himself. As Department of Justice Secretary Menardo I. Guevarra expressed,

> [l]ike many [of the] Jesuits, [Fr. Bernas] was a man of the world — [a man in action and the action himself who would influence in shaping the world.] He did not live in an ivory tower. He was accessible [by] and accommodating to everyone [. He] could engage in a lively discussion on any topic [, and he would do so] especially over a

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29 *Id.* ¶ 106.

30 *Id.* ¶ 107.

31 *Id.*

32 *Id.* ¶ 72.

33 Ateneo de Manila University School of Law, Core Subjects, *available at* https://ateneo.edu/aps/law/jd-program-law/core-subjects (last accessed July 20, 2021) [https://perma.cc/F5Q2-DN9J].

34 Ateneo de Zamboanga University, Bachelor of Laws Curriculum, *available at* https://www.adzu.edu.ph/bachelor-of-laws-curriculum (last accessed July 20, 2021) [https://perma.cc/TWL8-FPRX].

35 Ateneo de Zamboanga University, *supra* note 24.

36 *Id.*

> glass of scotch [ ] and with a great sense of humor. [In the profession of law], he was St[.] Thomas More reborn[.][37]

Aside from offering "Theology and the Law" and integrating "Ignatian [Teachings and V]alues" in the curriculum, recollection has been an integral part of the students' life. It is not the usual recollection of memories and journeys in the school, but a recalibration of the heart.[38] The exercise involves the incessant question of *Para Que* or the *Whys* of our choice to persist in law school. This is essential as the question begs clarity of intent and depth of motivation. In the Ateneo, the *why* is very critical as it is the students' anchor in order to get going when the tough times come, though they may not come in an easy manner, if there is a worthy cause and reason, then the one's reason is meaningful.

Recollections in the Ateneo allow the words to be seen not as mere words but as reflections of the future ahead and the weight they carry, as the responsibility is no longer to the mere self, but to society, the legal profession, and the Court.[39] Beyond books and memory work, law students are made to reflect on their submission to such an intensive formation. The very core of the recalibration of the heart results in a deeper understanding and appreciation of their roles as future vanguards of the law. Law students are trained to become not only excellent lawyers, but also conscientious ones — focusing more on the need of the community. As the popular adage *Ad Majorem Dei Gloriam* suggests, Jesuit Law School graduates must fulfill their roles for the greater glory of God.[40] This is an answer to the calling not only of a Higher being, but of society. The depth of the reason is the gauge of the action with a directed spirit.

Ultimately, in the Jesuit Law Schools, law students are subjected to rigorous discipline that the Jesuit education is known for. As one Atenean lawyer responded when asked about what sets the Jesuit Law School apart from all the rest, "[w]e will not give an inch, you do your part and work your butt off and stand your ground in a toxic world."[41] The training

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37 Mike Navallo, *Joaquin Bernas' Legacy Lives on in the 'Seeds' He Planted*, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/spotlight/03/06/21/joaquin-bernas-legacy-lives-on-in-the-seeds-he-planted (last accessed July 20, 2021) [https://perma.cc/4NBN-GRP9].

38 Interview *with* Fr. Ismael Jose V. Chan-Gonzaga S.J., Chaplain, Ateneo Professional Schools *through* Zoom (June 17, 2021).

39 *See* CODE OF PROFESSIONAL RESPONSIBILITY, ch. 1-3.

40 *See* Jesuit Institute, *supra* note 3, ¶ 91 & Ateneo de Zamboanga University, *supra* note 24.

41 Interview *with* Fr. Ismael Jose V. Chan-Gonzaga S.J., Chaplain, Ateneo Professional Schools *through* Zoom (June 17, 2021).

of internal discipline is for the students to understand the essence of the profession, to keep the practice intact, and to act with utmost integrity as they become an instrument and friend of the law. This is supported in the Code of Professional Responsibility, which states that "[a] lawyer shall at all times uphold the integrity and dignity of the legal profession[,]"[42] and the mandate to have an integral continuing requirement of good moral conduct.[43] The Ateneo ensures that the formation is not only to pass the bar, but to be humans needed by the world. The Jesuit Law Schools train the students to always actively respond when the world needs lawyers to relentlessly protect the abused and the abandoned.[44] This is strongly grounded on Canon 14 of the Code of Professional Responsibility,[45] which reminds the members of the Bar that to be a lawyer means never refusing one's services to the needy.[46] It presupposes that the world recognizes the needy as vulnerable people whom lawyers must protect. Doing so is not mere compliance with the Code of Professional Responsibility, but rather is a way to showcase one's humanity as an innate value of a Jesuit Lawyer. As Fr. Jose Ramon T. Villarin, S.J. (Fr. Jett) puts it, "*magpakatao bago magpakaabogado*."[47] The Jesuit Law Schools recognize that the profession which awaits every law student requires rigorous training and therefore seek to provide every law student with such. Nevertheless, the fact that the profession is replete with enticements to iniquity is not ignored, which is why Atenean education strives to ensure that future lawyers are formed "[Ignatian] to the core."[48]

As a whole, the Jesuit Law Schools promote the continuous process of formation of the students where Ignatian values are the core of learning the law.[49] Beyond the excellent mind, the Ignatian lawyer's heart matters more as the heart propels him or her to prioritize the welfare of the underprivileged in the community. The constant asking of why and for whom are lawyers existing are the core questions that will guide an Atenean lawyer through the noise and darkness of the world. Answering those questions consciously allows the journey to continue and for

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42 CODE OF PROFESSIONAL RESPONSIBILITY, canon 7.

43 In the Matter of the Disqualification of Bar Examinee Haron S. Meling in the 2002 Bar Examinations, B.M. No. 1154, 431 SCRA 146, 150 (2004) (citing Leda v. Tabang, A.C. No. 2505, 206 SCRA 395, 401 (1992) (citing People v. Tuanda, 181 SCRA 692, 697 (1990))).

44 *See* Ateneo de Zamboanga University, *supra* note 24.

45 CODE OF PROFESSIONAL RESPONSIBILITY, canon 14.

46 *Id.*

47 Fr. Jose Ramon T. Villarin, S.J., *Greater-Than*, Speech at Ateneo Law School's 2020 Online Conferment Ceremony for Class of 2020 (July 19, 2020).

48 James J. MacMahon, S.J., *Message*, 1 ATENEO L.J. iv, iv (1951).

49 *See* Ateneo de Zamboanga University, *supra* note 24.

Atenean lawyers to be contemplatives in action as they find God in all things — in the formation to be a lawyer, in being a lawyer, and in being human in this society.

III. The Ateneo Brand of Lawyers

What is that branding that an Atenean lawyer has that sets him or her apart from the rest? The result of the recalibration of the heart is to ensure that every Ignatian lawyer is grounded in faith[50] — persevering with humility and dedicated with competence towards society. To date, the Jesuit Law Schools have produced several lawyers who have brought pride to the school for demonstrating the Ignatian brand of lawyers with 4Cs — *competence, character, compassion, and commitment*.[51]

A. Competence

The Jesuit education has always emphasized excellence,[52] that is, doing the best and ensuring that it is observed all the time. This is *competence*. To be competent means not only having a mastery of the law, but also gaining a deeper appreciation of the law and of the profession itself. As provided by the Rules of Court, there are minimum requirements to be admitted to the bar and all implied competencies are laid out therein.[53] This brand of competence is integral as the practice of law, as defined in *Cayetano v. Monsod*,[54] has a broad application already. Since the practice and expression of the legal profession are highly multi-faceted, the formation and necessary competence of the lawyer must be holistic.[55] In the Ateneo, formation with competence as a thrust and brand goes *beyond* the classroom. The established partnerships with non-profit organizations and legal aid clinics are manifestations of the

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50 *Id*.

51 These 4Cs were arrived at by the Author to summarize the aspects of Ignatian lawyering and which finds inspiration from Jesuit Recollections and Retreats attended by the Author since high school. *But see* Jesuit Education, Jesuit Education Aims to Human Excellence: Men and Women of Conscience, Competence, Compassion and Commitment, *available at* http://www.sjweb.info/education/doc-news/HUMAN_EXCELLENCE_ENG.pdf (last accessed July 20, 2021) (mirroring the 4Cs mentioned by the Author).

52 Joaquin G. Bernas, S.J., Homily on the Feast of St. Ignatius, *available at* http://202.125.102.18/index.php?p=120&type=2&aid=7095 (last accessed July 20, 2021) [https://perma.cc/GD83-HGUQ].

53 *See generally* RULES OF COURT, rule 138 (as amended).

54 Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210, 214 (1991). "Practice of law means any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience." *Id*.

55 *See id*.

competence of Atenean lawyers in being empathetic to real-world challenges and battles.[56] To be a competent Ignatian lawyer means not only possessing such understanding, but also using such understanding in bringing about social justice. In other words, a competent Ignatian lawyer uses the law as the primary weapon to battle social injustices, and staunchly faces this battle with all of his or her might. The inspiration to pursue excellence must not only be for the self, but also for others that the lawyer works with and whom the lawyer works for.

To equip an Ignatian lawyer with competence is to ensure that the vanguards are not only grounded in character, but that these are more than sufficient to serve the needs of the world. Competence is not merely qualifying in examinations and passing the bar; rather, competence is the ability to determine the common good and be able to deliver justice to the party that deserves it. Competence is ensuring that the letter of the law is not bent for evil purposes and instead is given the credence of justice and equity. Competence in an Ignatian lawyer is ensuring that they do not cross the line of what the law prohibits, but only to challenge the world in fighting against that which is not acceptable and equitable, especially for the vulnerable members of society.

B. Character

Relatedly, the Ignatian lawyer cannot fully express competence without *character*. In the Ateneo, competence without the grounding of character is nothing. This is because Ignatian education believes in holistic formation, which is only possible when character is present. Beyond intelligence, wisdom and humility are emphasized by the Jesuit Law Schools. As Fr. Jett underpinned during a commencement exercise, "[t]he choice of the Ateneo lawyer is not between bad and good, but between good and better."[57] This is the process of discernment — it is about searching the answers to bothersome yet necessary questions. Equity in social justice is a difficult dream, but is nonetheless a necessary cause that must be pursued, and the necessity of character is critical for a consistent drive and commitment for such a cause.

The greater-than sign is Ateneo's only point in running a school for lawyers, in running any school for that matter.[58] Fr. Jett emphasized that

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[56] *See* Jesuit Institute, *supra* note 3, § 8.

[57] Fr. Villarin, S.J., *supra* note 47.

[58] See Leilani S. David-Capule, My Law School Days and How Ateneo Law School Education Affected My Life as a Lawyer, *available at* https://www.ateneo.edu/aps/law/about-law/my-law-school-days-and-how-ateneo-

in Ateneo, there are only two laws that matter: *first* is to "love God with everything you [have] got[,]" and *second* is to "love your neighbor as you love yourself."[59] These laws capture the very core of any Jesuit Law School — that is, forming humans before forming lawyers.[60] Again, he stressed, "[*m*]agpakatao *muna bago magpakaabogado."* This is a necessary and apt reminder that Ateneo is forming men and women with "faith that does justice[,]"[61] more than forming mere lawyers. Being men and women with and for others is a critical characteristic that every Ignatian Lawyer must possess. Character is measured in thoughts, words, and actions not in mere declarations, as the journey is material in the formation of the character. While excellence in the law profession is good, in the Ateneo, it is not good enough. One is a human person first who happens to be a lawyer, not a lawyer who just happens to be a person.

C. Compassion

With *competence* and *character*, Ateneo lawyers are formed to be men and women for and with others with a faith that does justice.[62] The nature of the Atenean to be other-centric and to be someone who looks beyond the need of the self is a unique mark of the Ateneo. As also manifested in Chapter I of the Code of Professional Responsibility, the very core role of lawyers in the society is to have and be of *compassion*.[63] The core of Canons 1 and 2 is to ensure the accessibility, efficiency, and competence of a lawyer for the benefit of the society and most especially the vulnerable.[64] The Jesuit Law Schools seek to develop lawyers who are not only excellent, but also passionate for justice, as expressed in the Lawyer's Prayer by St. Thomas More.[65] This is concretized through the

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law-school-education-affected-my-life-lawyer (last accessed July 20, 2021) [https://perma.cc/WZ3U-C72B].

59 Fr. Villarin, S.J., *supra* note 47.

60 *Id.*

61 Jesuit Institute, *supra* note 3.

62 *See generally id.*

63 *See generally* CODE OF PROFESSIONAL RESPONSIBILITY, ch. 1.

64 *See* CODE OF PROFESSIONAL RESPONSIBILITY, canon 1-2.

65 St. Thomas More, Lawyer's Prayer, *available at* https://www.sanantoniorealestatelawyer.com/a-prayer-for-lawyers-to-keep-us-grounded (last accessed July 20, 2021) [https://perma.cc/4HK4-AGT9]. The prayer is as follows —

> Lord, grant that I may be able in argument, accurate in analysis, strict in study, candid with clients and honest with adversaries. Sit with me at my desk and listen with me to my client's plaints, read with me in my library, and stand beside me in court, so that today I shall not, in order to win a point, lose my soul.

establishment of legal aid clinics, where law students assist the underprivileged in the community they belong to.[66] With such training, a sense of compassion and care for others is deeply entrenched in every Ateneo lawyer.

The core of compassion is never the self, but others. It is asking the question of where one is needed and what should be done to make the society better — not in a grand manner, but in simple and impactful ways. The Ateneo has always been the school that is missioned the way Jesuits are — missioned in a society that needs them and where they can be "agents of change[.]"[67] Questions to know where one is needed is not only asked when he or she is reminded of the teachings of the Jesuits. Rather, there is a need to open one's eyes in perceiving the world, which may be described as noisy, dark, and chaotic, thus making one's presence and compassion towards the society's cause critical. The Ateneo sets the mission and calling; Ignatian lawyers, without hesitation, answer the call and are uninhibited to be missioned wherever the world takes them.

D. Commitment

Does it stop there? The answer is a resounding *no*. As the Jesuit Law Schools are branded to be focused on holistic formation, it must be acknowledged that such formation does not stop in Jesuit Law Schools. Real formation is answering the call of the profession and saying *yes* to the commitment. Developing competence, character, and compassion for others while being in law school is one thing, but ensuring that these values will be practiced after law school is another. That is why the Jesuit Law Schools train the students the value of *commitment*. It is the acknowledgement that becoming an Atenean lawyer is a continuous process and a way of life. As laid out in the case *In the Matter of the Disqualification of Bar Examinee Haron S. Meling in the 2002 Bar Examinations*,[68] the good moral character of a lawyer is a continuing requirement in the profession, which shows that the profession itself is a

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Id.

66 *See e.g.,* Gabriela Baron, *Ateneo Offers Free Legal Assistance Online*, MANILA BULL., Apr. 6, 2020, *available at* https://mb.com.ph/2020/04/06/ateneo-offers-free-legal-assistance-online (last accessed July 20, 2021) [https://perma.cc/D43J-NXAQ].

67 Ateneo de Manila University, The Ateneo Way, *available at* https://www.ateneo.edu/grade-school/ateneo-way (last accessed July 20, 2021) [https://perma.cc/L4SP-QEMZ].

68 In the Matter of the Disqualification of Bar Examinee Haron S. Meling in the 2002 Bar Examinations, B.M. No. 1154, 431 SCRA 146, 150 (2004) (citing Leda v. Tabang, A.C. No. 2505, 206 SCRA 395, 401 (1992) (citing People v. Tuanda, 181 SCRA 692, 697 (1990))).

continuous process of formation that does not end upon passing the bar exams. It is a constant and active journey of consciously asking questions on what is best to be done for the greater good and for the greater glory of God. Formation is not fully achieved after one acquires the diploma from the Jesuit Law School. Neither does it stop when one passes the bar and becomes a lawyer. Being an Ignatian lawyer is a way of life[69] and not a mere end goal to achieve. An Atenean lawyer is committed to exercising competence, character, and compassion in his or her profession, and this is the identity that sets him or her apart. At best, it is a calling they answer when the commitment to stay true is nothing more than an expected consequence. To make such commitment is a choice, and Ignatian lawyers are taught to always choose to be that agent of change in the society.

The last point of commitment is the commitment of the lawyers to the Court. Canons 10 to 14[70] serve as clear reminders of what Ignatian lawyers ought to be. The commitment in observing and maintaining respect to the Court and its officers is the same with humility and compassion found in the core of the Ignatian lawyer in its formation. The commitment of the Ignatian lawyer to assist in the speedy and efficient administration of justice is laid out in Canon 12 of the Code of Professional Responsibility.[71] This must be understood as a way of life rather than a fleeting characteristic. It is an indelible mark on the core being of an Ignatian lawyer, and not merely a phase of formation. Commitment in the Ateneo is saying yes when it is needed; not only when it is easy. It is saying yes despite the difficulties.

Thus, the Atenean lawyer is one who is equipped with competence, imbued with character, inspired with compassion, and entrenched with commitment to be vanguards of law and servants of God. It is grounded on Ignatian Spirituality, which encourages the search for God in all things[72] with the constant reminder of doing better, knowing the whys of the choices made, and putting the needs of others before that of the self. Indeed, "[t]o find God in the legal institution is to find God in the people of the law."[73]

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69 *See* Jesuit Institute, *supra* note 3, ¶ 62.

70 *See generally* CODE OF PROFESSIONAL RESPONSIBILITY, canon 10-14.

71 *See* CODE OF PROFESSIONAL RESPONSIBILITY, canon 12.

72 Ateneo de Manila University, A Faith That Does Justice, *available at* https://www.ateneo.edu/aps/law/about-law/faith-does-justice?fbclid=IwAR1CaK5cLKpa9g7epeMJXxxDKAgNWMu11DyuOei5MSHmlF4-xXayPJbLp-w (last accessed July 20, 2021) [https://perma.cc/L4AD-NAN6].

73 *Id*.

IV. The Legacy of the Jesuit Law School

In the world today, there are several questions and realities that many may fail to understand. People face a lot controversial issues and concerns that could cloud their perspective. But what is needed is a moral compass that is clear and grounded — clear in a way that the compass directs one to the direction of the needy. Much like the Jesuits, Atenean lawyers are assigned to a society that needs them and to whom they could be of aid. Atenean lawyers think and act with humility, and be courageous enough to battle society's worldly desires and temptations. Ignatian lawyers, just like Fr. Bernas, must wish to leave an indelible mark in their own actions and thoughts. Given the ongoing threats to Ignatian values and principles brought about by powerful forces and life-threatening circumstances, the Jesuit Law Schools are not without challenges in forming its brand of lawyers. The social dynamics and political inclinations bring color to social discourse, and which also shows the challenges faced by Ignatian education from which the law schools are not insulated.

Nevertheless, consolation can be found from the students who fight for what they believe in. When these students start standing their ground amidst the army of trolls and the many external influences of a chaotic world, it can be seen that the mark and legacy of the Ignatian lawyer is action.[74] There may be a myriad of distractions and multiple crossroads that are inevitable in one's journey, but an Ignatian lawyer will merely choose what is good over the bad; instead, the Ignatian lawyer will doggedly pursue that which is better and drive towards the best outcome. Things may oftentimes be difficult, but with the right people with the right values and with the right cause, it remains possible.

The impact of the action is the legacy — making things better despite the simplicity is legacy. In the Ateneo, it is about the impact of the action, and the process and fact of taking a stand no matter the consequences, as long as necessary. This perspective and consciousness of the social need, and aligning it with one's personal mission is the ultimate legacy of an Ignatian Lawyer. The Jesuit Law School can be considered successful when the students are able to look beyond themselves. As Fr. IJ Chan expressed, *"[m]asayang-masaya kami kapag ang tinitingnan ay hindi lamang ang sariling paninindigan, kun'di pati ang pangangailangan ng lipunan*."[75] In short, it is when the students do not focus on the "I" but on the "We;" when the focus is already about the "Us," which is an inclusive paradigm and thinking. Many Atenean lawyers have been produced, but

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74 *See* Jesuit Institute, *supra* note 3, ¶ 167.

75 In English, this means, "We are very happy when the students not only value their personal stance, but also the need of society."

more so have there been successes in forming the Ignatian lawyers they are missioned to be. And who best exemplifies this but Fr. Bernas, whose "legacy is one of meaningful liberties enshrined in the text and spirit of the Bill of Rights[.]"[76] His impact has been material and critical for decades now and will continue being material in the years to come.[77]

The legacy that an Ignatian Lawyer may bring is the impact he or she has for the people — these are the colleagues in the profession who should be treated with utmost respect and courtesy, as Canon 8 of the Code of Professional Responsibility[78] places it. It is a legacy that may at times be difficult to work towards, as it requires treating others humanely and being human in a world full of negativities and frustrations. Yet an Ignatian Lawyer will always choose to be the light in the dark. As cliché as it may sound, the question of "*para kanino ka bumabangon?"* is an extremely important question to anchor our one's *whys* in order to fuel his or her perseverance. The legal profession is a privilege and what lawyers do with such privilege will speak of who they are: Ignatian lawyers who commit themselves to creating that change and inspiring ripples to follow. The mindset of doing better than one's best in the spirit of *magis* is what it takes to improve and be more effective as agents of change.[79] These are the *whys* in one's journey in law school and further life as lawyers.

Despite the challenges, the Jesuit Law School has unceasingly endeavored to produce lawyers who possess competence, character, compassion, and commitment — the brand of lawyers that the world needs — its legacy. The Jesuit Law School endeavors to produce Ignatian lawyers who will go against the tide of times and stand their ground in making that difference. These Ignatian lawyers are officers of the court who do not consider the profession as an avenue to advance personal agenda, but as an opportunity to change and improve the system to truthfully be for all. Ateneans always say *Pro Deo et Patria*, and so lawyers must be contemplatives in action for the greater glory of God,[80] and ensure that justice is accorded in order that the country be a better place — one day, one step, and one action at a time.

Where there are people who act like they are above the law and can do whatever they want, the world needs competent lawyers who can uphold the law. Where there are lawyers who can be consumed by greed, the

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76 Mike Navallo, *supra* note 37.

77 *Id.*

78 CODE OF PROFESSIONAL RESPONSIBILITY, canon 8.

79 *See* Jesuit Institute, *supra* note 3, ¶ 105.

80 *Id.* ¶ 91.

world needs lawyers with unwavering character who cannot be swayed by money and power. Where there are lawyers who serve as accomplices to the powerful few, the world needs compassionate lawyers who can protect the interests of the underprivileged. And where there are people who continue to threaten the sanctity of law and the rights of others, the world needs committed lawyers who can unceasingly be the vanguards of law.